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EDITORS

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TABLE

OF

CASES REPORTED

A.

A. B. Baxter & Co. v. Andrews (Ga.)	268
Ackerman, Williamson-Halsell Frazier Co. v. (Kan.)	484
Albritton, Com. ex rel. v. Rubel (Ky.)	224
Aldrich, Standard Sav. & L. Asso. v. (C. C. A.)	393
Allis-Chalmers Co., Iron Molders' Union No. 125 v. (C. C. A.)	315
Alma Coal Co. v. Cozad (Ohio)	1092
Anderson v. Wisconsin C. R. Co. (Minn.)	1133
Andrews, A. B. Baxter & Co. v. (Ga.)	268
Northport Wesleyan Grove Campmeeting Asso. v. (Me.)	976
Appel, Re (C. C. A.)	76
Arkansas Ins. Co. v. Cox (Okla.)	775
Arlington F. Ins. Co., Winston v. (App. D. C.)	960
Armory Co., Steltz v. (Idaho)	872
Atchison, T. & S. F. R. Co., Cogswell v. (Okla.)	837
Atlantic C. L. R. Co., Benedict Pine- apple Co. v. (Fla.)	92
v. Geraty (C. C. A.)	310
Autuono, Moses v. (Fla.)	350

B.

Bacon, Bright v. (Ky.)	386
Bailey v. State (Miss.)	409
Bank, Farmers & M., Everett v. (Neb.)	996
Merchants' Nat., Gilpin v. (C. C. A.)	1023
of North America, McNeely Co. v. (Pa.)	79
Bardwell v. Southern Engine & Boiler Works (Ky.)	110
Baxter & Co. v. Andrews (Ga.)	268
Beaver v. Ross (Iowa)	65
Becktold Printing & B. Mfg. Co., Jack- son v. (Ark.)	454
Beers v. Prouty (Mass.)	39
Benas, Kelly v. (Mo.)	903
Benedict Pineapple Co. v. Atlantic C. L. R. Co. (Fla.)	92
Blackburn, Eaton v. (Or.)	53
20 L.R.A. (N.S.)	

Blake v. Hamilton Dime Sav. Bank Co. (Ohio)	290
Board of Trustees, State ex rel. Mc- Manus v. (Wis.)	1175
Booth v. Prete (Conn.)	863
Boston Elev. R. Co., Tompkins v. (Mass.)	1063
Braasch v. Michigan Stove Co. (Mich.)	500
Bright v. Bacon (Ky.)	386
Brooks, Campbell v. (Miss.)	507
Brown, Logan v. (Okla.)	298
Brown-Corliss Engine Co., Stenbom v. (Wis.)	956
Bryan, School Dist. No. 20 v. (Wash.)	1033
Buckner, St. Louis, I. M. & S. R. Co. v. (Ark.)	458
Buckstaff-Edwards Co., Rankel v. (Wis.)	1180
Byard, Com. v. (Mass.)	814
Byrd, Texas Midland R. Co. v. (Tex.)	429

C.

Cahill, People v. (N. Y.)	1084
Caldbeck v. Simanton (Vt.)	844
Caledonian Ins. Co. v. Imperial Tobac- co Co. (Ky.)	277
California Club, Cuzner v. (Cal.)	1095
Campbell v. Brooks (Miss.)	507
Crossett v. (La.)	967
Douglas v. (Ark.)	205
Capron v. Douglass (N. Y.)	1003
Carr v. Davis (W. Va.)	58
Carter v. Couch (Ala.)	858
Charles J. Off & Co. v. Morehead (Ill.)	167
Chicago, M. & St. P. R. Co., Houren v. (Ill.)	1110
v. United States (C. C. A.)	473
Christensen v. Oregon S. L. R. Co. (Utah)	255
Citizens' F. Ins. Co. v. Lochridge & Ridgeway (Ky.)	226
Clarke, Ex parte (Neb.)	171
v. Lyon (Neb.)	171
Cogswell v. Atchison, T. & S. F. R. Co. (Okla.)	837
Coleman v. MacLennan (Kan.)	361

Colorado Springs & I. R. Co. v. Nichols

(Colo.)	215
Com. v. Byard (Mass.)	814
Schneider v. (Ky.)	107
Com. ex rel. Albritton v. Rubel (Ky.) ..	224
Concordia, State v. (Kan.)	1050
Connecticut F. Ins. Co. v. Imperial Tobacco Co. (Ky.)	277
Corona Coal & Iron Co. v. White (Ala.)	958
Couch, Carter v. (Ala.)	858
Cox, Arkansas Ins. Co. v. (Okla.)	775
Cozad, Alma Coal Co. v. (Ohio)	1092
Cronon, Minneapolis General Electric Co. v. (C. C. A.)	816
Crossett v. Campbell (La.)	967
C. R. Pease House Furnishing Co., Cunningham v. (N. H.) ..	236
Cunningham v. C. R. Pease House Furnishing Co. (N. H.)	236
Cuzner v. California Club (Cal.)	1095

D.

Darsam v. Kohlmann (La.)	881
Davis, Carr v. (W. Va.)	58
v. New England R. Co. (Mass.)	1061
v. William Rosenzweig Realty O. Co. (N. Y.)	175
Denny, Lyttle v. (Pa.)	1027
Deragon v. Sero (Wis.)	842
Detroit United R. Co., Goodfellow v. (Mich.)	1123
Dickinson v. Seaman (N. Y.)	1154
Dietz, Levin v. (N. Y.)	251
Donaldson v. Hall (Minn.)	1073
State v. (Utah)	1164
Donovan v. Griffith (Mo.)	825
Douglas v. Campbell (Ark.)	205
Douglass, Capron v. (N. Y.)	1003
Dow, Steer v. (N. H.)	263
Dunbar, State ex rel. McNary v. (Or.) ..	1015
Duncan v. National Mut. F. Ins. Co. (Colo.)	340
Dunton v. Westchester F. Ins. Co. (Me.)	1058
Dyer v. Schneider (Minn.)	505

E.

Eaton v. Blackburn (Or.)	53
Ecker v. Ecker (Okla.)	421
Eckerson, Haverstraw v. (N. Y.)	287
Edenton, Small v. (N. C.)	145
Elam v. Mt. Sterling (Ky.)	512
Ellis v. State (Wis.)	444
Elwell, Ratliff v. (Iowa)	223
Erie R. Co. v. Reicherd (C. C. A.)	295
Everitt v. Farmers & M. Bank (Neb.) ..	996
Ex parte Clarke (Neb.)	171
Thomas (Okla.)	1007
20 L.R.A. (N.S.)	

F.

Farmers & M. Bank, Everitt v. (Neb.) ..	996
Fehsefeldt, Johnson v. (Minn.)	1069
Fields, Gibson v. (Kan.)	378
Finch, State v. (Kan.)	273
Fire & R. P. Constr. Co., State ex rel, v. Icke (Wis.)	800
Ford Motor Co., Gerhard v. (Mich.) ..	232
Fort Smith Refrigerator Works, Sternberg v. (Ark.)	89
Fox, Hanson v. (Cal.)	338
Frazier, Hobbs v. (Fla.)	105

G.

Gallagher, Moran v. (Mass.)	116
Galveston, H. & S. A. R. Co. v. Matzdorff (Tex.)	833
Gates v. Tebbetts (Neb.)	1000
Geraty, Atlantic C. L. R. Co. v. (C. C. A.)	310
Gerhard v. Ford Motor Co. (Mich.) ..	232
Gibson v. Fields (Kan.)	378
Gilly v. Hirsh (La.)	972
Gilpin v. Merchants' Nat. Bank (C. C. A.)	1023
Gims, Mirick v. (Ohio)	42
Godkin v. Weber (Mich.)	498
Goldsboro, Rosenthal v. (N. C.)	809
Goodfellow v. Detroit United R. Co. (Mich.)	1123
Graciosa Oil Co. v. Santa Barbara County (Cal.)	211
Graef, King v. (Wis.)	86
Great Northern R. Co., Tills v. (Wash.)	434
Gregg v. Mitchell (C. C. A.)	148
Griffith, Donovan v. (Mo.)	825
Gulf, C. & S. F. R. Co. v. Moseley (C. C. A.)	885

H.

Hall, Re (Minn.)	1073
Donaldson v. (Minn.)	1073
Hamilton Dime Sav. Bank Co., Blake v. (Ohio)	290
Hanover F. Ins. Co. v. Imperial Tobacco Co. (Ky.)	277
Hanson v. Fox (Cal.)	338
Hardie v. Swofford Bros. Dry Goods Co. (C. C. A.)	785
Hargo, United States v. (Okla.)	1013
Harman, Stewart & Co. v. (Md.)	228
Harper, Vernon v. (Ohio)	44
Hartford City, Pittsburg, C. C. & St. L. R. Co. v. (Ind.)	461
Hase v. Seattle (Wash.)	938
Haverstraw v. Eckerson (N. Y.)	287
Hazelton v. Locke (Me.)	35
Henry v. Herrington (N. Y.)	249
Herald, State v. (Wash.)	433

V

Merchants' Nat. Bank, Gilpin v. (C. C. A.)	1023
Metropolitan L. Ins. Co., Smith v. (Pa.)	928
Michigan Stove Co., Braasch v. (Mich.)	500
Midkiff, Humphrey v. (La.)	912
Miller, Morris v. (Neb.)	907
v. State (Ala.)	861
Minneapolis General Electric Co. v. Cronon (C. C. A.)	816
Minnesota Club, State ex rel. Young v. (Minn.)	1101
Mintz, Wilmore v. (Colo.)	259
Mirick v. Gims (Ohio)	42
Mitchell, Gregg v. (C. C. A.)	148
Moffitt, Re (Cal.)	207
Monitor Drill Co. v. Mercer (C. C. A.)	1065
Moore v. Irvin (Ark.)	1168
Moran v. Gallagher (Mass.)	116
Morehead, Charles J. Off & Co. v. (Ill.)	167
Morris v. Miller (Neb.)	907
Moseley, Gulf, C. & S. F. R. Co. v. (C. C. A.)	885
Moses v. Autuono (Fla.)	350
Mt. Sterling, Elam v. (Ky.)	512
Muckenfuss v. State (Tex. Crim. App.)	783
Muskegon Log Lifting & Operating Co., Whitman v. (Mich.) ..	984

N.

Nash, Levy v. (Ark.)	155
National Fire Proofing Co. v. Hunting- ton (Conn.)	261
National Mut. F. Ins. Co., Duncan v. (Colo.)	340
New England R. Co., Davis v. (Mass.) ..	1061
McKeon v. (Mass.)	1061
Newhall v. Journal Printing Co. (Minn.)	899
Nichols, Colorado Springs & I. R. Co. v. (Colo.)	215
North American Acci. Ins. Co., Knoebel v. (Wis.)	1037
Northport Wesleyan Grove Campmeet- ing Asso. v. Andrews (Me.) ..	976
Nuchols, State ex rel. Poole v. (N. D.) ..	413

O.

Ocean Steamship Co. v. Savannah Lo- comotive Works & Supply Co. (Ga.)	867
Off v. Morehead (Ill.)	167
Olston v. Oregon Water Power & R. Co. (Or.)	915
Oregon S. L. R. Co., Christensen v. (Utah)	255
Oregon Water Power & R. Co., Olston v. (Or.)	915
Overton, Turner v. (Ark.)	894
20 L.R.A. (N.S.)	

P.

Painter v. Painter (Pa.)	117
Partridge v. State (Ark.)	321
Pennsylvania F. Ins. Co. v. Imperial Tobacco Co. (Ky.)	277
People v. Cahill (N. Y.)	1084
Pere Marquette R. Co. v. Strange (Ind.)	1041
Philadelphia & R. R. Co., Powell v. (Pa.)	1019
Philadelphia, Holbert v. (Pa.)	201
Philadelphia Co. v. Renner (Pa.)	932
Pintsch Compressing Co., McGill v. (Iowa)	466
Pittsburg, C. C. & St. L. R. Co. v. Hartford City (Ind.)	461
Ploof v. Putnam (Vt.)	152
Poole, State ex rel., v. Nuchols (N. D.) ..	413
Powell v. Philadelphia & R. R. Co. (Pa.)	1019
Prete, Booth v. (Conn.)	863
Prouty, Beers v. (Mass.)	39
Putnam, Ploof v. (Vt.)	152

R.

Railroad Co., Atlantic C. L., Benedict Pineapple Co., v. (Fla.) ..	92
Erie, v. Reicherd (C. C. A.) ..	295
Kanawha & W. V., Vickers v. (W. Va.)	793
Louisville & N., v. James (Ky.) ..	380
New England, Davis v. (Mass.) ..	1061
New England, McKeon v. (Mass.)	1061
Oregon S. L., Christensen v. (Utah)	255
Pere Marquette v. Strange (Ind.)	1041
Texas Midland, v. Byrd (Tex.) ..	429
Railway Co., Atchison, T. & S. F. Cogswell v. (Okla.)	837
Atlantic C. L., v. Geraty (C. C. A.)	310
Boston Elev., Tompkins v. (Mass.)	1063
Chicago, M. & St. P., Houren v. (Ill.)	1110
Chicago, M. & St. P., v. United States (C. C. A.)	473
Colorado Springs & I., v. Nich- ols (Colo.)	215
Detroit United, Goodfellow v. (Mich.)	1123
Galveston H. & S. A., v. Mats- dorff (Tex.)	833
Great Northern, Tills v. (Wash.)	434
Gulf, C. & S. F., v. Moseley (C. C. A.)	836
Louisville, v. Johnson (Ky.) ..	133
Oregon Water Power & Olston v. (Or.)	915

Philadelphia & R., Powell v. (Pa.)	1019
Pittsburg, C. C. & St. L., v. Hartford City (Ind.)	461
St. Louis, I. M. & S., v. Buckner (Ark.)	458
St. Paul City, Jenkins v. (Minn.)	401
San Francisco & N. W., Still v. (Cal.)	322
Seaboard Air Line, v. Simon	126
Seaboard Air Line, Thompson v. (S. C.)	426
Wisconsin C., Anderson v. (Minn.)	1133
Hankel v. Buckstaff-Edwards Co. (Wis.)	1180
Rann v. Twitchell (Vt.)	1030
Ratliff v. Elwell (Iowa)	223
Re Appel (C. C. A.)	76
Hall (Minn.)	1073
Kelly (Cal.)	337
McCrea (C. C. A.)	246
Moffitt (Cal.)	207
Reicherdt, Erie R. Co. v. (C. C. A.)	295
Renner, Philadelphia Co. v. (Pa.)	932
Republic Iron & Steel Co., Stafford v. (Ill.)	876
Robinson, State ex rel. Young v. (Minn.)	1127
Rodman v. Manning (Or.)	1158
Roland v. Tift (Ga.)	354
Rosenberger, State v. (Mo.)	284
Rosenthal v. Goldsboro (N. C.)	809
Ross, Beaver v. (Iowa)	65
Rubel, Com. ex rel. Albritton v. (Ky.)	224

S.

St. Louis, I. M. & S. R. Co. v. Buckner (Ark.)	458
St. Paul City R. Co., Jenkins v. (Minn.)	401
San Francisco & N. W. R. Co., Still v. (Cal.)	322
Santa Barbara County, Graciosa Oil Co. v. (Cal.)	211
Savannah Locomotive Works & Supply Co., Ocean Steamship Co. v. (Ga.)	867
Schneider v. Com. (Ky.)	107
Dyer v. (Minn.)	505
School Dist. No. 20 v. Bryan (Wash.)	1033
School Dist. No. 116 v. Wolf (Kan.)	358
Seaboard Air Line R. Co. v. Simon (Fla.)	126
Thompson v. (S. C.)	426
Seaman, Dickinson v. (N. Y.)	1154
Seattle, Hase v. (Wash.)	938
Sero, Deragon v. (Wis.)	842
Shaw v. Staight (Minn.)	1077
Shea v. Whitman (Mass.)	980
Sherrod v. State (Miss.)	509
Siegel v. Marcus (N. D.)	769
20 L.R.A. (N.S.)	

Siegel, Cooper, & Co., Martin Emerich Outfitting Co. v. (Ill.)	1114
Simanton, Caldbeck v. (Vt.)	844
Simon, Seaboard Air Line R. Co. v. (Fla.)	126
Small v. Edenton (N. C.)	145
Smith v. Metropolitan L. Ins. Co. (Pa.)	928
Southern Engine & Boiler Works, Bardwell v. (Ky.)	110
Southern Steel Co. v. Hopkins (Ala.)	848
Spatz, John Deere Plow Co. v. (Kan.)	492
Spear v. Westbrook (Me.)	804
Spratlin, State ex rel. v. Thompson (Tenn.)	1
Spring Garden Ins. Co. v. Imperial Tobacco Co. (Ky.)	277
Stahl, Hines v. (Kan.)	1118
Staight, Shaw v. (Minn.)	1077
Standard Sav. & L. Asso. v. Aldrich (C. C. A.)	393
State, Bailey v. (Miss.)	409
v. Concordia (Kan.)	1050
v. Donaldson (Utah)	1164
Ellis v. (Wis.)	444
v. Finch (Kan.)	273
v. Herald (Wash.)	433
v. J. P. Bass Pub. Co. (Me.)	495
Luther v. (Neb.)	1146
Miller v. (Ala.)	861
Muckenfuss v. (Tex. Crim. App.)	783
Partridge v. (Ark.)	321
v. Rosenberger (Mo.)	284
Sherrod v. (Miss.)	509
v. Webb (Mo.)	1142
v. Wood (La.)	392
State ex rel. McManus v. Board of Trustees (Wis.)	1175
McNary v. Dunbar (Or.)	1015
Fire & R. P. Constr. Co. v. Icke (Wis.)	800
Young v. Minnesota Club (Minn.)	1101
Poole v. Nichols (N. D.)	413
Young v. Robinson (Minn.)	1127
Spratlin v. Thompson (Tenn.)	1
McGovern v. Williams (Wis.)	941
Steer v. Dow (N. H.)	263
Steltz v. Armory Co. (Idaho)	872
Stenbom v. Brown-Corliass Engine Co. (Wis.)	956
Sternberg v. Fort Smith Refrigerator Works (Ark.)	89
Sterrett v. Sweeney (Idaho)	963
Stevens & Co. v. Stiles (R. I.)	933
Stewart & Co. v. Harman (Md.)	228
Stiles, Stevens & Co. v. (R. I.)	933
Still v. San Francisco & N. W. R. Co. (Cal.)	322
Stone v. Stone (Iowa)	221
Strafford v. Republic Iron & Steel Co. (Ill.)	876

Strange, Pere Marquette R. Co. v. (Ind.)	1041	W.	
Sultan Logging Co., La Bee v. (Wash.)	405	Wade v. United States (App. D. C.) ...	347
Sunday Creek Co. v. Woodworth (Ohio)	42	Water, Light, & Transit Co., Trigg v. (Mo.)	987
Sweeney, Sterrett v. (Idaho)	963	Webb, State v. (Mo.)	1142
Swofford Bros. Dry Goods Co., Hardie v. (C. C. A.)	785	Weber, Godkin v. (Mich.)	498
T.		Westbrook, Spear v. (Me.)	804
Tebbetts, Gates v. (Neb.)	1000	Westchester F. Ins. Co., Dunton v. (Me.)	1058
Territory v. Jones (N. M.)	239	White, Corona Coal & Iron Co. v. (Ala.)	958
Texas Midland R. Co. v. Byrd (Tex.)	429	Whitman v. Muskegon Log Lifting & Operating Co. (Mich.)	984
Thomas, Ex parte (Okla.)	1007	Shea v. (Mass.)	980
Thompson v. Seaboard A. L. R. Co. (S. C.)	426	Wilkinson v. Kanawha & H. Coal & C. Co. (W. Va.)	331
State ex rel. Spratlin v. (Tenn.)	1	William Rosenzweig Realty O. Co., Da- vis v. (N. Y.)	175
Tift, Roland v. (Ga.)	354	Williams, State ex rel. McGovern v. (Wis.)	941
Tills v. Great Northern R. Co. (Wash.)	434	Williamson-Halsell Frazier Co. v. Ack- erman (Kan.)	484
Tompkins v. Boston Elev. R. Co. (Mass.)	1063	Wilmore v. Mintz (Colo.)	259
Trigg v. Water, Light, & Transit Co. (Mo.)	987	Winston v. Arlington F. Ins. Co. (App. D. C.)	960
Turner v. Overton (Ark.)	894	Wisconsin C. R. Co., Anderson v. (Minn.)	1133
Twitchell, Rann v. (Vt.)	1030	Wolf, School Dist. No. 116 v. (Kan.)	358
U.		Wood, State v. (La.)	392
United States, Chicago, M. & St. P. R. Co. v. (C. C. A.)	473	Woodworth, Sunday Creek Co. v. (Ohio)	42
v. Hargo (Okla.)	1013	Y.	
Wade v. (App. D. C.)	347	Young v. Lemieux (Conn.)	160
V.		State ex rel. v. Minnesota Club (Minn.)	1101
Vernon v. Harper (Ohio)	44	State ex rel. v. Robinson (Minn.)	1127
Vickers v. Kanawha & W. V. R. Co. (W. Va.)	793		

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ANNOTATED

NEW SERIES.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE EX REL. KATIE
SPRATLIN, Appt.,

v.

LOUIS P. THOMPSON.

(118 Tenn. 571, 102 S. W. 349.)

Judgment — default — failure to call defendant.

1. Failure to call out defendant prior to the entry of a default judgment will not render the judgment void.

Trial — default — substantial damages.

2. Failure to file in court the insurance policy on which suit is brought will preclude the entry of a substantial judgment by the court on default without the intervention of a jury.

Mandamus — parties.

3. An insurance company against which a judgment has been rendered by default is a necessary party to a mandamus pro-

Subject Note. — Necessity of jury to compute damages on default judgment.

I. American cases, 1.

II. English cases, 33.

III. Summary, 35.

I. American cases.

Alabama:

In this state, in actions on contracts in writing designating the amount due, a jury is held not necessary. This was provided for by an early statute and the present Code, but some of the cases do not refer to any statute or Code. Where the damages are fixed by statute it is also held that a jury is not necessary. It seems that in all cases not within the exception of the Code or statutory provision, a jury is necessary; and this applies to cases on contracts where evidence is required, as well as to cases of torts and unliquidated damages. This is in accord with the common-law rule.

So, under Ala. Rev. Code, § 2682, provided.

ceeding to compel the issuance of a fieri facias thereon.

Execution — vacated judgment.

4. The clerk cannot issue an execution on a judgment which has been set aside by the court.

Same — remedy.

5. Mandamus to compel the issuance of an execution is not the proper remedy to question the propriety of the court's action in setting aside a judgment.

(May 11, 1907.)

APPEAL by relator from a judgment of the Circuit Court for Shelby County dismissing a petition for a writ of mandamus to compel the issuance of an execution. Affirmed.

The facts are stated in the opinion.

Mr. Thomas M. Scruggs, for appellant:

The order purporting to set aside the judgment was void.

ing that a written instrument purporting to be signed by defendant's agent must be received in evidence without proof of execution, unless denied by affidavit, and Rev. Code, § 2770, providing for judgment by default without a jury, it was held that, in an action on a certificate of deposit, a jury was not necessary in default. Talladega Ins. Co. v. Woodward, 44 Ala. 287.

And, under Ala. Code, § 2740, authorizing a judgment by default without a jury in an action founded on a written instrument ascertaining the demand, it was held that a jury was not necessary in a default in an action on a note and interest. Allen v. Lathrop-Hatton Lumber Co. 90 Ala. 490, 8 So. 120.

And a note to pay principal, interest, and 10 per cent attorneys' fees was held sufficiently definite to support judgment by default for the entire amount due, including the attorneys' fees, without the intervention of a jury, under Ala. Code 1886, § 2740. Wood v. Winship Mach. Co. 83 Ala. 424, 3 Am. St. Rep. 754, 3 So. 757.

Under Ala. Code, § 2645, authorizing a

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; Anderson v. Thompson, 7 Lea, 262; State v. Dalton, 109 Tenn. 549, 72 S. W. 456.

Messrs. Fitzhugh, Biggs, & Fitzhugh, for appellee:

Mandamus is not the proper remedy.

State v. Miller, 1 Lea, 596; Harris v. State, 96 Tenn. 517, 34 S. W. 1017; State v. Wilbur, 101 Tenn. 219, 47 S. W. 411; 2 Spelling Enj. & Extr. Rem. § 1378; Compton v. Airial, 9 La. Ann. 496; Pickell v. Owen, 66 Iowa, 485, 24 N. W. 8; Gorman v. Calhoun Circuit Judge, 140 Mich. 230, 103 N. W. 567; Roberts v. Lenawee Circuit Judge, 140 Mich. 115, 103 N. W. 512.

Mandamus does not lie to revise judicial action.

judgment against a cosurety on a motion, it was held that it was the practice for the court to receive proof and render judgment where the defendant did not make an issue to be tried by the jury. Irwin v. Scruggs, 32 Ala. 516. The court said: "The statute which authorizes the rendition of judgment final, upon judgment by default, *nil dicit*, or on demurrer, where the action is founded upon an instrument of writing ascertaining the plaintiff's demand, has no application to this case, and is not to be construed as prohibiting the rendition of a judgment without the intervention of a jury in all cases not described by it."

The same was held in Barclay v. Barclay, 42 Ala. 345.

Under the city charter of Decatur, providing for a city court and authorizing questions of fact to be tried by the court without a jury unless a jury is demanded, it was held that a jury was not necessary in a default. Decatur & N. Improv. Co. v. Crass, 97 Ala. 524, 12 So. 41. The court said: "It is insisted, however, that the defendant may not desire to make defense to the merits in a suit on an unliquidated demand, and abstain therefrom, reserving the right to appear after judgment by default and give evidence in mitigation or reduction of the damages. . . . When the complaint was filed in this case, it was competent for defendant to have made its demand for a jury by writing it on the complaint. It did not do it, and it cannot be relieved of its own negligence on appeal to this court." The cause of action does not appear, except that it was an attachment against a nonresident.

It was held that an action against an indorser on a note could be rendered without the intervention of a jury, under Ala. act 1812, providing that in all actions founded on any writing, ascertaining the sum sued for, if judgment by default be entered therein, the court may enter judgment for the demand without the intervention of a jury. Chapman v. Arrington, 3 Stew. (Ala.) 480; McKenzie v. Clanton, 33 Ala. 528; Malone v. Hathaway, 3 Stew. (Ala.) 29. In the last case the court said: "We are all of 20 L.R.A. (N.S.)

Reed v. St. Clair Circuit Judge, 122 Mich. 156, 80 N. W. 985; Ambos v. Ingham Circuit Judge, 123 Mich. 618, 82 N. W. 267; Detroit v. Wayne Circuit Judge, 125 Mich. 634, 85 N. W. 1; Steel v. Clinton Circuit Judge, 133 Mich. 695, 95 N. W. 993; Valley City Desk Co. v. Kent Circuit Judge, 139 Mich. 194, 102 N. W. 651; Re Connecticut Mut. L. Ins. Co. 131 U. S. CLXXX. Appx. and 26 L. ed. 561.

The United States Casualty Company is a necessary party.

State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299; Powell v. People, 214 Ill. 475, 105 Am. St. Rep. 117, 73 N. E. 795; Stethem v. Skinner, 11 Idaho, 374, 82 Pac. 451; Austin v. Cahill (Tex. Civ. App.) 83 S. W. 536; Tabor v. General Land Office.

opinion that the judgment by *nil dicit* in this case was clearly within the statute, and final, without the necessity or resorting to a jury to assess damages."

In an action of assumpsit against an indorser of a bill of exchange, where the indorsement was made in this state and the law controlled the rate of damages, it was held that a jury was not necessary. Cullum v. Casey, 9 Port. (Ala.) 131, 33 Am. Dec. 304.

So, in an action against an indorser of a bill of exchange, it was held that a jury was not necessary, as a default admitted that the steps necessary to fix the liability had been taken, and also admitted the amount of the bill and damages recoverable. Henderson v. Howard, 2 Ala. 343.

In an action against a drawee of a bill of exchange it was held that a jury was not necessary, as a default admitted that all steps necessary to fix the liabilities had been taken. Randolph v. Parish, 9 Port. (Ala.) 76.

But in an action against the indorser of a note not payable in bank, it was held that a jury was necessary as evidence was required to fix the liability of the indorser, where there was no allegation of a suit against the maker nor any showing that such suit could be dispensed with. If it was mercantile paper it was necessary that the signatures of the maker and indorser should be proved. Langdon v. Williams, 22 Ala. 681.

So, in an action against an indorser on a common money count, it was held that a jury was necessary, as it did not appear to be founded on an instrument in writing ascertaining the sum due. Kennon v. M'Rae, 3 Stew. & P. (Ala.) 249. In this case the first count of the complaint was on the indorsement, but did not allege demand and notice; the second count was for money had and received, but this did not appear to be on an instrument in writing; and the first count, being bad, would not support a judgment on the second count by referring to the first count.

On a note payable in "current money of the state of Tennessee," it was held that a final judgment for the amount and interest

29 Tex. 508; Texas Mexican R. Co. v. Jarvis, 80 Tex. 456, 15 S. W. 1089; State ex rel. Sunday v. Richards, 50 Fla. 284, 39 So. 152.

Nell, J., delivered the opinion of the court:

At the March term, 1906, the case of Katie Spratlin against the United States Casualty Company in the circuit court of Shelby county, a judgment by default was rendered against the defendant in that case for \$5,172. The judgment recites that the plaintiff "moved the court for a judgment against the defendant for the amount of the debt and interest sued on in said declaration, and evidenced by the policy sued upon; the defendant having been properly served with process herein, and having failed to file

any pleas to said declaration." The entry does not show that the defendant was called out; nor does it appear that the policy had been filed with the record. The record shows, on the contrary, that it was not filed until a subsequent term; that is to say, the judgment by default was rendered on May 12, 1906, and the policy was filed October 24, 1906.

On the 2d of June, 1906, which was during the May term of the circuit court, the following entry was made in the cause referred to:

Katie Spratlin

v.

U. S. Casualty Co.

This cause came on to be heard on the

could be taken without a jury, as a jury would be bound by the valuation fixed by the parties. Spain v. Grove, Minor (Ala.) 177.

And in an action on a note containing a stipulation for 10 per cent for attorneys' fees it was held that a jury was not necessary on default. Ledbetter & Co. v. Vinton, 108 Ala. 644, 18 So. 692.

And in an action of debt it was held that the court could render final judgment on default without writ of inquiry. Pettigrew v. Pettigrew, 1 Stew. (Ala.) 586. It was held that the Alabama act of 1812, giving a summary remedy by petition to the county court to recover a legacy, was cumulative to the remedy provided by Ala. act 1803, p. 333.

After an action on a note was begun it was stipulated that, if not paid within a certain time, a judgment by default for the debt and damages, without a jury, could be entered. This was held sufficient waiver of a jury trial, especially as the claim sued on was a note. People's Ice Co., v. People's Nat. Bank, 133 Ala. 248, 31 So. 804.

On a trial against a sheriff and his sureties for failure to return an execution, where the measure of damages was fixed by statute, it was held that there was no necessity for the intervention of a jury on a default. Garey v. Edwards, 15 Ala. 105.

So, in an action for a statutory penalty against a corporation engaging in business without complying with the statute, it was held that it was not necessary for a writ of inquiry to assess the damages, as judgment had to be rendered for the amount of the penalty, if for anything. Tennessee Mut. Bldg. & L. Asso. v. State, 99 Ala. 197, 13 So. 687.

But, in an action on an account, it was held that, on default judgment, a jury was necessary, under Ala. Code, § 3032, which is substantially the same as § 2366 of the prior Code, providing that default judgments be entered by the clerk in actions on instruments of writing ascertaining the plaintiff's demand. Rhea v. Holston Salt & Plaster Co. 59 Ala. 182.

In an action on an open account for goods 20 L.R.A. (N.S.)

sold and delivered and for money paid, it was held that, under Ala. Code, § 2366, a jury was necessary. Porter v. Burleson, 38 Ala. 343.

The intervention of a jury was held necessary in an action on a fire-insurance policy, as this was not an action on an instrument of writing ascertaining the plaintiff's demand, under Ala. Code 1876, § 3032. Manhattan F. Ins. Co. v. Fowler, 76 Ala. 372. The amount of plaintiff's loss could not be known without the aid of evidence.

And an action on a fire-insurance policy was held not to be one authorizing a final judgment after default without a jury, under Ala. Code 1886, § 2740. Home Protection v. Caldwell, 85 Ala. 607, 5 So. 338.

In an action for unpaid calls for railroad stock, it was held that a jury was necessary on default, as there were no instruments of writing ascertaining the plaintiff's demand, as provided by Ala. Code, § 2366. Connolly v. Alabama & T. Rivers R. Co. 29 Ala. 373.

So, in an action for damages for cutting timber, it was held that a jury was necessary to assess the damages on judgment by default. Wagon v. Turner, 73 Ala. 197. This was on the ground that it was not an action founded upon an instrument in writing ascertaining the plaintiff's demand.

And, where the action was not on contract in writing, it was held error to render final judgment on appeal by default without a jury. Kenum v. Henderson, 6 Ala. 132. The statute authorizes a final judgment by the court in actions on written evidence of debt if under \$20.

On a motion prosecuted against sureties on a bond against a deceased sheriff, where judgment by default was had, with leave to execute a writ of inquiry, it was held that this was proper; but it was also held that the judgment entry should have shown that every material averment of the motion was proved. Chandler v. Reid, 114 Ala. 390, 21 So. 475.

In an action to recover compensation for recopying records it was said that, after judgment by default, it was necessary to execute a writ of inquiry. Washington County v. Porter, 128 Ala. 278, 29 So. 185.

motion of defendant to set aside the judgment by default heretofore entered, to wit, on May 12, 1906, and to reinstate the cause, which said judgment by default was granted on the statement made by counsel for plaintiff that it would be set aside if any counsel appeared and made application therefor. And, counsel for plaintiff having appeared in open court and assented thereto, it is accordingly ordered and adjudged that said judgment by default be set aside and this cause reinstated; and defendant is allowed thirty days within which to plead.

On the 23d of June the pleas of the defendant in that case were filed.

On October 24, 1906, a petition for mandamus was filed against the clerk, and that petition is the foundation of the present action.

In a suit on a foreign judgment, it was held that the common law would be presumed to prevail, and that the plaintiff would not be entitled to any notice with reference to the execution of the writ of inquiry awarded on defendant's counterclaim where plaintiff was in default. *Christian & C. Co. v. Coleman*, 125 Ala. 158, 27 So. 786.

And, where there was a partial breach of a written contract of sale, it was held that, in order to recover damages not liquidated, it was necessary to have a jury. *McPherson v. Robertson*, 82 Ala. 459, 2 So. 333. This was an action to recover a penalty.

And, where the declaration claimed a certain sum as debt, but did not show such a contract as, by the statute of Alabama or by any principle of common law, authorized final judgment by default, it was held error to render final judgment without the intervention of a jury. *Martin v. Price*, Minor (Ala.) 68.

Under the common law, in all actions in which uncertain damages were sought to be recovered, it was held that they were to be assessed by a verdict before judgment could be recovered. It was also held that the damages should be assessed by verdict before judgment could be rendered, under Ala. Laws 1802, 304, § 7, providing that any person who shall cut down a tree on land not his own, without the consent of the owner, shall forfeit and pay for each tree so cut. *Byrne v. Haines*, Minor (Ala.) 286.

And, it was held in *Phillips v. Malone*, Minor (Ala.) 110, that final judgment without a jury could not be taken on a note for the payment in property at a stated price.

On a judgment by default on a contract to pay a certain sum for staves at \$2 a thousand, subject to deduction for those not furnished, it was held that the court could not render judgment without the intervention of a jury. It was necessary to allege what staves were procured by plaintiff, and it was also necessary to prove this fact, as the writing did not furnish any data as to 20 L.R.A. (N.S.)

The petition, after reciting the recovery of the judgment by default and the order setting it aside, further alleges that the last-mentioned order was made without petitioner's consent and over her protest; furthermore, that the judge had no power to enter the order, since the term of the court at which the judgment by default was rendered had already terminated. It further alleges that, on the 16th of October, 1906, the petitioner demanded of the clerk of the circuit court a writ of *habeas corpus*, but the clerk refused to issue it. Thereupon the petitioner prayed that a mandamus be issued, commanding the clerk to issue the writ.

The United States Casualty Company was not made a party to the proceeding.

A copy of the record in the case in which the *fi. fa.* was sought accompanied the petition, and from it appeared the facts con-

the amount. *Martin v. Woodall*, 1 Stew. & P. (Ala.) 244.

And, where evidence was necessary to ascertain the rate of interest of another state, in an action on a note, it was held in *Evans v. Irvin*, 1 Port. (Ala.) 390, that, under the Alabama statute, judgment by default could not be rendered without a jury.

In an action of debt on a foreign judgment and for damages to the extent of interest, it was held in *Murray v. Cone*, 8 Port. (Ala.) 250, that it was necessary to have a jury or an inquiry as to damages. The statute or usage of the place of judgment should be proved.

So, the rate of interest in another state will not be judicially noticed, and must be proved. It was held that in an action of debt on a judgment from another state asking interest it was necessary to have a jury on default. *Clarke v. Pratt*, 20 Ala. 470.

And a jury was held necessary in an action on a contract for the payment of rent for land supposed to contain 10 acres, more or less, as the sum was not fixed with precision, but had to be ascertained by the quantity of the land rented. *Driver v. Spence*, 3 Ala. 98.

In an action on a written contract for the receipt of so much money, "for which I agree to account on a final settlement," it was held that a jury was necessary, as proof of demand and settlement was required. *Wellborn v. Sheppard*, 5 Ala. 674.

And, in an action of debt on an administration bond, against the principal sureties, where it was necessary to prove a devastavit, it was held that a jury was necessary. *Amason v. Nash*, 24 Ala. 279.

In an action of assumpsit it was held that on a default judgment final judgment would have to be by jury. *Beville v. Reese*, 25 Ala. 451; *Young v. McLemore*, 3 Ala. 295.

Arkansas:

Under an Arkansas statute, default judgments in actions on writings may be rendered by the court where the amount due is shown by the instrument; in other cases a

netted with the judgment by default and the order setting it aside, and the other facts above detailed. The declaration in that cause was as follows:

"The plaintiff, Katie Spratlin, sues the defendant, United States Casualty Company, a corporation doing business in the state of Tennessee, for the sum of five thousand dollars (\$5,000), with interest thereon since October 16, 1905, and, for the cause of such action, shows: That the defendant corporation is doing business in Tennessee, with power to insure the lives of persons and to issue its policies therefor. That, in consideration of the premium then and there paid by plaintiff to the defendant, the defendant did, on the 5th day of January, 1904, issue its policy to the plaintiff upon the life of William A. Spratlin, which policy is numbered 163,589, and denominated

"Peerless Policy of Personal Accident Insurance," which policy is here to the court shown. That, by said policy of insurance, or contract, the defendant obligated, promised, and bound itself to pay to the plaintiff, Katie M. Spratlin, wife of W. A. Spratlin, the sum of five thousand dollars (\$5,000) upon satisfactory proof of the death of William A. Spratlin. While said policy was in full force and effect said William A. Spratlin received a bodily injury, effected exclusively and directly by external, violent, and accidental means, independent of any other cause, resulting in the immediate death of said William A. Spratlin, due notice of which was given the defendant, as provided in said contract. That, according to the terms of said contract or policy, the payment of said \$5,000 was demanded of the defendant, but the same was refused, and

writ of inquiry is necessary. There was some confusion in regard to actions on penal bonds, under the act of 1843, but the statute has been changed so that a court may assess the damages, except for a breach of condition other than the payment of money, and except in proceedings on official bonds.

So, in an action on an open account it was held that Ark. act 1866-67, p. 210, providing that a party upon his oath may make a prima facie case when the opposing party does not dispute such evidence, did not change the time or mode of trial, nor restrict the defendant's right to trial by jury where it was not waived. Gould's Dig. (Ark.) p. 858, § 81, provides that, when an interlocutory judgment shall be rendered by default in any suit founded upon an instrument of writing, and the demand is ascertained in such instrument, the court shall assess the damages; and in all other cases the damages shall be assessed by a jury. *Hodges v. Crawford*, 25 Ark. 565.

And, where a judgment was rendered on default on an appeal from a judgment on an account, it was held error where no jury was called. *Pirani v. Allhime*, 4 Ark. 440.

And, where the only plea filed was want of jurisdiction in an action on an account, it was held error for the court to render final judgment without a writ of inquiry, where it overruled the plea to the jurisdiction. *Evans v. Parks*, 10 Ark. 306. It was also held that the plea to the jurisdiction was well taken.

And, in an action on a bill of exchange for damages, interest, and protest, it was held that the amount of the instrument could be ascertained on default, but that damages arising out of protest, under Ark. Dig. chap. 25, should be settled on proof, for which a jury was necessary. *Johnson v. Frank*, 16 Ark. 199. Ark. Dig. 126, §§ 81, 82, provides that, on a judgment by default in a suit founded upon any instrument of writing, where the demand is ascertained by such instrument, the court shall assess damages, and in all other cases of such interloc-

utory judgment the damages shall be assessed by a jury.

And, in an action of covenant on an instrument payable in current bank notes of the state of Arkansas, it was held that a jury was necessary. *McKiel v. Porter*, 4 Ark. 534. This was because an action of covenant was for damages for breach of contract, and the extent of damages must depend upon the evidence introduced. Plaintiff was entitled to recover only the value of the notes at the time they were to have been paid.

And, in an action of covenant, it was held necessary that a jury should assess the damages on default, in *Johnson v. Pierce*, 12 Ark. 599. This was because the court could pronounce upon and ascertain only liquidated demands.

An action on a writing payable in current bank notes was held to be one for unliquidated damages; and it was held that a writ of inquiry was necessary to show the value of the bank notes. *Ellett v. Chilton*, 5 Ark. 181.

And, where damages could not be assessed by calculation, it was held that on default a jury was necessary, in *Wallace v. Henry*, 5 Ark. 105. This was an action on a note payable in "Arkansas state bank paper."

In an action on recognizances given on appeal, where the appeals were dismissed with costs for want of prosecution, it was held that a writ of inquiry should have been awarded to assess the damages, and not judgment *nil dicit* for the whole amount of the recognizance. *Ashley v. Brasil*, 1 Ark. 144.

And, in an action of replevin, on judgment by default, it was held that an inquest for damages should be held. *Jetton v. Smead*, 29 Ark. 372. In this case the plaintiff would have to prove the value of the cotton, so that he could take an alternative judgment for the value in case its delivery could not be had.

In an action of debt on a penal bond conditioned for the conveyance of land, and for

the defendant still fails and refuses to pay the same without cause. That said failure and refusal to pay said sum of \$5,000 by the defendant is not in good faith, and the plaintiff has been forced to an additional cost of \$1,250. Plaintiff therefore sues the defendant for the sum of \$6,250, with interest thereon since the 16th day of October, 1905, as provided by said contract and the laws of Tennessee; and the plaintiff demands a jury to try the issues involved in this cause."

The circuit judge declined to issue the alternative writ prayed for in the petition, and dismissed the petition. Upon this action of the court the petitioner appealed to this court, and has here assigned errors.

During the argument a question was sug-

gested concerning the failure of the plaintiff to call out the defendant in the original cause before the default was taken.

Good practice requires that the party should be called out, and that entry be made of the fact; but failure to do this will not make the judgment void. 6 Enc. Pl. & Pr. pp. 78, 79. The rule is probably more stringent when the default is entered on an appearance bond in criminal cases as a preliminary step to the issuance of a *scire facias*. *State v. Grigsby*, 3 Yerg. 280; *White v. State*, 5 Yerg. 183, 184.

In all cases where the default is taken upon an instrument showing a present indebtedness, as a bond, bill, or note, or liquidated account, signed by the parties, so that the amount may be ascertained by simple

failure to convey, it was held that a writ of inquiry was necessary to ascertain the damages on default. *Lee v. Leech*, 9 Ark. 423.

But, where a court could make the computation in an action on a bail bond, the damages being the recovery in the original suit, with interest, it was held that a jury was not necessary. *Leech v. Pirani*, 5 Ark. 118. The court said: "The rule being well established that, where the damages are mere matter of figures, and it is perfectly clear what the damages must be, the court may always assess them upon judgment by default, or *nil dicit*."

In *Williams v. State*, 10 Ark. 256, an action of debt on an official bond of a sheriff for failing to pay over county revenues, it was held that on default a jury was necessary, under Ark. Dig. chap. 120.

In an action on a delivery bond it was held that there must be a jury on a default, as it was a bond other than for the payment of money. *Jennings v. Ashley*, 5 Ark. 128. The court said: "The 41st, 42d, and 45th sections of chap. 60, Rev. Stat. pp. 380, 381, provided the means of ascertaining the *quantum* of damages on a forfeited delivery bond. But the above sections, together with the 39th, are repealed by act of 3d December, 1840, pamphlet act, p. 5, so that the statutory means therein prescribed no longer remain."

And, in an action on a forfeited delivery bond, where the cause of action arose before the passage of the act of 1843, it was held that the amount of damages would have to be ascertained by a jury under Ark. Rev. Stat. chap. 112, §§ 5-8. *McKisick v. Brodie*, 6 Ark. 375.

And, in an action on a forfeited delivery bond, it was held that a writ of inquiry was necessary. *Pelham v. Page*, 6 Ark. 148. But this was overruled in *Calloway v. Roane*, 7 Ark. 354, holding that Ark. Acts 1842, p. 49, act 1843, provides that, where any delivery bond has been forfeited, and no judgment entered, plaintiff may, on motion and notice, obtain judgment as judgment on penal bonds, the court ascertaining the damages. The court said that in *Pelham v. 20 L.R.A. (N.S.)*

Page, supra, the court overlooked the statute that authorized the court to ascertain the damages.

Since Ark. act January 7, 1843, it was held that the court could assess the damages on a judgment, on motion, on a forfeited delivery bond. *Hall v. Fowles*, 8 Ark. 175.

In *Nelson v. Hubbard*, 8 Ark. 477, it was held that the Arkansas act of 1813, concerning judgments on delivery bonds, which authorized the court to assess damages, applied only to summary proceedings. Where it was a common-law proceeding on the bond, it was held that a jury was necessary to assess the damages.

But it was said in *Chapline v. Robertson*, 44 Ark. 202, that now, by statute, a default authorizes the court to assess the damages in an action on a penal bond, without calling a jury.

So, likewise, the cases of *Jennings v. Ashley*; *Nelson v. Hubbard*; *McKisick v. Brodie*; and *Johnson v. Pierce*,—supra, holding that, in actions on penal bonds, the intervention of a jury is indispensable, have been superseded by an alteration of the statute.

In an action on a bond conditioned for the payment of a less sum, where the amount due could be ascertained by computation, it was held that the court could assess damages on default without a jury. *Witt v. State*, 14 Ark. 173. This was an action on a bond given by sureties of a sheriff reciting that there remained due a given amount which was to be void if sums were paid on a certain day. It was said that the Arkansas statute, title "Penal Bonds" provides for three classes of cases,—the first four sections relate to actions on bonds for the payment of a less sum of money, §§ 5-15 apply to suit on bonds for a breach of the condition other than the payment of money, §§ 15, etc., regulate the mode of proceeding on official bonds, including administrators and guardians; and it is only in the last two classes of cases that a jury must be called, unless waived, to assess the damage. The court said: "But, upon the reading of the statute, those provisions have no application to actions on bonds conditioned for the payment of a less sum, and where the amount

calculation from the papers, judgment may be entered at once upon default taken without the intervention of a jury; but in all other cases a jury is required to fix the amount. *Masonic Educational Asso. v. Cook*, 3 Head, 313; *Williams v. Bank of Tennessee*, 1 Coldw. 44-46; *Mississippi & T. R. Co. v. Green*, 9 Heisk. 588, 593; *Beeler v. Huddleston*, 3 Coldw. 201, 204; 3 Meigs's Dig. p. 1699, § 1723; *Id.* p. 2019, § 2823.

Manifestly, if the suit be based upon such a bill, bond, or note as above referred to, but there is no such instrument filed in the cause, there are no "papers" from which the calculation can be made; and such was the case in which the judgment by default was entered. A jury was therefore, under the facts stated, necessary before judgment

could be entered for anything more than nominal damages. It is true that profert of the policy was made in the declaration; but this only means, not that the paper is in court, but that the plaintiff has it, and holds himself in readiness to produce it upon demand. *Caruthers. History of a Lawsuit*, 184, 186; *Standard Loan & Acci. Ins. Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136.

The judgment was entered for \$5,172 without a jury. It would therefore be wholly improper for us to award the writ of mandamus to compel the issuance of an execution on such a judgment, since the court would thereby lend its aid to the effectuation of a palpable injustice. Moreover, the proper parties are not before the court. The person whose interest is most vitally

due is ascertained, or ascertainable by computation from the face of the instrument itself, as is the case here. In all such cases the penalty is inserted rather as an adherence to ancient form, and not because it is an essential part of the contract; and, while no good reason can be imagined for the intervention of a jury to assess the damages, the statute is not so unreasonable as to require it." *California*:

In California, under the practice act and Code provisions, a jury is held not necessary in actions on contract. In ejectment suits the practice is to dispense with a jury on defaults. It seems that, where the amount is not ascertainable by calculation from a contract, a jury is required; and the court may order a jury in damage suits. In some of the cases the Code was not cited.

Cal. practice act 1851, § 150, provides that, in actions arising on contracts for the recovery of money or damages, if no answer is filed, the clerk may enter default judgment for the amount specified in the summons, and in other actions, if the taking of an account or the proof of any fact be necessary, the court may hear or order a reference; and where the action is for damages, the court may order the damages to be assessed by a jury, or by a reference if the examination of a long account is necessary. It was held that, in an action on an unliquidated demand where the summons stated the amount for which the plaintiff would take judgment, a writ of inquiry was not necessary. *Hartman v. Williams*, 4 Cal. 254. This was an action for violating a verbal contract of employment. The same provisions are carried into the Code of Procedure of 1902, § 585.

In *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24, which was an action on a note for 10 per cent for attorneys' fees, it was held that the sum asked was susceptible of exact determination by calculation, and it was proper on a default to render judgment for the amount.

In an action of assumpsit, where the complaint was on the common money counts and also a count that plaintiff was the as-
20 L.R.A. (N.S.)

signee of city warrants which were unpaid, it was held that a default could be taken although some of the counts were imperfect; but this did not affect the right of the plaintiff to take judgment on those that were good. *Hunt v. San Francisco*, 11 Cal. 250.

In an action of ejectment, where the complaint alleged damages in a certain sum for ouster, and there was no issue as to the damages alleged, it was held that no proof was required, as that is the practice in this state. *Johnson v. Vance*, 86 Cal. 110, 24 Pac. 862.

In ejectment after judgment by default it was held in *Smith v. Billett*, 15 Cal. 23, that it was not error to refuse a jury trial, because there was then no issue to try.

In an action of damages against the sheriff for wrongfully seizing money on an illegal assessment for taxes, where the complaint was verified, it was held that, on a default, no proof was required, and the court could render judgment. *Tuolumne Redemption Co. v. Patterson*, 18 Cal. 415. This question of jury does not seem to have been discussed.

On service of the summons and failure of the defendant to appear, it was held that the court acquired jurisdiction, by reason of the default, to enter judgment, and it was not necessary that a formal default should have been previously entered by the clerk. *Hibernia Sav. & L. Soc. v. Matthai*, 116 Cal. 424, 48 Pac. 370. This was an action of foreclosure.

But, under Cal. Code Civ. Proc. § 585, subd. 1, authorizing the clerk to enter judgment on default in actions arising on contracts for the recovery of money or damages only, it was held that he could not enter judgment in an action for damages for trespass as it was not an action on contract, —especially as the complaint did not specify for what sum the judgment would be entered. *Shay v. Chicago Clock Co.* 111 Cal. 549, 44 Pac. 237.

Colorado:

In Colorado, where the action is for money only, due on a writing, and the amount rests in computation, a jury is not necessary by statute. In other cases a jury has been

concerned, the United States Casualty Company, is wholly omitted. All persons interested should be made parties. *State ex rel. Lyle v. Willett*, 117 Tenn. 334, 97 S. W. 299; *Powell v. People*, 214 Ill. 475, 105 Am. St. Rep. 117, 73 N. E. 795; *Austin v. Cahill* (Tex. Civ. App.) 88 S. W. 536.

In addition to the foregoing, it is clear the clerk did not wrongfully refuse to issue the execution. He could act only in obedience to his records. In the face of a minute entry setting aside the judgment on which the petitioner asked him to issue an execution, he could not issue such execution. It was not for him to pass judgment on the act of the circuit judge in setting aside the judgment. He was only a ministerial officer. *State v. Miller*, 1 Lea, 590, 606, 607; *State v. Wilbur*, 101 Tenn. 211, 220, 47 S. W. 411; 2 *Spelling, Inj. & Extr. Rem.* §§ 1378, 1418.

If the petitioner desired to question the entry setting aside the judgment by default, she should have brought to this court by the writ of certiorari the case in which the entry was made, and the error, if any, could have been corrected in that form. Possibly,

held necessary. The later Code provisions authorize the court to assess damages.

Whether it is constitutional to authorize clerks in vacation to enter default judgments was held to be a question not necessary to discuss at length, in *Phelan v. Ganabin*, 5 Colo. 14; but it was held that the statutory conditions give the sentence of judgment, the statute directs the judgment, and the clerk has no judicial functions.

This case was approved in *Terpening v. Holton*, 9 Colo. 308, 12 Pac. 189.

In an action for damages for diverting water in an irrigating ditch, it was held that a jury was necessary on default. *Jones v. Stevens*, 1 Colo. 67. Colo. act 1861, p. 275, changed the common-law rule so as to permit the clerk to assess damages where the action was on a writing for the payment of money only, and where damages rest in computation.

At common law, on a judgment by default a writ of inquiry was necessary and issued to ascertain the damages of the plaintiff. It was held that this procedure was modified and adopted by Colo. practice act, § 15, Rev. Stat. 506, for the district courts. By probate act, § 28, Rev. Stat. 526, the rules of practice for district courts were prescribed for probate courts. *Colorado Springs Co. v. Hewitt*, 3 Colo. 275. It was held that in a default in probate court, where the damages did not rest in computation, a writ of inquiry was necessary, and the inquiry should be by a jury of twelve men.

In an action of debt on a recognizance of bail it was held that a judgment by default could be entered for the amount of the penalty without a jury, as there was nothing for a jury to determine. *Crump v. People*, 2 Colo. 316.

20 L.R.A. (N.S.)

also, the action of the court could have been corrected by appeal or writ of error.

The learned counsel for petitioner has cited numerous authorities (*Bronson v. Schulden*, 104 U. S. 410, 26 L. ed. 797; *Anderson v. Thompson*, 7 Lea, 262; *State v. Dalton*, 109 Tenn. 549, 72 S. W. 456; *Johnson v. Russell*, MSS. Jackson, April term, 1895) to the effect that a judgment cannot be set aside at a subsequent term of the court. Without controverting these authorities at all, we only say that the question cannot be brought before this court in the manner attempted. *Mandamus* is an extraordinary writ, and can be resorted to only when other remedies fail. *Re Connecticut Mut. L. Ins. Co.* 131 U. S. clxxx. Appx. and 26 L. ed. 561; 2 *Spelling, Inj. & Extr. Rem.* §§ 1308, 1309; *High, Extr. Legal Rem.* 3d ed. § 39.

The foregoing objections are insuperable obstacles in the way of the maintaining of the petition.

It results that there is no error in the judgment of the court below, and it must be affirmed.

In an action for unliquidated damages it was held that evidence was necessary in a default. Colo. Civ. Code, chap. 11, relating to judgments on failure to answer, provides that, if the taking of an account or proof is necessary to enable the court to assess the damages, the court may hear the proof or may order a reference; or, where the action is for damages, in whole or part, the court may order the damages to be assessed by a jury, or they may be assessed by the court. *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278.

Under a similar provision (Colo. Code Civ. Proc. § 168), it was held that the evidence and final judgment should be taken in the county where the court was sitting. *Hotchkiss v. First Nat. Bank*, 37 Colo. 228, 85 Pac. 1007, 11 A. & E. Ann. Cas. 393.

In an action on a note where the defendant was in default and the amount was liquidated, ascertainable from the terms of the contract, it was held that the judgment was properly rendered by the court, under Colo. Code 1883, §§ 37, 149. *Thomas v. Colorado Nat. Bank*, 11 Colo. 511, 19 Pac. 501.

And in an action of damages for debt, where the answer was unverified, it was held that judgment should be entered in favor of the plaintiff, as by default, for want of an answer. *Perras v. Denver & R. G. R. Co.* 5 Colo. App. 21, 36 Pac. 637.

Connecticut:

In Connecticut, until 1899, the writ of inquiry was unknown, and the courts could assess the damages. This was held not to invade any constitutional rights. In 1899 a statute provided for a jury in actions of tort.

The practice of assessing damages by the court having been established in Connecticut

before the adoption of the Constitution, it was held that, on a default, the court could assess the damages in an action of tort; and that this did not conflict with the Constitution, providing: "The right of trial by jury shall remain inviolate." Seeley v. Bridgeport, 53 Conn. 1, 22 Atl. 1017. The court said: "But it had never been the practice to have damages upon a default assessed by a jury. It had always been done by the court. This provision of the Constitution has therefore no application to the case."

In an action for damages it was held to be the settled practice in Connecticut for the court, on default, to assess the damages without a jury. Lennon v. Rawitzer, 57 Conn. 583, 19 Atl. 334.

In an action of book debt, on a default, it was held in Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760, that a justice of the peace could enter judgment for the damages. The court said: "The assessment of damages after default in England, as well as in some of our sister states, is made by a jury upon a writ of inquiry or by a reference to the clerk or prothonotary. By our law damages in such cases are assessed by the court, and this has been done in the present case."

In Lamphear v. Buckingham, 33 Conn. 251, it was held that cases on default and on demurrer overruled are in the same condition in respect to an inquest or hearing in damages. The court said: "By our practice, this inquiry is not by writ of inquiry, or by reference, but made by the court on a hearing in damages."

And in Batchelder v. Bartholomew, 44 Conn. 494, an action on the case, it was said from the earliest history of jurisprudence in this state, where, in an action on the case for the recovery of unliquidated damages, the defendant has suffered a default, the assessment has been made by the court without the intervention of a jury; but it was held that after a default, and for the purpose of reducing the damages, the defendant could prove that he was not guilty of negligence.

Conn. Pub. Acts 1897, chap. 190, p. 884, provides that damages in actions of tort, in a judgment on default or demurrer overruled, are assessed by the court, when the defendant gives written notice of his intention not to plead over. Chapter 220 provides that defendant cannot contradict the negligence alleged unless he filed a notice of such intention. If this notice is not filed, the only questions on the hearing relate to the damages; but, when it is filed, the court cannot assess substantial damages if the defendant disproves the negligence. Morris v. Winchester Repeating Arms Co. 73 Conn. 690, 49 Atl. 180.

Conn. Laws 1889, chap. 157, taking effect August 1st, providing that, in actions of tort, where defendant defaults and there is a hearing in damages, such hearing shall be by a jury, unless the defendant gives notice that he will suffer a default to the clerk of the court within thirty days after the time fixed by law for closing pleadings, was held not to apply to actions pending, in Rowen v.

New York, N. H. & H. R. Co. 59 Conn. 304, 21 Atl. 1073.

Florida:

In Florida, under the statutes, where the action is on an open account or contract for the payment of money, not requiring evidence, a jury is not needed on a judgment by default, but is required in other cases.

So, in an action on a note, it was held that the plaintiff should produce and file the evidence on which the damages were to be assessed, as he was required to do in an action upon a written instrument. Snell v. Irvine, 17 Fla. 234. Fla. act February 24, 1873, chap. 1938, provides that, if the action is on an open account or contract for the payment of money, not in writing, upon the entry of a default the clerk shall ascertain the amount which the plaintiff is entitled to recover, from the examination of plaintiff under oath, or other proofs, by affidavit or otherwise, and enter up judgment for the amount so assessed.

And, under Fla. act February 24, 1873, chap. 1938, in an action on a note, on default it was held that the records should show that the plaintiff produced to the clerk the note sued upon, and that the clerk assessed the amount. Coons v. Harlee, 17 Fla. 484.

In an action on a joint note where one of the makers was in default, it was held that the jury trying the issues of fact should also assess the damages against the one in default, as Fla. act 1873, chap. 1938, § 7, authorizing the clerk to assess damages on default where the action was on a written promise, did not apply where an issue was joined as to one joint defendant. Netso v. Foss, 21 Fla. 143.

And, under Fla. act 1873, the records must show that the plaintiff produced to the clerk the note sued on. If the clerk did not comply with Fla. act 1873 in entering a default, it was held that his proceedings were invalid, and, in an action on an account, the judgment should show what evidence was produced. Blount v. Gallaher, 22 Fla. 92.

But, in an action to recover rent on a lease, it was held proper for the court to refer the case to a jury during the term time to assess the damages on a default. McClellan's (Fla.) Dig. p. 835, § 100, providing for default in an action on a liquidated demand not requiring evidence, was held not to apply. Parkhurst v. Stone, 36 Fla. 463, 18 So. 596.

In cases where evidence outside the contract sued upon was necessary to ascertain the amount to be recovered it was held that on default the clerk could not enter final judgment, under Fla. Rev. Stat. § 1035, authorizing clerks to enter a default where the cause of action was purely and simply a money demand founded upon a contract for the payment of money only. Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. 473.

Georgia:

In this state, under the Constitutions from 1868 to 1877, the court was required to render judgments on default "in actions

on contract" where an issuable defense was not filed under oath. In 1877 this was changed to read: "in cases on unconditional contracts in writing." The judgment by the court on failure to demand a jury is held not to infringe on any constitutional rights.

Ga. Const. 1868, art. 5, § 3. Code 1873, Appx. § 5091, provides: "The court shall render judgments without the verdict of a jury in all civil cases founded on contract where an issuable defense is not filed on oath."

Const. 1877, art. 6, § 4, ¶7, Code 5145, provides, the court shall render judgment without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation.

So, under Ga. Const., Code, § 5091, requiring the court to render a judgment without a jury in all civil cases founded on contract, where an issuable defense was not filed on oath, it was held that, in an action on an insurance policy on default, a jury was improper, as a jury trial was directly contrary to the Constitution. *Lester v. Piedmont & A. L. Ins. Co.* 55 Ga. 475.

It was held in an action of assumpsit that, under Ga. Const. 1868, requiring a sworn plea, the plaintiff was entitled to a judgment by default before the judge, not as at common law, but as understood under act 1799. *Craig v. Pope*, 48 Ga. 551. It was said: "The end sought to be attained by the introduction into the Constitution of the state of this clause was not, as we think, to introduce a mode of trial by a judge, instead of the ancient mode of trial by jury. Whatever may be the case now with a certain class of minds, as to the opinions they have of jury trials, we do not think any distrust of that ancient system existed in the convention of 1868. It put a clause into our fundamental law elevating the qualifications of jurymen, but it guarantees the right of trial by jury, as heretofore used. The real intent of the clause under consideration was to prevent delay. With this view, appeal trials were abolished, and this provision made, that there should be no trial by jury unless the defendant would, under oath, set up a substantial, issuable defense."

Where no issuable defense was made to a suit against the principal and sureties on a sheriff's bond, it was held to be the duty of the court to render judgment without a jury, under Ga. Const. 1868. *Burnett v. Smith*, 60 Ga. 314.

And, where a written contract promised to pay a certain sum of money, or, on default, to pay so much cotton for rent, it was held that, in a suit on the first promise, no defense on oath being filed, a judgment by the court without a jury was valid. *Mosely v. Walker*, 84 Ga. 274, 10 S. E. 623. It was held that the promise to pay a certain sum was not qualified by the subsequent provision.

In an action of attachment on a note, and a notice, under Ga. Code, § 3309, that the plaintiff purposed to take a general judgment L.R.A. (N.S.)

ment, it was held, where no defense was made, that a judgment by the city court of Macon without a jury was proper. *Sutton v. Gunn*, 86 Ga. 652, 12 S. E. 979. Ga. Acts 1884-85, p. 473, creating the city court, authorized the judge to give judgment, and provided that either party was entitled to a jury by demanding the same, in cases where such party was entitled to a jury under the Constitution and laws of this state. It was held that every party was presumed to desire that his case would be tried by the court if he failed to demand a jury, and more onerous terms might be exacted without infringing upon the constitutional sacredness of trial by jury.

And, in a joint action against the makers and indorsers of a note where no issuable defense was filed under oath, it was held that the court could render judgment without a jury. *Georgia R. & Bkg. Co. v. Pendleton*, 87 Ga. 751, 13 S. E. 822. The court said: "In our opinion, there is no variance either from the truth or sound principle in classifying this case as one founded upon an unconditional contract in writing, and the court properly rendered its judgment against all of the defendants without a jury." And in this case "it would not be going too far to hold that these persons were not, in a strict sense, indorsers, but were really sureties, and liable as makers." And it was held that, if the necessity of a jury was doubtful, the judgment would not be open to attack by illegality after the expiration of the term.

Under Ga. act 1872, Augusta charter, providing that a judge of the city court shall render judgment without a jury when no issuable defense is filed on oath, was held to be constitutional, in *Dortic v. Lockwood*, 81 Ga. 293. (This is from the syllabus of the case prepared by the court.) The act entitled either party to a jury by a demand in writing, which was not done in this case.

But, where no plea or defense was filed in an action against the maker and indorsers of a note, it was held that the court had no jurisdiction to enter judgment against the indorsers, without a jury, as their liability was not an unconditional one, but depended on proof of protest and notice. *Kaiser v. Brown*, 98 Ga. 19, 25 S. E. 923.

And, in an action by a second indorser against the first indorser of a note, an allegation not apparent upon the instrument, which rendered protest necessary, was held to make a case proper for the jury, and not for the court, although no issuable defense was filed. *Everett v. Westmoreland*, 92 Ga. 670, 19 S. E. 37. The declaration alleged that it was negotiated at a chartered bank, and it became necessary to bind the first indorser to show by proof that it was protested. The court said: "Whenever it is incumbent on the plaintiff to make proof of anything outside of what is contained in the contract sued on, the verdict of a jury should be taken, whether an issuable defense has been filed or not."

Ga. Stat. 3457, providing that on a

default on an open account the plaintiff shall be permitted to take judgment, was construed to mean a verdict under the Constitution of 1877. *Stephens v. Gate City Gaslight Co.* 81 Ga. 150, 6 S. E. 838.

Ga. Code 1873-1882, § 3457, provides for default and trial by jury, except as provided elsewhere in this Code (taken from act 1799), provided that in suits on open accounts, where process has been served personally and there is no defense, the plaintiff shall be permitted to take judgment as if each item were proved. (This proviso is from act 1861, p. 59, and the Constitution of 1868.) Since the Constitution of 1877, the word "judgment" should read "verdict" in the Code, and in a suit on an open account on default the plaintiff may take a "verdict." But a suit on a receipt for notes and accounts to be collected and for failure to pay over was held not a suit on account, and to require proof before a verdict on default. *Fryer v. Cole*, 70 Ga. 687.

Under Ga. Rev. Code, § 3405, it was held that cases in default were to be tried by a jury, and the plaintiff should fail unless he made out a case by the necessary proof, in an action of assumpsit for goods sold. *Durden v. Carhart*, 41 Ga. 76. In this case it was said: "The English practice on this subject has never been adopted in Georgia. There, in case judgment is rendered by default, if the suit is for a specific thing, as in an action of debt for a sum certain, the judgment is absolute. But, says Blackstone, vol. 3, p. 398: 'Where damages are to be recovered, a jury must be called in to assess them, unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is that the plaintiff ought to recover his damages (indebitely); but, because the court knows not what damages the said plaintiff hath sustained, therefore the sheriff is commanded that, by the oaths of twelve honest and lawful men, he inquire into said damages and return such inquisition into court. This process is called a writ of inquiry, in the execution of which the sheriff sits as judge and tries by a jury, subject to nearly the same law and conditions as the trial by jury at nisi prius, what damages the plaintiff hath really sustained.'"

On an appeal from a common-law judgment rendered in 1860, it was held that a judgment rendered in 1874 against the defendant in favor of his security on the appeal, without a jury, was void, although no defense was filed under oath. The Constitution of 1868 provides that there shall be no appeal from one jury in the superior court to another; but the court may grant a new trial. The court shall render judgment without a jury in civil cases founded on contract where an issuable defense is not filed on oath. It was held that this clause, "there shall be no appeal" (Code, § 5031), was prospective. Appeals should be tried as before, under the Constitution of 1868 (Code, § 5124), providing that the right of

trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate. The court said: "Such a thing as an appeal trial without a jury, on facts, is still unknown to our jurisprudence, unless by consent to submit facts as well as law to the court." *Walker v. Bivins*, 57 Ga. 323; *Birdsong v. Woodward*, 57 Ga. 354.

And, under Ga. Code, § 3457, in an action on notes and accounts which were introduced in evidence, it was held not error to direct a verdict on default. *Wiggins v. Mayer*, 91 Ga. 778, 18 S. E. 430.

Illinois: In Illinois an early statute authorized a default judgment in actions on an instrument in writing for the payment of money only and for the assessment of damages, and in other actions by the court in case neither party required a jury. This has continued through various statutes, and it is held that in damage suits either party may demand and obtain a jury.

So, in an action of replevin it was held that the court could assess the damages, and that Ill. practice act, March, 1847, providing that, if judgment shall be given for the defendant without a trial, the damages may be assessed by the court, was no violation of the constitutional right to a trial by jury, as there was no issue to be tried. *Campbell v. Head*, 13 Ill. 122.

And the right of trial by jury was held not impaired by refusing a jury to assess damages in default, in *Hopkins v. Ladd*, 35 Ill. 178. The court said: "This is a mere matter of practice, none will deny, and, being so, the assessment of damages could be made by the court without a jury. The idea that a party has a constitutional right to have a trial by jury is not controverted. Here was no trial in any sense of that term. The defendant has declined putting his case on trial by abiding the judgment on the demurrer."

Ill. Rev. Laws, 490, Gale's Stat. 532, providing that, whenever judgment shall be given by default in any action brought on an instrument of writing for the payment of money only, the court may direct the clerk to assess the damages by computing the interest and report the same to the court, upon which final judgment shall be given, and in all other actions when judgment shall go by default the plaintiff may have his damages assessed by the court, was held to mean that the plaintiff may, if he elects, have his inquest taken in court; but he may waive this right. *Vanlandingham v. Fellows*, 2 Ill. 234.

And, in an action on a note against two defendants, where a default was made as to one, it was held that the court who tried the issue could compute the amount and enter judgment as to both. *Smith v. Harris*, 12 Ill. 462.

And, in an action of attachment on a note, it was held that the court could assess damages on default, under Ill. act February 11, 1857, authorizing certain circuit courts on interlocutory judgments, to enter default in actions on contract where the damages

are unliquidated and do not rest in computation. *Quigley v. Spear*, 33 Ill. 352.

In an action of debt upon a judgment record for a sum certain it was held that, on default, the damages could be computed by the court without the intervention of a jury, as they were made up of interest on the unpaid debt and rested wholly in computation. *St. Louis, A. & T. H. R. Co. v. Miller*, 43 Ill. 199.

And, under Ill. Laws 1857, p. 392, providing the same rule of practice for the court of common pleas in Aurora as was provided for the Kane circuit court, it was held that the court could assess damages on default without a jury. *Miles v. Goodwin*, 35 Ill. 53.

Scates's (Ill.) Comp. 261, provides that, where interlocutory judgment is given in an action on an instrument in writing for the payment of money only, and the damages rest in computation, the court may refer it to the clerk to assess the damages, and in all other actions where judgment shall go by default the plaintiff may have the damages assessed by a jury. Act February 14, 1863, provides that in all suits in courts of record upon default where writ of inquiry has heretofore been required to assess damages, it shall be lawful for the court to assess damages without a jury, unless either party shall claim a jury. In 1857, a special law authorized the court of the thirteenth circuit to assess damages in all cases of default. Scates's Comp. 637, act February 18, 1859, provides that the practice in the circuit court of Kendall should be the same as that in the thirteenth circuit. This was held to be a mere matter of practice, and the assessment of damages could be without a jury. *Hopkins v. Ladd*, supra.

And, in an action of assumpsit, it was held that after a default the assessment should be made by the court, unless a jury was demanded by either party, under Ill. act 1863, p. 47. *Crabtree v. Green*, 36 Ill. 278. In this case it was held error to render final judgment without default.

In an action for damages not resting in computation, it was held that the clerk had no power to enter up judgment, especially in the absence of all proof. *Towner v. George*, 53 Ill. 168. The court said: "In this case the damages were an open question to be tried by a jury on evidence, or by the court under the act of February 14, 1863. Under that act the court may, unless a jury be demanded, assess the damages, but the clerk has no such power."

On default, where neither party asked to have the damages assessed by jury, it was held proper for the court to assess the damages, under Gross's (Ill.) Stat. p. 512, § 23, authorizing the court to make the assessment. *Reed v. Horne*, 73 Ill. 599. This was an action of damages for selling liquor to a husband.

And, under Ill. Rev. Stat. 780, § 41, providing that, upon default, either party may have the damages assessed by a jury, it was held, in an action of debt on a penal bond, 20 L.R.A. (N.S.)

where defendant demanded a jury, that it was error to refuse. *Pinkel v. Domestic Sewing Mach. Co.* 89 Ill. 277.

And, under Ill. Rev. Stat. 1874, chap. 110, § 40, providing that, where interlocutory judgment shall be given on a penal bond or upon an instrument in writing for the payment of money only, and the damages rest in computation, the court may refer it to the clerk to assess and report the damages, and may enter judgment therefor, provided that either party may have the damages assessed by a jury, it was held that a jury was not necessary unless either party demanded it. *Palmer v. Harris*, 98 Ill. 507.

In an action against two as partners, where one defaulted, and the jury were sworn to try the issue only, without swearing them to assess the damages as against the party in default, it was held that the party pleading could not complain when no objection was made by the party in default. *McDonald v. Fairbanks, M. & Co.* 161 Ill. 124, 43 N. E. 783.

In *Blizzard v. Epkens*, 105 Ill. App. 117, a defendant who was in default was held entitled to demand a jury at any time before the damages were assessed, under Ill. practice act, § 41, providing that either party may have the damages assessed by a jury. In this case the demand for a jury was not made on the first day of the term, as required under Ill. Rev. Stat. chap. 37, § 200. It was held that those provisions applied only to cases pending at a term where no jury had been summoned.

A judgment by *nil dicit* was held to operate substantially as a judgment by default admitting every material allegation; but the default did not admit the amount of damages, and it was held that the defendant was, upon demand, entitled to a jury. *Loellke v. Grant*, 120 Ill. App. 74.

And, in a judgment by default in an action on a note, it was held that the court could assess the damages, under Ill. Rev. Laws, 490, Gale's Stat. 532, without requiring the clerk to assess the same. *Wilcox v. Woods*, 4 Ill. 51.

And, in an action on a note payable in cattle, for \$300.50, it was held that, after the expiration of the day, it became payable in cash, and therefore was a money demand; and the clerk could assess the damages in default of a valid plea. *Vanhooser v. Logan*, 4 Ill. 389, 38 Am. Dec. 90.

Under Ill. Stat. 1858, 261, 262, in an action of assumpsit on a note, it was held that the assessment of damages by the clerk was specially authorized by statute in cases of interlocutory judgment on default, where the damages rested in computation. *Robertson v. Hamet*, 19 Ill. 161.

In an action on a note payable in currency it was held that the clerk could assess the damages on a judgment by default. *Swift v. Whitney*, 20 Ill. 144; *Trowbridge v. Seaman*, 21 Ill. 101.

In an action on guaranty of a note where the declaration contained also a common count for money had and received, it was held that the clerk could assess the damages

on default. *Thompson v. Haskell*, 21 Ill. 215, 74 Am. Dec. 98. *Scates's* (Ill.) Comp. 261. provides that the clerk may assess the damages, and this was held to have the force and effect of a writ of inquiry.

So, in an action of assumpsit on an order for a definite sum of money, to be paid on condition, which was alleged to have happened, it was held that, on default judgment, the damages rested merely in computation, and could be assessed by the clerk. *Phelps v. Reynolds*, 49 Ill. 210.

And a writ of inquiry was held unnecessary in any case where the damages could be ascertained by computation, in *Rust v. Frothingham*, *Breese* (Ill.) 258, and *Clemson v. State Bank*, 2 Ill. 45.

In all cases where the promise was not in writing for a specific sum of money, it was held that the damages must, on default, be assessed by the court or jury, under Ill. practice act, Sess. Laws 1872, p. 344, providing that in all cases of default where the damages are to be assessed it shall be lawful for the court to hear the evidence and assess the damages without a jury; but either party may have the assessment made by a jury. *Meyers v. Phillips*, 72 Ill. 460. This was an action on a note promising to pay a certain sum of money if the promisor should get drunk, and a special count on the agreement, not referring to the note, required a jury or the court to assess the damages.

In an action of assumpsit against a sheriff for money had and received, it was held error to assess damages without a jury. *Whiteside v. Bartleson*, *Breese* (Ill.) 42.

Indiana:

Prior to Ind. Code 1852, if evidence was necessary to enable the court to render judgment, a jury was required. The Code authorizes the court to hear proof, and, in actions on contract, assess the damages or direct the same to be ascertained by a jury. The defendant in default, in damage suits, is held entitled to require a jury.

Under 2 *Gavin & H.* (Ind.) Stat. 216, Code, § 360, providing that the assessment of damages in case of default shall be on or after the day on which the default is taken; and § 367, providing that, if the taking of an account or proof of fact or assessment of damages is necessary after the failure to answer, the court may hear the proof, and, in actions on contract, assess the damages or direct the same to be ascertained by a jury,—it was held that, in the assessment of damages, the defendant may appear and demand a trial by jury. *Briggs v. Sneghan*, 45 Ind. 14. This is § 600 (582) of the present Code of Civil Procedure.

2 Ind. Rev. Stat. p. 115, § 340, was held in *Langdon v. Bullock*, 8 Ind. 341, to change the rule of common law; and, in a suit for tort in taking personal property, the failure to appear at the trial was held to waive a jury.

In *Briggs v. Sneghan*, *supra*, where a jury was had on default in an action for damages caused by the erection of a house

in an unskillful manner, the court said that a default admits the cause of action "but leaves the amount open to be determined by the proof; that, in the assessment of the damages, the defendant may appear and demand a trial by jury." The Code was not referred to, but the statement was the conclusion of a review of the authorities at common law.

And, in an action for assumpsit against an administrator on account of effects unadministered, and for money had and received, it was held that, on judgment by default, damages should be assessed by a jury, and not by the court. *Wood v. Lemon*, 1 Blackf. 198.

And, in an action on a penal bond, it was held that, on default, the damages should be assessed by a jury. *Tannehill v. Thomas*, 1 Blackf. 144. The court said that, in a bond for the performance of covenants, Ind. Stat. 1817, p. 37, "expressly requires that the damages for the breaches assigned should be assessed by a jury."

In an action on a delivery bond it was held that, on judgment by default, the damages should be assessed by a jury, unless the parties, by consent, submit the matter to the court. *Campbell v. Woolen*, 5 Blackf. 80.

Where a declaration on a note contained the common counts, and there was judgment by default for the plaintiff, it was held that there should be a writ of inquiry, unless the parties submit the case to the court, or a *nolle prosequi* is entered as to the common counts. *McFall v. Wilson*, 6 Blackf. 260.

So, where the declaration in assumpsit contained a count on a note, and a general count for goods sold and delivered, it was held that, on a judgment by default, a writ of inquiry was necessary. *Starbuck v. Lazenby*, 7 Blackf. 268.

And the same was held where the judgment was *nil dicit*. *Sherman v. Wilson*, 7 Blackf. 362.

In an action of debt, where the three counts did not contain such a statement of facts as would enable the court to determine by calculation the amount due the plaintiff, it was held that the assessment should have been made by a jury. *Linn v. Schmall*, 8 Blackf. 94.

And, where the declaration consisted of the special and the common counts, and the defendant made default, it was held that the common count should have been dismissed, or the damages assessed by a jury. *Carter v. Spencer*, 4 Ind. 78.

But, in an action of covenant on an obligation for a certain sum with interest payable in whisky, it was held that, on judgment by default, the plaintiff could take final judgment for the principal and interest without the intervention of a jury to assess the damages. *Mettler v. Moore*, 1 Blackf. 342.

And, where the amount of damages depended upon a mere calculation, it was held that no writ of inquiry was necessary on

default. *Henrie v. Sweasey*, 5 Blackf. 273. Indian Territory:

A general demurrer to the complaint was overruled, and, on plaintiff's motion, default judgment was entered. It was held that a default judgment admitted the allegations of the complaint, and, as this fully stated the amount of the debt for goods and merchandise sold, the court could enter judgment without a jury. *Tynon v. Crowell*, 3 Ind. Terr. 346, 58 S. W. 565. Iowa:

In Iowa the Code provides that the court may assess damages unless a jury is demanded by the party not in default. This is held to be constitutional, as the right to a jury under the Constitution may be lost or waived.

On plaintiff's motion an action of replevin was dismissed, and on defendant's motion redocketed to assess the damages. It was held that the plaintiff was in default and could not demand a jury, under Iowa Code, § 3151, which, after providing for the manner of assessing damages on a money demand, declares that in other cases the court shall assess the damages unless a jury is demanded by the party not in default. *Wilkins v. Treynor*, 14 Iowa, 391. The court said: "If there is no issue, and it is a mere inquiry into the damages sustained by the party not in default, the party who had lost or failed to secure a standing in court cannot, as a matter of right, claim to be heard as if he was diligently prosecuting or defending the action. The right of trial by jury, guaranteed by the Constitution, may be lost or waived by the act or consent of a party. This right is not an attribute or inalienable in its nature and character, but rather a privilege that may be waived or forfeited."

And, where the defendant in an action on a note and mortgage was in default, it was held that he had no right to demand a jury, under Iowa Rev. 3152. *Carleton v. Byington*, 17 Iowa, 579.

And, where the defendant was in default, it was held that he had no right to a jury in the assessment of plaintiff's damages. *Armstrong v. Catlin*, 17 Iowa, 581.

In *Clute Bros. v. Hazleton*, 51 Iowa, 355, 1 N. W. 672, the plaintiff was in default for want of reply against a counterclaim. It was held that he could not demand a jury on the counterclaim and at the same time waive a jury on the cause of action in the petition. In this case the plaintiff offered evidence, but the court refused to receive it, and said: "The difficulty here is that the plaintiff's cause of action was admitted, and, as we understand, the only question to be determined was the amount defendant was entitled to on his counterclaim. As to this, the only right plaintiff had was to cross-examine defendant's witnesses."

So, under Iowa Code, § 2872, providing that, when a party is in default, the court is empowered to assess the damages, unless a jury is demanded by the party not in default, it was held that the party in default was not entitled to a jury to assess

the damages. *Preston v. Wright*, 60 Iowa, 351, 14 N. W. 352.

And, under Iowa Code, §§ 1828-1832, providing that, when the action is for money demand, and the amount is a mere matter of computation, the clerk may assess the damages, and in other cases they are to be assessed by the court unless a jury is demanded by the party not in default, it was held, in an action on a subscription of stock where instalments had been called for, that the clerk could not assess the damages; but this should have been done by the court, unless a jury was demanded by the plaintiff. *Burlington & M. River R. Co. v. Marchand*, 5 Iowa, 468. In this case defendant's liability was not definitely fixed by the articles of subscription.

Iowa practice act, § 13, Rev. Stat. 471, authorizing the court to direct the clerk to assess damages when judgment was given by default on any instrument of writing, but providing that in all other actions the plaintiff may have his damages assessed by a jury, was held to apply to actions brought originally in the district court, and not as an imperative rule on appeal cases from a justice's court. *Taylor v. Barber*, 2 G. Greene, 350. In this case the action was tried before a jury on a claim for money due. On appeal the defendant defaulted. Justice's act, art. 8, §§ 2, 3, 16, provide for an affirmance or trial on appeal. This was held to control.

And, where a judgment was given by default on a note, it was held that, under Iowa practice act, § 13, the court could direct the clerk to compute the interest, and assess the damages. *Parvin v. Hoopes*, *Morris* (Iowa) 204.

Iowa Code, § 2872 (Rev. 3151) provides that, where the action is for a money demand, and is a mere matter of computation, the clerk shall ascertain the amount. In other cases the court shall assess the damages unless a jury is demanded by the party not in default.

Where the statute provided that, on default, the court may direct the clerk to assess the damages, it was held not prejudicial error for the court to assess the damages in an action of debt. *Davis v. Morford*, *Morris* (Iowa) 99.

And, under Iowa Code, § 1831, providing that in cases of default, where the damages are assessed either by court or jury, the defendant may appear at the time of the assessment and cross-examine the plaintiff's witnesses, but for no other purpose, it was held that the defendant could not introduce evidence, nor address the jury, nor ask instruction. *Cook v. Watters*, 4 Iowa, 72.

Kansas:

Kan. Code Civ. Proc. (1868) § 401 (Gen. Stat. 1897, § 397), provides that, if the taking of an account, or proof of fact, or the assessment of damages, is necessary, the court may, with the assent of the party not in default, assess the damages, or, with like assent, refer the same to a referee or jury.

So, in an action on a penal bond, it was

held that an interlocutory judgment should have been entered on default, and an order should have been made by the court that the truth of the breaches assigned be inquired into and the damages sustained thereby assessed; and this should have been done by a jury, as in other cases. *Simmons v. Garrett*, 1 Kan. Dasser's ed. 82, Appx. The court said: "See Laws 1855 (p. 540, §§ 5 and 7; p. 561, § 42), which clearly points out this mode of proceeding."

In an action against a city for injury to property in consequence of changing the grade of a street, default was taken against the defendant, and the cause was referred to a master to assess the damages. It was held that the defendant, having been summoned, could not require a second notice of assessment. *Leavenworth v. Hicks*, 1 Kan. Dasser's ed. 160, Appx.

And, in a suit on a foreign judgment for a sum certain, where the answer of the defendant was withdrawn, it was held that the defendant had no right to demand a jury, as there was no issue to try, nor any damages to assess, nor facts to ascertain. *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446.

And, in an action on a note, where the defendant was in default, it was held that a trial by the court, where the plaintiff consented, was proper, under Kan. Code, § 290, providing that the trial by jury may be waived by the consent of the party appearing when the other party fails to appear. *Goff v. Russell*, 3 Kan. 212. Kentucky:

Ky. Civ. Code Pr. § 379 (409), provides that, if the taking of an account, or the proof of fact, or the assessment of damages, is necessary on a default, the court may hear the proof, and (in actions on contracts, Code 1854, § 479) assess the damages or refer the same to a jury. Under the former practice, in actions for a liquidated sum, no jury was required, but one was necessary where the damages were uncertain.

So, in an action against a sheriff and a surety on his bond, it was held that a default judgment was properly rendered without a jury. *Combs v. Breathitt County*, 18 Ky. L. Rep. 809, 38 S. W. 138, 39 S. W. 33. This was an action for revenue collected by the sheriff, which he had failed to pay over.

So, under Ky. Code, Pr. § 418, authorizing the court to ascertain the amount for which judgment should be rendered on failure of the defendant to answer, it was held that the court could assess the damages where the petition showed the amount claimed, and this was sustained by record evidence made part of the petition. *Lambert v. Ingram*, 15 B. Mon. 265.

Actions on contract under the Code of 1854.

In an action on notes where defendant was in default, it was held that the court could render judgment. *Marr v. Prather*, 3 Met. (Ky.) 196. This was under Ky. Civ. 20 L.R.A. (N.S.)

Code, § 409, providing that, if the taking of an account or assessment of damages is necessary to enable the court to pronounce judgment on a failure to answer, the court may hear the proof, and, in actions on contracts, assess the damages.

And, under Ky. Civ. Code, § 153, in an action to recover the amount of goods sold and delivered, it was held that the court could render judgment on default without the intervention of a jury. Civil Code, § 409, confers on the court power not only to render judgment on default, but to assess damages and to hear proof. *Francis v. Francis*, 18 B. Mon. 57.

So, in an action on a contract, where the defendant was in default, it was held that the court had a right to try the case and render a judgment. *Harvey v. Payne*, 2 Met. (Ky.) 451.

And, in an action founded on contract, on default it was held competent for the court to hear the evidence and assess the damages, under Ky. Civ. Code, § 409. *Dehoney v. Sandford*, 2 Bush, 169.

Under Ky. Civ. Code, § 409, it was held that on default, where an assessment of damages was necessary, in an action on a contract, the court could have heard the proof and assessed the damages, or referred it to a commissioner or to a jury. But the record was defective and did not show that the court heard proof in an action to recover the value of whisky which the defendant agreed to deliver. *Beam v. Hayden*, 5 Bush, 426.

Under Ky. Civ. Code, § 153, it was held that, in a suit *ex contractu* for medical services, where the account was exhibited and there was no answer, the court could pronounce judgment on default. *Harris v. Ray*, 15 B. Mon. 630.

But, in an action for the refusal to permit plaintiff to perform stipulated services, it was held that the court could not assess the damages without a jury and without proof. *Wood v. Morgan*, 6 Bush, 507.

And, in an action of ejectment and for damages, it was held that a default judgment for damages was improper where there was no inquest by jury, nor any evidence before the court. *Burchett v. Herald*, 98 Ky. 530, 33 S. W. 85. The error was on a question of evidence.

Under the former practice, the court could render default judgments where the amount was certain; but, where evidence was required, a jury was necessary.

In an action on a covenant for the payment of a certain sum, on default it was held that the court might have assessed the damages without the intervention of a jury. *Dicken v. Smith*, 1 Litt. (Ky.) 209. The court said: "The right of the court in such a case to assess the damages was, no doubt, first asserted at an early period; but that right has been uniformly maintained ever since."

And, in an action of covenant where the damages were liquidated, it was held that the court could render a judgment in a

default without the intervention of a jury. *Jenkins v. Yeates*, 2 J. J. Marsh. 48.

But, where the debt demanded was payable in currency, differing in value from that of this state, and interest was to be calculated, it was held that a jury was necessary to assess the damages. *Pollock v. Colglazure, Sneed* (Ky.) 2.

And the intervention of a jury was held necessary where the obligation sued on was payable in Virginia currency. *Lynch v. Barr, Sneed* (Ky.) 170.

So, a clerk was held not authorized to calculate interest on single bills, in pursuance of Ky. act 1799, chap. 17, § 2, if the single bill was given prior to that act; but the interest should be found by a jury on a writ of inquiry. *Troxwell v. Fugate, Hardin* (Ky.) 2.

And, in an action on a note and for interest according to the laws of another state, it was held that the law would have to be proved and ascertained by the verdict of a jury, and the court could not render judgment for the interest on default. *Pawling v. Sartain*, 4 J. J. Marsh. 238.

In an action of covenant, where the sum to which the plaintiff was entitled was a certain amount, it was held that, on default, the court could assess the damages without a jury; but not if the case came within the statute of 1 Ky. Dig. 248. *Goff v. Hawks*, 5 J. J. Marsh. 341. The court said: "It may well be doubted, under this rule, whether there be any case in covenant, wherein the court can render judgment without the aid of a jury, except it be where the defendant has stipulated to pay money. In this case the covenant or obligation declared on is not for the payment of money."

A default in an action of detainee was held to admit the plaintiff's right of action to the property sued for, but not the value as stated; and a jury was held necessary to assess the value as well as the damages for detention. *Thompson v. Thompson*, 7 B. Mon. 421.

And, in an action of equity for damages for entering on land and cutting trees, it was held that the failure to appear did not dispense with the necessity for a jury, unless with the assent of the court. under Ky. Civ. Code 1854, § 361, providing that a trial by jury may be waived by the parties in actions arising on contracts, and, with the assent of the court, in other actions, by failing to appear at the trial, by written consent filed with the clerk, or by oral consent in open court. *Clarke v. Seaton*, 18 B. Mon. 226.

But, in an action of conversion and detention of personal property, it was held that the court could try the case without a jury on default, under Ky. Code Pr. § 373, providing that trial by jury may be waived by the parties in actions arising on contract, and, with the assent of the court, in other actions, by failing to appear at the trial. *Daniel v. Judy*, 14 B. Mon. 393.

And, in an action on a covenant to pay an attorney a reasonable fee for defending a party, it was held that, under Ky. Code Pr. 20 L.R.A. (N.S.)

p. 80, art. 3, providing that a trial by jury may be waived by a party in actions on contract, by failing to appear at the trial, the court could give judgment without a jury. *Wilson v. Barnes*, 13 B. Mon. 330.

In an action for damages for loss of a slave unlawfully carried on a steamboat, whereby the slave escaped, it was held that the court could not assess the damages without a jury. *Shirley v. Landram*, 3 Bush, 552. This was under Ky. Rev. Stat. chap. 7, §§ 3, 4, providing that in proceedings in chancery to enforce the liability of the owners of a boat, under the preceding sections, the damages should be assessed by jury; it was further held that Ky. Civ. Code, § 419, authorizing the court in certain cases to assess special damages given by statute, did not apply, but it was controlled by §§ 451-454, requiring, in actions like this, the damages to be assessed by a jury.

Louisiana:

In Louisiana, under the Code, where the damages are uncertain, a jury is required.

So, where damages were uncertain and rested on opinion alone, without a fixed rule or means of proof to ascertain them precisely, it was held that a jury was necessary, under La. Code Pr. art. 313, providing that when, from the nature of the case, damages are to be assessed, the court will direct a jury to be summoned; but it was held, where they were fixed by contract or by law, as legal interest, a jury would not be required. *Brander v. Goodin*, 6 La. Ann. 521.

So, under this article, in an action of tort where damages are to be assessed, it was held that a jury was necessary, in *Olivier v. Cannon*, 18 La. 474.

And, under this section, it was held that damages for disturbance of possession could not be rendered on default without a jury. *Guillotte v. Thompson*, 5 Rob. (La.) 141.

In *Daly v. Van Benthuyzen*, 3 La. Ann. 69, it was said that La. Code Pr. 313, has always been held to relate to the assessment of damages under judgment by default.

In an action to recover a note and damages for its detention, it was held error to render a judgment by default without the intervention of a jury. It was further held that La. Code Pr. art. 313, requiring the party who wishes for a jury to deposit \$12 applied to the plaintiff, for without a jury the court could not legally give the plaintiff damages. *Liles v. New Orleans Canal & Bkg. Co*, 6 Rob. (La.) 273.

Maine:

In Maine, it appears that the court render judgment by default in damage unless the plaintiff demands a jury. as to whether the defendant may waive a jury,—*Quare*.

So, in an action of debt on a tax collector's bond, it was held that, whatever might have been the right of the defendant to have the damages assessed by a jury if he had seasonably applied therefor, he waived his right to a jury trial by neglecting to demand one until an auditor had been appoint-

ed and made his report. *Gorham v. Hall*, 57 Me. 58.

And in *Wood v. Leach*, 69 Me. 555, which was a judgment on default, the court said: "The plaintiff had a right to have his damages assessed by a jury. Not claiming that right, the court might refer the matter to a master or assessor 'for informing the conscience of the court, and his doings, being approved and adopted by the court, become theirs.' . . . Much more, then, may the parties agree upon an individual by whom damages, as in this case, were to be assessed."

In an action of trespass *quare clausum* on a default, it was held that a jury was properly impaneled. *Crommett v. Pearson*, 18 Me. 344.

In an action of trover it was held to be the duty of the court, where the damages were not the subject of mere computation, to give judgment for such damages as they should find the plaintiff had sustained, unless the plaintiff should move to have a jury, in which case, judgment was to be entered for such damages as they should assess. *Begg v. Whittier*, 48 Me. 314. The court said: "If the defendant be defaulted, the court assess damages unless, for special reasons, they order an inquiry by a jury."

If not claimed by the plaintiff to be done by the jury at the time, the right to an assessment of damages by them is waived."

Maryland:

In Maryland the common-law rule seems to prevail. This was modified by the statute of 1858 allowing the court to enter judgment in actions on verified accounts. This was held not to authorize judgment for interest without a jury.

In an action for a broker's commission in finding a purchaser, it was held that a judgment by default did not settle the right of plaintiff to recover the amount stated, but the defendant was entitled to an inquisition by a jury. *Cooper v. Roche*, 36 Md. 563.

On a judgment by default in an action of assumpsit on a note, a writ of inquiry was had, and the verdict of the jury was for "damages and about \$10 for costs." The question of costs was held to be a mere formal defect. *Kiersted v. Rogers*, 6 Harr. & J. 282.

On a judgment by default, in a suit on a sheriff's bond for an escape, it was held that the court would not assume the power of assessing damages and giving final judgment, under 8 & 9 Wm. III. chap. 11, § 8, providing that, in actions on bonds, plaintiff may assign as many breaches as he pleases, and a jury shall be summoned to fix the damages, which was adopted in Maryland. *State use of Creedy v. Lawson*, 2 Gill, 62. In this case the court said: "This case being within the equitable provisions of the statute, the defendant is liable to no greater damages than the plaintiff has actually sustained, to be ascertained by the verdict of a jury."

In an action on an open account it was

held that the court had no power to allow interest, as this should be ascertained by a jury on a writ of inquiry. *Mailhouse v. Inloes*, 18 Md. 323. The court said: "We entertain no doubt that, under the provisions of the act of 1858, the court had power to enter a final judgment at the proper term or rule day, for the amount of the appellees' claim 'for goods sold and delivered,' where the account is authenticated and verified by the affidavit of the plaintiffs, as prescribed in the 9th section of said act. But the judgment must be restricted to the amount of the account thus authenticated, and the court had no power, of its own mere motion, to allow interest on the account. The interest was a subject of inquiry by a jury, as provided for by the 6th section of the act."

In an action of trover it was held that a judgment by default, if regularly entered, was as binding as any other in declaring that the plaintiff was entitled to recover, although the amount of the recovery remained to be ascertained by a jury. When that was determined, it was held there was no rule of law which gave to such finding less dignity than to a verdict founded upon the issues. *Green v. Hamilton*, 16 Md. 317, 77 Am. Dec. 295.

Under Md. act 1864, chap. 175, authorizing a judge, upon satisfactory proof of the correctness of the account, to assess the damages, it would be assumed, in the absence of proof, that the court, in assessing the damages, proceeded under the common count, and not under a special count, in an action to recover money on the usual money counts and a special count for unliquidated damages for nondelivery of hay. *Horner v. O'Laughlin*, 29 Md. 465.

Massachusetts:

In Massachusetts it is optional with the plaintiff, under the statute, whether he will require a jury or not.

So, Mass. Pub. Stat. chap. 171, § 2, providing that, when the defendant defaults, the court shall award such judgment for plaintiff as it shall, upon inquiry, find to be just, unless the plaintiff moves to have the damages assessed by a jury, in which case they shall be so assessed, was held to require a motion for the jury after default; and a jury trial claimed when the action was entered was held not to avail. *Gallagher v. Silberstein*, 182 Mass. 20, 64 N. E. 402.

In an action of dower where the defendant was in default, it was held that, under Mass. Stat. 1784, chap. 28, § 7, providing that a default is a confession of the charge in the declaration, and that damages may be assessed by the court with the plaintiff's assent or he may have a jury, the court, with the plaintiff's assent, might have assessed her damages. *Perry v. Goodwix*, 6 Mass. 498. The court said: "The court generally refuses to assess the damages in actions where the law has prescribed no rule by which they may be measured, but leaves them to the feelings of a jury."

And, under Mass. Stat. 1784, chap. 28, § 8,

providing that, where the defendant does not appear, his default should be recorded, and the court should give such damages as they shall find upon inquiry that the plaintiff has sustained, unless the plaintiff shall move for an inquiry by jury, it was held that a jury was not necessary when not demanded in an action for damages for injuring a hired horse. *Jarvis v. Blanchard*, 8 Mass. 4.

Michigan:

In Michigan, it seems that it is optional with the parties whether or not they will require a jury.

Mich. Comp. Laws 1897, § 10,259 (Comp. Laws 1857, § 3435, How. Stat. § 6485), provides that all issues of fact shall be tried by the court, unless a jury is demanded by one of the parties, providing that in all actions of tort, and in all other actions peculiarly proper for a jury, it shall be competent for the court to order the cause to be tried by a jury. Section 10,281 (Comp. Laws 1857, § 4423, How. Stat. § 7644) provides that, on default in actions on certain specified written contracts, the court shall direct the clerk to report the sum the plaintiff ought to recover.

How. (Mich.) Stat. § 7647, provides that, if the defendant shall have appeared, or shall have given notice of his intention to appear, the clerk shall give like notice of assessment of damages, as is required of the trial of a cause. This was held to refer to the length of time elapsing between the service of the notice and the assessment. *Sinnock v. Hosmer*, 97 Mich. 475, 56 N. W. 800. How. Stat. § 7658, chap. 265, provides that in all other suits wherein the clerk is not authorized to assess the damages, they may be assessed by a jury. The court said: "Our statutes contain no other provisions regulating the case where the damages are to be assessed by court or jury;" and further said that the writ of inquiry is unknown in our practice.

In a default on a declaration containing only common counts in assumpsit, it was held that damages should have been ascertained by the court or by a jury. Mich. Const. 1850, art. 6, § 27, provides that the right of trial by jury shall be deemed waived in all civil cases, unless demanded by one of the parties, and act 1853, Comp. Laws, § 3435, provides that all issues and questions of fact shall be tried by the court, unless a jury is demanded by one of the parties. *O'Flynn v. Holmes*, 8 Mich. 95.

In a joint action against the maker and indorser of a note, where one defaulted, it was held that the plaintiff could have the damages assessed on default by the jury sworn to try the issue, and take a joint judgment. *Storey v. Bird*, 8 Mich. 316.

In an action on a bill of exchange, default was entered and made absolute, and a reference was made to the clerk to assess damages, and judgment was rendered on the assessment. It was held to be a proper case for assessment by the clerk. *Wilcox v. Sweet*, 24 Mich. 355.
20 L.R.A. (N.S.)

Mich. Rev. Stat. 1838, p. 460, §§ 8, 9, provide that, in actions for breach of a bond or for a penalty for nonperformance of contract, when it shall appear by default that the condition is broken or penalty forfeited, judgment shall be entered in common form for the penal sum, and execution shall be awarded for so much as is due, to be ascertained by the court, and, if either party desires it, or the court directs, by jury. It was held in an action upon a covenant the court had power, in default, to assess the damages. *Prentiss v. Spalding*, 2 Dougl. (Mich.) 90.

Minnesota:

In this state the present statutes direct the clerk to make the assessments in actions on contracts for the payment of money only; and in other actions for money the plaintiff may have a writ of inquiry. Rev. Laws 1905, § 4133.

So, under Minn. Stat. p. 555, § 173, subd. 1, requiring the clerk to enter judgment on default for the amount mentioned in the summons, where the action arises on an obligation for the payment of money only; and providing that in other actions for the recovery of money only, on filing a like proof, the plaintiff may have an order entered by the clerk that a writ of inquiry of damages issue, and, upon return of the inquest, judgment may be entered for the amount without further application to the court, or he may apply to the court to have the damages assessed, and for judgment,—it was held that this section contemplates that, when the defendant, in an action on an instrument in writing to pay money, suffers a default, his confession shall be all the proof requisite for the clerk to perfect the judgment; but in other cases the damages must be assessed by some of the modes pointed out. It was also held that errors of the clerk in the assessment of damages must be corrected by the trial court before an appeal will lie. *Babcock v. Sanborn*, 3 Minn. 141, Gil. 86.

This was overruled in *Reynolds v. La-Crosse & M. Packet Co.* 10 Minn. 178, Gil. 144, where it was held error for the clerk to assess damages where the complaint contained counts on contract and one on tort.

Where the defendant appeared in an action on a note and answered, and, when the cause was reached, abandoned the issue and contested the amount of damages, it was held that the court had a right to treat the case as if no answer had been put in, and send it to the clerk for judgment as for want of an answer, for he certainly had the power to determine the question himself when requested to do so; and it was further held that any question of damages that belongs to the clerk to determine might in the first instance be submitted to the judge. *Kent v. Bown*, 3 Minn. 347, Gil. 246.

Mississippi:

In Mississippi, under the statutes, a jury is not necessary in actions of debt for a sum certain and on instruments of writing ascertaining the sum due, or upon open ac-

count filed; but is required in all other cases.

So, in an action on a tax collector's bond for money not paid over, and for failure to collect taxes, it was held that a writ of inquiry should have been awarded to ascertain the amount due after deducting all legal allowances. *Boykin v. State*, 50 Miss. 375. Miss. Code 1857, art. 253, provides that, in actions of debt for a sum certain, and actions on an instrument of writing ascertaining the sum due, or on open accounts filed, if judgment is entered by default the clerk shall calculate the amount and judgment be entered; and in all actions when the sum due does not appear, and in all actions for damages, interlocutory judgments may be taken on which writs of inquiry shall be awarded.

And, in an action of debt on notes and an open account and a bill indorsed giving the kind of money which, if not used at par, was to be redeemed, it was held in *Sandford v. Campbell*, 7 Smedes & M. 107, that a jury was necessary on default. The court said that, under Miss. Stat. (Howard & H.) 616, § 9, a court is authorized to enter up final judgment without a jury on a bill single and note.

And, in an action on a note made in the District of Columbia it was held necessary to have a writ of inquiry to ascertain the amount of interest, on a judgment by default. *Fretwell v. Dinsmore, Walk.* (Miss.) 484. This was because the foreign laws would have to be proven.

But, a writ of inquiry was held not necessary on a judgment by default in an action of assumpsit founded on an award for a specific sum. This was under Miss. Code, 120, § 97, providing that all judgments by default, founded upon any instrument in writing ascertaining the sum due, shall be final on the last day of the term. *Chace v. East, Walk.* (Miss.) 439.

And, on a judgment by default in an action against the indorser of a note, it was held that it became final without the intervention of a jury, it being for a sum certain. *Owen v. Little, Walk.* (Miss.) 326.

And, under Miss. act 1822, chap. 13, § 67, in an action on a note and for interest, where default was taken, it was held that interest should be calculated by the clerk. *Washington v. Planters' Bank*, 1 How. (Miss.) 230, 28 Am. Dec. 333.

And, a jury was held unnecessary in a judgment by default in an action on a note with the usual money counts, under Miss. Rev. Code, 120, § 67, providing for ascertaining the amount due, where the action is founded on any instrument of writing for a sum certain, without the intervention of a jury. *Gridley v. Brigs*, 2 How. (Miss.) 830.

In an action on an instrument in writing ascertaining the sum due, it was held that default judgment should have been entered without calling a jury, under Miss. (Howard & H.) Dig. 616, § 9. *Harrison v. Agricultural Bank*, 2 Smedes & M. 307.

And, in an action on a note, it was held error to submit the case to a jury on de-
20 L.R.A. (N.S.)

fault. It was also held that swearing the jury to try an issue when there was no issue to try was a mere clerical error,—following *Garrett v. Felt*, 32 Miss. 137, and saying that it was held differently in *Wilkinson v. Patterson*, 6 How. (Miss.) 193, and *Harrison v. Agricultural Bank*, supra. But Miss. Rev. Code, 501, art. 153, requires all regular jurors to be sworn to try all issues and execute all writs of inquiry that may be submitted to them. *Hewett v. Cobb*, 40 Miss. 61.

Missouri:

In Missouri, under the statutes, a jury is not necessary in actions on notes payable in money. In other cases a jury is optional with plaintiff. This privilege is also held applicable to the defendant, although not specifically given by statute.

In an action for damages for wrongful seizure of slaves under execution, it was held that a writ of inquiry must be executed by a court or jury, and the damages shown by proof, under Mo. Pr. act of 1849, § 12, providing that, if the action is founded upon a bond, bill, or note for money, and there is no answer, the clerk may, under the direction of the court, enter judgment for the amount; and, in other cases where there is no answer, the plaintiff may, if he requires it, have a jury, and, if no jury is required, the court may assess his damages. *Wetzell v. Waters*, 18 Mo. 396.

In *Robinson v. Lawson*, 26 Mo. 69, it was held that, where the answer was stricken out, the case stood as upon a default, and no more proof was required than was necessary in the assessment of damages on a default.

Where the defendant demanded a jury on an inquiry of damages on default, and the plaintiff waived the jury, it was held error to refuse the intervention of a jury. The statute provides that the plaintiff may, if he demands it, have a jury to assess his damages, and, if no jury is demanded, the court shall, at the proper term, assess the damages. It was held that no negative words were used, implying a prohibition on the part of the defendant to demand a jury. *Brown v. King*, 39 Mo. 380.

And, under Mo. Code Pr. 1849, art. 12, § 2, providing that, where there is no answer in cases not founded on a bond, bill, or note for money, the plaintiff may have a jury if he requires it, to assess his damages, it was held that there was nothing prohibiting a writ of inquiry at a subsequent term. *Froust v. Burton*, 15 Mo. 619.

A writ of inquiry was held to be necessary in an action on a bill payable in currency, as currency at the date of the bill was not a specie, and it became necessary to ascertain its value. *Farwell v. Kennett*, 7 Mo. 595. So it was held that, where the note was payable "with the current rate of exchange on Philadelphia, when due," a jury was necessary. *Guelberth v. Watson*, 8 Mo. 663. This was under Mo. Rev. Code 1835, p. 461, §§ 34, 35, providing that, when an interlocutory judgment by default is

entered on an instrument of writing, and the demand is ascertained by such instrument, the court shall assess the damages, and in all other cases the damages shall be assessed by a jury.

So it was held, in an action on an account under this section, that a jury was necessary on a default before a justice. *Pratte v. Corl*, 9 Mo. 163.

But a jury was held unnecessary where there was nothing in the record to show that the defendant, after his default, asked for the aid of a jury, under Mo. Rev. Stat. 1889, §§ 2133-2215. *Mumford v. Keet*, 71 Mo. App. 535. This was an action on a covenant of warranty. In this case part of the answer was stricken out and the defendant refused to stand on his answer and plead, and judgment was entered as default.

And, in an action of covenant for rent on a deed, it was held that the court could calculate the amount on a default without a writ of inquiry. *Dent v. Morrison*, 1 Mo. 130. *Geyer's Dig. (Mo.)* 251, provides that in all cases where the demand is liquidated and reduced to writing the clerk may, on a judgment by default, calculate the principal and interest, and indorse the amount on execution. The practice under this act, which was passed in 1807, has uniformly been for the clerk to calculate the amount and the court to render judgment accordingly.

And, in an action of debt on a single bill, a writ of inquiry was held not necessary as the sum was fixed and certain. *M'Cutchin v. Batterson*, 1 Mo. 342.

Under the Missouri statutes regulating the practice, providing that, if neither party requires a jury, the court shall assess the damages, and the attachment law, providing that, if the damages are liquidated or are ascertainable by writing, then the court shall assess the damages, otherwise a writ of inquiry shall be awarded, it was held that no writ of inquiry was necessary in an action on a note payable in commonwealth's paper. *Alexander v. Hayden*, 2 Mo. 211. Nebraska:

Neb. Code, § 432, provides that the court, with the assent of the party not in default, may assess the damages, and § 896 provides that the above shall not impair the right to a jury trial, if demanded.

In *Bankers' Reserve Life Assn. v. Finn*, 64 Neb. 105, 80 N. W. 672, where a demurrer was overruled and an answer tendered was refused, it was said that Neb. Code, § 432, provides that, "if the taking of an account, or the proof of a fact, or the assessment of damages, is necessary to enable the court to pronounce judgment upon a failure to answer, . . . the court may, with the assent of the party not in default, take the account, hear the proof, or assess the damages, or may . . . refer the same to a referee, master, or . . . a jury."

In an action against several parties on a note, where some of the parties made default, it was held that judgment should have been entered against them, and the jury should try the issue only as to the 20 L.R.A. (N.S.)

parties who pleaded. *German-American Bank v. Stickley*, 50 Neb. 321, 80 N. W. 910. Nevada:

In Nevada, under the practice act, a jury is discretionary with the judge.

Nev. Pr. act, § 150, provides that (1) where the action is on contract for the recovery of money or damages only, on failure to answer, the clerk shall enter the default and enter a judgment; (2) in other actions default is entered in the same manner; but it is made the duty of the plaintiff to apply to the court for the relief demanded, and if the taking of an account or proof of any fact is necessary, the court may take the account, or hear the proof, or order a reference; and, where the action is for the recovery of damages, the court may order the damages to be assessed by a jury. This was held to be directory, leaving it discretionary with the judge. *Ballard v. Purcell*, 1 Nev. 342.

In *Haley v. Eureka County Bank*, 21 Nev. 127, 12 L.R.A. 815, 26 Pac. 64, it was said: "In an action arising upon contract, for the recovery of money or damages only, a default and final judgment may be entered by the clerk. In all other cases the plaintiff must apply to the court for the relief prayed for in his complaint, and, when he does so, the court may require additional proof; and it is not error for the court to refuse to enter judgment on the pleadings alone, and the proof must be made when demanded."

New Hampshire:

In New Hampshire the writ of inquiry is said to be unknown in the practice in that state. The reference to a jury seems to be discretionary with the court.

In *Bowman v. Noyes*, 12 N. H. 302, it was said: "The practice in this state, when a default has been entered, is for the court to assess the damages, instead of awarding a venire, unless for special reasons the court should order an inquiry into the damages by the jury. And where, in actions on contracts, one defendant is defaulted and another defends, there has not been, in point of form, any inquiry of damages against the one defaulted; but in practice the jury have in effect assessed them, if they found against the other defendant. If they found for the one who pleaded, prior to the statute of 1834, no judgment was rendered against the one defaulted."

In *West v. Whitney*, 26 N. H. 314, it was said that the practice in that state is that damages are to be assessed, on default, in one of three ways: First, where the damages are merely a matter of computation, they are computed by a clerk; second, where the damages are uncertain, the amount is determined by the jury under the direction of the court, in the nature of an inquiry, if either party makes application for such a hearing; and the same applied where the court, for its own information, submitted the case to a jury. In other cases the evidence is taken in writing and laid before the court, and the damages assessed by the judges. The court said that the writ of in-

quiry of damages and the assessment by a jury under the direction of a sheriff is unknown in this state.

To the three modes of assessing damages upon default, enumerated above, was added a fourth,—where the assessment is made by a judge upon oral evidence produced before him in court, the record then should show that oral testimony was produced before the court. *Collins v. Walker*, 55 N. H. 438.

And, in an action on the case against a sheriff for default of his deputy in not paying over money collected, it was held that in New Hampshire the court assesses the damages unless for some special reason it orders an inquiry into the damages by jury. It was further held that the neglect to demand a jury until after the damages were assessed by an auditor would be considered as a waiver of the rights, if any existed. *Price v. Dearborn*, 34 N. H. 481.

New Jersey:

In New Jersey, in cases where the damages are not a mere matter of computation, a jury is held to be necessary. The statute dispensing with a jury was held to apply only to actions of assumpsit and to matters of mere calculation. In an action on a constable's bond the statute gives to either party the right to a jury.

So, N. J. (Nixon's) Dig. 729, § 71, making it the duty of the court to assess damages on interlocutory judgments by default, unless a writ of inquiry is demanded, was held to apply only to actions of assumpsit. *Peacock v. Haney*, 37 N. J. L. 179. The court said: "Independently of statutory provision in actions of assumpsit, debt, and covenant, the practice of the court is to assess damages . . . in certain cases." Where the damages are a mere matter of computation, a writ of inquiry is not necessary; but, where the damages are uncertain, to be ascertained on the hearing of testimony, they should, in cases not within the statute, be determined by writ of inquiry.

In an action of trespass on the case upon promises, the first three counts being on special undertakings and the fourth for money had and received, it was held that the court could assess the damages without a writ of inquiry where none was demanded. under N. J. Rev. Laws, 423, § 70. *Belton v. Gibbon*, 12 N. J. L. 76.

But, in an action of debt on a constable's bond, it was held that a writ of inquiry for the assessment of damages on default would be awarded on the demand of either party interested, under Nixon's Dig. (N. J.) 638, § 148, providing that assessments of damages in actions respecting constables shall be made by a jury on application of either party interested. *Jersey City v. Chase*, 30 N. J. L. 233.

In an action on a bail bond given in an action on a contract for an uncertain amount, which could not be ascertained by calculation, it was held that a writ of inquiry should be awarded to assess the damages. *Simmons v. Kelly*, 39 N. J. L. 438.

In *Simmons v. Kelly*, supra, it was said: "In *Middleton v. Bryan*, 3 Maule & S. 155, 20 L.R.A. (N.S.)

classing replevin bonds with bail bonds, and using precisely the same arguments which have been urged in this case, it was held that no writ of inquiry was necessary because the value of the goods distrained had been ascertained before the bond was given. Such has not been the practice of our court, and the better rule should be applied to both kinds of bonds. By § 149 of our practice act, the plaintiff may have his damages assessed by the court in actions of assumpsit, or by the clerk when the court is not actually in session. By § 150 of the same act, in all actions *ex contractu* where the damages or sum recoverable are a mere matter of calculation, or can readily be ascertained, the same may be assessed on judgment by default by the court or a clerk, as in actions of assumpsit." The damages in this case are not matters of calculation. New Mexico:

In *Lamy v. Remuson*, 2 N. M. 247, it was held that the right of the court to assess damages in replevin on a default judgment did not infringe any constitutional right, the court saying: "The weight of decisions in the states upon similar statutes is in the affirmative."

New York:

In New York the practice under the Revised Statutes was for the clerk to assess the damages on contracts where the amount was a mere matter of calculation; in other cases a writ of inquiry was necessary. This was substantially continued by the Code of Procedure. The Code of Civil Procedure, § 1215, provides that in all cases of personal injury or injury to property the damages must be ascertained by a writ of inquiry; and this is the present Code provision.

In an action for conversion of money, it was held that a writ of inquiry was necessary. In *Fullerton v. Young*, 46 Misc. 292, 94 N. Y. Supp. 511. The court said: "It was unquestionably the ancient practice for this court to assess damages in tort actions where the same could be ascertained by mere calculation or was fixed by agreement, and only in instances where the damages were uncertain, such as slander, libel, and assault and battery, were writs of inquiry required. Such, also, was the practice for many years under the Code of Procedure (§ 246), but upon the adoption of the Code of Civil Procedure, in 1876, important changes were made, and, among others, a provision that in all cases of personal injury or injury to property the damages must be ascertained by a writ of inquiry. Code Civ. Proc. § 1215. The term 'injury to property,' as so employed, might very well be regarded as having reference only to physical acts inflicting injury upon specific real or personal property, were it not for the definition contained in § 3343, subdiv. 10, where the words 'injury to property' are defined as 'an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract.' The word 'property,' as defined by §§ 2, 3, and 4 of the statutory construction law (Laws 1892, chap. 677, p. 1486), embraces

money. I therefore see no escape from the conclusion that the conversion of money collected by the defendant and belonging to the plaintiffs' assignor constituted an injury to property, as such conversion certainly lessened the estate of such assignor."

And, under N. Y. Code Civ. Proc. § 1215, authorizing a court to make an assessment on default, except where the action is for damages for personal injuries, it was held that, in an action for personal injuries, the damages must be ascertained by a writ of inquiry. *Elsay v. International R. Co.* 93 App. Div. 115, 87 N. Y. Supp. 28.

In *Bossout v. Rome, W. & O. R. Co.* 131 N. Y. 37, 29 N. E. 753, which was an affirmation of a verdict of damages, and a remittitur directing a judgment to be entered pursuant to the stipulation on appeal, it was held that the effect of the affirmation of the order granting a new trial and the entry of judgment absolute thereon in the supreme court was the same as if the whole of plaintiff's action had been admitted and a default had occurred, and the sole question left was as to the amount of damages sustained by the plaintiff. The court reviewed the old practice and that of the Code for assessing damages on writ of inquiry.

In a proceeding against a defendant by publication, proof of the cause of action was made to the court on default. The court said: "The Code does not specify the nature of such proof. It was sufficient here to satisfy the court, and consequently there was jurisdiction to grant the judgment." *Stow v. Stacy*, 14 N. Y. Civ. Proc. Rep. 45.

Under N. Y. Code, § 246, subdiv. 2, providing that the court may assess the damages or order a reference, it was held that, on a judgment by default on failure to answer, the court might order the damages to be assessed by a jury in an action on a bail undertaking given to procure a discharge from civil arrest. *Kelsey v. Covert*, 15 How. Pr. 92.

And, under N. Y. Code Proc. § 246, subdiv. 1, authorizing the clerk to assess the damages on default in an action on an instrument for the payment of money only, it was held that the Code did not require that the contract should be one stipulating by its terms for the payment of money, but required that the action should be one arising on contract, and that only money should be sought to be recovered. *Croden v. Drew*, 3 Duer, 652.

And, under N. Y. Code Proc. § 246, providing that in actions not on an instrument for the payment of money the clerk is to ascertain the amount, it was held that the clerk was substituted for the former sheriff's jury of inquiry, in an action on account for goods sold. *Squire v. Elsworth*, 4 How. Pr. 77.

And, under N. Y. Code, § 266, where the defendant did not appear, it was held that the plaintiff could waive a jury and take an inquest before the court at the circuit. *Haines v. Davis*, 6 How. Pr. 118, 1 N. Y. Code Rep. N. S. 407. The court said: "It has been several times decided that the 20 L.R.A. (N.S.)

practice of taking inquests at the circuit was not abolished by the Code of Procedure (*Anderson v. Hough*, 1 N. Y. Code Rep. 50; *Dickinson v. Kimball*, 1 N. Y. Code Rep. 83; *Sheldon v. Martin*, 1 N. Y. Code Rep. 81; *Jones v. Russell*, 3 How. Pr. 324.) Provision is also made for taking inquests by the 12th rule. . . . Usually in these cases the defendant does not appear, and the importance of a jury to him cannot depend on the order, in regard to other causes on the calendar, in which his is tried."

And, under N. Y. Code Proc. § 1008, providing that, in actions triable by a jury, if the parties waive the trial by jury of the issue of fact, the action must be tried by the court without a jury, unless a reference is directed, and § 1009, providing that a party may waive his right to a jury by failing to appear at the trial, it was held that on default the defendant waived his right to a jury. *Thompson v. Finn*, 9 Daly, 379. This was an action for personal injuries, and the court could have tried the case with or without a jury.

In an action for damages for injury to the person, on default the court, in *Stanley v. Anderson*, 1 N. Y. Code Rep. 52, directed the sheriff to summon a jury on a writ of inquiry. N. Y. Code 1848, § 202, subdiv. 2, providing for judgment by the clerk in actions on contract, and, where proof is required, that the court may order a reference, and, where the action is for money only, the court, if the plaintiff requires it, shall order the damages to be assessed by a jury, being silent as to the manner in which such assessment should be made, the plaintiff demanded a jury and the damages were assessed at \$12.

A judgment by default against defendant in action of trespass entered without proof is erroneous, as an assessment of damages is necessary. *Dutch Reformed Church v. Wood*, 8 Barb. 421.

In an action for damages for an assault it was held that such damages should be assessed by a jury, unless the examination of a long account was necessary,—this being an action for the recovery of money only,—and a reference was erroneous. *Boyce v. Comstock*, 1 N. Y. Code Rep. N. S. 290.

On a default in an action containing a count on a note, and the common money count, it was held that the clerk could assess general damages. *Colden v. Knickerbacker*, 2 Cow. 31. 1 N. Y. Rev. Laws, 522, authorizes the court in certain cases, on judgment by default, to refer to the clerk to assess the damages. Section 17 provides that, if the suit is on any bill or note truly set forth in the declaration, the execution of such bill or note need not be proven. Section 18 authorizes the clerk to take proof, and, if required, report the same to the court. So may the clerk assess damages on an account stated.

And in an action of debt on default, it was held that a writ of inquiry was not necessary, and that the damages could be assessed by the clerk. *Fenton v. Garlick*, 6 Johns. 287.

And where, in an action of assumpsit on a default, a jury was summoned and the damages assessed in the presence of the court without an inquisition, it was held that the proceedings were regular, as the court could assess the damages without a jury. *McCollum v. Barker*, 3 Johns. 153. The court said: "If the court might have dispensed with the jury, they could, of course, have dispensed with an inquisition formally signed and sealed by the jury, who acted in their presence."

Where a writ of inquiry was directed to be executed at the circuit, it was held that the circuit judge, and not the sheriff, could take direction of its execution. *Ellsworth v. Thompson*, 13 Wend. 658. The court said: "In actions sounding in damages, or where the demand is unliquidated, it is said the court may assess the damages themselves, and that the inquisition before the sheriff is merely to inform the conscience of the court; but, whatever theories we may indulge, the assessment of damages by a jury, when it cannot be done by calculation, is a proceeding which the court have no right to depart from."

In *Fenton v. Garlick*, supra, it was said: "In *Blackmore v. Flemmyng* (7 T. R. 446) it was held to be at the election of the plaintiffs to have the prothonotary tax interest on the judgment on which the action of debt was brought, or to have the sum assessed by a jury of inquiry. In *Nelson v. Sheridan* (8 T. R. 395) the court of King's bench refused to grant a rule to refer a similar point to the master, and said it should be left to a jury. These cases are not reconcilable with each other; but the former is the better guide, and the more correct decision, for it is warranted by the settled practice and the old authorities."

In *Kreitz v. Frost*, 55 Barb. 474, it was said that the practice under N. Y. Rev. Stat. 280, before the adoption of the Code of Procedure, required the clerk to assess damages on default on bills of exchange, notes, contracts for absolute payment of a sum certain, or on contracts for the delivery of specific articles, and, in all other cases where the damages were not a mere matter of calculation, the only mode of ascertaining them was by a writ of inquiry. It was held that this practice was substantially continued by the Code of Procedure; only where taking of an account or proof of any fact is necessary, the court may order a reference. In an equity suit a writ of inquiry was never ordered.

In *Brown v. Miller*, 1 Barb. 24, where plaintiff, on default, wanted a reference, a rule was made that hereafter a sworn copy of the account on which suit was brought would be required to be attached, so that it could be ascertained whether a reference was necessary. The court said: "Cases of this kind have occurred where the damages could very conveniently have been ascertained by a sheriff's jury, but where the plaintiff's attorney, upon an affidavit like this, has obtained a rule of reference and

very largely and unnecessarily augmented the costs."

In *Randolph v. Foster*, 3 E. D. Smith, 648, which was an action for a mechanics' lien, the defendant made default and plaintiff's damages were assessed by a sheriff's jury. The plaintiff asked for an extra allowance and costs.

Where the plaintiff in a libel case obtained an order for a sheriff's jury to assess the damages, he could not thereafter have that order changed to a jury before the judges. *Joannes v. Fisk*, 3 Robt. 710. The court said: "The Revised Statutes seem to provide for the holding of a court by the sheriff in such cases (2 Rev. Stat. 286, §§ 47, 58), and, if so, he must have a right to exercise judicial powers as to the subordinate questions arising in the course of the assessment, as well as the preservation of order and the punishment of witnesses for disobeying a subpoena."

On a motion by plaintiff on default, in an action for assault and battery, that the amount be assessed before a jury at the trial term, instead of by a sheriff and his jury, it was held that the fact that the attorneys for the defendant were the advisers of the sheriff was insufficient to change the practice. *Hays v. Berryman*, 6 Bosw. 679.

North Carolina:

Under the various Code provisions, the decisions in North Carolina are to the effect that, where the amount can be ascertained by computation, a writ of inquiry is not necessary; but in all other cases a jury is necessary.

So, under N. C. Code Civ. Proc. § 217, providing that, if the taking of an account or proof of fact is necessary, the court may hear the proof or order a reference; and, where the action is for the recovery of money only, or real or personal property, with damages, the court may order the damages to be assessed by a jury or a reference,—it was held that, in an action for the recovery of money only, it was competent for the court to pass upon the facts or refer them to a jury. *Dunn v. Barnes*, 73 N. C. 273.

And, in an action for goods sold and delivered, where the claim was precise and agreed to, or could be rendered certain by computation, it was held that there was no necessity for a writ of inquiry, under N. C. Code Civ. Proc. § 217, providing that, in all actions on contracts for the recovery of money only, the court shall render judgment. *Adrian v. Jackson*, 75 N. C. 536.

And, under N. C. Code Civ. Proc. § 217, where the action was on an account for property sold and money lent, and was not sworn to, it was held that the amount should be assessed by the clerk on a default before final judgment. *Oates v. Gray*, 66 N. C. 442.

And, where the complaint was sworn to and the action was for a specific sum, due by contract, it was held that, on default, a jury was not necessary under N. C. Code Civ. Proc. § 217. *Rogers v. Moore*, 86 N.

C. 85. The court said: "The section of the Code under review, so far as it undertakes to delegate judicial power to the clerk which he might exercise in vacation, has been superseded and rendered inoperative by subsequent legislation which makes the summons returnable to terms of the court, and the judgments the act of the judge and not of the subordinate officer under him. Battle's Rev. Stat. chap. 18; Mabry v. Erwin, 78 N. C. 45. The result seems to restore the old practice in this particular, and to refer the inquiry of damages after an interlocutory judgment to the jury acting under the supervision of the judge, and not to leave this to the mere oath of the plaintiff as to what he supposes those damages to be."

In *Williams v. Beasley*, 35 N. C. (13 Ired. L.) 112, it was said: "There cannot, therefore, properly be a final judgment, by default, upon appeal from a justice of the peace; but the matter must be determined upon proofs, either by the court or by a jury."

On an appeal from a justice, where the defendant did not plead, it was held that the proper practice was to call in a jury to assess the sum due the plaintiff; in the nature of an assessment of the damages on a writ of inquiry on a judgment by default. It was held that this practice was not founded on a statute, but was proper to aid the court, and was not erroneous, for, if the court could give a summary judgment, there was no harm in adding a jury. *Ramsour v. Harshaw*, 30 N. C. (8 Ired. L.) 480.

In an action of assumpsit upon an unliquidated account judgment was had and an appeal taken. It was held that in default on an appeal it was necessary to have an inquiry of damages. Act 1808, 1 Rev. Stat. chap. 31, § 96, Rev. Code, chap. 31, § 91, provided that, in suits on bills of exchange, notes, and signed accounts, a clerk could ascertain the interest without a writ of inquiry, and the amount ascertained was to be included in final judgment. Section 105 of the Revised Code provides the same on appeals, and that, in default on such demands as are mentioned in § 91, the plaintiff shall have judgment, and, in other cases, have his inquiry by a jury. This required a writ in actions which sounded in damages, as covenant and assumpsit. *Hartsfield v. Jones*, 49 N. C. (4 Jones, L.) 309.

A default judgment and damages in an action of trespass without a writ of inquiry was held erroneous, under N. C. Rev. Code, chap. 31, § 57, providing that, on failure of defendant to answer, the plaintiff may have judgment by default, which, in actions of debt, should be final, unless where damages are suggested on the roll; and in that case, and all others not specially provided for where the recovery shall be in damages, a writ of inquiry shall be executed at the next term. *Moore v. Mitchell*, 61 N. C. (Phill. L.) 304.

And a judgment on default on a note in confederate money or its equivalent was 20 L.R.A. (N.S.)

held erroneous, as a jury should have assessed the damages on a writ of inquiry before the judgment was made final. *Williams v. Rockwell*, 64 N. C. 325.

N. C. Rev. Code, chap. 31, § 91, provides that, on default, in an action on a single bond, a covenant for the payment of money, bill of exchange, note, or a signed account, a judgment is final; and the clerk ascertains the interest without a writ of inquiry. It was held that the practice was that, where the action sounded in damages, as in assumpsit, covenant, or trespass, a judgment by default was only interlocutory, and the amount of damages should be ascertained by a jury upon a writ of inquiry. *Parker v. Smith*, 64 N. C. 291.

And in *Merwin v. Ballard*, 66 N. C. 398, it was said: "This action is upon an open account and sounds in damages, and the judgment upon demurrer, like a judgment by default in such cases, can only be interlocutory, and the amount of damages must be ascertained by a jury upon a writ of inquiry." The North Carolina Civil Code of Practice had just gone into effect and was held not to apply to this case, but the law as it existed when the action was brought.

In an action on a constable's bond where there was default, it was held that N. C. Code Civ. Proc. § 217, applied, providing that, in actions on contracts for the recovery of money only, the clerk ascertains the amount; and in other actions the judge may, upon proof, ascertain the damages or may order a reference, or have the damages assessed by a jury. *Parker v. House*, 66 N. C. 374.

In an action for unliquidated damages, a judgment final on default, instead of interlocutory with an inquiry as to the damages, was held erroneous, under N. C. Code Civ. Proc. § 217, sub. 2. *White v. Snow*, 71 N. C. 232.

In an action for conversion of personal property it was held that it was for unliquidated damages, and a writ of inquiry was necessary. *Mayfield v. Jones*, 70 N. C. 536.

In *Wynne v. Prairie*, 86 N. C. 73, the court said: "The requirement in the Code that, upon default, the clerk 'shall enter judgment for the amount mentioned in the summons' has become impracticable by the change in its form; and it would seem that the provisions in regard to ascertaining the amount of an unliquidated demand by the clerk have been superseded by the restoration of the old practice of a writ of inquiry following the interlocutory judgment that the plaintiff ought to recover, and that he do recover, his damages, until they have been assessed and determined. This court has also extended the right to a final judgment, as in *Mabry v. Erwin*, 78 N. C. 45, to cases which do not rest on contract, but where the judgment is for a definite and liquidated demand according to the former mode of procedure."

N. C. Code, § 385, provides for judgment by default final on a verified complaint on a contract to pay a sum of money fixed or

capable of being ascertained by computation. Section 386 provides that in all other actions judgment by default and inquiry shall be had at the return term, and the inquiry shall be executed at the next succeeding term; and, in an action to remove a cloud on title, except where a reference may be ordered to state a long account, the inquiry shall be by jury, unless, by consent, the court is to try the facts as well as the law. It was held, in an action to remove a cloud on title, that this section controlled, and a default final at the return term was error. *Junge v. MacKnight*, 135 N. C. 105, 47 S. E. 452.

And a jury was held necessary on a judgment by default in a suit on a bail bond, under N. C. Code Civ. Proc. § 217, amended by N. C. Code, § 385, providing that final judgment may be taken by default on a verified claim on a contract to pay absolutely a sum of money fixed by contract or capable of being ascertained therefrom by computation. *Roulhac v. Miller*, 90 N. C. 174.

And, in an action on an open account to recover the value of goods sold, it was held that judgment should be by default and inquiry, under N. C. Code, § 385, in *Witt v. Long*, 93 N. C. 388. In this case the allegation of an agreement to pay did not imply that the defendant stipulated to pay the price charged, and the sum to be paid was not fixed by the terms of the contract.

And, in *State ex rel. Anthony v. Estes*, 101 N. C. 541, 8 S. E. 347, in an action on a guardian bond for misconduct, the question of damages was submitted to the jury on default.

And, where the amount could not be ascertained by computation, or was not fixed by the terms of the contract sued on, a final judgment on default was held erroneous, under N. C. Code, §§ 385, 386. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

In an action for malicious prosecution on default, the damages were referred to a jury, in *Banks v. Gay Mfg. Co.* 108 N. C. 282, 12 S. E. 741.

And in *Faucette v. Ludden*, 117 N. C. 170, 23 S. E. 173, it was said that, under N. C. Code, § 385, 'if a complaint should allege a breach of contract without setting out that the contract provides for the payment absolutely or upon a contingency of a sum or sums of money fixed by the terms of the contract or capable of being ascertained therefrom by computation, and no answer is filed, the proper judgment is one by default and inquiry.'

And, in an action on an official bond of the clerk of the superior court, it was held that a final judgment under N. C. Code, § 385, was not the judgment required; but it could only be a judgment by default and inquiry, under § 386, which could not be executed until the next term. *State ex rel. Battle v. Baird*, 118 N. C. 854, 24 S. E. 668.

In an action on an open account a default judgment that was final was held to be irregular, as it should have been by default and inquiry; but even this judgment should

not be set aside without showing a good defense. *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696.

In *Junge v. MacKnight*, supra, Connor, J., dissenting, held that this case overruled *Jeffries v. Aaron*, supra, on the ground that in this case the default judgment was set aside without showing prima facie a valid defense.

But in an action for goods sold, where the complaint alleged that the defendant promised to pay a sum certain, and the complaint was verified, the plaintiff was entitled to final judgment on default, under N. C. Code, § 385. *Hartman v. Farrior*, 95 N. C. 177.

And, in an action for a sum certain expended for the benefit of defendant, where the complaint was verified, a judgment by default final was held to be proper, under N. C. Code, § 385 (1). The court said: "There was nothing for the jury to pass upon. Upon a judgment by default and inquiry the legal liability is fixed by the default, and the inquiry is only to ascertain the amount." *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476.

And, where the action was for a sum certain, expended for the benefit of the defendant and upon an implied promise to repay, and the complaint was verified, it was held that judgment was proper by default final, under N. C. Code, § 385, subdiv. 1. *Scott v. Mutual Reserve Fund Life Assn.* 137 N. C. 515, 50 S. E. 221.

In an action on a note and for fraudulent conversion of money, on a judgment by default, it was held that the court had a right to enter final judgment on the cause of action on the note, under N. C. Code, § 385; but it was said that it did not have the right to enter judgment on the charge of fraud, which would have required a writ of inquiry if such judgment had been asked for. *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18.

In an action sounding in damages and for tort, it was held that a judgment by default and inquiry was conclusive as to the cause of action; and the plaintiff would have been entitled to nominal damages without any proof. *McLeod v. Nimocks*, 122 N. C. 437, 29 S. E. 577.

Ohio:

In Ohio, under the statutes of that state, if neither party demands a jury, the court may assess the damages.

On a default it was held, in *Eaton v. Morgan*, Tappan, 45, that liquidation of damages could not be referred to a clerk; and a reference was therefore held void.

In an action of ejectment it was said: "If this judgment had been properly rendered by default, it would then have been competent for the court to assess the damages; the statutory provision being as follows: 'That, where judgment shall be entered by default against the defendant, the court shall assess the damages, unless the plaintiff or defendant request a writ of inquiry.' *Swan Stat. (Ohio) 671, § 98.*" *Slocum v. Swan*, 4 Ohio St. 161.

In *Averill Coal & Oil Co. v. Verner*, 22 Ohio St. 372, which was an action to recover money for services and for money loaned, it was said: "By § 376 of the Code it is provided, however, that the court may, in an action where the taking of an account, or the proof of a fact, or the assessment of damages, is necessary to enable the court to pronounce judgment upon failure to answer, refer the same to a referee on the motion of the party not in default. At the time the order of reference was made in this case the defendant was in default of answer, and no jury was demanded by it at that or at any other time during the pendency of the action." The court said that, if the defendant had not answered or demanded a jury, the judgment on the report of reference could not be disturbed.

Oregon:

In Oregon the court may, under the Code, assess the damages in cases of default. This is held not to be in conflict with any constitutional right.

In *Gohres v. Illinois & J. Gravel Min. Co.* 40 Or. 516, 67 Pac. 666, it was said that Hill's Anno. Laws (Or.) § 249, subdiv. 12, provides that, on default, the plaintiff is entitled to judgment in action on contract for the recovery of money or damages only; but in all other actions, including those sounding in damages or tort, as opposed to an action of debt, the clerk shall enter the default, and thereafter the plaintiff may apply for the relief demanded; and, where the judgment is rendered otherwise than on a verdict, the court shall, without a jury, assess the damages, and may hear, proof or make an order of reference.

Hill's Code 1892, § 249, subdiv. 2, authorizing a court to assess damages without a jury, was held not to conflict with the Constitution. *Deane v. Willamette Bridge Co.* 22 Or. 167, 15 L.R.A. 614, 29 Pac. 440. In this case it was said "that a writ of inquiry, as established at common law, was a matter of practice, and not of right, and is subject to the supervision of the court or the legislature." The language of the territorial statute which was in force at the time of the adoption of the Constitution is that upon default "the court may order the damages to be assessed by a jury," indicating that the power vested in the court was discretionary, either to assess the damages itself or direct a jury to assess them. This construction is consistent with the practice as established at the common law. Under that practice the power was discretionary.

Pennsylvania:

In Pennsylvania the statutes provide for defaults in the absence of an affidavit of defense. Some courts provide for such practice by rule. These all seem to apply only in cases on contract, and not where tort or negligence enters into the cause of action. This practice has been held to be no invasion of any constitutional right to trial by jury. The questions arising on the right to default judgment for want of an 20 L.R.A. (N.S.)

affidavit of defense are not within the scope of this note. They can be found in the notes in Purdon's Digest of Statutes, 13th ed. subject, "Practice."

Act March 21, 1806, provides for judgment by default on failure to file an affidavit of defense in actions for any debt founded on a verbal promise, book account, note, bond, penal or single bill. Act May 25, 1887, provides for statement of claim in assumpsit and trespass. Act March 28, 1835, § 2, provides for default in actions in district courts of Philadelphia on bills, notes, bonds, or other instruments of writing for the payment of money, and for the recovery of book debts, and in all actions of scire facias on judgments and on liens of mechanics on failure to file an affidavit of defense; and provides that each of the judges of said court may render judgments by default. Act April 22, 1899, provides that the courts of the state may, by rule, authorize the prothonotary to enter judgment for want of affidavit of defense.

A rule of court requiring an affidavit of defense in all actions of debt or contract, and providing for judgment for want of affidavit, was held not to be contrary to the Constitution providing that the trial by jury shall be as heretofore. It was held that the rule made no alteration in the trial by jury, but only provided that, previous to the trial, the defendant shall swear or affirm that to the best of his knowledge and belief he has a just cause of defense. *Vanatta v. Anderson*, 3 Binn. 417.

And the affidavit-of-defense law of Pennsylvania was held not to infringe any constitutional right to a trial by jury. *Lawrance v. Borm*, 86 Pa. 225. The court said: "Clearly, if a defendant in an action presents no defense to be tried by a jury, he cannot claim that his privilege is denied him. . . . And when, on a statement of all the facts a defendant can conscientiously swear to, the court finds that the law upon these facts is against him, clearly, he has no right to go before a jury."

And, in an action on a note where no affidavit of defense was filed, the defendant had a reference to arbitrators. This was set aside and judgment was rendered for plaintiff, under Pa. act April 21, 1852, relating to Berks and Tioga counties, requiring affidavits of defense. This act was held to be constitutional, the court saying: "You cannot try your defense either by arbitration, or by jury, unless you have one, and, under the act of 1852, you are conclusively presumed not to have any until you swear to it, and put your oath on record." *Taggart v. Fox*, 1 Grant. Cas. 190.

And in *Bishop v. Denormandie*, 1 Pittsb. 145, where the affidavit of defense was held insufficient, it was held that Pa. act April 21, 1851, authorizing judgments of default in actions on bills, notes, bonds, or other instruments of writing for the payment of money, and contracts for the loan or advance of money, whether in writing or not, was constitutional.

In *Lawrance v. Smedley*, 6 W. N. C. 42, where, in an action on a note, the trial court entered judgment for the plaintiff for want of sufficient affidavit of defense, on error, it was urged that the affidavit-of-defense law was unconstitutional as it was in violation of the right of trial by jury. It was held that the affidavit of defense was sufficient allegation of a set-off. The court did not discuss the constitutional question.

In *Hoffman v. Locke*, 19 Pa. 57, a defendant entered a rule to choose arbitrators in an action on a note, and the plaintiff thereafter asked judgment, under Pa. act April 3, 1851, authorizing judgment to be entered in certain cases for want of an affidavit of defense, and the court ordered the rule to arbitrate stricken out and gave judgment for plaintiff. On appeal it was said: "This judgment was pronounced by the court for want of an affidavit of defense, and in accordance with an act of the legislature. But it is said the legislature had no power under the Constitution to pass such a law. The clause of the Constitution which forbids it is not pointed out; and I am ignorant of any provision which secures to the good people of this commonwealth the privilege of making false defenses against honest claims. The law is not only constitutional, but eminently wise, just, and necessary. It is no tyranny to require that a good defense shall be fully and fairly stated on the record and no hardship to verify it on oath. Still less is it a subject of reasonable complaint that a judgment may be rendered against a party who, upon his own showing, has no legal or equitable ground upon which he can resist it. . . . How such men can demand a jury trial without doing violence to their principles is not easy to see, unless they forget that jurors are always sworn."

In *Lynch v. Kerns*, 10 Phila. 335, it was said: "The affidavit-of-defense law is a just and necessary one, and its influence on the administration of justice has been most salutary; but it is a departure from the course of the common law, as a mode of obtaining judgment."

In *Wall v. Dovey*, 60 Pa. 213, where the plaintiff did not comply with the act of March 25, 1835, in regard to filing "book entries," the judgment rendered on account of insufficient affidavit of defense was set aside. Referring to *Hamill v. O'Donnell*, 2 Miles (Pa.) 101, the court said: "In that case judgment had been entered, but, on a rule to show cause why it should not be set aside, as it appeared on examination that the copy filed was a copy of ledger entries, the rule was made absolute. This is the only safe principle on which the act can be administered. It confers a special power to enter a compulsory judgment against a defendant, and is in derogation of his right to a trial by jury."

In an action on a note it was held that on default the court could render judgment and assess damages without a writ of inquiry. *Bank of United States v. Thayer*, 2 Watts & S. 443. The Pennsylvania act of 20 L.R.A. (N.S.)

March 28, 1835, gives the court power to enter judgment by default in all cases, without exception, when the suit is on a bill, a note, or other instrument for the payment of money. It was held that, under the charter of the Bank of the United States providing the rate of interest on failure to pay its notes, the interest was fixed.

In *Yates v. Meadville*, 56 Pa. 21, where it was held that a rule of the common pleas court requiring the filing of an affidavit of defense in all cases of *scire facias* upon a mechanic's claim did not extend to municipal claims, it was said: "Now, though the affidavit rule has been found convenient in practice, and is therefore to be commended, yet it is in derogation of the right of trial by jury, and cannot therefore be extended by construction beyond its terms. The practice in Philadelphia, or in other places where the district-court law is extended, furnishes no guide."

In *Church v. Given*, 15 Phila. 188, a judgment was entered on a warrant of attorney attached to a bond of indemnity, and the damages were assessed by the prothonotary *ex parte*. An averment of default had been filed, and the assessment showed the amount of the liens with interest and costs. On a rule to strike off the assessment of damages on the grounds that they were not liquidated and there was nothing to show the exact amount, that they could not be assessed in the office, and that there should be a writ of inquiry, the rule was made absolute without opinion.

In *Corry v. Pennsylvania R. Co.* 194 Pa. 516, 45 Atl. 341, it was held that the act of May 25, 1887, providing for default judgments in the absence of an affidavit of defense, did not apply to causes of actions which were *ex delicto* or of a mixed character containing an element of contract and an element of tort. The court said: "Where the element of negligence enters into the relation of the parties, indefinite and uncertain damages, depending not on any stipulations of the parties, whether express or implied, but on the uncertain verdicts of juries, become substituted as the foundation of the right of recovery." Rhode Island:

In Rhode Island the statutory provision is that in default judgments damages shall be assessed by the court, or, at the discretion of the court, by a jury, in all cases except where otherwise provided.

R. I. Gen. Laws, 1896, chap. 243, § 5, provides that in all cases, except where otherwise provided, if judgment be rendered on default, damages shall be assessed by the court, with or without a jury, at the discretion of the court. It was held that excessive damages on default could not be reviewed on appeal. *King v. Rhode Island Co.* 27 R. I. 112, 60 Atl. 837.

On error to the circuit court for the district of Rhode Island, in an action on bills of exchange, on default, judgment was entered and damages and protest. The Rhode Island acts provided that in all cases where judgment shall pass by default

it shall be inquired into and assessed by the court, or otherwise by a writ of inquiry, at the discretion of the court. It was held that the judgment of the circuit court should be affirmed. *Brown v. VanBraam*, 3 Dall. 344, 1 L. ed. 629. South Carolina:

In South Carolina the early statutes provided for reference to the clerk in actions on liquidated demands on default. This was held not to apply where such judgments were final and needed no verdict before the act. An inquisition was held proper to ascertain the "interest" due on a judgment. But a judgment was held to be a liquidated demand. The later Code provides for default without a jury in cases of liquidated demands and verified accounts; in all other cases by the verdict of a jury.

On an assessment of damages by the clerk on default, under act 1809, 1 Brev. Dig. 39, § 32, providing for reference to the clerk in actions on liquidated demands on default, it was held that in an action on a note, the clerk could make his assessment on the copy of the note and file his declaration; but he should have required the original. *Bank of State v. Vaughan*, 2 Hill, L. 556.

In *Dinkins v. Vaughan*, 1 M'Cord, L. 554, it was held that the act of 1809 which refers the sum actually due on any liquidated demand to be assessed by the clerk, could not have intended to include such cases wherein the judgments were final and required no verdict even before the act, as, for instance, a debt on a bond or judgment. In such cases the remedy was perfect before the act, and required no alteration. This case was an action of debt on a judgment which was referred to the clerk to assess damages, and the motion to set aside the judgment and execution was sustained.

And, in an action on a judgment, it was held that the plaintiff was entitled to a writ of inquiry, after judgment by default, to recover interest in the way of damages. *Smith v. Vanderhorst*, 1 M'Cord, L. 328, 10 Am. Dec. 674. The court said: "Where an inquisition is taken, it is to inform the conscience of the court merely in cases of interlocutory judgments, where, from the particular circumstances of the case, it is doubtful whether any, and, if any, what, damages should be given. In cases of this description, it should be left to a jury to consider of the damages."

A judgment was held to be a liquidated demand under the act of 1809, providing that in actions on liquidated demands it shall not be necessary for the plaintiff to execute a writ of inquiry. *Crowther v. Sawyer*, 2 Speers, L. 573.

Act 1809, 7 Stat. at L. 308, provides that in all actions on any liquidated demand, where the defendant suffers an order for judgment to be entered, it shall not be necessary for the plaintiff to prove his demand, or execute a writ of inquiry, but the same shall be referred to the clerk to ascertain the sum due. It was held that, in an action of assumpsit against the drawee, where there had been no acceptance, 20 L.R.A. (N.S.)

the action was not on a liquidated demand, as it was not in writing and the only exception to this was an action on a judgment which was held to be a writing of the defendant. *Wilkie v. Walton*, 2 Speers, L. 473. The court said: "But there is no other case of which I am aware where a demand in writing, to which the defendant is not a party by his signature, can be called a liquidated demand."

Under Code, § 267, providing that, where the action is for the recovery of money only, default judgment may be given if the demand is liquidated; and, if unliquidated, and the plaintiff itemizes his account and attaches an affidavit that it is true and correct, judgment may be rendered as in the case of the liquidated demand; and in all other cases relief shall be ascertained either by the verdict of a jury, or, in cases of chancery, by the judge, with or without a reference,—it was held that, where the itemized account attached to the complaint was unverified, and a summons served only on one of the defendants, no judgment by default could be rendered against either of the defendants. *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913.

In *Marion v. Charleston*, 72 S. C. 576, 52 S. E. 418, it was said that, under art. 267 of the Code, in case of default the relief shall be ascertained by a verdict of the jury, or, in case of chancery, by the judges, with or without a reference. This was an action to cancel a deed for fraud and for damages where an answer had been filed. South Dakota:

The present Code of Civil Procedure, § 237, provides for judgments on default by the court in actions on contracts for the recovery of money only, and in other actions, if the taking of an account or proof of fact is necessary, the court may hear proof or order a reference. Where the action is for the recovery of money only, or of specific real or personal property, with damages for withholding, the court may order the damages to be assessed by a jury.

In *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34, where the question was as to the notice to be given the defendant of the assessment, it was held that, under Comp. Laws, § 5025, providing that judgment may be had where the defendant fails to answer the complaint in an action on contract for the recovery of money only, and the court shall enter judgment for the amount; but, if the complaint is not sworn to, the court shall ascertain the amount which the plaintiff is entitled to recover and enter the judgment as assessed,—no notice of the assessment was required. This was an action on a note.

Tennessee:

Under the Code of Tennessee, if the amount due is one of simple calculation from the papers in the case, a jury is held not necessary; but it is required in other cases. The plaintiff may waive the right to a jury if the defendant does not object.

In *STATE EX REL. SPATLIN v. THOMPSON*, which was an action on an insurance policy

which was not filed in the cause, it was held that there were no papers from which calculation could be made on default, and a jury was necessary, under Code, 4679 (2952, 3668), providing that in all cases where a default is taken, if the amount can be ascertained by simple calculation from the papers, judgment by default may be taken without the intervention of a jury; but in all other cases a jury is required.

And, under a similar statute (Code, § 2952), it was held that a jury was necessary in an action of debt for work and labor preformed, goods sold, and money paid. *Masonic Educational Asso. v. Cook*, 3 Head, 313. Referring to this section, the court said: "The term 'papers,' here refers to the writing or other evidence upon which the action is founded, and not to the pleadings in the cause. It was doubtless intended to apply to suits instituted upon bonds, bills of exchange, promissory notes, liquidated and signed accounts, and the like, from which the amount due the plaintiff could be readily ascertained by simple calculation. In all other cases the intervention of a jury is necessary to ascertain the sum due the plaintiff."

So, under Code, § 2952, a final judgment by default rendered upon an account, without a jury, was held erroneous, in *Beeler v. Huddleston*, 3 Coldw. 201.

In *Williams v. Bank of Tennessee*, 1 Coldw. 43, where the question was one of damages, being left blank in the declaration, it was said that, under Code, § 2957, it is provided that, if the defendant fails to appear and defend, judgment by default may be taken against him; and, by § 2952, a judgment is final if the amount of plaintiff's claim can be ascertained by simple calculation from the papers. "If the amount cannot be readily ascertained the damages will be ascertained by a jury impaneled at the same term for the purpose." In this case it was held that the court was authorized to give judgment as the amount of plaintiff's claim was susceptible of ascertainment from the note and protest.

In an action on a contract in writing for the payment of money where the amount due could be readily ascertained by calculation, it was held that a jury was not necessary. *Williams v. Inman*, 5 Coldw. 267. This was under Tenn. Code, § 2952.

And, in an action for damages, against a landlord for a falling building, where the plaintiff, on default, waived a jury, it was held that the judge could fix the amount where the defendant did not object. *Taylor v. Sledge*, 108 Tenn. 719, 69 S. W. 266.

But, in a judgment by default on an action of debt in detinue, it was held that a writ of inquiry was necessary, under act 1801, chap. 5, § 62, providing that if, in detinue, the verdict shall omit the price or value, the court may, at any time award a writ of inquiry to ascertain the same. *Studdert v. Hassell*, 6 Humph. 137.

And, under act 1794, chap. 1, providing that, where the plaintiff has judgment by 20 L.R.A. (N.S.)

default, which in an action of debt shall be final unless where damages are suggested on the roll; and in that case and others not specially provided for, when the recovery shall be in damages, a writ of inquiry shall be executed at the next term,—it was held, in an action of debt on a guardian's bond, that the statute should be followed; and a writ of inquiry was had at the term after that in which judgment by default was taken. *Perry v. Starke*, 10 Humph. 574.

And in an action to recover on a written contract to pay on demand a specific sum in gold, silver, confederate notes, or current bank notes, a judgment by default was held to entitle the plaintiff to the value of current bank notes at the time of the demand. It was held that a jury was necessary. *Mississippi & T. R. Co. v. Green*, 9 Heisk. 588.

Texas:

In Texas, under the statutes, in cases of liquidated demands, a jury is not required on default; but for unliquidated damages a jury is required. This latter right is held preserved by the Constitution.

So, under Hart's Dig. art. 812, providing that, if the cause of action is liquidated and proved by an instrument in writing, the clerk shall, unless a jury is asked for by either party, assess the damages, it was held that errors of the clerk in failing to credit payments indorsed on the note would be material error. *Holland v. Cook*, 10 Tex. 244.

And, in an action on a note drawing interest by the laws of another state, it was held not necessary to call a jury to ascertain the law of such state as to the rate of interest. It was held that the cause of action was liquidated by the writing as to the principal sum due, and the law ascertained the rate of interest, and the court could hear proof without a jury. *Willard v. Conduit*, 10 Tex. 213.

And, where the amount sued for was evidenced by writing, it was held that there was no necessity for a jury on a judgment by default, as nothing remained but to assess the damages. *Tarrant Co. v. Lively*, 25 Tex. Supp. 399.

And, in an action on a note for a liquidated sum, it was held that judgment by default could be rendered without a jury. *Swift v. Faris*, 11 Tex. 18.

In an action on a note after default it was held that nothing remained but for the clerk to assess the damages, under Hart's Dig. art. 812. *Guest v. Rhine*, 16 Tex. 549.

And in a suit on a liquidated demand on a note it was held that the damages were to be assessed by the clerk, who should allow the credits indorsed on the note in making his calculation. *Harland v. Hendricks*, 19 Tex. 292.

And in an action on a note it was held that the assessment should be made by the clerk, under the Texas statute which provided that, if the cause of action is liquidated and proved by any instrument in writing, the clerk shall, unless the party asks for a jury, assess the damages of the plain-

tiff. *Trabue v. Stonum*, 20 Tex. 453; *Graves v. Farquhar*, 20 Tex. 455. (The statute is not cited, but is believed to be Hart's Dig. art. 812.)

So, in an action to foreclose a mortgage note, it was held that, where the damages were liquidated, a jury was not necessary, under Tex. Stat. art. 812. *Ricks v. Pinson*, 21 Tex. 507.

In *Roy v. Bremond*, 22 Tex. 626, which was an action on a note and mortgage, there was judgment by default, a writ of inquiry was awarded, and the verdict of the jury establishing the liability of the defendants.

In *Morrison v. Van Bibber*, 25 Tex. Sup. 153, which was a default in an action on a mortgage, it was held that there was no necessity for a writ of inquiry as there were no unliquidated damages. This case does not refer to *Roy v. Bremond*, 22 Tex. 626; but in that case there was no question made as to the right to a writ of inquiry, and there *Roberts, J.*, dissenting, said that a writ of inquiry was not necessary under Hart's Dig. art. 812.

An action on a note payable in current bank notes was held to be for a liquidated sum, and a jury was not necessary on default. It was held that the court could take judicial notice of the signification of the term. *Fleming v. Nall*, 1 Tex. 246.

And, in an action against an indorser of a note on a certain liquidated demand, where there were no damages to be assessed by the jury, it was held that final judgment on default could be rendered without the intervention of a jury. *Cartwright v. Roff*, 1 Tex. 78.

On a scire facias on a bond to keep the peace, on a default judgment a jury was not called, and judgment was rendered for the penalty. *Lawton v. State*, 5 Tex. 272.

In a suit on a note to enforce a vendor's lien, it was held that, plaintiff's cause of action being liquidated, it was not necessary to call a jury to assess the damages. *Niblett v. Shelton*, 28 Tex. 548. *Oldham & W. Dig. art. 486*, provides that, if the cause of action is liquidated and proved by a writing, the clerk shall, unless a jury is asked for, assess the damages.

And, in an action on a purchase-money note and to foreclose a vendor's lien, where the petition described the land, it was held that a judgment on default could be rendered without a jury. *Bridges v. Reynolds*, 40 Tex. 208.

And, in an action on a note and to foreclose a lien, it was held that, on judgment by default, the assessment of damages by the court without a jury was proper; and, if a jury was desired, it should have been demanded and a jury fee deposited. *Bumpass v. Morrison*, 70 Tex. 756, 8 S. W. 596.

But in *Johnson v. Dowling*, 1 Tex. App. Civ. Cas. (White & W.) 615, it was held that a judgment by default would be set aside if the petition was not sufficient to enable the court to render accurate judgment.

Under Hart's Dig. art. 812, providing that, if the cause of action is unliquidated, 20 L.R.A. (N.S.)

a jury should be sworn to assess the damages, it was held that, in an action of trespass for cutting timber, the province of the jury was simply to ascertain the amount of damages, and the plaintiff was not required to prove that the defendant was guilty of the trespass. *Clark v. Compton*, 15 Tex. 32.

And, in an action on an unliquidated demand, it was held that a final judgment on default could not be rendered without a jury, under Stat. vol. 4, p. 89, providing that, in suits upon unliquidated demands, the intervention of a jury must be had to ascertain the amount of indebtedness before the judgment by default can be made final. *Cummings v. Butler*, *Dallam* (Tex.) 531.

And, in an action for hiring slaves, where there was no written evidence of the indebtedness, it was held error to render judgment by default without a jury, under *Oldham & W. Dig. art. 496*, as the cause of action was not liquidated. *Freeman v. Jordan*, 33 Tex. 428.

And, where uncertain credits were indorsed on a note, it was held error to render judgment by default without the intervention of a jury, in *Mills v. Stuhl*, 37 Tex. 312.

In an action on a bond to keep the peace, it was held erroneous to render judgment on default without a jury, under *Paschall's Dig. art. 2555*, requiring proof in actions on such bonds. *Brumme v. State*, 30 Tex. 538. A breach of the bond was a question of fact to be ascertained by the jury.

In an action against the sureties on a sheriff's bond for nonfeasance in office, it was held that a jury was necessary on a default. *Hurlock v. Reinhardt*, 41 Tex. 580. The court said: "But the amount which he was entitled to recover from the sheriff was undoubtedly to be ascertained, not by the amount of his demand, but by the value of the attached property, of which he had failed to get the benefit by reason of the default of the sheriff, as alleged in the petition."

And, under *Paschall's Dig. art. 1508*, requiring a jury on an unliquidated demand, it was held that the failure to call a jury was error, as the statute applied at the time of this trial. *Cross v. Huffaker*, 1 Tex. App. Civ. Cas. (White & W.) 53.

In a suit for conversion of property it was held necessary for a jury to ascertain the amount of damages on default, where no question was propounded to the defendant, in the interrogatories filed, as to the extent of the damages. *Mississippi Mills v. Bauman*, 12 Tex. Civ. App. 312, 34 S. W. 681.

Where the defendant did not demand a jury or deposit a jury fee, in an action for unliquidated damages, it was held that the damages were properly assessed by the court. *Bumpass v. Morrison*, 70 Tex. 756, 8 S. W. 596.

In *Mississippi Mills v. Bauman*, 12 Tex. Civ. App. 312, 34 S. W. 681, where the action was for conversion, it was held that

plaintiff was not entitled to a judgment by default, as it was necessary for the jury to ascertain the amount of damages. The court said: "No judgment by default was taken, and no request was made to have the jury find on this particular matter."

Rev. Stat. arts. 1284-1286, provide for a jury for defendants in case judgment is rendered by default, but do not expressly give this privilege to the plaintiffs. Where the plaintiffs had demanded a jury and paid a fee therefor, it was held that they were entitled to have the damages assessed by a jury, and the court did not err in giving them this privilege. This was an action for damages for failure to transport lumber. It was said that at common law, where the damages were not liquidated in default, a jury was always called, and this right was preserved by Bill of Rights, § 15, and could not be infringed by the act of legislation. *Central & M. R. Co. v. Morris*, 68 Tex. 61, 3 S. W. 457.

Vermont.

In Vermont, where the damages were uncertain, the assessment by jury was provided for by statute. A later statute provides for assessment by the court or jury, or a reference.

In *Benham v. Sage*, 1 D. Chip. (Vt.) 247, a jury was held necessary in an action on a recognizance on an appeal. Judiciary act, § 75, provides that in actions to recover forfeiture annexed to any articles of agreement, covenant, bond of recognizance with the condition annexed, contract, charter party, or specialty, where the forfeiture or nonperformance is found by a jury, or by default, the court may render judgment; and when the sum for which judgment ought to be rendered is uncertain, the same shall, on request of either party, be assessed by a jury.

In *Webb v. Webb*, 16 Vt. 636, it was said: "In this state it is not common to execute a writ of inquiry,—the damages, in cases of default, judgment upon demurrer, and by *nil dicit*, being usually assessed by the court, or by some person by them appointed for that purpose. This practice we have taken, I presume, mainly from Connecticut, for I do not find that the same practice obtains so generally elsewhere. But the course of trial and the necessity of proof are the same everywhere, and under all forms of procedure. And in this state, by statute, either party is entitled to have the damages assessed by the jury,—which would be a privilege of very little import if the judgment had already established conclusively the rule, or the *quantum* of damages. 1 Sw. Dig. 784, 785."

Rev. Laws 1880, § 1178, Vt. Stat. 1411, provides that, where judgment is rendered otherwise than on a verdict of a jury, the judges may, by themselves, by the jury in court, by the report of the clerk, or by a person appointed, ascertain the sum due. It was held in this case, where the court directed an assessment by the clerk, and ordered the cause continued for assessment, that, as regards the damages, they should
:O L.R.A. (N.S.)

be ascertained by the clerk at the term to which the case was continued. After the damages were so assessed, it then devolved upon the court to give final judgment, and such judicial action was necessary before final judgment could be entered. *Leonard v. Sibley*, 76 Vt. 254, 56 Atl. 1015. Virginia:

The Virginia statute provides for writ of inquiry; but this is not necessary in cases of liquidated demands. The statute which dispensed with a jury in actions on liquidated demands was held constitutional. In cases requiring evidence to establish plaintiff's demand a jury was held necessary.

Code, chap. 171, § 42, provides that, on default, judgment shall be entered with an order for damages to be inquired into when such inquiry is proper. Section 43 provides that there need be no inquiry in an action of debt on any bond or writing for the payment of money, or against the drawer or indorser of a bill of exchange or negotiable note, or scire facias upon a judgment or recognizance. It was held that, in an action of ejectment, there should be an order for an inquiry of damages. *James River & K. Co. v. Lee*, 16 Gratt. 424.

But, in an action of ejectment where no statement of damages was filed, it was held that there was no reason for an inquiry of damages, either by the court or jury, under Code 1887, § 2752 (Va. Code 1904, p. 1413). *King v. Davis*, 137 Fed. 198.

In an action on an insurance policy providing for an adjustment among several insurers, it was held that a writ of inquiry was necessary, under Code, § 3284, providing for a judgment by default, with an order for the damages to be inquired into when such inquiry was proper. It was held that § 3285, providing that, in an action on a writing for the payment of money, there need be no such inquiry, did not apply, as that statute meant writings like a bond for the payment of a certain sum. *Commercial Union Assur. Co. v. Everhart*, 88 Va. 962, 14 S. E. 836.

In an action of debt on a judgment, it was held that a writ of inquiry ought to have been awarded, under 1 Rev. Code, chap. 128, § 79, p. 508, providing for a default judgment on a specialty, bill, or note in writing. *Sheiton v. Welsh*, 7 Leigh. 175.

In an action of *indebitatus assumpsit* against the acceptor for nonpayment of a bill of exchange, a writ of inquiry was awarded, and the defendant acknowledged the plaintiff's action but did not confess judgment for any sum. It was held that the court was not authorized to render judgment for plaintiff, but should have caused a writ of inquiry. *Dunbar v. Lindenberger*, 3 Munf. 169. This judgment was not said to be in default, but it was discussed as though it was a confession of judgment.

In an action of debt for money loaned, but not founded on any specialty, or a note in writing, it was held that a writ of inquiry was necessary. *Hunt v. M'Rea*, 6 Munf. 454.

And, in an action on a note having credits

indorsed, it was held that a writ of inquiry was necessary unless the plaintiff took the judgment subject to such credits, when a final judgment could be rendered in the office at rules for principal and interest. *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326, 16 Am. Dec. 755.

And, in an action of debt against the makers and indorsers of a note, it was held that an office judgment could not be entered without a writ of inquiry. *Hatcher v. Lewis*, 4 Rand. (Va.) 152. In this case demand, protest, and notice would have to be proved. The court said: "In a suit against the drawer alone, a judgment might be rendered against him without a writ of inquiry; but, when he is sued with the indorser, no judgment can properly be given finally against him until a final judgment is also given against all the defendants."

And a writ of inquiry was held necessary in an action on a note against an indorser, as it was not, as against him, an action for the payment of money under act 1804, but a collateral contract to pay under certain circumstances. *Metcalf v. Battaile*, Gilmer (Va.) 191.

In *James River & K. Co. v. Lee*, 16 Gratt. 424, it was said that the prior cases in Gilmer, Randolph, and Leigh were under the Code of 1819, and a writ of inquiry was necessary in every case except in an action of debt upon an instrument of writing for the payment of an ascertained sum. The court said: "The present Code, chap. 171, § 43, seems to have made no other change in this respect than to extend the exception to an action of debt against indorsers, as well as the drawer, of a bill of exchange or negotiable note; and to an action of debt or scire facias upon a judgment or recognizance; in which cases it had been held, as we have seen, that a writ of inquiry was necessary, under the Code of 1819."

In an action on a note where the defendant declined to plead, but demanded a jury, it was held that he was not entitled to a jury, and that no constitutional right was denied. It was contended that Code, § 3211, giving a remedy by a motion for judgment on fifteen days' notice was a summary proceeding, and abrogated the rule of pleading; but it was held that defendant would be required to make an issue before he could demand a jury. *Preston v. Salem Improv. Co.* 91 Va. 583, 22 S. E. 486.

Washington:

Under Washington Codes the reference to a jury seems to be discretionary with the court.

In an action for forcible detainer it was held that the damages on default must be made by proof, under Ballinger's Anno. Codes & Statutes, § 5090, providing that, in an action on contract for the recovery of money only, the court may enter judgment, and in other actions for damages the court may order the damages to be assessed by a jury or by a reference. The amount of the damages was held not confessed by default. *Ferguson v. Hoshi*, 25 Wash. 664, 66 Pac. 105.

20 L.R.A. (N.S.)

West Virginia:

In West Virginia the statute seems to provide for dispensing with a jury in actions on notes and the like. Where the amount recoverable is not ascertainable from the contract sued upon, it is held that the right to a jury is a constitutional one.

In an action of debt on a note, where the clerk entered office judgment and made an order for an inquiry of damages, it was held that the order was a nullity, and void. Code 1899, chap. 125, § 46, provides that every judgment entered in the clerk's office, in an action wherein there is no order for an inquiry of damages, shall become final on the last day of the next succeeding term. *Bradley v. Long*, 57 W. Va. 599, 50 S. E. 746.

Under Const. art. 3, § 13, providing that in suits at common law where the value in controversy exceeds \$20, exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved, it was held that there could be no final judgment by default without a writ of inquiry in any action of law where the value in controversy exceeds \$20, where the action was for damages, or where the sum which the plaintiff was entitled to recover was not definitely ascertainable from the contract. *Hickman v. Baltimore & O. R. Co.* 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455. The court in this case having allowed a jury on the demand of plaintiff, it was held that the proceedings were regular. This case was an action for assault and battery.

Wisconsin:

A jury does not seem to be required in this state, but is within the discretion of the court, in actions not arising on contract for the recovery of money only. In such a case the assessment is made by the clerk, under the statutes. This provision is held not to be unconstitutional, as it does not confer judicial powers.

So, in *Wells v. Morton*, 10 Wis. 473, Rev. Stat. 1858, chap. 132, authorizing clerks of courts in default cases to enter up judgment in certain cases, was held not to conflict with Const. art. 7, § 2, vesting judicial power in the "courts" therein provided for.

In an action on a fire-insurance policy, it was held that the clerk had jurisdiction to enter up judgment, under Rev. Stat. § 2891, subdiv. 1, providing that judgment on default may be had in an action arising on contract for the recovery of money only, and, if the complaint is duly verified, the clerk shall enter judgment; but, if the complaint is not verified, the clerk shall assess the amount which the plaintiff is entitled to recover from examination of plaintiff under oath or other proof, and enter judgment. *Schobacher v. Germantown Farmers' Mut. Ins. Co.* 59 Wis. 86, 17 N. W. 969. This case holds that the clerk may enter judgment on a claim for unliquidated damages arising on contract.

Stat. 1898, § 2891, subdiv. 2, provides that, in actions other than those on contracts for the recovery of money only, if the taking an account or proof of any fact is necessary an order of reference may be made; and,

when the action is for the recovery of money only, or of real or personal property, with damages, the court may order the damages to be assessed by a jury. It was held that the court, in an action of replevin, could refuse to give plaintiff judgment on default without evidence. *Sibley v. Weinberg*, 116 Wis. 1, 92 N. W. 427.

Rev. Stat. chap. 101, § 3, provides that, when a suit is brought on a written contract, and the same is set forth in the declaration, if interlocutory judgment is rendered by default the court shall direct the clerk to assess the damages. Section 8 provides that the clerk shall report to the court the sum ascertained to be due. Section 9 provides that the court shall give judgment. It was held that a judgment entered by the clerk in vacation, on a note, was erroneous. *Holmes v. Lewis*, 2 Wis. 83.

And, under Rev. Stat. chap. 132, § 27, in an action to recover the contract price of an article sold, where the complaint was not verified, it was held that, on default, the clerk should assess the amount from examination of plaintiff under oath, or other proof. *Gorman v. Ball*, 18 Wis. 25.

In an action on a note the verification of plaintiff's attorney was defective. It was held that the clerk should have made the assessment, under Rev. Stat. chap. 132, § 27, but the assessment should be made on the note without other evidence, and it might be presumed that it was made from the fact of his signing the judgment. *Bonnell v. Gray*, 36 Wis. 574.

II. English cases.

The practice in England, in actions for a liquidated sum resting in computation only, was to dispense with a writ of inquiry; but in other cases the reference was to a jury. This has changed in a degree,—some courts holding that the writ of inquiry is only to inform the conscience of the court, and that the courts might render judgment themselves. 1 *Sellon's Practice*, p. 347, says: "But a writ of inquiry is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages. . . . Thus, of late years, in certain cases, they have assessed damages which were formerly assessed by a jury on writ of inquiry." The same rule is stated in *Bingham on Judgments*, p. 3.

On judgment by default in an action of covenant for arrears of an annuity, it was held that the court would grant a rule for a reference to the master to compute the amount. *Allwovey v. Hill*, 2 Chitty, 32.

And, in an action of covenant on a mortgage, a reference was had to the master to compute what was due for principal and interest. *Berthen v. Street*, 8 T. R. 326.

And, in an action for rent on a covenant in a lease, it was held that it was proper to refer to a master to compute arrears, without executing a writ of inquiry. *Hoard v. Hunt*, 3 Jur. 24; *Wingfield v. Cleverley*, 13 Price, 53.

And, in an action of covenant for nonpay-

ment of rent, a reference was made to the master to compute the amount due. *Byrom v. Johnson*, 8 T. R. 410.

In an action of covenant on an indenture of demise, where the breaches assigned were for nonpayment of rent and land tax, a rule to compute was denied. *Park, J.*, said: "The only judge in court said he had never heard of a rule to compute in an action for breaches of covenant, and was unwilling to make a precedent for it." *Morris v. Thompson*, 4 Scott, 295.

In an action for rent where it did not appear whether it was an action of debt or covenant, the court refused to grant a rule to refer on default to the prothonotary, unless it appeared that it was an action on a lease under seal. Affidavit to that effect was produced by the court, and the rule was granted. *Campion v. Crawshaw*, 6 Taunt. 356.

In an action of assumpsit on a bill of exchange, on default, it was held that there should be a reference to a prothonotary to ascertain the damages and interest, without a writ of inquiry. *Andrews v. Blake*, 1 H. Bl. 529.

And, in an action on a bill of exchange, on default, a rule was granted to refer the same to the master to calculate principal and interest. *Kenyon, Ch. J.*, said: "In such cases as the present it is extremely convenient to do what was done in the court of common pleas; as the *quantum* of damages depends on figures, they may be ascertained as well before the master as a jury." *Shepherd v. Charter*, 4 T. R. 275.

And, in an action on a bill of exchange, it was held that the court could assess the damages on an interlocutory judgment without a jury, where the plaintiff assented. *Gould v. Hammersley*, 4 Taunt. 148.

And, on a judgment by default on a promissory note, it was held that it should be referred to a prothonotary to ascertain the amount without a writ of inquiry. *Longman v. Fenn*, 1 H. Bl. 541. The court said "that, as the practice was clear in actions of debt, there seemed to be no good reason why it should not also prevail in those actions of assumpsit where the demand was precisely ascertained. In *Bruce v. Rawlins*, 3 Wils. 62, on a judgment by default in trespass, *Wilmot, Ch. J.*, had gone so far as to hold that the court might, if they pleased, themselves assess damages. In the present case, if there were any fact which it was necessary for a jury to determine, it ought to have been stated by affidavit. But, as no such fact appeared, as the sum was defined on the face of the note, and as the interest was capable of exact computation by the prothonotary, it was highly reasonable to save the parties the expense of a writ of inquiry."

And, in an action on a note, on default, it was held that a reference to one of the prothonotaries to ascertain the damages and costs, without a writ of inquiry, was proper. *Rashleigh v. Salmon*, 1 H. Bl. 252.

In *Moody v. Pheasant*, 2 Bos. & P. 446, *Bayley, Serjeant*, applied to the court for

leave to enter up final judgment upon a bail bond without executing a writ of inquiry, observing that, although the practice had been otherwise, the court of King's bench had of late decided that a writ of inquiry was unnecessary in such cases. The court (consisting of Heath, Rooke, and Chambre, JJ.), being of the same opinion, gave leave to enter up final judgment accordingly.

A final judgment by default in an action of debt, where no writ of inquiry was executed, was held valid, where the record did not show that the debt was of such a nature as to require a writ of inquiry to ascertain its precise amount. *Weald v. Brown*, 2 Crompt. & J. 672. The court said: "There is no doubt that, in certain cases of actions of debt, some of which are referred to by my brother Holroyd in *Brill v. Neele*, 1 Chitty, 619, and *Arden v. Connell*, 5 Barn. & Ald. 885, a writ of inquiry is requisite. If, from the nature of the contract, the amount must of necessity be uncertain, then, in an action of debt, as well as in other actions, there must be a writ of inquiry to reduce it to certainty. An apposite case is an action of debt for not setting out tithe, where the jury must ascertain the single value, before the court can give to the defendant the treble value of the tithes. But this is an exception to the general rule that, in actions of debt, the plaintiff is entitled to consider the amount specified as the real debt, and that there is no reason for a writ of inquiry to inform the conscience of the court."

In *Taylor v. Capper*, 14 East, 442, it was held that, after default judgment in an action of debt, the court would not direct a writ of inquiry to be executed, but referred it to a master to ascertain what was due, upon the application of defendant after an execution had been executed.

In *Whitaker v. Harrold*, 12 Jur. 395, it was said: "It may be that, on this supposition, the court of Queen's bench, which may assess damages on a demurrer, or judgment by default, without the intervention of a jury, have awarded too much damages; but, this being a matter in the discretion of the court, it cannot be inquired into on a writ of error."

In *Thellusson v. Fletcher*, 1 Dougl. K. B. 315, which was an action on a policy of insurance, on default a jury on a writ of inquiry assessed the damages at the sum underwritten, without any proof of the amount or value, or any evidence, except of the defendant's handwriting to the policy. On a rule to show cause why the inquisition should not be set aside, the rule was discharged. Buller, J., said "that writs of inquiry are often sued out in cases where they are not necessary. . . . It does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions upon a bill of exchange, or a promissory note, nothing but the instrument is to be proved before the jury, the sum being thereby ascertained. Though, even in cases where there is no

necessity for a writ of inquiry, that proceeding is of use when the plaintiff goes for interest, which the jury assesses in the name of damages."

In an action of debt on an obligation, it was held that the court was able to tax the damages without a writ of inquiry. *Roo v. Apsley*, 1 Sid. pt. 1, p. 442.

In an action of debt for use and occupation, where the prothonotary would only permit interlocutory judgment to be signel, on an application for mandamus it was held that it was not clear that in actions of debt a writ of inquiry was not necessary, and a mandamus was refused. *Arden v. Connell*, supra.

And, in an action of debt on a judgment which has been obtained on a bill of exchange, a default was rendered. It was held that a reference to the master to ascertain the damages should be refused, as it should be left to a jury to consider whether any and what damages should be given. *Nelson v. Sheridan*, 8 T. R. 395. In this case Lawrence, J., distinguishing cases cited, said: "In some of the cases cited interest was to be given by the very terms of the contract between the parties."

And, in an action of assumpsit on a foreign judgment, on a rule being taken to show cause why it should not be referred to the master without executing a writ of inquiry, it was held that the rule should be discharged, as this was an attempt to carry the rule further than has yet been done, and the defendant may go into the consideration of a foreign judgment. *Messin v. Massareene*, 4 T. R. 493.

And, in a default on a bill of exchange for £200, Irish money, the plaintiff moved for a rule to refer it to the master to ascertain the amount; but the rule was discharged on the ground that the same reason applied as in the case of *Messin v. Massareene*, supra; *Maunsell v. Massareene*, 5 T. R. 87.

In an action of debt for use and occupation, on default the prothonotary refused to allow plaintiff's attorney to sign final judgment, but suggested signing interlocutory judgment. On mandamus proceedings it was held that the judgment in an action of debt was final in the first instance, and the plaintiff ought to have proposed to sue out a writ of inquiry. *R. v. Conyngham*, 1 Dowl. & R. 529.

In *Holdipp v. Otway*, 2 Wms' Saund. 106, in an action of debt on a bill obligatory, on default it was held that the course of King's bench was to tax the damages for the detention of the debt as well as the cost, if the plaintiff will assent; but, if he will not, he will be entitled to a writ of inquiry for the damages; but this was at the election of the plaintiff.

In *Brill v. Neele*, 1 Chitty, 619, where it was held that there was a misjoinder, the court said: "There are several cases of actions of debt in which a writ of inquiry would be requisite where there is judgment by default, as in debt for foreign money. Then there must be a writ of inquiry to

ascertain the value of the money in English money. Many other instances may be put in which, though by letting judgment go by default the defendant may admit a contract in substance, as stated, yet he does not necessarily admit that the exact sum of money is due."

In *Bruce v. Rawlins*, 3 Wils. 61, which was an action of trespass against revenue officers, on a motion to set aside an inquisition as excessive, Wilmot, Ch. J., said: "This is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages; but I am of opinion we ought not to interpose in this case, which differs widely from the case of stopping the wagon" (referring to a case where a wagon was stopped and searched, and the award of £100 was set aside).

In an action of debt on a judgment of seventeen years' standing the plaintiff sued out a writ of inquiry on default. On application made, it was held that, if the plaintiff would not consent to refer to the prothonotary, it was at his election, and, having sued out a writ of inquiry, he had made his election; and the court refused to stay the same. *Blackmore v. Flemming*, 7 T. R. 446.

III. Summary.

The common-law rule that, in actions for a liquidated sum resting in computation, a jury is not required, is substantially the rule in Louisiana, Nebraska, New Jersey, New York, Texas, Vermont, Virginia, West Virginia, Maryland (and on verified accounts), Mississippi (and on open accounts filed), and North Carolina (and on a verified claim).

A jury is not necessary in California in actions on contracts; nor in Minnesota, Washington, and Wisconsin in actions on contracts for the payment of money only; nor in Illinois on such contracts in writing; nor in Pennsylvania in actions on contracts where no affidavit of defense is made; nor in Florida in actions on open accounts or contracts for money; nor in Nevada or Oregon in actions for money or damages only.

In some states where the amount is shown by a contract in writing a jury is not necessary, as in Alabama, Arkansas, Colorado, Georgia, since the Constitution of 1877, Tennessee, when the amount may be ascertained from the papers, and in Missouri in actions on notes payable in money. The converse of the above is generally true,—that in other cases a jury is necessary. This is subject to the exceptions given below.

Where the amount is not liquidated as described above, the question as to the necessity for a jury seems to rest in the discretion of the court in some states under the statute, as in California, Colorado (a late act), Nevada, New Hampshire, Oregon, Rhode Island, South Dakota, Washington, and Wisconsin.

But in other states it seems that the right to a jury is optional with either party who may demand the same, as in Illinois, 20 L.R.A. (N.S.)

Indiana, Iowa, Michigan, Ohio, Missouri, except in actions on notes, and in Vermont, in actions for uncertain damages. In Kentucky a jury may be waived by the parties in actions on contracts, and with the assent of the court in other cases.

In some states it seems to be optional with the plaintiff, as in Kansas, Maine, Massachusetts, and Nebraska.

In New York the Code provides that a jury is necessary in actions for injuries to persons and property.

In Connecticut the right to a jury is not recognized on default; but the statute of 1899 gives a right to a jury in actions for torts.

The rendition of a default judgment without a jury is held not to invade any constitutional right, in Connecticut, Illinois, Iowa, New Mexico, Oregon, Pennsylvania, Virginia, Wisconsin, and Georgia. In the last state the Constitution gives the right to the court in cases of unconditional contracts in writing; but in Texas and West Virginia, the right to a trial by jury, when demanded, is recognized as a constitutional right. I. T.

MAINE SUPREME JUDICIAL COURT.

FRANKLIN H. HAZELTON

v.

SPERRY H. LOCKE.

(— Me. —, 71 Atl. 661.)

Trover — money.

1. Trover will lie to recover money so long as it is capable of being identified.

Assumpsit — agent.

2. A state manager of an insurance company may maintain an action to recover from an agent, whom he has appointed to canvass for applications and collect premiums and pay them over to himself or the company, money so collected in payment of a premium.

Trover — collections.

3. Trover will not lie by a state manager of an insurance company, who has appointed an agent to secure applications and collect premiums, to recover a premium which the agent has collected, and which he refuses to pay over, where the contract does not require him to keep the money collected intact, and he is entitled to commissions on premiums collected and paid over.

(April 23, 1908.)

Case Note. — Right of principal to maintain trover or case for money collected by agent or attorney.

This note is limited strictly to those cases dealing with the right of a principal to maintain trover or case for money collected by an agent, and does not purport to include those cases where any other kind of prop-

EXCEPTIONS by plaintiff to an order of the Superior Court for Cumberland County granting a nonsuit in an action of trover for the conversion of certain moneys. Overruled.

The facts sufficiently appear in the opinion.

Mr. Harvey D. Eaton, for plaintiff:

Trover will lie for money.

Chitty, Pl. title, "trover;" Draycot v. Piot, Cro. Eliz. pt. 2, p. 818; Kinaston v. Moor, Cro. Car. 89; Larson v. Dawson, 24 R. I. 317, 96 Am. St. Rep. 716, 53 Atl. 93; Parker v. Norton, 6 T. R. 695; Parker v. Crole, 5 Bing. 63; Murray v. Burling, 10 Johns. 172; McMorris v. Simpson, 21 Wend. 610; Ewell v. Gillis, 14 Me. 72; McNear v. Atwood, 17 Me. 434; Marr v. Barrett, 41 Me. 403.

The state manager was entitled to bring the action.

McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291; Ashley v. Root, 4 Allen, 504; King v. Mackellar, 109 N. Y. 215, 16 N. E. 201; Reeside v. Reeside, 49 Pa. 322, 88-Am. Dec. 503; Ringo v. Field, 6 Ark. 43; Wood v. Blaney, 107 Cal. 291, 40 Pac. 428; Michigan Carbon Works v. Schad, 17 N. Y. S. R. 505, 1 N. Y. Supp. 490; Wallace v. Castle, 14 Hun, 106.

Mr. Llewellyn F. Hobbs for defendant.

Peabody, J., delivered the opinion of the court:

This was an action of trover for the conversion of \$51.13 in the money of the United States. The writ was dated July 8, 1905.

erty was misappropriated, or even those cases where money came into the hands of the agent by means other than collection for his principal.

In accordance with the holding of *HAZELTON v. LOCKE*, it seems to be the general rule that an action for conversion cannot be maintained against an agent who receives money for his principal in a fiduciary capacity, unless he is bound to turn over the identical money. *Walter v. Bennett*, 16 N. Y. 250; *Wright v. Duffie*, 23 Misc. 338. 51 N. Y. Supp. 255; *Rothchild v. Schwarz*, 28 Misc. 521, 59 N. Y. Supp. 527; *Herrmann Furniture & Plumbers' Cabinet Works v. Hyman*, 28 Misc. 567, 59 N. Y. Supp. 526; *Vandelle v. Rohan*, 36 Misc. 239, 73 N. Y. Supp. 285.

This was also recognized in *Greentree v. Rosenstock*, 61 N. Y. 583, and *Hartman v. Hlicks*, 28 Misc. 527, 59 N. Y. Supp. 529.

In *Royce v. Oakes*, 20 R. I. 418, 39 L.R.A. 845, 39 Atl. 758, it was held that the failure of a servant or agent to pay over on demand money which he has collected for his principal will not sustain an action of trespass on the case, but the only remedy is by assumpsit or debt.

In *Tinkham v. Heyworth*, 31 Ill. 519, it was held that an action on the case will not lie against a banker for failing to pay over money collected by him in that capacity for another. In distinguishing such actions against bankers from an action against attorneys, the court said: "Were this action against an attorney, for not paying over money collected, we should not hesitate to hold that case would lie. We think it is different in the case of a bank. Different duties and different rights arise in the two cases. The bank receives no fee for its services, but only the use of the money until it shall be called for by the creditor; while the attorney is entitled to a direct reward, and has no right to use the money at all, but must pay it over to his client immediately without demand. Money thus collected never becomes the attorney's money; he has no right to make himself the debtor of the client by crediting him with the amount, while the bank may place the

money in its vaults as its own, and credit the customer with the amount, and thereby become the debtor of the customer, the same as in case of an ordinary depositor; and this, whether the customer keeps an ordinary account with the bank or not."

In *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. Supp. 164, it was held that an attorney who collects money for a client, and deposits the same to his own credit, and fails to pay it over on demand, is not liable to trover as for a conversion of such money, the court saying: "When an attorney collects a debt due to his client, he does not convert the money received by placing it in bank to his own credit and mixing it with his own funds. The money so received is not the client's property, and the attorney's obligation regarding the same is one resting on contract, merely, to account for it and pay over such sum as, upon an accounting, shall be found to be due from him thereon. And even if he neglects to so account and pay after a demand made, he is not liable to trover as for a conversion of such amount."

After a new trial the question came again before the court, and, in 94 App. Div. 504, 87 N. Y. Supp. 1101, it was said: "There was a difference of opinion in this court on the former appeal as to whether the plaintiff, in any event, could recover of the defendant in an action for conversion. Since the decision on the last appeal, the court of appeals, in *Britton v. Ferrin*, 171 N. Y. 235, 63 N. E. 954, have held that, after a demand and refusal to pay, an action for conversion will lie against a person who has received money in a fiduciary capacity." The *Britton* Case involved the question whether a factor can defeat a recovery in an action of tort by his principal of the proceeds of a sale which he, the factor, on demand, refused to pay over, by purchasing the claim of a third person against the principal, and interposing it as a counterclaim; the court taking occasion to say: "Whatever may have been the rule as to the liability of factors upon their refusal to surrender to their principal the avails of property consigned to them for sale an-

The defendant's plea was the general issue, and a brief statement setting out his discharge in bankruptcy under the bankruptcy act of 1898, and that the claim, demand, debt, or action declared on was provable against his estate, from which he is discharged, not being excepted by said act.

The case was tried before the justice of the superior court for Cumberland county without the intervention of a jury.

At the conclusion of the plaintiff's evidence, upon motion of the defendant's attorney, the presiding justice ordered a nonsuit, to which ruling and action the plaintiff excepts, and the case is before this court upon the exceptions.

The following is a summary of the facts upon which the nonsuit was ordered:

terior to the amendment of § 549 in 1886, we think that amendment plainly evinces an intent by the legislature to place an action to recover money received by a factor, agent, broker, or other person in a fiduciary capacity within the category of torts, and to secure to a principal the same rights and remedies that exist as to other wrongs of a similar character. In such an action, under the provisions of that section, the important and controlling issue is as to the tort or wrongdoing of the defendant. If it is established, then the plaintiff is entitled to a judgment in tort, and the added remedy of an execution against the person of the defendant is given. If the tort be not proved, then the plaintiff cannot recover in such an action, but it is not a bar to an action on contract to recover the money due thereon. Thus it seems clear that the legislature regarded an action brought to recover money received by an agent or factor in a fiduciary capacity, which he refuses to deliver to his principal, to whom it belongs, as one of tort, and to secure to a plaintiff the same remedies as in actions for fraud, conversion, or other similar misconduct."

However, in *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774, where an attorney at law was guilty of appropriating to his own use money collected by him for his client, it was held that it is the duty of an agent to keep money collected by him, for the principal, to whom it belongs; and if, in the absence of any authority, express or implied, to treat it as his own, and himself as a mere debtor, he wrongfully converts it to his own use, he is liable to an action of trover, and to all the legal consequences of such an action. The court in this case recognized the difficulty of applying the rule in case the money was mingled with other money, and said that where, by the course of dealing between the parties, the agent had been accustomed to treat the money collected as his own, and to consider himself the absolute debtor of the principal for the amount, which practice had been recognized by the principal, an authority for that purpose might be fairly implied, which would 20 L.R.A. (N.S.)

The plaintiff and defendant entered into a written contract dated February 2, 1904, for transacting the business of canvassing for applications for life insurance in the Equitable Life Assurance Society of the United States, of which the plaintiff was manager for the state of Maine, upon certain specific terms and conditions, among which that the defendant was to receive commissions on the premiums under various forms of policies, which were to accrue only as the premiums were paid to the plaintiff or the society in cash.

On January 10, 1905, the defendant received of George C. Fuller \$51.13 in currency, consisting of bills and silver, which was for the premium on a policy of insurance issued on the life of his wife by the

protect the agent from liability for converting the money of his principal to his own use. The court took occasion to say further: "But, in the absence of any such, I am unable to discover any reasoning which should shield an agent from liability in trover for converting the money of his principal to his own use. For if right in saying that when the money he has received is in a distinct parcel, and is demanded by the owner, and he refuses to deliver, he would be liable in trover, could he, by mingling the money with his own, without any authority, and then refusing to pay it over, place himself in any better position? It would seem difficult to support such a proposition by any satisfactory reasoning. In cases where the agent so mingles the money of his principal with his own, yet, on demand, pays the amount due to his principal, the question whether he had technically converted any part of the identical money he had received would be of no practical importance, inasmuch as the principal would get the amount belonging to him. But when he so mingles them without authority, and then refuses to pay, I am unable to see why such refusal should not be just as much evidence of a conversion as though the money were still in a separate parcel. The only difficulty growing out of the nature of money is, as some of the cases have said, a difficulty of fact, and not of law. In law, the rights of the parties in respect to the money are the same as in respect to any other property. The only difference is, that the identity of money is more easily destroyed than that of other property, and where the agent has so destroyed it, it can no longer be specially recovered; not because the right no longer exists, but because of the difficulty in fact. But this difficulty does not exist in respect to the question of the liability of the agent for the conversion. So far as that is concerned, there is no more difficulty in showing its conversion than in showing the conversion of any other property. And that being so, it would follow that the agent should be held liable for converting it, up-

Equitable Life Assurance Society on the 1st day of April, 1905. The attorney for the plaintiff called on the defendant and asked him for this sum of \$51.13, also on two other occasions prior to the commencement of the action, and he declined and refused to deliver the same.

As we view the case, it is not necessary to consider the specific defense presented by the brief statement. The general issue raises the following questions:

1. The nature of the property as a proper subject of this form of action, and the sufficiency of its description. As specified in the writ, the property was money in the currency of the United States, and the evidence is that it consisted of bills and silver amounting to \$51.13. Legal currency may be the subject of an action of trover. There is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as when delivered at one time, by one act, and in one mass (*Burn v. Morris*, 4 Tyrw. 485; *Royce v. Oakes*, 20 R. I. 252, 38 Atl. 371; *Walter v. Bennett*, 10 N. Y. 250; *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65; *Conaughty v. Nichols*, 42 N. Y. 83; *Vandelle v. Rohan*, 30 Misc. 239, 73 N. Y. Supp. 285; *Reeside v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503; *Ringo v. Field*, 6 Ark. 43; *Wood v. Blaney*, 107 Cal. 291, 40 Pac. 428; *Michigan Carbon Works v. Schad*, 17 N. Y. S. R. 505, 1 N. Y. Supp. 490; *Wallace v. Castle*, 14

Hun, 106; *Duguid v. Edwards*, 50 Barb. 288; *Grand Trunk R. R. Co. v. Edwards*, 56 Barb. 408; *Graves v. Dudley*, 20 N. Y. 76), or when the deposit is special, and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained (*Murphey v. Virgin*, 47 Neb. 602, 66 N. W. 632; *Donohue v. Henry*, 4 E. D. Smith, 162; *Coffin v. Anderson*, 4 Blackf. 395). In *Moody v. Keener*, 7 Port. (Ala.) 218, it was held that in actions of tort only the same certainty is required as in indictments; that it was not necessary to set out the money verbatim, that the description in a general manner is sufficient, and is in accordance with the decisions of this state. *Stinchfield v. Twaddle*, 81 Me. 273, 17 Atl. 66; *Eastern Mfg. Co. v. Camden Lumber Co.* 96 Me. 537, 53 Atl. 40.

2. The title of the plaintiff. It is contended that the evidence shows that the money belonged to the Equitable Life Assurance Society of the United States. It appears from the evidence that the plaintiff was the manager of this society in the state of Maine, and that the money in question was a premium due to it on one of its life insurance policies. By the contract the defendant was appointed by the plaintiff to canvass for applications, and to collect the premiums on all policies obtained by him, and to pay over forthwith to the plaintiff or to the assurance society. As between the

on the same principal that he would be for converting any other."

The right to maintain an action of trover against an attorney for money collected by him was also recognized in *Pratt v. Brewster*, 52 Conn. 65.

Where an agent's contract of employment requires him to turn over to his principal the identical money collected in the course of his employment, trover may be maintained by the principal against him for the conversion of the moneys collected. So holds *Salem Traction Co. v. Anson*, 41 Or. 502, 67 Pac. 1015, 69 Pac. 675.

In *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65, it was held that one who, in a written assignment of wages, covenants that, if he collects them, he will receive the same "solely as the servant of," and will deliver them to the assignee, is guilty of conversion and liable to imprisonment under the terms of a statute if he does collect the wages, and, upon demand, fails to pay over to the assignee.

So, where money is collected by an agent without the authority of the principal, the latter has a right to insist upon receiving the identical money, and trover will lie for its recovery. *Donohue v. Henry*, 4 E. D. Smith, 162. The court said: "It is objected that trover will not lie for this item of money. This is true where the money has gone into the defendant's possession with

the plaintiff's assent, and permitted to be mixed up with his own money. But, where money is received from a third person, the party to whom the money belonged has a right to insist upon receiving the identical money so collected; and, if not delivered on request, may maintain a possessory action therefor."

In *Schanz v. Martin*, 37 Misc. 492, 75 N. Y. Supp. 997, it was held that where an agent, without authority from his employers, collected the price of goods sold, he is liable to the latter in an action for conversion. It appeared in this case that the employers first sought to hold the customer liable, and only sought to hold the agent liable upon ascertaining that the latter had received the money. The court took occasion to say: "There might be ground for argument that the plaintiffs' right to the money accrued only when they made their election and demand, and that, if the defendant did not still have it at that time, he could not be said to have converted the money of the plaintiffs, but that of the customer, who alone was entitled to it up to the time the plaintiffs elected to ratify the defendant's act in collecting." This suggestion, however, was finally dismissed on the ground that it rested upon the agent to show that he did not still have the money when it was demanded of him.

parties, the plaintiff, having a special property in the premiums collected, was entitled to receive them. This right gave him a remedy against the defendant upon his refusal to pay over the same as directed. *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

3. In determining from the circumstances and relation of the parties whether trover or assumpsit is the proper remedy, it is necessary to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the defendant in receiving and retaining the money in question. From its nature the title thereto passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe-keeping and transmission. An agent, unless restricted by the terms of his contract, would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, but might be the ground for an action of assumpsit. *Orton v. Butler*, 5 Barn. & Ald. 652; *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; 30 Stat. at L. 550, 551, chap. 541, 1 Fed. Stat. Anno. 578-581 (U. S. Comp. Stat. 1901, p. 3428).

The defendant was the agent of the plaintiff for the collection and paying over not of a single premium of insurance, but such as were payable for all policies effected by him in his business of canvassing; and he was entitled to receive as commission a certain percentage of these premiums when paid over. An action of trover by the principal might, under these circumstances, be unjust to the agent by depriving him of his right of set-off and other legal defenses. *Orton v. Butler*, supra.

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ELI C. BEERS

v.

ISAAC PROUTY & COMPANY.

(200 Mass. 19, 85 N. E. 864.)

Master — incompetent servant — ignorance of language.

1. One sent to help operate a complicated machine may be found incompetent, so as to render the master liable for injury to his superior through his act, where he could not

understand the language of his superior, and the operation of the machine required two men and the frequent stopping, cleaning, and starting of it, in the accomplishment of which directions to him from the superior were necessary.

Negligence — cause of accident.

2. The inability of a helper on a complicated machine to understand the language of his superior may be found to be the cause of the latter's loss of fingers, cut off by the machinery, where they were caught in such a way as to be fastened, but not injured, and the superior directed the helper, whose duty it was to do so, to put the power off from the machine, but the latter, not knowing the situation, and not understanding the directions, started the machine, cutting off the fingers.

(October 20, 1908.)

Case Note. — Liability of master as affected by inability of fellow servant to understand English.

In *Date v. New York Glucose Co.* 114 App. Div. 789, 100 N. Y. Supp. 171, affirmed in 190 N. Y. 510, 83 N. E. 1124, it appeared that plaintiff was oiling some shafting at the top of a ladder, the foot of which was on a tramway, over which a car was pushed by fellow servants, knocking down the ladder. The court said: "The only negligence claimed against the defendant is that the three men were not competent or fit servants for the work, for the reason that they were foreigners, unable to understand any English. Even so, it was not negligence or breach of duty to the plaintiff for the defendant to employ them to do such simple work as pushing a car. They could see and hear, and I do not see how it could occur to anyone that the fact that they could not understand English would make it dangerous to others for them to push the car along the track through the rooms. If they had understood all languages, they could have neglected, just as they did, to look ahead along each side of their loaded car, assuming they could not see the plaintiff or his ladder by looking over the load, which it does not seem could have been the case. The fact that they did not know the meaning of the words 'stop,' 'look out,' and 'ladder,' which were called to them, and therefore did not heed them and stop, may or may not have caused the accident. But the defendant could not have anticipated such an accident from such a cause, and that is the test of its negligence or breach of duty in putting them at such work."

In *B. Lantry Sons v. Lowrie* (Tex. Civ. App.) 58 S. W. 837, it was held that where the negligence specifically relied upon by plaintiff in his declaration was that his master had put him to work with a Mexican who could not understand the English language, and that, for this reason, he was incompetent to engage in work with plaintiff as a collaborer, it was error to so charge

EXCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County, made during the trial of an action brought to recover damages for personal injuries for which defendant was alleged to be responsible, which resulted in a verdict in defendant's favor. Sustained.

The facts are stated in the opinion.

Mr. Marvin M. Taylor, for plaintiff:

Incompetency of a fellow servant may consist in physical or mental defects; and the inability to understand a strange language, as it may not indicate the slightest mental weakness or defect, must be classed as a physical defect.

Louisville & N. R. Co. v. Davis, 91 Ala. 487, 8 So. 552; *Irwin v. Brooklyn Heights R. Co.* 59 App. Div. 95, 69 N. Y. Supp. 80; *McPhee v. Scully*, 163 Mass. 216, 39 N. E. 1007; *Chicago & A. R. Co. v. Du Bois*, 65 Ill. App. 142; *Date v. New York Glucose Co.* 104 App. Div. 207, 93 N. Y. Supp. 249, 114 App. Div. 789, 100 N. Y. Supp. 171; *Lobstein v. Sajatovich*, 111 Ill. App. 654; *Gawlack v. Michigan C. R. Co.* 11 Ohio C. C. 59; *Di Bari v. J. W. Bishop Co.* 199 Mass. 251, 17 L.R.A. (N.S.) 773, 85 N. E. 89; *Aziz v. Atlantic Cotton Mills*, 180 Mass. 156, 75 N. E. 73; *Robinska v. Lyman Mills*, 174 Mass. 432, 75 Am. St. Rep. 364, 54 N. E. 873; *Austin v. Fisher Tanning Co.* 96 App. Div. 550, 89 N. Y. Supp. 137; *B. Lantry Sons v. Lowrie* (Tex. Civ. App.) 58 S. W. 837; *Coppins v. New York C. & H. R. R. Co.* 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915; *Bjbjian v. Woonsocket Rubber Co.* 164 Mass. 214, 41 N. E. 265; *Ohio Laws*, 1904, p. 72.

If the injury was due to the fact that the fellow servant was not fit for his position, owing to the want of proper instructions, the master may be held.

Labatt, Mast. & S. §§ 243, 553; *Lebbering v. Struthers*, 157 Pa. 312, 27 Atl. 720; *Core v. Ohio River R. Co.* 38 W. Va. 456, 18 S. E. 596; *La Fortune v. Jolly*, 167

the jury as to permit plaintiff to recover in the event that the Mexican was not a competent and suitable person to do the work about which he was then engaged with the plaintiff, since the charge was too broad, and went beyond the pleadings, and submitted issues of negligence not relied upon.

Where the case made by the averments of plaintiff's petition is that his injury was due to his coservant's inability to understand the English language, the fellow-servant doctrine has no application. *Ibid.*

If the plaintiff knew that his fellow servant could not understand the English language, he assumed the risks resulting from engaging in the same work with him, in so far as the injuries resulted from such inability to understand English. *Ibid.*

20 L.R.A. (N.S.)

Mass. 170, 45 N. E. 83; *McPhee v. Scully*, supra.

Messrs. **Parker & Milton**, **Charles C. Milton**, and **Daniel F. Gay** for defendant.

Rugg, J., delivered the opinion of the court:

The plaintiff was at work, as an employee of the defendant, upon a somewhat complicated machine for the manufacture of paper or pasteboard boxes. In its ordinary and economical operation the labor of two men was required. A common occurrence was for the paper or pasteboard to clog in process of manufacture, rendering it necessary to stop the machine and clean off the paper and paste which had stuck to it. The work of the plaintiff was "feeder," and he was the superior of the two men, and in authority in running the machine. The other person working upon the machine was called "catcher." It was the ordinary course of employment for both men to work in cleaning when necessary. The plaintiff had been at work upon the machine for several weeks. About half an hour before the accident occurred, one *St. Hilliare* was for the first time sent by the boss of the defendant to work upon the machine as catcher. The plaintiff knew *St. Hilliare* only casually, and was not aware of the fact that he could not speak or understand the English language. After they had thus been at work together less than an hour, the machine, having become clogged with the pasteboard and paste, was stopped by *St. Hilliare*, and both men began cleaning. Then *St. Hilliare* started the machine a bit, whereby the plaintiff's fingers were caught just hard enough so that they could not be pulled out, although "it was not exactly painful as they were held there." Thereafter the plaintiff, in English, which was the only language he knew, directed *St. Hilliare* to put off the power. Instead of following this direction, *St. Hilliare*

In the absence of actual knowledge, plaintiff will not be put upon inquiry to ascertain if his Mexican coservant can understand the English language, but he may assume that the master has exercised reasonable discretion in selecting the servant with whom he must labor. *Ibid.*

Where plaintiff, to show incompetency of his fellow servant, confined his evidence to facts establishing inability to understand the English language, and defendant's evidence tended to show that such servant could understand the language, it was for the jury to say whether or not he understood orders given in English, or whether his failure or refusal to obey the orders was caused by his wilfulness and carelessness. *Ibid.*

started the power up, and the plaintiff's fingers were cut off. It might have been inferred that it was necessary, in the natural and proper operation of the machine, for the two men at work upon it to communicate with each other through the medium of speech. The question raised is whether, under these circumstances, the defendant might have been found to have furnished an incompetent fellow servant from the fact that it put a man at work on the machine who could not speak the English language, or the language of the man in charge of the machine. The charge of the trial judge must have left the clear impression upon the minds of the jury that mere inability to speak the English language on the part of St. Hilliare could not be found to be sufficient evidence of incompetency.

The duty of the employer is to exercise ordinary prudence in the selection of his servants, in order to ascertain that they are competent to perform the work to which they are to be assigned. If he employs an incompetent servant, having reason to know or opportunity to discover his want of capacity, then he is liable to any other employee, himself in the exercise of due care, who receives injury as a proximate result of some act of the incompetent servant, growing out of his want of capacity. The employee has a right to rely upon the assumption that, in this respect, the master will perform his duty, and that the fellow servants employed to work with him will not be lacking in the possession of those usual attributes which would make them ordinarily safe coworkers. He may with propriety act on the theory that he will, in the performance of his own duties, be free from danger of want of capacity in his fellow laborers to perform their duties. What constitutes incompetency of an employee varies with the nature of the duties he is called upon to perform, and their relation to other human beings. Where mere manual labor is required, and there is no occasion for the exercise of discretion, and no expectation of co-operation with other laborers, it may be that servants of diverse tongues may, with propriety, be put to work in the same company. Color blindness or extraordinary nearsightedness might render one incompetent to act as a locomotive engineer, while these same deficiencies might not impair the usefulness of a watchmaker. Deafness might make one useless as a telegraph operator or on a telephone exchange, but be no serious difficulty in a boiler maker. Ignorance respecting the duties one is called upon to perform would generally be incapacity.

It is of no consequence whether that ignorance consists in a want of knowledge

of mechanical processes or linguistic acquirements, provided the knowledge of the subject-matter is essential in the performance of the required duty. Ignorance of the English language in an experimental chemist working by himself for a steel manufacturer might not render him incompetent, but it could not be contended that one unfamiliar with that language would be a suitable teacher for the public schools. The plaintiff was a superior artisan, and had been at work upon the machine which caused his injury, for a considerable period of time. He had a right to assume that the defendant would not send an incompetent workman to assist him. From the photograph used in argument and the description given by witness, it is apparent that the box machine upon which these two men were at work was of considerable size, complicated in its design, and intricate in its mechanism. In its ordinary use, frequent stopping, cleaning, and starting were necessary, and co-operation between the workmen was required. There was evidence sufficient to justify a conclusion by the jury that it was necessary for the plaintiff to give directions by word of mouth from time to time to the catcher. Under these circumstances the jury should have been permitted to find that the placing a man upon this machine, who was unable, by reason of ignorance of the English language, to understand and act upon directions received from the plaintiff, was, in and of itself, sufficient evidence of the employment of an incompetent servant. It was as if a man absolutely deaf had been sent. This want of knowledge, resulting in an inability to obey orders, was as much incompetency as nervousness or lack of judgment on the part of a stationary engineer (*Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90), or weakness, infirmity, and excitability in an elevator man (*Ledwidge v. Hathaway*, 170 Mass. 348, 49 N. E. 656).

Nor can it be said that the plaintiff was not injured by this error. It is not open to argument that the defendant did not, or might not, in the exercise of reasonable care, know of the inability of St. Hilliare to speak the English language, and that English was the vernacular of the plaintiff. The very act of hiring must have furnished this information. There was also ground for the view that the plaintiff's injury resulted directly from the inability of St. Hilliare to understand his orders. St. Hilliare was the one whose position for work at the machine made him naturally the one to put the power on and off. His posture was not such as to give him necessarily the knowledge that the plaintiff's fingers were caught, and he testified that he did not

know they were caught until he saw they were cut off. That he threw the power on instead of off may have been found to be the direct result of his inability to understand the direction given him in English by the plaintiff.

Exceptions sustained.

OHIO SUPREME COURT.

HENRY D. MIRICK, Plff. in Err.,

v.

WILLIAM J. GIMS, Treasurer of Scioto County.

SUNDAY CREEK COMPANY, Plff. in Err.,

v.

WOODWORTH, Treasurer of Athens County, et al.

(79 Ohio, 174, 86 N. E. 880.)

Dog tax—charge on realty—validity—police power.

Section 2833, Rev. Stat., as amended and took effect April 4, 1906 (98 Ohio Laws, p. 87), so far as it requires the levy of the *per capita* tax on dogs upon the real estate upon which the dogs may have been kept and harbored, and the collection thereof as other taxes upon real estate, notwithstanding the owner of such real estate had no knowledge that the dogs had been harbored thereon and was not consenting thereto, is an arbitrary and unreasonable exercise of police power, not required by the general welfare, and therefore unconstitutional and void.

(Summers, J., dissents in part.)

(December 22, 1908.)

Headnote by the COURT.

Case Note.—Constitutionality of statute making license, occupation, or privilege tax a lien on real property owned by one other than the person assessed.

A statute imposing a lien for the amount of a retail liquor dealer's tax upon the realty where the business is conducted, as to leases made before the passage thereof, is an unconstitutional and unwarranted interference with private property by subjecting that of one person to the payment of the debt of another. *State v. Frame*, 39 Ohio St. 399.

But no constitutional right is invaded by such act when applied to leases made after its passage. *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. 683.

A statute making the tax of a dealer in cigarettes a lien upon the real property where sold, but which permits the property

ERROR to the Circuit Court for Scioto County to review a judgment affirming a judgment of the Court of Common Pleas dismissing the petition in an action brought to enjoin the collection of a certain tax. Reversed.

ERROR to the Circuit Court for Athens County to review a judgment affirming a judgment of the Court of Common Pleas sustaining a demurrer to the petition in an action brought to enjoin the collection of a certain tax. Reversed.

Statement by Davis, J.:

Mirick, who is a nonresident owner of land situate in Scioto county, and who alleges that he has continuously resided in Washington, District of Columbia, ever since he acquired title to such land, brought suit in the court of common pleas of Scioto county to enjoin the collection of a tax assessed against his real estate for three dogs charged against him upon the tax duplicate. He averred that he was not the owner of any dogs in Scioto county, did not harbor any dogs on his said real estate, did not permit or suffer anyone else to do so, and did not know of any dogs being kept on said premises until his tax bill was presented, and denied that any dogs were kept on his premises. He averred that, when said tax was assessed upon his real estate, the said premises were in possession and under the control of one McCall, his lessee, and that he did not make or change the lease of said land since the passage of the statute under which said tax was assessed. A demurrer to the petition was overruled, and, after an answer by defendant, alleging that the tax was levied upon a certain three dogs kept and harbored on the estate, a trial was had in the court of common pleas, and that court

owner to be heard upon an application for a remission of such tax, is within the legislative power of a state, and does not deprive one of his property without due process of law. *Hodge v. Muscatine County*, 196 U. S. 270, 49 L. ed. 477, 25 Sup. Ct. Rep. 237, affirming 121 Iowa, 482, 67 L.R.A. 624, 104 Am. St. Rep. 304, 96 N. W. 968. The court said: "It is difficult to see why a tax upon the business carried on upon such property may not be made a lien as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed upon such business."

And the property owner is not entitled to relief because he had no knowledge that his property was being used for the sale

dismissed the plaintiff's petition, and rendered judgment against him for costs. This judgment was subsequently affirmed by the circuit court. The Sunday Creek Company, which is a corporation engaged in the business of mining, shipping, and selling coal, filed its petition in the court of common pleas of Athens county to restrain the collection of a tax for dogs assessed upon its lands and amounting to \$336. It alleged that such tax was assessed under and by virtue of § 2833, Ohio Rev. Stat.; that it is the owner of about 300 dwellings on its premises, which are rented to miners and others in its employ and with express notice and orders that no dogs shall be kept or harbored thereon, or on the close adjacent thereto, or elsewhere on plaintiff's premises; and that, if any dogs have been kept or harbored on said premises by any of its tenants, the same has been done without the knowledge or consent of the plaintiff, and against its orders and protest. It alleged that it was not the owner of any dogs listed for taxation, nor that it had ever had any interest in any of them. A demurrer to the petition was sustained and, the plaintiff not electing to plead further, the petition was dismissed at plaintiff's costs. On appeal to the circuit court the demurrer was sustained, and the same judgment rendered.

Messrs. Evans & Crawford, for plaintiff in error Mirick:

The police power cannot be used arbitrarily to deprive the owner of property of his holdings.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; California Reduction Co. v. Sanitary Reduction

of cigarettes until after the assessment therefor was levied, where it does not appear that knowledge was not acquired within ample time to have made application to the proper board for a remission of the tax. *Ibid.*

So, in Newton v. McKay, 130 Iowa, 596, 102 N. W. 827, a law making a tax of one engaged in the sale of intoxicating liquors a lien upon the real property where sold was upheld, notwithstanding the fact that the property owner had no knowledge of such use until after the expiration of the time in which he might have made an application for a remission of the tax, as the assessment of the tax was of record when made, and it was the property owner's fault if he did not ascertain the fact, as he was thereby given all the notice that due process of law required.

Newton v. McKay, supra, was followed in Bolton v. McKay (Iowa) 102 N. W. 1131, 20 L.R.A. (N.S.)

Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Re Jacobs, 98 N. Y. 98, 58 Am. Rep. 639; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; McGehee, Due Process of Law, pp. 217, 218.

By the statute one man, against his will and without his knowledge or consent, is made responsible for the default of another; and such a statute cannot be sustained.

Daggett v. Hudson, 43 Ohio St. 548, 54 Am. Rep. 832, 3 N. E. 538; Monroe v. Collins, 17 Ohio St. 666; Wasson v. Wayne County, 49 Ohio St. 623, 17 L.R.A. 795, 32 N. E. 472.

Messrs. W. O. Henderson and Grosvenor, Jones, & Worstell for plaintiff in error Sunday Creek Company.

Mr. Harry W. Miller, for defendant in error Gims:

The provision is a valid exercise of the police power.

Holst v. Roe, 39 Ohio St. 340, 48 Am. Rep. 459.

Such a tax does not provide for the taking of property without due process of law.

Mullen v. Peck, 49 Ohio St. 447, 31 N. E. 1077; Anderson v. Brewster, 44 Ohio St. 576, 9 N. E. 683.

Mr. I. M. Foster for defendants in error Woodworth et al.

Davis, J., delivered the opinion of the court:

These cases are alike in the particular that in both the landowner claims to have had no knowledge of the fact that dogs were kept or harbored on his premises; and they challenge the validity of the statute which charges the tax upon the land notwithstanding the owner may not have had such knowledge. They differ somewhat in the claim that in the one case the real estate was

But it was held in Gudger v. Bates, 52 Ga. 287, that a lien could not be obtained for a distiller's tax upon the land where the business was carried on, as provided by the act of Congress of 1867, where the landowner had no knowledge of such use of his land, and such act required that such lien should be created only with his consent.

So, a statute making a street or other railway company which leases or sells the right to display advertising matter in its cars or stations liable for the payment of a privilege tax imposed upon those to whom such right has been granted, deprives the railway company of its property without due process of law. Knoxville Traction Co. v. McMillan, 111 Tenn. 521, 65 L.R.A. 290, 77 S. W. 665.

As to the validity of a statute holding a property owner liable for water or light furnished to a tenant, see case note to East Grand Forks v. Luck, 6 L.R.A. (N.S.) 198.

leased before the enactment of the present statute, and that the land has never since been within the possession or control of the owner, and that, in the other case, if dogs were kept and harbored on the land, it was done contrary to the express orders of the owner. It may be, and is, conceded, at least for the purposes of this case, that a tax on dogs, having for its object the protection of the sheep industry, is within the legitimate exercise of the police power. *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459. The question which is raised in these cases is a narrower one. Here it is not whether dogs may be taxed for such a purpose, but whether the tax may be made a charge on the land where the dogs are kept, when they are kept there without the knowledge or consent of the landowner.

There is no express limitation in the Constitution of this state upon that branch of legislative power which is commonly called "police power." Such limitations as are recognized arise by construction from the nature of the power itself, and from the Declaration of Rights contained in article 1, as well as the limitation contained in § 28 of article 2; and in considering these the 1st clause of § 20, art. 1, must not be overlooked, viz.: "This enumeration of rights shall not be construed to impair or deny others retained by the people." The police power is an attribute of sovereignty, and has its origin, purpose, and scope in the general welfare, or, as it is often expressed, the public safety, public health, and public morals. These terms indicate its field, yet its boundaries are necessarily vague and indefinite. The broad discretion thus vested in the state is fraught with dangers to the personal and property rights of private persons; and therefore the courts have always asserted the right to restrain the exercise of the power to the extent that private rights may not be arbitrarily or unreasonably infringed. Such cases are within the rights reserved by the Bill of Rights, and are therefore the unconstitutional, or rather extra-constitutional, exercise of police power, and void.

Section 2833, Rev. Stat., was amended into its present form and took effect from April 4, 1906 (98 Ohio Laws, p. 87). Here for the first time appears in our statutes a provision that a "*per capita* tax on dogs" shall be collected, not from the owner or the keeper and harbored of the dogs, but from the owner of the land on which they are kept or harbored. The statute provides: "Which *per capita* tax shall be levied upon and entered against the real estate upon which said dog is kept or harbored and collected as are other taxes upon real estate." etc. There does not appear to be any way of

avoiding, by construction, the conclusion that by this enactment the landowner, and the landowner alone, must bear the penalty, although he may not be the owner, or keeper or harbored of the dogs and may be ignorant of their existence, and even though he may have done all in his power to prevent the occurrence of such an offense; yet the real offender is subjected to no penalty at all, unless the payment of a trifling property tax, measured by the value of the dogs, is a penalty. Thus, the property of an innocent person may be taken without notice and without due process of law to recompense an injury to another, committed by a third person who holds no relation to the landowner except that of tenant under a lease. While we recognize and approve the doctrine that every man holds his property subject to the condition that he must so use it as not to injure others, we are not persuaded to accept the view that the general welfare, or even the protection, of a favored class of industries, justifies such drastic legislation as this appears to be. To us it seems to be inequitable, arbitrary, and unreasonable, unnecessarily infringing upon the natural and inalienable rights of citizens, and therefore void.

The Case of *Mirick* might be disposed of on another ground. His land at and before the passage of this act was under lease and in the control of tenants, and has been so ever since. If there were no other sufficient objection to the statute, it could not apply to *Mirick's* Case without a violation of § 28, art. 2, Const.

The judgments of the Circuit Courts and those of the Courts of Common Pleas are reversed.

Price, Ch. J., and Shauck, Crew, Summers, and Spear, JJ., concur. Summers, J., does not concur in the judgment in the Sunday Creek Case.

OHIO SUPREME COURT.

CHARLES A. VERNON, Admr., etc., of Pearly B. Vernon, Deceased, Plff. in Err.,

v.

GEORGE H. HARPER et al.

(79 Ohio 181, 86 N. E. 882.)

Street — paving contract — subcontractor — lien.

The death of the principal contractor during the completion of a contract for the improvement of a village street, which contract was thereafter completed by the ad-

Headnote by the COURT.

ministrator, does not deprive a subcontractor who has furnished material which has gone into the work of his statutory right to a lien upon the fund arising from the contract.

(December 22, 1908.)

ERROR to the Circuit Court for Athens County to review a judgment reversing a judgment of the Court of Common Pleas which sustained a demurrer to the answer in an action brought by complainant as administrator to recover upon a paving contract of his testator. Affirmed.

Statement by Spear, J.:

The controversy between the parties in the courts below was determined upon a demurrer filed by the plaintiff in error, admin-

istrator, to the answer of the defendant in error George H. Harper, and like demurrer to the answer of defendants in error Rumer & Blyth. Those demurrers were sustained by the common pleas, and judgment entered against the answering defendants, and that judgment was reversed by the circuit court. This court is asked to reverse this latter judgment and affirm that of the common pleas. The pleadings present this question: Can a materialman (a subcontractor) who, under a contract with the principal contractor, has furnished material for the completion of the principal contractor's contract for the paving of a village street, obtain a lien on the fund which has accrued by virtue of the contract between the village and the principal contractor, the latter having died during the progress of the work,

Case Note.—*Effect of death of principal contractor on rights of subcontractor or materialman to a lien, or to payment by owner.*

Mechanics' liens were unknown at common law, and consequently it has sometimes been held that statutes giving such liens are to be strictly construed. On the other hand, it has frequently been said that the statutes are highly remedial, and are to be construed liberally in favor of those for whose benefit they were enacted. Some of this conflict is undoubtedly due to differences existing in the various lien laws; but it is pointed out in *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744, that this apparent antagonism between the cases is more apparent than real; the statute both creates a right and gives a remedy, and to lay the foundation for this relief there must be a substantial compliance with the material requirements of the statute, but the law will be liberally construed so far as the enforcement thereof is concerned.

It would appear that, in this view, the decision in *VERNON v. HARPER* is correct. The subcontractor was unable to serve a copy of his notice of claim upon the original contractor because he was dead, but a copy was served upon his administrator, who completed the contract. This certainly was a substantial compliance with the statute. To hold otherwise would deprive the subcontractor of the lien which the legislature clearly intended to grant him.

The question does not seem to have arisen before, under exactly the same statutory provisions. There are several other cases, however, which involve the right of a subcontractor or materialman to a lien after the death of the principal contractor; and in each of these it was held that the death of the principal contractor would not affect the right of a subcontractor or materialman to a lien.

Thus, in *Telfer v. Kiersted*, 9 Abb. Pr. 418, the principal contractor died after he had completed his contract, but before the

plaintiff's lien was filed; the defendants insisted that the lien law was a special statute, to be strictly construed, that it contemplated the existence of the contracting parties, and that the death of the contractor in effect repealed or abrogated the statute and deprived the laborer or materialman of his lien. The court said: "The answer to this argument is that the primary object of the legislature was to create in favor of the laborer and materialman a lien upon the fund in the owner's hands, due to the contractor; and, as to that fund, to give him priority over every general creditor of the contractor, imposing only as a condition that, within the time prescribed therefor, he should file and serve the notice required by the statute. That condition has been performed, and the plaintiff's right thereupon became absolute. The contractor having finished the building, there was a balance due to him which was subject to the plaintiff's inchoate right, and that right could be defeated only by the payment to the contractor of the balance prior to notice of the lien."

And in *Watrous v. Wilson*, 55 How. Pr. 461, the court, after citing with approval *Telfer v. Kiersted*, supra, held that the death of a contractor did not deprive a materialman of the right thereafter to file a notice of claim and acquire a lien for materials furnished at the request of the contractor.

So, too, in *Bambrick v. Webster Groves Presby. Church Asso.* 53 Mo. App. 225, it was held that a materialman might include in one claim or account materials furnished to the original contractor, with materials furnished to his executor, who completed the contract after the former's death.

In *Miller v. Whitelaw*, 28 Mo. App. 639, the facts that the principal contractors were partners, and that the partnership was dissolved before all of the materials had been furnished, were held to affect in no wise the rights of the materialman to a lien.

and the same having been completed to the acceptance of the village by his administrator? And, if he can, should the money be paid into the hands of the administrator, to be paid out by him to the persons entitled thereto?

Messrs. L. A. Koons and Grosvenor, Jones, & Worstell, for plaintiff in error: Assuming a lien on the fund in the hands of the village, the money should be paid into the hands of the administrator, and be, by him, paid out to the ones legally entitled.

Kilbourne v. Fay, 29 Ohio St. 275, 23 Am. Rep. 741; Lingham v. Kraft, 3 Ohio N. P. N. S. 653.

No preference to any creditor can be obtained after the death of the debtor, under the mechanics' lien statutes.

Kilbourne v. Fay, supra; Hoff's Appeal, 102 Pa. 218; Foster v. Stone, 20 Pick. 542; Severance v. Hammatt, 28 Me. 511; Gauss v. Hussmann, 22 Mo. App. 115; Bergin v. Braum, 15 Ohio S. & C. P. Dec. 383; Williams v. Webb, 2 Disney (Ohio) 430.

Messrs. Ivers & Danford and Lewis & Sayre, for defendants in error:

Where the contract with the deceased is executory, and the personal representative can sufficiently execute all that the deceased could have done, he may do so and enforce the contract.

Parsons, Contr. § 131; Beach, Modern Law of Contr. § 774; McKeown v. Harvey, 40 Mich. 226.

Spear, J., delivered the opinion of the court:

The first question is answered when proper construction is given to certain sections of our statute relating to liens, being §§ 3193, 3194, 3198, 3200, 3203, Rev. Stat. These sections, so far as pertinent to this case, provide that any subcontractor who has furnished material for the construction of a street, provided for in the contract between any public authority and a principal contractor, and under a contract between such subcontractor and the principal contractor, may at any time thereafter, not to exceed four months from the delivery of such material, file with the board or officer a sworn and itemized statement of the amount and value of such material furnished. Thereupon such board or officer shall retain subsequent payments from the principal to secure such claims. The board or officer shall, or the lien claimant may, furnish the principal contractor with a copy thereof within five days, and, if such principal contractor shall fail within five days to notify in writing the board or officer of his intention to dispute the claim, he shall be considered as assenting to its correctness, and thereupon

20 L.R.A. (N.S.)

subsequent payments shall be applied *pro rata* upon such claim. If the head contractor shall neglect or refuse to pay, within five days after his assent to or adjustment of the claim, the amount thereof and costs incurred to the subcontractor, the board or officer shall pay, when due, the whole or *pro rata* amount thereof out of payments subsequently falling due, and, on failure within ten days, the subcontractor furnishing material may recover, in an action for money had and received, the whole or *pro rata* amount of his claim, not exceeding the balance due the principal contractor. If, by collusion or fraud, the board or officer pay in advance the payments due under the contract, he shall be liable to the subcontractor for the amount due on such contract on the date of filing of the sworn account, the same as if no payment had been made.

It is not claimed that there was a literal compliance with the requirements of the statute with respect to furnishing the original contractor with a copy of the verified account of the subcontractors. There could not have been. The original principal contractor was dead. The claim is, and the record shows, that the uncompleted contract between the original contractor and the village was completed by the administrator, the plaintiff, and that the material furnished by the subcontractors was furnished in pursuance of their agreement with the principal contractor, and was accepted by the administrator, and went into the completion of the job thus being conducted to a successful termination by the administrator. And the notice, with copy of the sworn account, was in due time served on the administrator, having first been served on the village authorities, and the amount or justice of the accounts has never been, and is not now, disputed. This, it is claimed, was a sufficient compliance with the statute to entitle the subcontractors to the benefit of the statutory lien, and it was so held by the circuit court. We are of opinion that this claim is well founded. The policy of the state with respect to the claims of laborers and materialmen to be compensated for their work and material out of the structure to which their work and material have contributed is indicated by the statute as to liens, and has been clearly defined in a number of decisions in this and other courts. The statute should be liberally construed in order to carry out the purpose of the general assembly in its enactment, the legislation being highly remedial in character. This policy is fully elaborated in Bullock v. Horn, 44 Ohio St. 420, 7 N. E. 737, and need not be enlarged upon here. In an earlier case, Williams v. Webb, 2 Disney (Ohio) 430, it

is held that "the death of the owner of property before a lien has been taken does not interfere with the rights of, or prevent the necessary steps to secure, a lien by the person performing labor or furnishing materials." It is further held that, although the statute in terms provides that the account shall be verified by the person performing the labor or furnishing the material, yet that the oath may be made by an agent of the party entitled to the lien, Gholson, J., observing in the opinion that, "while we might be disposed to accede to the general proposition that such statutes should not be extended beyond what their terms clearly import, yet this does not require us to stick to the letter." See also *Foster v. Stone*, 20 Pick. 542, and *Bergin v. Braun*, 15 Ohio S. & C. P. Dec. 382. So, in the case at bar, we are not required to stick to the letter. The contract was an executory one, which the administrator might properly complete. *Gray v. Hawkins*, 8 Ohio St. 450, 72 Am. Dec. 600. In doing so he acted as principal contractor, stepping into the shoes, for all practical purposes, of his decedent. And, as such principal contractor, he did finish the work with the aid of these men who furnished the material, they acting in good faith in compliance with their contract with the deceased. Their contribution to the work, thus accepted by the administrator, enabled him to complete his decedent's agreement with the village. To all intents and purposes they complied with the spirit and purpose of the statute. To deny them the advantage of their outlay would be to stick in the bark, to permit the mere letter to override and defeat the plain spirit and purpose of the statute.

The second question seems to present no difficulties. The fund arising from the completion of the paving contract should not be paid to the administrator. It was brought within the jurisdiction of the court of common pleas by the answer of the village in the nature of an interpleader. That court has all the parties before it, with full jurisdiction to determine all their rights and render final judgment, and there is no reason for paying money over to the administrator which belongs to the subcontractors, and which they have a right to receive undiminished by any fees or cost of any kind on the part of the administrator.

The judgment of the Circuit Court will be affirmed, and the cause remanded to the Court of Common Pleas of Athens County to carry into effect the judgment of the Circuit Court and this judgment, and the cause to be there proceeded in conformably to the 20 L.R.A. (N.S.)

said judgment of the Circuit Court and of this opinion.

Price, Ch. J., and Shauck, Crew, and Summers, JJ., concur.

OKLAHOMA SUPREME COURT.

W. O. HERR, Plff. in Err.,

v.

J. H. HERRINGTON et al.

(— Okla. —, 98 Pac. 443.)

Mortgage — foreclosure — junior mortgagee — rights.

1. A junior mortgagee, not being made a party to a suit to foreclose a first mortgage, is not affected by a judgment and decree foreclosing it. The foreclosure is effectual against those persons who were made parties, and a sale would vest the estate in the purchaser, subject to the rights therein of the subsequent lienholder.

Liens — inferior holder — rights.

2. One who has a lien inferior to another upon the same property has a right: First, to redeem the property, in the same manner

Headnotes by KANE, J.

Case Note. — *Right of junior mortgagee as to surplus upon a foreclosure sale under a senior mortgage, in a proceeding to which he was not a party.*

Although there are many cases on the general question of the right of a junior mortgagee to the surplus at a foreclosure sale under a senior mortgage, very few cases have been found where, as in *Herr v. Herrington*, it appeared that the junior mortgagee was not a party to the proceeding under the foreclosure sale. And none has been found where it appeared that the junior mortgagee himself was the purchaser at a sale under the senior mortgage.

It will be noticed that the decision in *Herr v. Herrington* seems to rest mainly upon the fact that at the foreclosure sale the bids were made with full knowledge of the condition of the title, and subject to the right of the junior mortgagee to redeem, and that, at least so far as the record was concerned, the junior mortgagee, at the time of his purchase, must have taken into consideration his own interest in the property, for the court expressly took occasion to say that, if the junior mortgagee had alleged that the land sold for its full value notwithstanding the outstanding right to redeem, or such other facts as would appeal to the conscience of a court of equity, he would possibly be entitled to the relief prayed for.

It was on this ground that it was held in *Milmo Nat. Bank v. Rich*, 16 Tex. Civ. App. 363, 40 S. W. 1032, that a junior mortgagee cannot elect to transfer his lien after

as its owner might, from the superior lien; and, second, to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby.

Mortgage foreclosure — redemption — waiver.

3. If the holder of a junior encumbrance on land, not being made a party to a suit to foreclose a senior mortgage, becomes the purchaser of said premises at the foreclosure sale, he thereby waives his right to redeem.

Same — operation and effect.

4. The necessary consequence of a decree of foreclosure of mortgaged premises is to merge the interests of the parties to the suit in the decree, and to transfer and vest them in the purchaser at the sale.

Same — surplus — junior mortgagee.

5. A junior mortgagee has no claim, by

a sale under the first mortgage, to which he was not made a party, to the surplus derived at such sale, but must resort to the land; the court saying: "If we bear in mind that the sale as made in this case is irrespective of his rights, and that the purchaser paid the amount of his bid for the property subject to his rights, it seems perfectly clear that what the purchaser obtained and paid his money for was the title of the mortgagor in the land and a subrogation to the rights of the first mortgagee. For these rights he was willing to pay, and did pay, the sum of \$8,000, and assumed toward the second mortgagee in respect to the land the attitude previously sustained by the first lien holder and the mortgagor. Therefore the surplus, after paying the amount of the first mortgage, should go to the mortgagor." And see *Winslow v. McCall*, 32 Barb. 241, sufficiently set out in *Horr v. Herrington*.

However, in *Milligan v. Gallen*, 64 Neb. 501, 90 N. W. 541, the syllabus by the court is to the effect that a junior mortgagee who has not been made a party to a suit to foreclose a first mortgage is entitled to claim and receive any money resulting from the foreclosure sale and remaining in the sheriff's hands after the first mortgage had been satisfied. In this case, however, the question was not whether a junior mortgagee was entitled to the surplus, but whether the purchaser under the foreclosure suit had the right to the surplus, the assignee of the junior mortgage having elected to redeem. Besides, it also appeared that the junior mortgagee was made a party in the foreclosure suit, but that his assignee, who had failed to record the assignment, was not made a party.

In *Mutual L. Ins. Co. v. Truchtnicht*, 3 Abb. N. C. 135, it was held that, if a person who holds several mortgages on certain property sells free from his junior encumbrances not mentioned in the complaint, and thus practically releases to the purchaser on the foreclosure sale all claim to the equity of redemption, he may ask to have

virtue of his mortgage, upon the surplus money arising from a sale under a suit to foreclose a senior mortgage to which he was not made a party.

Junior mortgagee — redemption.

8. If a junior mortgagee has been duly recorded, a purchaser of the mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage, and with knowledge of the right of the holder of that mortgage to redeem.

(November 16, 1908.)

ERROR to the District Court for Washita County to review a judgment in defendant's favor upon a petition filed in intervention in a mortgage-foreclosure suit. Affirmed.

The facts are stated in the opinion.

the surplus on the sale applied to the payment of such encumbrances.

A case somewhat similar to *Horr v. Herrington* is *Hooper v. Castetter*, 45 Neb. 67, 63 N. W. 135. In this case certain real estate was also encumbered by two mortgages; the holder of the second mortgage brought a suit in equity to foreclose, obtained a decree, and at a sale thereunder purchased the property, the holder of the first mortgage not being made a party to the foreclosure suit; after obtaining his decree, but before the sale, the holder of the second mortgage purchased and took an assignment to himself of the first mortgage; under an agreement, as he alleged, with the mortgagor that the amount due on the first mortgage should be applied on whatever bid he might make for the property at the sale thereof; as to this agreement, however, the trial court found against him. It was held that the ownership of the first mortgage did not of itself entitle him, as against the mortgagor or judgment creditors, to a decree applying the surplus proceeds of the sale towards the liquidation of the mortgage purchased. The court said: "Keeping in view the finding of fact made by the district court, Castetter has no more right to have the surplus proceeds of the sale applied to the liquidation of the Scottish-American mortgage than would a stranger to the proceedings have, had such stranger purchased this Scottish-American mortgage and taken an assignment of it after a decree rendered against the Remingtons and in favor of Castetter; and it will scarcely be contended that, had a stranger purchased this mortgage at the time Castetter did, his ownership of the mortgage would have entitled him to have the surplus proceeds arising from the foreclosure sale applied to its discharge; or that the Scottish-American Mortgage Company would have such right."

There are many cases in which it did not appear whether or not the junior mortgagee was a party to the foreclosure proceedings under the senior mortgage, but these have been expressly excluded from this note.

Messrs. J. I. Howard and Massingale & Duff, for plaintiff in error:

The judgment was not binding upon the junior mortgagee for the reason that he was not a party to the suit and had no notice of the proceedings.

11 Enc. Pl. & Pr. p. 842, § 4, subdiv. b., 23 Cyc. Law & Proc. p. 1255; Fleming v. Prudential Ins. Co. 19 Colo. App. 126, 73 Pac. 752; Bannon v. Thayer, 124 Ill. 451, 17 N. E. 54; Tyres v. Kennedy, 126 Ind. 523, 26 N. E. 394; Harper v. East Side Syndicate, 40 Minn. 381, 42 N. W. 86; Haller v. Parrott, 82 Iowa, 42, 47 N. W. 997; Williams v. Cooper, 124 Cal. 666, 57 Pac. 577; Weinereich v. Hensley, 121 Cal. 647, 54 Pac. 254; Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851; Goodall v. Mopley, 45 Ind. 355; Levy v. Winter, 43 La. Ann. 1049, 10 So. 198; Browder v. Jackson, 3 Lea. 151; National Foundry & Pipe Works v. Oconto City Water Supply Co. 51 C. C. A. 465, 113 Fed. 793; Vincent v. Hansen, 113 Mich. 173, 71 N. W. 488.

The mortgage of plaintiff in error was not merged in his title obtained at the foreclosure sale, but attached to the surplus proceeds.

20 Am. & Eng. Enc. Law, p. 1064; Ray v. Norseworthy, 23 Wall. 128, 23 L. ed. 116; Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 592, 4 Sup. Ct. Rep. 679; Westheimer v. Thompson, 3 Idaho, 560, 32 Pac. 205; Hospes v. Almstedt, 83 Mo. 473; Clark v. Jackson, 64 N. H. 388, 11 Atl. 59; Fithian v. Corwin, 17 Ohio St. 119; Mott v. Clark, 9 Pa. 399, 49 Am. Dec. 566; Walker v. Baxter, 26 Vt. 710; Crombie v. Rosentock, 19 Abb. N. C. 312; Clapp v. Hadley, 141 Ind. 28, 50 Am. St. Rep. 398, 39 N. E. 504; Lowman v. Lowman, 118 Ill. 582, 9 N. E. 246; Central Trust Co. v. Richmond, N. I. & B. R. Co. 45 C. C. A. 60, 105 Fed. 803.

Mr. W. A. Smith, for defendants in error:

The surplus should not be paid to the purchaser.

Jenkins v. Green, 22 Kan. 563; Tucker v. McCrie, 8 Kan. App. 228, 55 Pac. 493; Butler v. Craig, 29 Kan. 206; Brier v. Brinkman, 44 Kan. 570, 24 Pac. 1108; Moody v. Northwestern & P. H. Bank, 20 Wash. 413, 55 Pac. 568.

The purchaser of property at a senior mortgage foreclosure sale is bound by a recorded junior mortgage.

Mitchell v. Weaver, 118 Ind. 55, 10 Am. St. Rep. 104, 20 N. E. 525; Soderberg v. King County, 15 Wash. 194, 33 L.R.A. 670, 55 Am. St. Rep. 878, 45 Pac. 786; Johnston v. Reilly, 68 N. J. Eq. 130, 59 Atl. 1044; Balduff v. Griswold, 9 Okla. 438, 60 Pac. 223; 11 Am. & Eng. Enc. Law, p. 20 L.R.A. (N.S.)

208; Jones v. Black, 18 Okla. 344 88 Pac. 1052, 90 Pac. 422, 11 A. & E. Ann. Cas. 753.

If a subsequent mortgagee is not made a party to a proceeding to foreclose, it will not defeat the action, but he still retains his right to redeem.

Valentine v. Havener, 20 Mo. 133; Smith v. Shay, 62 Iowa, 119, 17 N. W. 444; Williams v. Townsend, 31 N. Y. 411; Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087; Parker v. Child, 25 N. J. Eq. 41; Speer v. Whitfield, 10 N. J. Eq. 107; Tiedeman, Real Prop. § 321; 20 Am. & Eng. Enc. Law, p. 588; Trimmier v. Vise, 17 S. C. 499, 43 Am. Rep. 626.

Kane, J., delivered the opinion of the court:

This was a controversy between W. O. Horr, the plaintiff in error, and J. M. Beal, one of the defendants in error, over the surplus accruing from the foreclosure sale of a certain tract of land. On the 19th day of January, 1903, the defendants in error, J. H. Herrington and F. C. Herrington, husband and wife, executed and delivered to one Lydia May Field, a promissory note for the sum of \$1,000, and, to secure payment of the same, executed and delivered a mortgage upon certain real estate situated in Washita county, Oklahoma. On the 1st day of December, 1903, the same parties executed to the plaintiff in error a note for \$1,000, and executed a mortgage upon the same real estate to secure payment thereof. On the 4th day of February thereafter they made, executed, and delivered to the defendant in error J. M. Beal a warranty deed to said premises, all of which instruments were duly recorded. On the 9th day of September, 1904, Lydia May Field instituted foreclosure proceedings upon the first mortgage, making the Herringtons and J. M. Beal parties defendant, the plaintiff in error herein, the second mortgagee, not being made a party. On the 31st day of October, 1905, a trial was had between the parties to the suit, and a judgment was rendered in favor of Lydia May Field and against the Herringtons for the sum of \$938.37, together with interest and attorneys' fees; and a decree of foreclosure was entered against all of the parties defendant, whereby it was decreed that the land be sold in the manner prescribed by law, and the proceeds of said sale applied: (1) In payment of costs of said sale and action; (2) in payment of said judgment; and (3) that the residue, if any, be paid to said defendant J. M. Beal. About thirty days after the judgment and decree were entered the plaintiff in error, by leave of court, intervened in said action, setting up

his note and mortgage. After stating facts sufficient to entitle him to a foreclosure of his second mortgage, he further alleged, in substance that, by reason of the execution and delivery of the note and mortgage by John H. Herrington and F. C. Herrington to the intervenor, said intervenor has a lien on the premises therein described, and that intervenor is entitled to a judgment against said John H. Herrington and F. C. Herrington in the sum of \$753.37 and interest thereon at the rate of 12 per cent per annum from February 1, 1904, and reasonable attorneys' fees and all costs of suit. That the note from John H. Herrington and F. C. Herrington, his wife, to Lydia May Field, was a prior and first lien on said tract of land, and that the note and mortgage of intervenor was a secondary and inferior lien thereon. Then follows the prayer, which is in words and figures as follows: "Wherefore, your intervenor prays that said plaintiff herein, Lydia May Field, make strict proof of her claim against said defendants; and that a strict accounting thereof be made and of all the costs therein expended and all claims arising against said tract of land by reason of her mortgage thereon; and that, when said tract of land is sold, as provided by law, that the proceeds thereof be applied, first, to the payment of the amount found to be due Lydia May Field under her first and prior lien and all costs therein expended; and that her mortgage and note be canceled; and that the proceeds of said sale, after being so applied, shall next be applied to the payment of the said note of this intervenor, amounting to \$753.37 principal and interest from February 1, 1904, at the rate of 12 per cent per annum and a reasonable attorney's fee as therein provided, and all costs of said suit herein expended; and that the remainder thereof be paid to said defendants as their interests may appear; and that the note and mortgage of intervenor be canceled and held for naught." On the 5th day of July, 1906, the land was sold under the decree, and was purchased by the intervenor for the sum of \$1,765, the same being more than two thirds of the appraised value of the land; and the sale was afterwards, upon this motion, confirmed, and a sheriff's deed thereto made, executed, and delivered, the amount of the bid being paid to the sheriff, and, by him, turned into court. In November, 1906, Beal was served with summons in the proceedings in intervention, and on the 19th day of March, 1907, he appeared and filed his separate answer to the petition, setting up the facts of the suit on the first mortgage, it having proceeded to judgment and sale, and that the intervenor was the purchaser, that the mortgage of in-

20 L.R.A. (N.S.)

tervenor was of record at the time said sale of land was made, and praying that the surplus in the sum of \$600 over and above the amount necessary to pay the first mortgage and costs should be ordered turned over to him because of his ownership of the equity of redemption and legal title at the time of the sale. To this answer the intervenor demurred, which demurrer was overruled by the court and judgment entered in favor of Beal.

That the plaintiff in error, not being a party to the proceedings, was not affected by the judgment and decree foreclosing the first mortgage, is now too well settled to need argument or authorities to support it. When a party in interest other than the owner of the equity of redemption is not made a party to a bill for the foreclosure of a mortgage, the foreclosure is effectual as against those persons interested in the equity who were made parties. A sale would vest the estate in the purchaser, subject to redemption by the person interested in it who was not made a party to the proceedings. *Story, Eq. Pl. § 193; Matcain v. Smith, 6 McLean, 416, Fed. Cas. No. 9,272; Kelgour v. Wood, 64 Ill. 345; Ohling v. Luitjens, 32 Ill. 23; Georgia P. R. Co. v. Walker, 61 Miss. 481; Frische v. Kramer, 16 Ohio, 125, 47 Am. Dec. 368; Tallman v. Ely, 6 Wis. 244; Banning v. Sabin, 45 Minn. 431, 48 N. W. 8; Turman v. Bell, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; Porter v. Kilgore, 32 Iowa, 379; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293; Valentine v. Havener, 20 Mo. 133; Brundred v. Walker, 12 N. J. Eq. 140; McCall v. Yard, 11 N. J. Eq. 58; Haffley v. Maier, 13 Cal. 13.*

In this state the statutory rule is to the same effect. Section 3456, Wilson's Rev. & Anno. Stat. 1903, provides that "one who has a lien, inferior to another, upon the same property, has a right: First, to redeem the property in the same manner as its owner might, from the superior lien; and, second, to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby." Section 3457 defines "redemption" as follows: "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

It is clear that the plaintiff in error did not attempt to exercise either of his statutory rights. That he was entitled to do so up to the time the land was sold and he became a purchaser thereof, there can be no doubt. And that his right to redeem would continue if anyone but himself had been the purchaser at that sale seems equally clear.

The sale would vest the estate in the purchaser, subject to redemption by the holder of the junior encumbrance, who was not made a party to the proceedings. This doctrine is amply sustained by the authorities heretofore cited. The sale, though it failed to be effectual as against the holder of the second mortgage, would operate as an assignment of the first mortgage and all the mortgagee's rights thereunder to the purchaser, who might proceed *de novo* to foreclose as against the parties who had been omitted. But, if the holder of a junior encumbrance, who had not been made a party to the suit, becomes the purchaser, it obviously follows that his right to redeem is lost or waived. He could not redeem from himself, and he could not foreclose his mortgage against himself, for no one may be plaintiff and defendant in the same cause. The rule that the purchase of the land by the junior mortgagee merges his lien in the superior title is founded upon the reason that there could generally be no advantage to him in keeping on foot his own mortgage against his own estate. 1 Jones, Mortg. § 869. But, of course, whenever an advantage could accrue to the mortgagee by preserving his lien for the purpose of using it as a screen to protect him from an intermediate title, such as a junior mortgage or other subsequent lien, the purchaser is entitled to keep his lien alive for such purpose. But there is no reason for the invocation of this rule in the case at bar. This controversy does not affect the title to the land; it is admitted by all parties that the plaintiff in error is the owner of it in fee simple, and, as far as the record shows, there were no liens subsequent to his mortgage.

Under our laws a mortgage conveys no title to the mortgagee, and, there being no provision for redemption after the foreclosure sale, it follows that all the right, title, and interest of all the defendants who were made parties to the suit merged in the decree and was vested in the plaintiff in error by virtue of his purchase at the sale and the issuance of the sheriff's deed to him, as he was the only person remaining who had any interest in the land. He intended, no doubt, to effect a merger of his mortgage lien into his paramount title thus acquired. "The necessary consequence of a decree of foreclosure and sale of mortgaged premises is to merge the interests of the parties to the suit in the decree and to transfer and vest them in the purchaser at the sale." Tallman v. Ely, 6 Wis. 244.

By the purchase of the land and filing his petition in intervention, he voluntarily abandoned his right to redeem, and sought

to attach his lien to the surplus arising from the sale. There are no reasons that we know of why this could not be done, provided there were sufficient equities to warrant a court of equity in granting such relief; but he was not entitled to it merely as a holder of a junior encumbrance, for the statute, which seems to be in harmony with the general rule, fixes his rights under the contract, "The only right of a junior mortgagee who has not been made a party to the foreclosure of a prior mortgage is to redeem the property from that mortgage. It does not matter that, on the sale of the property under the foreclosure of the prior mortgage there was a surplus which, with the consent of the mortgagor, was paid to a third mortgagee who was made a party to the suit, and the property subsequently depreciated so that there was no value above the first mortgage. The middle mortgagee has no claim upon the surplus. Whether the property has increased or depreciated in value since the sale under the first mortgage does not affect his right to redeem, which is the only right he has in the matter." 2 Jones, Mortg. §1431; McKernan v. Neff, 43 Ind. 503; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293; Gault v. Equitable Trust Co. 100 Ky. 578, 38 S. W. 1065; Sanger v. Nightingale, 122 U. S. 176, 30 L. ed. 1105, 7 Sup. Ct. Rep. 1109. "A subsequent encumbrancer has no claim upon the surplus moneys arising from a sale under a statute foreclosure of which he has no notice; his lien not being affected by the proceedings. The land, therefore, will not be discharged from the lien of his encumbrance and transferred to such surplus moneys." Winslow v. McCall, 32 Barb. 241.

Whether the surplus be the whole sum bid for the property, less the amount of the mortgage with the costs and expenses, depends upon the terms of sale. If the title put up and sold be the entire estate, without deducting prior encumbrances, the proceeds are primarily applicable to the payment of such prior encumbrances so far as needed for that purpose. But, if only the mortgage title be sold, or if that title be sold expressly subject to prior encumbrances, the purchaser must account to the mortgagor for the surplus of the purchase money, deducting only the amount of the mortgage with costs and expenses. Morton v. Hall, 118 Mass. 511; Alden v. Wilkins, 117 Mass. 216; O'Connell v. Kelly, 114 Mass. 97.

In the case at bar the records of the register of deeds disclosed that there were two mortgages on the land at the time the suit to foreclose the first one was commenced; and it must be presumed that all persons interested had notice of the condition of the title, and that all proceedings were had subject to the right of the junior mortgagee to

redeem. The appraisers, whose duty it was to appraise the land before the sale, must have made their appraisal with notice of the existing right to redeem, and presumably fixed the value thereof at its value subject to such right of redemption; and, of course, the bidders at the sale must be charged with like notice and must be presumed to have bid such sum as the land was worth, subject to the right to redeem. The rule is stated in *Belleville Sav. Bank v. Reis*, 136 Ill. 242, 26 N. E. 640, as follows: "When one who is absolutely entitled in his own right to a charge or encumbrance upon land becomes the owner in fee of the same land, with no intervening interest or lien, the charge will, at law, merge in the ownership and cease to exist. . . . The premises, in such case, become the primary fund for the payment of the mortgage, and whoever acquires that fund and the mortgage also must be regarded as having applied the fund to the payment of the mortgage. . . . The indebtedness will be presumed to have been discharged so soon as the holder of it becomes invested with the title to the land upon which it is charged, 'on the principle that a party may not sue himself at law or in equity.' The purchaser is presumed to have bought the land at its value, less the amount of indebtedness secured thereon, and equity will not permit him to hold the land and still collect the debt from the mortgagor."

The case of *McKernan v. Neff*, 43 Ind. 503, was, in principle, similar to the case at bar. In that case A mortgaged certain real estate to B. Afterwards he made a second mortgage on the same real estate to C, and after that a third mortgage to D. C assigned his note and mortgage to E. B foreclosed his mortgage, and D was a party to the proceeding and filed his cross bill against the mortgagor, but he was not served with process, nor did he appear to the cross bill. Neither C nor E was made a party, nor had they notice of the proceeding. The decree ordered the sale of the real estate and directed the proceeds to be first applied to the payment of B's mortgage, second, to the payment of D's mortgage, and the overplus, if any, to be paid to the mortgagor. The real estate was sold on the decree, and D became the purchaser. B's mortgage was paid out of the proceeds, and the residue, with the consent of the mortgagor, was paid to D. After the sheriff's sale the mortgagor conveyed the real estate by warranty deed to D, and D afterwards sold and conveyed to F, and, after the expiration of one year, he also received a deed from the sheriff. A, at the time of the decree, was insolvent, and so continued to be, and the real estate became so depreciated in value that it was not worth more than the amount of the mortgage of B. 20 L.R.A. (N.S.)

Held, that the decree of foreclosure and the sale of the real estate did not affect the rights of E. Held, also, that the equity of the mortgagor, and all other parties to the action were barred by the decree and sale; but, as to E, the proceedings only had the effect of transferring to the purchaser the interest of the mortgagee in the mortgage foreclosed, and he occupied the position of an assignee. Held, also, that E could foreclose his mortgage, and redeem the mortgaged premises by paying the amount of B's mortgage, as if there had been no foreclosure. Held, also, that E, having lost no rights by the foreclosure, had no right to any avails of a sale, or any equity that authorized a marshaling of the surplus according to priorities. Held, also, that a depreciation in the value of the real estate since the sheriff's sale could not affect the rights of the parties. It was further held that, if a junior mortgage has been duly recorded, a purchaser of the mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage, and with knowledge of the right of the holder of that mortgage to redeem. And a middle mortgagee who was not a party to proceedings of foreclosure on the senior mortgage cannot elect to affirm a sale made to the junior mortgagee, on a decree rendered upon the senior mortgage in such proceedings, and recover of the junior mortgagee the surplus after paying the senior mortgagee.

In the case of *Greensburg Fuel Co. v. Irwin Natural Gas Co.* 162 Pa. 78, 29 Atl. 274, certain property was sold; it was agreed that the sale did not affect a mortgage of a large amount held by the Southwest Natural Gas Company; at the sale this company holding the lien purchased the property, and thereafter claimed that it was entitled to share *pro rata* with the other creditors in the distribution of the proceeds. In the opinion, Mr. Justice McCollum says: "The property levied on in this case was sold subject to any mortgage or mortgages legally existing thereon, and the only mortgage upon it was held by the Southwest company. It was so sold on writs evidently controlled by the mortgagee and purchaser at the sheriff's sale. A mortgage, the lien of which is not discharged by a sheriff's sale, cannot share in the proceeds of the sale. In such case all that the purchaser takes by the sale is the equity of redemption, and his bid is for such sum as he is willing to pay for the property above the amount of the mortgage debt. If the purchaser is the mortgagee, his mortgage is, in equity, satisfied; his claim is paid in the purchase of the property sold subject to it."

The same principle was involved in the

case of *Trimmier v. Vise*, 17 S. C. 499, 43 Am. Rep. 624, where Mr. Chief Justice Simpson, who delivered the opinion of the court, says: "The purchase of the equity of redemption unites the equitable title under the mortgage and the right to redeem in the same person; and, where there is no intervening claim, merger is the result, and the mortgagee becomes the owner in fee, with nothing left for the mortgage to operate upon. . . . In addition to this, the right of the mortgagor to redeem being the only interest that can be sold by a judgment junior to the mortgage, the purchaser at such sale, whether he be the mortgagee or a stranger, is supposed to give the amount of his bid for that interest, over and above the mortgage debt, leaving the land, when purchased by a stranger, still subject to be sold for the mortgage debt, and, when purchased by the mortgagee, to be applied in satisfaction of his debt, which, by operation of law, is thereby extinguished. As we have already said, this is the admitted doctrine where the entire property has been purchased by the mortgagee."

Further discussing the same proposition, the learned chief justice continues: "In the case of *Moss v. Bratton*, 5 Rich. E. 3, the court held that Bratton, who bought at sheriff's sale under an execution junior to the mortgage, obtained his title encumbered with the lien; and, though he did not become personally liable for the mortgage debt, yet the land in his hands was specifically bound, so far as it might suffice for the payment of the debt. The only interest sold was the right of the mortgagor to redeem. No doubt Bratton supposed that the land was worth the amount he bid for this interest and the mortgage debt besides. If it turned out upon a resale for foreclosure that he was mistaken, this was an error of judgment on his part, and his misfortune, to which all men are liable."

The reasoning in the foregoing cases is applicable to the case at bar. All of the bidders at the foreclosure sale—and the record shows there were others besides the plaintiff in error—must have been bidding with full knowledge of the condition of the title, and that they would take the land offered for sale subject to the right of plaintiff in error to redeem, and no doubt governed their bids accordingly. At least, this is the presumption that, from the record before us, must prevail. The plaintiff in error bases his right to the surplus solely upon the proposition that he is entitled to it by reason of his junior mortgage. This position we believe to be untenable. His plea of intervention was filed shortly after the decree was rendered and before the sale, but summons was not issued thereon until after 20 L.R.A. (N.S.)

the sale. Under such circumstances the mere filing of the petition, without issuance or service of summons, would not constitute notice to the bidders or anyone interested in the land that the plaintiff in error had abandoned his right to redeem. The land would proceed to sale entirely unaffected by the petition, and the sale must have been subject to the right of redemption by the plaintiff in error. Of course, at the time the petition was filed there was no means of telling whether there would be a surplus or not, and so at that time plaintiff in error really had no cause of action in the form in which he brought it. The relief he seeks is purely equitable. If he had alleged in his petition that the land sold for its full value notwithstanding the outstanding right to redeem, or such other facts as would appeal to the conscience of a court of equity, he would possibly be entitled to the relief prayed for. Having failed to do this, and there appearing to be no equity supporting his right to a lien on the surplus, the judgment of the court below must be affirmed.

All the Justices concur.

OREGON SUPREME COURT.

A. E. EATON, Appt.,

v.

EDWARD BLACKBURN et al., Respts.

(— Or. —, 96 Pac. 870.)

Sale — inspection — transportation.

1. Upon sale of articles of a certain quality free on board at point of shipment, to be transported to another place, the buyer has a reasonable time for inspection after they arrive at destination, where the contract is silent as to time and place of inspection and acceptance, or of payment of purchase price.

Same — acceptance — what constitutes.

2. The mere receipt by the consignee of articles to be of a certain quality under the contract of sale, sent to him through a carrier, at point of destination, and his offer to sell and dispose of them, do not amount

Note. — The cases dealing with the question as to the right of a purchaser to a reasonable time for inspection or acceptance after arrival at destination, of goods shipped f. o. b. at point of shipment, are included in a case note to *Schiller v. Blyth & F. Co.* 8 L.R.A. (N.S.) 1167, and in a subject note to *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co.* 62 L.R.A. 804.

For cases passing on the question as to which party is to furnish cars under contract to ship goods f. o. b., see case note to *Hurst v. Altamont Mfg. Co.* 6 L.R.A. (N.S.) 928.

to an acceptance as matter of law if a reasonable time in which to inspect and reject has not elapsed; nor does the unauthorized sale by his agent of a small part of the property, which is promptly repudiated by him.

Evidence — erroneous admission — curing.

3. In an action for the price of hay which was to be of a certain quality an error in the admission of evidence that an intending purchaser from the buyer would not take it is rendered nonprejudicial by his testifying fully as a witness as to its quality.

On Petition for Rehearing.

Appeal — erroneous. instruction—remittitur.

4. A judgment will not be reversed because of an instruction which, although not affecting the real controversy between the parties, allows damages to one party to which he is not entitled, where the amount found under it can be segregated from the rest of the verdict if the successful party will remit such amount.

(July 21, 1908.)

PEPAL by plaintiff from a judgment of the Circuit Court for Baker County in defendants' favor in an action brought to recover the purchase price of certain hay. Affirmed.

Statement by Bean, Ch. J.:

This is an action to recover the purchase price of two car loads of hay. The defense is that the hay which plaintiff agreed to sell and deliver to defendants was to be "good, number one, merchantable hay," and that furnished was not of this quality, for which reason it was rejected. The defendants are commission merchants, residing and doing business in Baker City. Plaintiff resides in Union county, some miles distant from Baker. In March, 1906, he contracted and agreed to sell to defendants five car loads of hay, for use in their business, at \$11.50 per ton, f. o. b. cars, Nodine Spur, Union county. The contract was made at Baker City, and defendants were to pay the freight from place of shipment to that point; but nothing was said about the time or place of payment, or the inspection or acceptance of the hay. Shortly after making the contract, plaintiff loaded two cars with hay at Nodine Spur, and the same were carried by the railroad company to Baker, reaching there Sunday morning, March 25th. On the following day defendants, before they had examined or inspected the hay, made some effort to sell it, but were unable to do so. On the morning of the 27th, in company with Abercrombie, — a prospective purchaser. — Mr. Breck, one of the defendants,

opened the cars, in which the hay had been shipped, and examined it, but Abercrombie was unwilling to purchase. In the afternoon of the same day they made a further and more careful examination, and Breck, claiming that the hay was not of the kind and quality contracted for, refused to accept it, and so notified plaintiff and the railroad company on the following morning. At the time Breck and Abercrombie were examining the hay on the afternoon of the 27th, two bales were taken out of one of the cars for inspection, and on the same afternoon one of defendants' employees, without their knowledge or authority, sold one of such bales to a shipper of stock passing through Baker City, and paid the money over to defendants. As soon as they learned of the sale they repudiated the act of their employee, and directed him to return to the car another bale equally as good, or better, than the one sold by him. At the time of the trial it was contended by plaintiff that, under the contract between him and defendants, it was the duty of defendants to inspect and accept or reject the hay at Nodine Spur, where it was to be loaded on the cars; and, if they neglected to do so, they were bound to receive such hay as was actually shipped, and rely upon a claim of damages for breach of contract, if it was of inferior kind and quality; but, if this was not so, defendants' conduct after the hay reached Baker City was such as to amount, in law, to an acceptance thereof. The court instructed the jury that, if the hay, delivered on the cars by plaintiff at Nodine Spur, was substantially the kind and quality called for by the contract, it would amount to a full and complete performance, and enable him to recover the contract price, whether the hay was subsequently accepted by defendants or not; and, if the hay was different or inferior to that which plaintiff agreed to sell, notwithstanding which the defendants accepted it, or did something amounting to an acceptance, they could not thereafter repudiate their liability by returning or tendering a return of the hay, but that defendants had a reasonable time in which to inspect the hay after it reached Baker City, and if it was, in fact, of an inferior quality, and not according to the contract, they could reject it, and refuse to accept or pay for it, and, if they did so, plaintiff could not recover in this action. The court also held that the question as to whether defendants accepted the hay after it reached Baker was one of fact, to be determined by the jury under proper instructions from the court, which were given accordingly. The cause was tried before a jury, and a verdict rendered in favor of defendants. From the judgment subsequently rendered thereon,

this appeal is taken. The errors assigned are in the giving and refusing of certain instructions and admission of testimony.

Messrs. Lomax & Anderson for appellant.

Messrs. John L. Rand and Samuel White, for respondents:

Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only answer the description, but must be merchantable under that description.

Morse v. Union Stock Yard Co. 21 Or. 289, 14 L.R.A. 157, 28 Pac. 2; Puritan Mfg. Co. v. Westermire, 47 Or. 557, 84 Pac. 797; English v. Spokane Commission Co. 6 C. C. A. 416, 15 U. S. App. 218, 57 Fed. 451; Bunch v. Weil, 72 Ark. 343, 65 L.R.A. 80, 80 S. W. 582; Snowden v. Waterman, 100 Ga. 588, 28 S. E. 121; McClung v. Kelley. 21 Iowa, 508; Alden v. Hart, 161 Mass. 576, 37 N. E. 742; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 856; Holloway v. Jacoby. 120 Pa. 583, 6 Am. St. Rep. 737, 15 Atl. 487; Hood v. Bloch Bros. 29 W. Va. 244, 11 S. E. 910; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; McCaa v. Elam Drug Co. 114 Ala. 74, 62 Am. St. Rep. 88, 21 So. 479; Flint v. Lyon, 4 Cal. 17; Shaw v. Smith, 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886; Hanks v. M'Kee, 2 Litt. (Ky.) 227, 13 Am. Dec. 265; Lewis v. Rountree, 78 N. C. 323; Gerst v. Jones. 32 Gratt. 518, 34 Am. Rep. 773; 2 Benjamin, Sales, 645; Ketchum v. Wells, 19 Wis. 34; Whitaker v. McCormick, 6 Mo. App. 114; Chicago Packing & Provision Co. v. Tilton, 87 Ill. 547; Johnson v. Hibbard, 29 Or. 188, 54 Am. St. Rep. 787, 44 Pac. 287.

The mere delivery to a common carrier at the place agreed upon and an acceptance by it do not constitute an acceptance on the part of the buyer, nor pass title to the buyer, nor preclude him from rescinding the contract upon delivery by the common carrier at their place of destination, if the goods shipped are not of the kind, character, and quality contracted for.

Alden v. Hart, *supra*; Brigham v. Hibbard, 28 Or. 388, 43 Pac. 383; Johnson v. Hibbard, *supra*; Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 351; Holt v. Pie, 120 Pa. 425, 14 Atl. 389; 1 Mechem, Sales, § 746; 2 Page, Contra § 711, notes; Bruce v. Pearson, 3 Johns. 534; Downer v. Thompson, 2 Hill, 137; Larkin v. Mitchell & R. Lumber Co. 42 Mich. 296, 3 N. W. 904; Gardner v. Lane, 9 Allen, 492, 55 Am. Dec. 779.

To constitute an acceptance by the buyer, there must be both a physical and mental

acceptance. It means more than merely the receipt of goods.

Pierson v. Crooks, *supra*; 2 Mechem, Sales, § 1364.

Where the buyer necessarily relies upon the vendor's description, and has no opportunity to inspect the goods prior to shipment, he cannot be compelled to accept them until he has a reasonable opportunity to inspect them.

2 Mechem, Sales, §§ 1375, 1376; Brigham v. Hibbard, *supra*.

Bean, Ch. J., delivered the opinion of the court:

The principal point relied upon by plaintiff for a reversal of the judgment is the ruling of the court that, under the contract for the sale of hay in question, defendants had a right to inspect it after it reached Baker City, and, if it did not conform to the contract, to refuse to accept or pay for it. The argument is that the place of inspection and acceptance or rejection was at Nodine Spur, where the hay was to be delivered by the plaintiff f. o. b. cars; and, if defendants neglected to exercise the right of inspection at that time and place, they were liable for the value of the hay so delivered. But we do not so find the law. No place or time of payment or of inspection or acceptance was stipulated in the contract. All parties concur in this point. The contract was made between plaintiff and defendant Breck. These gentlemen both say that Breck met plaintiff at the depot at Baker City, and inquired of him if he had any hay for sale, and that he (plaintiff) said he had; that the price was \$11.50 per ton, f. o. b. cars at Nodine Spur, and that Breck said he would take five car loads at that price, and under the conditions named. The only difference between the witnesses is in reference to the terms of the contract regarding the kind and quality of hay to be delivered, and that matter is concluded by the verdict of the jury. Some stress is laid by counsel for plaintiff upon a statement by Mr. Breck, on cross-examination, that he would have had the privilege of examining the hay if he had gone down to Nodine Spur, but this was merely the opinion of the witness, and was not part of the contract. Indeed, when asked as to whether he was to be present at Nodine Spur to receive the hay for shipment, he replied: "Mr. Eaton knew it was impossible for me to be there. There was no understanding of that kind at all." So that it is manifest from the testimony that there was no time or place of inspection or acceptance agreed upon by the parties, or for the payment of the purchase price. The payment, therefore, became due and payable

on a complete delivery, and there could be no such delivery without an opportunity for inspection. Under an executory contract for the future sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them; and, unless he does so, he is not liable therefor. This necessarily gives to the vendee the right, and imposes upon him the duty, of inspection, and he must therefore be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides; and, where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them if they do not comply with the contract. *Brigham v. Hibbard*, 28 Or. 386, 43 Pac. 383; *Johnson v. Hibbard*, 29 Or. 186, 54 Am. St. Rep. 787, 44 Pac. 287; *Steiger v. Fronhofer*, 43 Or. 178, 72 Pac. 693; *Puritan Mfg. Co. v. Westermire*, 47 Or. 557, 84 Pac. 797.

Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349, is much in point. That case construed a contract between a New York importer and a London dealer, for the sale of iron by the latter to the former. The iron was to be delivered f. o. b. at Liverpool, and paid for by bills of exchange at sixty days, on delivery of the shipping documents at New York. The iron shipped by the London dealer was not in compliance with the contract, and the New York merchant refused to accept it, and brought an action against the vendor to recover money paid for duties and expenses at the port of New York. The seller contended that the buyer was bound to inspect the iron and ascertain its quality at Liverpool, and, not having done so, it was in law an acceptance, which precluded him from subsequently questioning the quality or returning the goods. But the court refused to concur in this view, and Mr. Justice Andrews says: "When and at what place the right of inspection was to be exercised was not definitely fixed by the contract. The intention of the parties, when ascertained, is to govern. They might have provided that the inspection should be made either at Liverpool or at New York. The contract is silent on this point; and the defendants insist that, in the absence of express words, the law ascertains and fixes the intention 20 L.R.A. (N.S.)

that examination should be made at the place where the defendants were to deliver the iron, to wit, at Liverpool. We are, however, of opinion that, where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier, to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, and that the carrier is not the agent of the vendee to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them." In answer to the argument made there, as here, that the title vested in the vendee upon the delivery of the goods to the common carrier, and that the vesting of such title implies an acceptance, and is inconsistent with the alleged right of inspection and rejection of the goods on their arrival at the place of destination, the learned justice says: "But, assuming that the title to the iron, for some purposes, vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title, subject to the right of inspection and rejection for inferior quality on arrival at New York.

The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule—more injurious even to the dealer or manufacturer than to purchasers—if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered." The same doctrine was applied by the supreme court of Massachusetts in *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742. In that case the defendants, residing at New Bedford, ordered a quantity of coal to be shipped from Weehawken, New Jersey, by certain line of barges, defendants to pay the freight. The coal shipped was not of the kind and quality ordered, and the court held that the defendants had the right to reject it on its arrival at New Bedford, Mr. Chief Justice Field remarking: "Whether in such a case as this the title to the property passes to the vendee when the coal is delivered on board the barge is not free from doubt, and we have not found it necessary to decide the question. . . . If it be assumed, in favor of the plaintiffs, that the title to this coal passed to the defendants when it was selected by the plaintiffs, and laden free on board upon the barge at Weehawken, and when bills of lading were given to the plaintiffs, under which

the cargo was to be delivered to the defendants or their assigns at the port of New Bedford, they paying the freight, we are yet of opinion that the rulings at the trial were correct. If the title passed to the defendants, it was a conditional title, and the condition was that the coal should be found to be of the quality purchased, and the defendants could reject the coal if, upon examination, it did not conform to the implied warranty that it should be merchantable." To the same purport, see *Morse v. Moore*, 83 Me. 473, 13 L.R.A. 224, 23 Am. St. Rep. 783, 22 Atl. 362; *Holt v. Pie*, 120 Pa. 425, 14 Atl. 389; *Fogel v. Brubaker*, 122 Pa. 7, 15 Atl. 692.

We are of the opinion, therefore, that no error was committed by the court below in its ruling on this phase of the case. In *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co.* 97 Md. 1, 62 L.R.A. 795, 54 Atl. 634, cited by plaintiff, the contract required payment to be made for the goods at the place of shipment, which the court held was necessarily inconsistent with a right of inspection at another place. But here, as we have seen, no time or place of payment was specified, and therefore it did not become due until the goods were delivered. The cases of *Barr v. Borthwick*, 19 Or. 578, 25 Pac. 360, and *Meyer v. Thompson*, 16 Or. 194, 18 Pac. 16, have no particular bearing here. The question in the former case was one of title, and in the latter whether there had been a sufficient delivery to take a parol contract, for the sale of personal property, out of the statute of fraud.

It is also insisted that defendants waived the right to reject the hay for defective quality, by their action and conduct in relation thereto after it reached Baker City. But this question was for the jury, and, we think, was fairly submitted to them. The defendants were not precluded from rejecting the hay by merely receiving it. They still had a reasonable time in which to inspect and reject it if not according to the contract. Nor did their offer to sell and dispose of the hay before they had examined it amount to an acceptance. This was before they ascertained that it was of an inferior quality, and was on the assumption that plaintiff had complied with his contract, and shipped hay of the kind and quality agreed upon. It was therefore not conclusive in law of an intent to accept the hay in performance of the contract (*Benjamin, Sales*, § 703). Nor, again, was the unauthorized sale of one bale by an employee of defendants conclusive of the acceptance by them of the entire shipment. The evidence shows, or tends to show, that the employee had no authority, either express or implied, 20 L.R.A. (N.S.)

to make such sale, and that it was promptly repudiated by the defendants as soon as they learned of it. The question of the acceptance of goods is ordinarily for the jury (*Benjamin, Sales*, § 895), and there is nothing in this record to take this case out of the operation of the rule.

After the defendant Breck had testified on the trial that, in company with Abercrombie, he examined the hay on the morning of the 27th of March, and found that it was not of the kind and quality called for by the contract between his firm and the plaintiff, he was asked by his counsel the question: "Did Mr. Abercrombie take it?" and was permitted, over the objection and exception of plaintiff, to answer, "No, sir." It is claimed that the admission of this testimony was error, and calculated to mislead the jury. It was probably admitted as tending to show the hay was not merchantable, because Abercrombie, after examining it, refused to purchase it. But, as he was subsequently called as a witness by defendants, and testified fully as to the quality of the hay, it is not apparent how the ruling assigned could have been prejudicial to the plaintiff even if erroneous.

Finding no error in the record, the judgment is affirmed.

A petition for rehearing having been filed, *Bean*, Ch. J., on October 6, 1908, handed down the following additional opinion:

The court instructed the jury, in substance, that, if the plaintiff agreed to sell and deliver to defendants 50 tons of good, merchantable hay, and failed to do so, the defendants would be entitled to a verdict for the market value of such hay at the place of delivery, less the contract price, with freight added. The jury found a verdict in favor of defendants, and assessed their damages at \$10.

The attention of the court is called to the fact, by a petition for rehearing, that the instruction was erroneous, because it is admitted that the failure of the plaintiff to deliver the hay, except the car load in dispute, was by the consent and at the request of defendants, and therefore they are not entitled to recover damages for such failure. The error in giving the instruction referred to, however, did not affect the real controversy between the parties, and, as the amount of damages allowed by the jury can be segregated from the rest of the verdict, the error does not call for a reversal of the case, if the defendants will, within ten days, remit the amount of such damages; otherwise, a new trial will be ordered. *Mackey v. Olssen*, 12 Or. 429, 8 Pac. 357; *Cochran v. Baker*, 34 Or. 555, 52 Pac. 520, 56 Pac. 641.

The other points made in the petition

were all considered by the court on the former hearing, and need not be further alluded to at this time.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WILLIAM H. CARR, Appt.,

v.

EDWARD R. DAVIS et al.

(— W. Va. —, 63 S. E. 326.)

Bail — indemnity bond — validity.

1. A bond of indemnity, given by a person under charge of felony, to indemnify his bail in a recognizance for his appearance to answer the charge, is not void as against public policy.

Fraudulent conveyance — indemnity bond — obligee — right to contest.

2. A bail in a criminal recognizance, against whom an award of execution upon the recognizance has been made, and to

Headnotes by BRANNON, J.

Case Note. — Validity of agreement to indemnify bail in a criminal case.

The earlier cases on this question have been gathered in a subject note to *United States v. Simmons*, 14 L.R.A. 78; nearly all of them being also reviewed or cited in the prevailing or dissenting opinion of *CARR v. DAVIS*. The cases gathered here, therefore, are only those found decided since the date of that note, and not found in *CARR v. DAVIS*.

As will be noted from the above-indicated authorities, the cases are not at one on this question, and a similar conflict characterizes the later cases.

In *Stevens v. Hay*, 61 Ill. 399, it was held that a mortgage executed by parties living in Illinois, to be used in Ohio, to indemnify any person who might become bail for a person who had been indicted in the latter state for a criminal offense, was valid in the hands of a person to whom it had been assigned for such purpose, and might be enforced to the extent of the loss suffered by the bail on the recognizance.

In *Harp v. Osgood*, 2 Hill, 216, the bail for the appearance of a party indicted, who had gone into another state, employed a constable to arrest him, with a view to his surrender; the constable went, but, in consequence of sickness in the accused's family, and important business relations, allowed him to go at large on receiving from a third person a writing promising to pay the constable a certain sum as indemnity if the accused did not appear in due time. It was held that such a writing was not void as against public policy, and that, upon default of the accused's appearance, the bail might recover upon it, in the name of the 20 L.R.A. (N.S.)

whom a bond has been given to indemnify him against all loss or damage which he might sustain on account of having signed the recognizance, may file a bill in equity, before payment of the recognizance debt, to set aside a deed made by the obligor in such indemnity bond, as made with intent to defraud him as a creditor.

Same — creditor — right to contest.

3. Anyone who, but for a deed made to defraud creditors, would have the right to subject the property to his demand, is a "creditor," entitled to sue in equity to set it aside, under chapter 74, Code 1899 (Code 1906, §§ 3099-3108).

Same — persons having valid cause of action.

4. Code 1899, chap. 74 (Code 1906, §§ 3099-3108), avoiding conveyances made to defraud creditors, embraces as creditors, as a general rule, all persons who have a valid cause of action.

Surety — rights against principal.

5. As to their right, in equity, to compel principal to pay for their relief.

(Miller and Robinson, JJ., dissent.)

(December 15, 1908.)

constable, the damages which he had sustained.

It was held in *People v. Ingersoll*, 14 Abb. Pr. N. S. 23, that the fact that persons offered as bail have received transfers of property without consideration, from friends of the accused, to enable them to qualify as bail, is not an objection to them, the court saying that, if the property conveyed to the bail had belonged to the accused, and he had so conveyed it, the case probably would have been different.

In *Ellis v. Norman*, 19 Ky. L. Rep. 1798, 44 S. W. 429, it was held that the surety in a forfeited bail bond is entitled to reimbursement out of indemnity given him by the principal to the extent of attorney's fees and other expenses incurred by him in good faith, in obtaining a remission from the governor, whereby the judgment on the forfeiture has been materially reduced, the case not being one of pardon brokerage.

In *Mayne v. Fidelity & D. Co.* 8 Pa. Dist. R. 711, it was held that a prosecutor of an accused, who also became his bail, cannot, upon forfeiture of the recognizance, recover from a third person who indemnifies him as bail. The court saying: "Under act of April 22, 1846, P. L. 477, this plaintiff will, on distribution of the moneys collected from him on the commonwealth's judgment, be entitled to receive out of what remains after payment of the costs of prosecution, collection, and audit, so much as will satisfy the amount of damage he has sustained by reason of the commission of the alleged forgeries. If now this action be sustained, the plaintiff, as obligee in the indemnity bond, will collect from the defendant the money which, as bail, he is called on to pay to the commonwealth, and which he will at

APPEAL by plaintiff from a judgment of the Circuit Court for Harrison County sustaining a demurrer to the complaint in an action brought upon an indemnity bond and to set aside alleged fraudulent conveyances of real estate. Reversed.

The facts are stated in the opinion.

Mr. E. G. Smith for appellant.

Mr. W. Scott, for appellees:

The indemnifying bond is contrary to public policy, and void.

Herman v. Jeuchner, L. R. 15 Q. B. Div. 361; United States v. Ryder, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. Rep. 196; United States v. Simmons, 14 L.R.A. 78, 47 Fed. 575; Davis, Crim. Law, p. 412; 5 Cyc. Law & Proc. p. 127; Re Von Der Ahe, 85 Fed. 959; Morgan v. Hale, 12 W. Va. 713.

Brannon, J., delivered the opinion of the court:

Sutton was under charge of felony. He gave a recognizance to answer the charge. Carr acknowledged the recognizance as bail for Sutton. Carr took from Sutton, Davis, and others a bond of indemnity to indemnify Carr against loss by reason of such recog-

once receive back again as prosecutor; with the practical result that the defendant here is held to make good the loss occasioned by Avirett's forgeries,—a thing which it never undertook or contemplated. Here we have presented the spectacle of one accused of a most serious crime, delivered for safe keeping into the hands of the person wronged, who, having compounded the offense, and received back part of the money out of which he has been defrauded, suffers the accused to escape, and now proceeds to collect the residue of his loss from the party that agreed to indemnify him, not against that loss, but against the very act which he has permitted and even assisted in. Such a use by prosecutor and defendant of the means devised by the law to save those awaiting trial from the inconvenience of imprisonment is novel and ingenious, but contrary to public policy, and one which the courts cannot countenance." This case, however, was reversed in 198 Pa. 490, 48 Atl. 469, the court saying, in regard to the question here annotated: "The decision of the question of law reserved in this case is without precedent in this state, and it does not seem to be in harmony with the trend of decision on the same or similar questions in other states."

In Dunkin v. Hodge, 46 Ala. 523, it was held that an agreement by which a person receives a sum of money from another in consideration of his becoming bail for the latter's son, who is accused of felony, in order that such son may get out of jail and run away and thus escape trial, is void as obstructing or interfering with the administration of public justice; and money paid under such an agreement, if not used, cannot be recovered back.

20 L.R.A. (N.S.)

nizance. Sutton failed to appear. An execution was awarded by the circuit court against Carr alone upon said recognizance. Carr brought this chancery suit against Davis, upon said indemnity bond, to set aside a conveyance of real estate by Davis as made to defraud creditors, among them Carr. The circuit court dismissed the bill on demurrer.

The question is, Is the bond of indemnity valid so as to create an enforceable demand in favor of Carr? It is said that the bond is void as against public policy in this: That it tends to make the bail less watchful to prevent the escape of the accused from trial than he would be if not indemnified; that, if not indemnified, the bail would keep strict watch on the accused, and, on suspicion of escape, to save himself from loss, would arrest the accused, and return him to prison to stand trial; but, being indemnified, he does not care. The authorities are divided upon the question. None are binding upon us. No West Virginia or Virginia case sets the rule for us. We must choose between conflict among cases not binding us, and adopt the rule we think most reason-

In J. G. Hutchinson & Co. v. Morris Bros. 86 Mo. App. 40, it was suggested that, if the bail put up a cash deposit for the principal, which the latter accepts by going at liberty thereunder, and afterwards forfeits the same, causing loss to the bail, the latter is a valid debt against the principal unless it was understood at the time of the deposit that the money should be forfeited by nonappearance, the court saying that such case is not like that of a contract of indemnity executed to one to secure him against loss if he will execute bail for the appearance of one accused of crime.

In a number of cases involving an agreement to indemnify another from liability as bail, the validity of the agreement, as being against public policy, was not questioned; the only question raised being whether or not an oral agreement of such nature was within the statute of frauds. Although these cases apparently assume that such an agreement is not against public policy, the question not being before the court, they are not of much value here, and thus no effort has been made to exhaust this class of cases.

One of these cases is Aldrich v. Ames, 9 Gray, 76, where it was held that an oral promise, for a valuable consideration, to indemnify another for his liability as bail for a third person, is not within the statute of frauds. Other cases holding to the same effect are Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Holmes v. Knights, 10 N. H. 175; Harrison v. Sawtel, 10 Johns. 242, 6 Am. Dec. 337.

In People v. Skidmore, 17 Cal. 260, a person was held to answer by a justice on a criminal charge; he, with his sureties, entered into a recognizance or instrument in

able and useful. Force there is, we must say, in the argument above stated, that indemnity tends to make the secured bail indifferent; but that rule would make it sometimes out of the power of the accused, innocent or guilty, to give bail, and require him to languish, perhaps die, in prison. It is settled, it seems, that when the bail pays a recognizance, the law does not imply a promise by the accused to reimburse the bail; otherwise in South Carolina. *Reynolds v. Harral*, 2 Strobb. L. 87. The books say that this is because there is no debt. Sometimes, often, indeed, the very purpose on the part of prisoner and bail in seeking bail is to give the prisoner chance to escape. If the law would raise a promise by the accused to repay the bail, it would do so in all cases, as well where there was such intent to secure bail to enable escape, as where there was not. Thus the law would aid the bad purpose to the defeat of public justice. So with subrogation. It does by no means follow from the fact that the law raises no promise to pay, that neither will it allow an express contract of indemnity; for, in case of an express contract, if such corrupt purpose were proven, it would avoid the contract. It is also settled that, though a criminal recognizance is a lien for the state on land, yet the bail surety cannot be substituted to the lien, and this for like reasons against raising an implied promise of repayment to the bail.

But though there is no such implied promise to sustain an action by the bail against the principal in the recognizance, and no subrogation in equity to the lien, can the accused make an express contract by bond, deed of trust, or oral promise to indemnify? This is denied in 3 Am. & Eng. Enc. Law, p. 684, and 16 Am. & Eng. Enc. Law, p. 172. In *Simpson v. Robert*, 35 Ga.

180, it is held that a mortgage indemnity by the accused is valid. In *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. Rep. 196, the syllabus states that "without an express contract of indemnity, a surety on a recognizance for the appearance of a person charged with committing a criminal offense against the laws of the United States cannot maintain an action against the principal to recover any sums he may have been obliged to pay by reason of forfeiture of the principal, and he is not entitled to be subrogated to the rights of the United States, and to enjoy the benefit of the government priority." It is true this precise question was not involved, but it was a question of subrogation. The court held that there is no implied promise or subrogation, but the syllabus imports that there may be an express contract to indemnify. The opinion clearly imports this. It refers approvingly to the Georgia case, and says that it accords with the English case of *Cripps v. Hartnoll*, 4 Best & S. 414, holding an express contract good. In *Maloney v. Nelson*, 144 N. Y. 182, 39 N. E. 82, was such a mortgage of indemnity. The syllabus says: "It seems that such a contract of indemnity is not void as against public policy." The opinion by Peckham, now Mr. Justice Peckham, says: "This leaves it unnecessary to consider the other defenses set up in the answer of the defendant Nelson, although we must say that the claim that the defendant's contract was void as against public policy does not impress us as being a good defense, at least in this state." In *Moloney v. Nelson*, 158 N. Y. 351, 53 N. E. 31, is a point in the syllabus reading thus: "Indemnifying bail in a criminal case is not contrary to the public policy of this state; and the fact that a bond and mortgage were given to indemnify bail does not

writing for his appearance before court to answer the charge; subsequently an indictment was found, and the accused failing to appear, his recognizance was forfeited and suit was brought against him and his sureties; the complaint, after setting out the cause of action on the recognizance, contained averments to the effect that the accused had executed a deed of trust to secure his sureties, and prayed that this property might be applied to the debt due by the recognizance; the deed provided that, in case the recognizance should become forfeited, so that the sureties became liable thereon, then the trustee was to apply the property to the payment and extinguishment of the recognizance; and in case the property was not sufficient, then to pay as far as possible. The court, in sustaining a demurrer to this complaint, said: "The matters of this agreement had nothing to do with the liability of these sureties on this recognizance. Nor had the plaintiff any

right to proceed in this action to subject this fund. Whether the sureties were liable or not could only be decided—as they contested their liability—by suit; and the deed provides this indemnity to secure them in case they be held liable. It may be that the sureties will not be held liable at all; or it may be, if they are, that they are ready and willing to pay whenever their liability is declared; and, in that case, there would be no necessity of coming upon this fund."

In *Slater v. Jacobitz*, 3 Colo. App. 127, 32 Pac. 184, a bond delivered to a surety on an appeal bond, given by the accused and another, conditional that "if the said . . . [accused] shall duly appear at the said term of said court, and answer the demand of the law thereat, then this obligation to be null and void, otherwise to remain in full force and effect," was held not to be an indemnifying bond, and a complaint based thereon did not state a cause of action.

render them void." The opinion refers to the claim by some that such a contract is void, and quotes with approval what Judge Peckham had said, above quoted, and went on to disapprove the claim that such a contract is void. When that case was in the appellate division, the court said that, "in view of the fact that contracts for the indemnity of sureties upon bail bonds have been frequently enforced in the courts, the fact that their validity has not been successfully attacked is of itself strong evidence that they have been presumed to be legal. In fact, there is no case holding that a contract made by a third party to indemnify a surety upon a recognizance is illegal, but all such contracts have been sustained. The only case in which there has been a suggestion that such contracts are invalid is where they have been made by the principal himself. It is not perceived that there is any valid distinction in principle between a contract made by the accused and one made by somebody else for his benefit, but nevertheless that distinction seems to exist in the books, and to result in contracts on the one hand being held valid, and on the other hand being disapproved." 12 App. Div. 548, 42 N. Y. Supp. 418. It is suggested that these New York cases are based on statute allowing an accused to deposit money instead of recognizance. How does that affect the question? Where that is the case, there is no surety to be made careless. How does that change the question of public policy in case there is a surety? The books say that whilst an indemnity given by an accused is bad, a friend may indemnify the bail. 16 Am. & Eng. Enc. Law, p. 172. It is not easy to see why the bail is not made careless as well where the friend indemnifies as where the accused does. If such be law, this would not relieve Davis. This suit is against Davis. Does it make any difference that Sutton signed the bond? If Davis had given a bond, Sutton not joining, it would be binding according to the rule or exception just stated. I shall not review conflicting authorities. Judge Miller's dissent will well obviate that labor. I will remark, as to *United States v. Simmons* (C. C.) 14 L.R.A. 78, 47 Fed. 575, that the court had before it the question whether it would accept as surety a person who had taken indemnity. That was a matter within the court's discretion. The law allows bail. We may say that the law favors bail as a relief from prison in cases where bail is grantable, and it would tend to defeat this merciful provision of law if we should adopt the harsh rule that a man, perhaps innocent, cannot use his property to indemnify his friend to relieve him from prison bars. We do not see that the mat-

ter is so far against public policy as to impel us to adopt so severe a rule. Pingree on Suretyship and Guaranty (§ 416) says: "In view of the fact that contracts for the indemnity of sureties upon bail bond in criminal cases have been frequently enforced in the courts, it is strong evidence that they have been presumed, by the bar and bench, to be legal." So far as we know, the understanding of our state bar accords with this view. We think such indemnity contracts are often made in West Virginia.

Is it seriously suggested that Carr cannot sue in equity before payment of the recognizance debt by him? The bond of indemnity is a contract liability which would support such suit. But there is the award of execution against Carr on the recognizance. That fixes a debt and liability. In case of a bond to indemnify, that judgment is conclusive of liability and binding on Davis. See cases as to effect of judgment upon indemnitor in a bond of indemnity to indemnify against a judgment against indemnitee in State use of *Beard v. Abbott*, 63 W. Va. 189, 61 S. E. 369. This bond was to indemnify Carr against a judgment or award of execution on the recognizance. It could have no other meaning, and in such case the cases say that the judgment or award of execution fixes the debt. *State v. Nutter*, 44 W. Va. 388, 30 S. E. 67; 7 Rob. Pr. 150; *Robinson v. Baskins*, 53 Ark. 330, 22 Am. St. Rep. 203, 14 S. W. 93. "A bond to save harmless against judgment is broken the moment a judgment is recorded against the obligee" (16 Am. & Eng. Enc. Law, p. 177), even though by default; payment not necessary (4 Am. & Eng. Enc. Law, p. 695). Having thus a demand, Carr can go into equity to set aside a fraudulent conveyance. Our fraudulent conveyance statute (Code 1899, chap. 74, § 9 [Code 1906, § 3107]) says that anyone is a "creditor" under it who, but for the bad deed, would have right to subject the property. The statute "embraces all who have a valid cause of action." 1 Moore, *Fraudulent Conveyances*, p. 198. "Under this statute any creditor at large of the fraudulent debtor, without respect to the form or character of the debt, may maintain a suit to set aside a conveyance as fraudulent as to him, even though the claim be an unliquidated one, founded upon no certainty as to the amount of the damages claimed; as, for instance, damages for a breach of promise to marry." Hogg, *Equity Principles*, § 183. We find in 20 Cyc. Law & Proc. p. 421, this: "Existing creditors are, as the words imply, persons having subsisting obligations against the debtor at the time the fraudulent alienation was made or the secret trust created, although their claims may not have matured or been re-

duced to judgment until after such conveyance. A contingent liability is as fully protected against fraudulent and voluntary conveyances as a claim certain and absolute; and whoever has a claim or demand arising out of a pre-existing contract, although it may be contingent, is a creditor whose rights are affected by such conveyances, and can avoid them when the contingency happens upon which the claim depends." "If A. gives a mortgage to C. to indemnify C. against his indorsement for A., a bill of *quia timet* may be brought by C. against A.'s representatives for a decree that they shall pay B. and indemnify C. against his indorsement." *Call v. Scott*, 4 Call, 402, cited in *Bird v. Stout*, 40 W. Va. 47, 20 S. E. 852. A principal undertakes to indemnify his surety by payment. So does one who undertakes to indemnify a bail in a recognizance. Both stand alike as to the right to call on the principal or indemnitor to pay to the relief of the surety and indemnitee. It is thoroughly settled that a surety may, before payment, in equity compel the principal to pay in exoneration. It is believed that the law cited in *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172, will verify the above proposition. Such is the general law. 27 Am. & Eng. Enc. Law, p. 475. It is also clear that equity will place a liability where it ultimately rests.

We reverse the decree, overrule the demurrer, and remand the case.

Miller, J., dissenting:

I cannot concur in the opinion of the majority. The grounds of demurrer relied on are that the bond of indemnity is void: First, because against public policy; second, want of consideration and want of mutuality; third, because the plaintiff's bill fails to show plaintiff has been unable, by the use of the means prescribed, to procure the appearance of the prisoner in court in discharge of his recognizance, or that he, being solvent, is able to pay, or has paid, the execution awarded against him, and thereby sustained any actual loss or damages; and, fourth, because the liability, if any, of R. C. Davis, on said bond, is not a debt within the meaning of §§ 3099 and 3100, Code 1906.

Is the bond void on grounds of public policy, or want of consideration? If it is, it will not be necessary to consider any other questions argued, for then the entire foundation for the suit fails, and the other questions cannot be said to fairly arise. The question has never been decided by this court, and but few cases have been cited or found by us from other courts in which the question has arisen and been passed upon. 20 L.R.A. (N.S.)

It is conceded that the effect of a bail bond is to transfer the legal custody of the prisoner from the state to the bail, with power to arrest, or cause his arrest and delivery to the lawful authorities at any time, whether within or without the jurisdiction of the court, in discharge of his recognizance. Chapter 156, Code 1906, particularly § 8 thereof; 5 Cyc. Law & Proc. pp. 126-128; *Re Von Der Ahe* (C. C.) 85 Fed. 959. The primary object of a bail bond in a criminal case is not to secure to the state the payment of the penalty in the bond, but the presence of the prisoner, that he may receive the judgment of the court on his guilt or innocence, and, if guilty, the punishment which the law imposes. The obligation of the bail is to accomplish this, and to this end he will be subrogated to the rights of the state to take out all proper process, but not to any of its rights to recover the penalty of the bond. *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. Rep. 196. In view of this relationship of duty and obligation of bail and principal it has been held that there is no implied promise of principal to bail to answer an action against him to recover the penalty incurred by his default, although such action might be maintained on such implied promise to recover costs incurred by the bail. *Highmore*, Bail, 204; *Fisher v. Fallows*, 5 Esp. 171; *Jones v. Orchard*, 16 C. B. 614; *Cripps v. Hartnoll*, 4 Best & S. 414,—all cited in *United States v. Ryder*, *supra*.

There is no doubt, however, that, as a general rule, a principal may lawfully indemnify his surety against loss by the conveyance of property except in cases of criminal arrest. 1 *Brandt, Suretyship & Guaranty*, § 240. But when we come to the question of the legality of a bond or other contract of indemnity given by principal to bail on a criminal case, a different question is presented. In 2 *Brandt on Suretyship & Guaranty*, § 610, it is said: "If a party accused of crime, in order to induce another to become his bail, gives such other a mortgage for his indemnity, the mortgage will be valid for that purpose." But, as this writer acknowledges, this doctrine is based principally on *Simpson v. Robert*, 35 Ga. 180, in which case the court replied to the argument based on public policy: "We are not prepared to sustain this doctrine. That a principal should, in case of default, not indemnify his bail against the effects of his forfeiture or failure to attend and answer for the crime, has never been doubted by anybody, and no authority is offered to support the position." Mr. Brandt says, however, in the same connection: "While the foregoing is fully borne out by the

Georgia case cited, decided in 1866, the editor of this edition considers it more than doubtful, in view of later decisions that are also referred to in the note." And this case, he says in the note, "cites no authority." In *Ratcliffe v. Smith*, 13 Bush. 172, the principal was indicted for horse stealing, and, to obtain bail and his release, conveyed land to his bail absolutely, in consideration that he might leave the state, and fail to answer the charge against him; and, in a suit to have the deed declared a mortgage, the court dismissed the bill on the ground that the contract was illegal and against public policy. *Herman v. Jeuchner*, L. R. 15 Q. B. Div. 561, decided in 1885, involving a deposit of money with the surety, holds the same doctrine, overruling *Wilson v. Strugnell*, L. R. 7 Q. B. Div. 548. In the earlier case of *Jones v. Orchard*, 16 C. B. 614, 623, decided in 1855, this doctrine is practically affirmed, for the English court there says: "It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded, and that such a contract would be contrary to public policy." The point actually ruled in that case was that an action by bail against principal in an estreated recognizance, for the payment of the prosecutor's costs, would lie upon an implied indemnity. In *Cripps v. Hartnoll*, supra, the plaintiff, at the request of defendant, and on his promise of indemnity, became bail for the appearance of his daughter, charged with crime, and, on her default, sued defendant on his promise. The precise point decided was that such a promise of indemnity was not a "special promise to answer for the debt, default, or miscarriages of another person," and therefore not within § 4 of the statute of frauds, 29 Car. II. chap. 3. The court below had decided this case on the authority of *Green v. Cresswell*, 10 Ad. & El. 453, holding in effect that, in order to bring a case within said provision of the statute, "the debt or default in respect of which the promise is made must be towards the promisee." "But," says the court, by Pollock, C. B., "there is a great distinction between that case and the present. Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and, with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be. . . . A mere promise of indemnity is not within the statute of frauds." And, in the same 20 L.R.A. (N.S.)

case, *Williams, J.*, says: "Whether, in a case where the plaintiff becomes bail for a stranger in a civil suit, there is a duty, as between the defendant in the action and the surety, that he will render or pay the debt, so as to reconcile the case of *Green v. Cresswell* with the doctrine that the statute applies only to promises made to a person for whom another is answerable, I think that, where bail is given in a criminal suit, there is certainly no debt or duty which can be considered as due to the surety from the party on whose behalf the recognizance is given." This decision is applicable, it is true, to the case where the bail was procured on the promise of a third person, and not by the principal himself. But, in a note to this case, Mr. Parsons, editor, by reference to several decisions of the courts of this country, regards it as having gone too far in holding there is no privity of contract of indemnity, primary, and not collateral to the principal undertaking, with respect, at least, to the application of the statute of frauds thereto.

But to return to the particular question, viz., the invalidity of an express contract of indemnity. It is argued that, whatever may be the law of the contract as between principal and bail, in a criminal case, where there is no express contract, the liability is complete where there is such express contract, as held in the Georgia case. It is claimed that *United States v. Ryder*, supra, recognizes this to be the law, unaffected by any considerations of public policy; it being there held that, without such express contract, the surety cannot maintain an action against his principal to recover money which he has been obliged to pay by reason of the forfeiture of the principal, thereby holding, it is argued, by implication, that, where there is such express contract, the converse of the proposition would be equally true. That was a case in which the bail, under the provisions of a Federal statute, sought to be subrogated to the right of the government to enforce payment of the penalty out of the estate of the principal in the hands of a third person; and it was held that the plaintiff was not entitled to such relief. The court, denying the relief, says: "The object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt or other civil duty; whilst the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever may be the penalty of the bond or recognizance; whilst payment by the bail of their

recognizance in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court. That obligation still remains, and the principal may, at any time, be retaken and brought into court. To enable the bail, however, to escape the payment of their recognizance by performing that which the recognizance bound them to do, the government will lend them its aid in every proper way, by process and without process, to seize the person of the principal and compel his appearance. This is the kind of subrogation which exists in criminal cases, namely, subrogation to the means of enforcing the performance of the thing which the recognizance of bail is intended to secure the performance of, and not subrogation to the peculiar remedies which the government may have for collecting the penalty; for this would be to aid the bail to get rid of their obligation, and to relieve them from the motives to exert themselves in securing the appearance of the principal. Subrogation to the latter remedies would clearly be against public policy, by subverting, as far as it might prove effectual, the very object and purpose of the recognizance. It would be as though the government should say to the bail, 'We will aid you to get the amount of your recognizance from the principal, so that you may be relieved from your obligation to surrender him to justice.' In this case, as said in 2 Brandt on Suretyship & Guaranty, § 610, note 9, "the court . . . relied upon the English case of *Cripps v. Hartnoll*, . . . in which A.'s express promise to indemnify B. against loss through B.'s becoming surety on the criminal bail bond of C. was enforced, and seemed to take it for granted that an express promise to indemnify criminal bail was not against public policy. The question of public policy does not seem to have been fully argued,"—which is true. If the right of subrogation, claimed in *United States v. Ryder*, was properly denied on principles of public policy,—the real point adjudicated in that case,—we do not perceive why the court, on like principle, should not also deny any relief for the enforcement of an express contract of indemnity, designed, or the effect of which would be, to relieve the bail from the performance of the principal obligation of his recognizance. Such relief was denied, on this ground, in the English case of *Herman v. Jeuchner* and *Ratcliffe v. Smith*, supra; and, while *Jones v. Orchard* sustained a right of action for costs incurred on an implied indemnity, the case otherwise sustains the doctrine of *Herman v. Jeuchner*. Nor do I think *Cripps v. Hartnoll*, relied on by the Supreme Court in *United States* 20 L.R.A. (N.S.)

v. Ryder, opposed to this view, for the point, not having been presented, was not directly adjudicated in that case. Moreover, in the case of *United States v. Simmons* (C. C.) 14 L.R.A. 78, 47 Fed. 575, *Benedict*, circuit judge, after a review of *Herman v. Jeuchner*, and some of the cases just referred to, declined, on grounds of public policy, to accept as bail persons indemnified beforehand by the principal.

United States v. Greene (C. C. W. D. Va.) 163 Fed. 442, decided in July last, involved the exact point presented here. The court says: "The reason why there is no implied obligation on the part of a principal in a bail bond in a criminal case to indemnify his surety is that such a contract is against public policy in that it 'gives the public the security of one person only instead of two.' As applied to an express contract by the principal to indemnify his surety (and as distinguished from a contract by a third person to indemnify the surety), it seems to me that the reason for the rule operates quite as strongly to invalidate such express contract as it does to deny the existence of an implied contract. An express contract by the principal in a bail bond in a criminal case, to indemnify his surety, at least as certainly gives the public the security of only one person, instead of two, as would an implied contract to such effect." The court, in that case, besides some of the cases already referred to by us, cites 16 Am. & Eng. Enc. Law, 2d ed. p. 172, and 3 Am. & Eng. Enc. Law, 2d ed. p. 684. In § 684 this authority says: "For obvious reasons of public policy the law will not imply an obligation, nor will it enforce an express agreement, on the part of the principal, to indemnify his bail against the amount of the penalty incurred by his default." If because the public will be deprived of two sureties instead of one be the correct reason for the rule that the law will not imply an obligation on the part of principal to bail, and will hold his express contract of indemnity void, as held in *United States v. Greene*, will not the state as surely be deprived of such double security where the indemnity is by a third person? It is only because the bail is indemnified, and is no longer bound, for his own protection, to bring in his principal, that it can be said the public has been deprived of one of its sureties; and is he not as surely indemnified where his contract is with a third person as with the principal in the recognizance? What possible difference can it make to the bail how or by whom he is indemnified? The bond in the case at bar is the bond of the principal in the recognizance, and falls directly within the rule

stated. True, there are sureties in the bond; but, if void as to the principal, is not the bond void also as to the sureties? If the law will relieve the principal in the bond for reasons rendering it void as to him in its very inception, it will surely not hold the sureties. 1 Brandt, Suretyship & Guaranty, § 163. The cases, which recognize this distinction all refer it to Cripps v. Hartnoll, supra, where the question of public policy was not even mooted, certainly not decided. Look at the situation here. The bail is seeking to charge the property of a surety in an indemnifying bond, not binding on the principal, for the amount of the judgment against him on his recognizance of bail. He did not allege or prove that he had been unable, by the use of the means which the law provides for his own protection, to recapture his principal and bring him into court. Can it be law that bail, thus in default, can cast the loss on sureties in an indemnifying bond? Principles of natural justice would seem to forbid it.

My conclusion, based on reason and authority, is that the contract of indemnity involved in this case is illegal and void, and that a court of equity should afford the plaintiff no relief.

I need not respond to any of the other points presented in argument; for, no matter what the rights of the plaintiff therein might be when involved in the enforcement of a legal contract, they cannot avail him in a case of this kind.

I would affirm the decree below.

Robinson, J., dissenting:

Public policy and the law demand a different decision. The poorest man, if honest, can find bail. The richest man, for whom those knowing him would not vouch without indemnity, should not be allowed to furnish bail by virtually purchasing it. The mere fact that indemnity is furnished indicates that confidence is not reposed. Bail is a matter of confidence and personal relation. It should not be made a matter of contract or commercialism. Our statute law does not even imply that one may become surety for himself on recognizance to appear and answer a criminal charge. Upholding indemnity, in any form, under contract, implied or express, in effect allows one to be his own surety for his appearance. Thus, he or his friends may buy his freedom from answering the law. This was never contemplated. And we should not permit it to be contemplated now that the question is one of the first instance here. Why provide for a bail piece, intended to promote justice, and then destroy its 20 L.R.A. (N.S.)

effect and utility? Why open the door to barter freedom from the law for money?

IOWA SUPREME COURT.

MARY BEAVER et al., Appts.,
v.

GEORGE ROSS, Sheriff of Dallas County,
et al.

(— Iowa, —, 118 N. W. 287.)

Equitable conversion — devise — when effected.

1. A devise of land to testator's wife for life with directions to sell it at her death, and out of the proceeds pay a certain amount to a certain person, and divide the remainder among testator's children, effects a conversion of the property as of the time of the testator's death; and judgments against the child before sale is actually effected will not create a lien on his interest in the property as testator's heir.

Fraud — burden of proof.

2. A judgment creditor of a legatee, who attempts to set aside an assignment of the legacy as in fraud of his rights, has the burden of showing the fraud.

(November 17, 1908.)

Case Note. — *As of what time does conversion take place under a direction to sell real property, which postpones the sale to a definitely ascertainable time subsequent to the testator's death.*

Although in some jurisdictions—especially in New York—the decisions appear to be in some confusion, the doctrine seems to be generally accepted that, unless to do so will clearly defeat the intention of the testator, or result in the evasion of some rule of law, a gift of the proceeds of a sale directed to be made will be regarded as a gift of personalty, even though the actual conversion of the property into personalty is definitely postponed till some future time.

This rule is, of course, subject to the qualification that the direction to sell must be positive, neither making the sale optional with the parties, nor leaving it to the discretion of those intrusted with its execution. This is apparent in the case of Keller v. Harper, 64 Md. 74, 1 Atl. 65, in which it was held that, where a testator gave his wife all of his estate for life or during widowhood, authorizing a sale of any part thereof during her lifetime with her consent, and finally provided that, after the death or marriage of his wife, his real estate not otherwise disposed of should be sold, and the money or proceeds arising therefrom should form and be a part of his estate generally, for distribution amongst his children, there was no such absolute and imperative order and direction for the conversion

A PPEAL by plaintiffs from a decree of the District Court for Dallas County in defendants' favor in a suit to enjoin the sale of certain real estate as the property of Jacob H. Beaver. Reversed.

The facts are stated in the opinion.

Messrs. Shortley & Kelly, for appellants:

The only effect of the levies complained of was to cloud the title and to interfere with the executor in selling said property and carrying out the provision of said will. *Wilkinson v. Severance*, 80 Iowa, 436, 45 N. W. 724; *Baker v. Copenharger*, 15 Ill. 103, 58 Am. Dec. 600; *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. 11; *Eneberg v. Carter*, 98 Mo. 647, 14 Am. St. Rep. 604, 12 S. W. 522; *Morrow v. Brenizer*, 2 Rawle, 195; *Brett v. Williamson*, 12 Lea, 659; *Shafer v.*

Tereso, 133 Iowa, 342, 110 N. W. 846; *Woerner*, Am. Law of Administration, 2d ed. § 342.

The defendants' judgments not having been liens upon the land, and the plaintiff having purchased in good faith and for good and valuable consideration the interest of the execution defendant, said interest is not liable to or for the payment of defendants' judgments.

De Vore v. Jones, 82 Iowa, 66, 47 N. W. 885; *Neighbor v. Hoblitcel*, 84 Iowa, 598, 51 N. W. 53; *Iowa City Bank v. Weber*, 72 Iowa, 137, 33 N. W. 606; *Carr v. Klein*, 93 Iowa, 313, 61 N. W. 918.

Messrs. White & Clarke, for appellees: The judgments were liens on the real estate.

(Code 1897, § 3801; Code 1897, § 48, sub-

of the land into money, the time when, and the conditions or contingencies upon which, the sale or sales may or must be made being so uncertain that the court must have great doubt that the conversion operated from the death of the testator, and must therefore conclude that, as to the property which was sold prior to the decease of the life tenant, the conversion took place at the time of sale, and, as to the property sold after the death of the widow, the conversion was at the time of her decease; and that therefore the interest of one of such children predeceasing the widow must be regarded as realty.

Such of the cases herein included as do not follow the principle above stated either carry their own explanation, or may be regarded as based on a misapprehended precedent, or on some loosely framed statement having reference to an actual, and not an equitable, conversion.

It should be noted that the doctrine of equitable conversion is not a fixed rule of law, but proceeds upon equitable principles, so that its application will be somewhat affected by the connection in which it is invoked. With this in view, as well as for convenience in reference, the following cases have been grouped so far as possible with regard to the ultimate question involved.

In determining rights to testator's realty, as such.

In *Massey v. Modawell*, 73 Ala. 421, it was held that the equitable conversion of real and personal property effected by a direction that, when the testator's youngest child should become of age, or marry, the entire property, real and personal, should be sold and converted into money, could not and did not take effect until, by the terms of the will, the land could be sold; but till then it was realty, with all the rights and incidents which attach to the lands, and the title was in the heirs by descent; and that therefore such heirs, before the land is sold under the power in the will or claimed for sale, have a remedy at law and no right or 20 L.R.A. (N.S.)

pretense for going into equity to recover the possession of lands sold by the executor without authority, before the time fixed by the will.

The force of this decision is, however, carefully limited in *Allen v. Watts*, 98 Ala. 384, 11 So. 646, where it is said that the expressions used in the opinion in that case which apparently support the proposition that, when land is directed to be sold and converted into money at some future time, there is no equitable conversion until the arrival of the time when the sale and conversion shall actually take place, are to be referred to the matter then in hand; and that the court should be understood as asserting that a conversion of the entire estate in the land could not and did not take effect while a term was outstanding which was not within the influence of the direction to convert; that the character of the interest of the children in the remainder was not determined, but only their equitable right to the present possession of the land was denied.

In *Savage v. Burnham*, 17 N. Y. 561, an amicable suit brought to obtain a judicial construction of a will, it was said that the doctrine of equitable conversion must be taken with the qualification that the change does not take place in theory until the period arrives or event occurs when the conversion ought to be made; so that, in the present case, the real estate was to be sold and the proceeds to become personalty after the decease of the testator's widow, and not before. The point actually decided, however, is that, during the life of the widow, the trustees to whom the testator had devised his entire estate upon trust to hold during the life of the widow, and apply the rents and profits as directed, and at her death to sell the real estate and apply the proceeds to a fund for the distribution of which among the testator's children and grandchildren provision was made, held the land as land.

In *Shumway v. Harmon*, 6 Thomp. & C. 626, it was held, in determining the right

div. 8; *Blain v. Stewart*, 2 Iowa, 378; *Crosby v. Elkader Lodge No. 72*, 16 Iowa, 399; *Lippencott v. Wilson*, 40 Iowa, 425; *Bartle v. Curtis*, 68 Iowa, 202, 26 N. W. 73; *Brebner v. Johnson*, 84 Iowa, 23, 50 N. W. 35; *Rand v. Garner*, 75 Iowa, 311. 39 N. W. 515; *Cook v. Dillon*, 9 Iowa, 407; *Strong v. Garrett*, 90 Iowa, 100, 57 N. W. 715.

There was no equitable conversion of the land before the sale of the real estate by the executor.

2 Underhill, Wills, §§ 702, 703; *Eneberg v. Carter*, 98 Mo. 647, 14 Am. St. Rep. 604. 12 S. W. 522; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 587; *Moncrief v. Ross*, 50 N. Y. 431; *Savage v. Burnham*, 17 N. Y. 561; *Vincent v. Newhouse*, 83 N. Y. 505; *McClure's Appeal*, 72 Pa. 414; *Brumfield v.*

Drook, 101 Ind. 190; *Brome v. Pembroke*, 66 Md. 193; 7 Atl. 47; *Wilder v. Ranney*, 95 N. Y. 7; *Ford v. Ford*, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188; *Brothers v. Cartwright*, 55 N. C. (2 Jones, Eq.) 113, 64 Am. Dec. 563; *Nelson v. Nelson*, 36 Ind. App. 331, 75 N. E. 681; *Wilson v. Rudd*, 19 Ind. 101; *Simonds v. Harris*, 92 Ind. 505; *Bowen v. Swander*, 121 Ind. 164, 22 N. E. 727; *Re L'Hommiedieu*, 138 Fed. 606; *Sayles v. Beat*, 140 N. Y. 368, 35 N. E. 636; *Boland v. Tiernay*, 118 Iowa, 67, 91 N. W. 836.

The alleged assignment to his wife by testator was fraudulent and void as to these judgment creditors.

Hamill v. Augustine, 81 Iowa, 302, 48 N. W. 1113; *Romans v. Maddux*, 77 Iowa, 203. 41 N. W. 763; *Iseminger v. Criswell*, 98

to the rents and profits of real estate directed to be sold after a year and a half, that such property must be considered as converted into money, and to have become personal estate in the hands of the executors as of the date when the sale was to take place.

In *Lydon v. Metropolitan Elev. R. Co.* 7 Misc. 25, 27 N. Y. Supp. 311, in denying the right of the persons entitled to the proceeds of a sale directed upon the death of a life tenant to maintain an action to enjoin the maintenance and operation of an elevated railroad in front of the premises, and for damages, it was said that, where there is a direction for a future conversion of real property into personalty, the property is not deemed to be converted until the time of its conversion as indicated by the testator has arrived.

In *Eisner v. Curiel*, 2 App. Div. 522, 37 N. Y. Supp. 1119, in which the question was as to the proper parties to a partition action, it was held that the interest of the beneficiaries among whom the proceeds of certain premises, which were to be sold upon the death of the survivor of certain persons to whom they were devised during their joint lives and during the lifetime of the survivor, were to be distributed, was not in the realty, but in the personalty resulting from the equitable conversion; and that it made no difference that the conversion was deferred until the determination of the life estates.

In *Hodges's Estate*, 5 Pa. Co. Ct. 283, where a testator gave a life estate to his wife, and, after her death, authorized the sale of all his estate, it was held, in determining the disposition to be made of a void bequest, that the conversion would be held to take place as of the death of testator.

In *Leiper v. Thomson*, 60 Pa. 177, in which the question was as to the validity of the title acquired by a purchaser at sheriff's sale on a judgment obtained against the administrator *c. t. a.* without joining the widow and heirs, it was held that, where a testator devised his real estate to trustees to sell when all his children became of age, 20 L.R.A. (N.S.)

and to divide the proceeds among his wife and children, such direction to sell operated as an equitable conversion of the realty into personalty; and any delay or postponement of the period of actual conversion would not change the principle.

So, also, in *Ramsey v. Hanlon*, 33 Fed. 425, where a testator, after devising his real estate to his wife for life, directed a sale and distribution of the proceeds, it was held that the principle of equitable conversion applied, notwithstanding the period of sale was remote; and that therefore a valid title was acquired by the purchaser at sheriff's sale under a judgment against the executrix, without joining the heirs or devisees or warning them by *scire facias*.

In determining capacity of beneficiaries.

In *Iglehart v. Iglehart*, 26 App. D. C. 209, 6 A. & E. Ann. Cas. 732, affirmed in 204 U. S. 478, 51 L. ed. 575, 27 Sup. Ct. Rep. 329, where the validity of a devise to a cemetery corporation for the care of a burial lot was under consideration, it was held that such devise, which was of real property directed to be sold upon the death of the life tenants, was to be considered as one of personalty; the court saying that the authorities are quite well agreed that such express direction of sale, though the time of sale is not immediate, operates to convert the property into personalty from the death of the testator.

In *Meakings v. Cromwell*, 5 N. Y. 136, it was held that, where a testator gave his wife the rents of certain lands for life, directing that after her death they should be sold, and the proceeds divided among certain persons, the latter gift was one of money, and not of land, and therefore valid though the beneficiaries were aliens.

In determining validity of testamentary disposition.

The cases are unanimous in declaring that realty will not be regarded as converted into personalty before the time appointed for its

Iowa, 382, 67 N. W. 289; Woods v. Allen, 109 Iowa, 484, 80 N. W. 540; Wiltse v. Flack, 115 Iowa, 51, 87 N. W. 729; Farwell v. Stick, 96 Iowa, 87, 61 N. W. 565, 64 N. W. 614; Daggett v. Bulfer, 82 Iowa, 101, 31 Am. St. Rep. 464, 47 N. W. 978; Overholtzer v. Hazen, 92 Iowa, 602, 61 N. W. 365; Conry v. Benedict, 108 Iowa, 664, 75 Am. St. Rep. 282, 76 N. W. 840.

Deemer, J., delivered the opinion of the court:

In November of the year 1898 F. E. Collins and S. M. Leach obtained judgments against Jacob H. Beaver, and in January of the year 1899 the Dallas County Savings Bank also obtained a judgment against him. These judgments were rendered by the Dal-

las county district court, and were properly made of record and duly indexed. In July of the year 1899 Israel Beaver died seized of the real estate in controversy, and, by his will, devised a life estate in the property to his wife, Elizabeth, and then provided that, "at the death of my wife, Elizabeth Beaver, the real estate and all the personal property still remaining shall be sold. Of the proceeds of the sale the sum of twenty-five hundred dollars shall be set aside and reasonably invested, the income derived from the same to be devoted to the support and maintenance of my son James M. Beaver for his life. At his death the said twenty-five hundred dollars and any accrued interest to be equally divided among the

conversion for the purpose of sustaining a testamentary disposition otherwise invalid.

In Williams v. Conrad, 30 Barb. 524, where the validity of a trust involving a suspension of the power of alienation was in question, the testator directed the sale of all his property after his children should be of full age and after the death of his wife, and a division of the proceeds among the children; and it was said: "There is no ground upon which the real estate can be considered as converted into money from the death of the testator. Such conversion is not called for by the will, and would be inconsistent with the plain intention of the testator. He did not desire or intend his property to be sold until after the death of his widow, and after his children were all of full age."

In Gano v. McCunn, 56 How. Pr. 337, it was held that the provision of a will directing a sale and devise of testator's estate at the end of six years could not be upheld, as against the statute in relation to the suspension of the power of alienation, by a resort to the doctrine of equitable conversion, as the rule of equitable conversion of real into personal, or personal into real, estate, does not operate until the time arises when the conversion is directed to take place.

In Trowbridge v. Metcalf, 5 App. Div. 318, 39 N. Y. Supp. 241, affirmed without opinion in 158 N. Y. 682, 52 N. E. 1126, in which the doctrine of equitable conversion was invoked to protect a provision directing the sale of lands five years after testator's death from the operation of the rule limiting the suspension of the power of alienation, it was held that as, by the express provisions of the will, such sales could not be made until after the expiration of five years, during those five years there is no equitable conversion, and the property remains real estate; and the devise must be considered as a devise of real estate, and not of personal property.

In DeWolf v. Lawson, 61 Wis. 469, 50 Am. Rep. 148, 21 N. W. 615, it was held that, where a testator directed his executor to rent certain real estate and divide the net 20 L.R.A. (N.S.)

income therefrom between two religious societies each and every year for twenty years, and, at the expiration of twenty years, to sell such real estate and pay the proceeds to the then living children of testator's daughter, such provision could not be sustained, as against the statute relating to the suspension of the power of alienation, upon the theory that the real estate of the testator must be deemed as equitably converted into personalty at his death, as the testator clearly did not contemplate a conversion before the time directed.

In determining *quantum* of interest taken.

In Vogt v. Vogt, 26 App. D. C. 46, where the question was as to whether a beneficiary under the residuary clause of the will took an absolute estate by virtue of the rule in Shelley's Case, it was said that, where the will directed a sale of the residuary estate when testator's youngest surviving child should attain the age of twenty-one years, or one year thereafter, the real estate, having been directed to be converted into money, is to be regarded as if it were money at the time of the testator's death.

In determining mode of transfer of legatee's interest.

In Miller v. Payne, 28 App. D. C. 396, in determining the effect of the conveyance by a beneficiary before actual conversion, it was held that the provision of the will that property should be sold one year after the death of the testatrix, and the proceeds divided between her children, operated as an equitable conversion.

In Mellon v. Reed, 123 Pa. 1, 15 Atl. 906, where the question was as to the validity of a parol transfer of a distributee's interest, it was held that, where a direction to sell real estate for the purpose of distribution became absolute at the death of testator's widow, there was an equitable conversion of such realty into personalty.

In Howell v. Mellon, 189 Pa. 169, 42 Atl. 6, it was held that, where a will directed a sale of realty at the death of the widow, and division of the proceeds among the

heirs hereinafter named. After setting aside of the said sum of twenty-five hundred dollars, all of the remainder of the proceeds of the said sale shall be equally divided between my children and heirs to wit: Jacob H. Beaver, Willard Beaver, Thomas Beaver and Mary E. Myers or their children. I hereby appoint Jacob H. Beaver, my executor to carry into effect the provisions of this my last will."

The widow died February 28, 1907, and, on June 1, 1907, executions were issued upon the aforesaid judgments, which, on the same day, were levied upon the interest of Jacob H. Beaver in the premises in controversy acquired under the will. On July 1, 1907, Jacob H. Beaver, as executor of the will, was also garnished under these executions.

children, from the date of testator's death, as between the children, it was personalty, and might be conveyed by them with such formalities only as are necessary in passing title to personalty.

But in *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 78 Pac. 1020, it is said that the provision of Civil Code, § 1338, that the proceeds of the sale of land directed to be sold must be deemed personal property "from the time of the testator's death," is applicable only when the will merely directs the sale to be made, without limiting or designating the time at which it is to be made; but that, if the will postpones the time of the sale until the happening of some future event or until some fixed date, the conversion is likewise postponed, and there can be no conversion until the executor shall have the power to make the sale. The ultimate decision in the case was that the foreclosure of the mortgage made by one of the beneficiaries of his interest in the land passed his interest therein, and in the proceeds of a sale thereof, in case the power of sale should be subsequently executed; but that the purchaser was not entitled to a partition thereof.

In determining rights of legatee's creditors.

Although they are agreed that a creditor cannot take real estate, as real estate, so as to defeat an execution of the power of sale, the cases seem to be at variance as to whether, with respect to the character of the creditor's remedy, the legatee's interest before the time when actual conversion can take place is to be regarded as realty or personalty. The view that the legatee is to be regarded as having a vested interest in the realty subject to be divested by the execution of the power of sale seems neither to be considered by the courts adopting it as conflicting, nor necessarily to conflict with the application of the doctrine of equitable conversion (which, as hereinbefore noted, is not a rigid rule, but a fiction adopted in the furtherance of justice) in determining the character of the legatee's interest for

To restrain the sale of the land under the executions, and to clear the title of all clouds resulting therefrom, this action was brought by Mary Beaver, the wife of Jacob H., and by Jacob H., as executor, and it is claimed that Mary Beaver took by assignment from Jacob some time in the year 1899 whatever interest he (Jacob) had in or to the lands in controversy or their proceeds; and that this assignment was verbal and made before the levy upon the land, or the garnishment of the executor. In their answer defendants claim that the interest which Jacob H. Beaver took under the will of his father was real property, and that the lien of their judgments attached thereto immediately upon the death of the father; that the real estate has never been converted into

other purposes. The question touched upon will not be here treated in detail, and the cases following are not to be taken as exhausting the subject.

In *Darst v. Swearingen*, 224 Ill. 229, 115 Am. St. Rep. 152, 79 N. E. 635, it was held that, where a testator, after giving his wife a life estate in certain real property, directed it to be sold within two years after her death and the proceeds equally divided among his children, the interest of one of such children during the widow's lifetime is not real estate subject to levy and sale by judgment creditors, but personal property,—citing *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Ebey v. Adams*, 135 Ill. 80, 10 L.R.A. 162, 25 N. E. 1013; *English v. Cooper*, 183 Ill. 203, 55 N. E. 687; *Starr v. Willoughby*, 218 Ill. 485, 2 L.R.A.(N.S.) 623, 75 N. E. 1029.

In *Morrow v. Brenizer*, 2 Rawle, 185, where a testator directed the sale of his property after the decease of his wife and a division of the proceeds among his children, it was held that a sheriff's sale under a judgment against one of the children passed no title.

In *Jones v. Caldwell*, 97 Pa. 42, it was held that an absolute direction to sell lands after the death of the testator's widow, and to divide the proceeds among his children, effects an equitable conversion thereof into personalty; and the interest of one of the children is not bound, as real estate, by a judgment against him before a sale.

In *Rowland v. Miller*, 100 Pa. 47, it was held that, where a testatrix did not devise her real estate as realty, but directed the distribution of its proceeds, and prohibited any sales for ten years after her decease, unless the executors should deem it advantageous or advisable, the persons entitled to the proceeds have no interest in the real estate as such, or upon which a judgment would become a lien.

But in *Wilson v. Rudd*, 19 Ind. 101, and *Simonds v. Harris*, 92 Ind. 505, it is held that the interest of a child under a will which, after giving lands to the testator's wife for life, directed that at her death they should be sold and the proceeds equally

personalty; that, if it had been so converted, their garnishments are superior to the alleged assignment to Mary H. Beaver; and that the assignment, even if one were made, is fraudulent and void, because it was executed with the intent to hinder, delay, and defraud the creditors of Jacob H. Beaver, and especially the defendants, who hold the judgments hitherto mentioned. A demurrer to the answer setting up the facts above recited was overruled, to which ruling exception was taken. These demurrers were bottomed upon the proposition that Jacob H. Beaver had no such interest in the real estate in controversy as was subject to levy or sale. It will be observed that, if Jacob H. Beaver took an interest in real estate under the will of his father, and that this

interest was subject to levy and sale, the decree of the trial court is undoubtedly correct, for the lien of the judgments attached immediately upon the death of the father, or, in any event, upon the death of the mother, and the assignment under which plaintiff Mary Beaver claims would be junior and inferior to the levy of the executions. On the other hand, if the interest which Jacob H. took under the will is personal in character, the assignment thereof to Mary H. Beaver would be superior to any lien or interest acquired under the levy of the executions, whether by garnishment or otherwise, unless the sheriff or the plaintiffs in execution show that the assignment was fraudulent as to them.

The first question in the case is the nature

divided among the children, was liable before its actual conversion to attachment and to sale under execution; and that the creditor thereby became entitled to the child's share of the proceeds of the sale.

And in *Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58, it was held that, where a testator devised all his property to his wife during life or widowhood, directing it, upon her death or marriage, to be sold and divided among the children, one of such children had an interest in the real estate which was subject to attachment and sale; and that his interest therein passed by the deed under those proceedings.

So, also, in *Sayles v. Best*, 140 N. Y. 368, 35 N. E. 636, it was held that, where a testator gave his executors power to sell real estate after the expiration of a life estate, or when the youngest child should become of age, directing the division of the proceeds equally among his legal heirs, a creditor recovering a judgment against one of such heirs before the time arrived when the power might be executed, acquired a lien upon his interest, which followed and attached to his interest in the proceeds. The court said: "It has been urged by the respondents' counsel that, by the execution of the power of sale, the land was converted into personalty, and the legal title of the heir was thereby divested and defeated, and that the legal title and estate of the heir failing, the lien of the judgment must fall with it. That would necessarily be the result where the heir and the distributee of the proceeds under the will are different persons; but, where they are the same person, another rule, we think must prevail. The conversion of the realty into personalty proceeds upon equitable principles. While the change in the quality of the property is made in accordance with the will of the testator, equity requires that the intervening rights of purchasers and lienors shall be protected."

In determining devolution of legatee's interest.

The greater number of decisions involving the point under discussion arise in this connection. (L.R.A. (N.S.)

section, and declare, almost without exception, that the legatee's interest will in such case be regarded as one in personalty, in the absence of any expressed contrary intention on the part of the testator.

In *High v. Worley*, 33 Ala. 196, in considering the rights of one claiming by devolution through a legatee, it was held that, where a testator had directed that the land should be retained by the executor for the use and support of his wife and children until his daughter should attain the age of sixteen, and that it should then be sold and the proceeds equally divided between his wife and children, share and share alike, the postponement of the sale did not prevent the operation of the principle of equity jurisprudence that the court of chancery will consider land directed to be sold and conveyed into money as money.

In *Allen v. Watts*, 98 Ala. 384, 11 So. 646, in which the question was as to whether the will of a child who had died before actual conversion was effectual to pass his interest under the will of his father, who had given real estate to his wife for life, to be sold at her death and the proceeds equally divided among the children, it was held that that interest or estate in the land which the father's will required absolutely and without contingency to be sold and converted into money which was to be paid to certain beneficiaries was, for the purpose of that provision, to be considered as money from the date of the testator's death; and that it was none the less a gift of personal property from the beginning because there was a postponement of the time when the legatees would come into the enjoyment of the legacies.

In *Re Stevenson*, 2 Del. Ch. 197, it was held that, where a will provided for the sale of property after the decease of testator's wife; there was an equitable conversion thereof from the death of the testator, so that the shares of beneficiaries who had died before actual conversion took place would pass as personal estate to their executors or administrators.

In *Rumsey v. Durham*, 5 Ind. 71, it was held that, where a testator, after giving his

of the interest which Jacob H. Beaver took under the will of his father. It will be noticed that no trustees are named in the will in whom the title might rest. A life estate is given the wife, Elizabeth, and it is then provided that the real estate shall be sold, \$2,500 of the proceeds set aside for the support and maintenance of one of the children, and the remainder thereof divided among five other children, naming them. Jacob H. Beaver was appointed as executor to carry into effect the provisions of the will. On the one hand, it is contended that Jacob H. Beaver took one fifth in fee of the land, subject to the life estate of the mother and its proportion of the \$2,500 which was to be set aside upon the death of Elizabeth for the use and benefit of James H. Beaver; while,

on the other, it is contended that, under the doctrine of equitable conversion, the interest which Jacob H. Beaver took under the will was and is personal in character, that this was assigned to Mary H. Beaver before the levies of any of the executions, and that her right thereto is prior and superior to the garnishments. "Equitable conversion" is defined as a constructive alteration in the nature of property by which in equity real estate is regarded as personalty or personal estate as realty. It grows out of the old equitable maxim that "Equity regards that done which ought to be done." It has been adopted for the purpose of executing trusts, and it is essential to the application of the doctrine that the property should be subject to a trust or imperative direction for

wife the use and benefit of his entire estate during widowhood, directed that, after her death or marriage, all his property should be sold and equally divided among his children, the direction to sell was; in effect, a conversion of the land into personalty; and the distribution of the testator's gift to his children should be governed by the same rule as if the donation in the first instance had been money.

In *Nelson v. Nelson*, 36 Ind. App. 331, 75 N. E. 679, in determining the interest of a deceased beneficiary's husband, it was held that, where a testator made it obligatory on his executor at the death of the life tenant to convert all of his estate then remaining into money, an equitable conversion took place at the time of his death, and was not postponed by the fact that the land was not to be sold until after the death of the life tenant.

In *Rawlings v. Landes*, 2 Bush, 158, it was held that, where a testator devised certain property to his widow for life, and directed it, at her death, to be sold and the proceeds to be divided among his children and grandchildren, the interest taken by a child was to be regarded as a money bequest to which her surviving husband became entitled on her decease.

In *Hocker v. Gentry*, 3 Met. (Ky.) 463, where a testator directed the sale of slaves when his youngest child should attain the age of twenty-one years, and a division of the proceeds among the children, and the question was whether the right of a child who had died before the time of sale arrived was to be regarded as a right to the slaves or to their proceeds, it was said that it has been frequently decided that, if the direction to sell is positive, the right of the legatee will, in equity, be regarded as a right to money from the time of the testator's death, though the period of sale is remote, and the conversion cannot be made till the time arrives.

In *Goldsmith v. Cone*, 7 Ky. L. Rep. 520, it was held that, where a testatrix devised her estate to her husband for life, directing a sale thereof for the purpose of distribution after his death, she intended mon-

ey to be divided; and it was, in equity, a bequest of personalty, and not a devise of land, so that the portion of one of the remaindermen passed upon her death, as personalty.

So, also, in *Miller v. Sageser*, 30 Ky. L. Rep. 837, 99 S. W. 913, it was held that, where a testator provided that, after the death of his wife, his farm should be sold and the proceeds divided among his children, the interest of a child was to be considered as personalty, so that, upon her death intestate, it passed to her surviving husband and child.

In *Fairly v. Kline*, 3 N. J. L. 755, 4 Am. Dec. 414, it was held that, where a testator directed all his land to be sold after his wife's death and the proceeds of the sale divided among his children, the interest of a child dying before the time of sale was one transmissible to her representative.

In *Bunce v. Vander Griff*, 8 Paige, 37, it was held that, where a testator gave his wife the use and income of all his property so long as she remained his widow, and directed its sale after her death or remarriage, the money arising upon the sale to be divided among the children, if the person entitled to the proceeds dies before the execution of the power, such proceeds are to be distributed as personal estate of the decedent, in the same manner as if the property had been sold before his death.

In *Fisher v. Banta*, 66 N. Y. 468, where the will contained an imperative direction to sell all the testator's real estate, and provided for a division of testator's real estate equally between his two sons after the youngest arrived at the age of twenty-three, it was held that from the moment of testator's death the conversion took place and the land became money for all purposes of administration, the sons taking their interest as legatees, so that upon their death before actual sale it passed to their personal representatives.

In *Ross v. Roberts*, 2 Hun. 90, affirmed without opinion in 63 N. Y. 652, it was held that, where a testator authorized his executors to sell his real and personal estate, and to convert the same into money for di-

conversion. *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160.

Appellees contend that the doctrine does not apply here for the reasons (1) that no title passed to the executor or other trustees; (2) that the conversion could not take place in any event before the death of the widow; and (3) that no express power of sale is given to the executor. It was quite generally held that there need be no devise in terms to testators, executors, or to trustees in order that the doctrine of equitable conversion may apply. *Ebey v. Adams*, 135 Ill. 80, 10 L.R.A. 162, 25 N. E. 1013. And the fact that the sale is postponed to a time subsequent to the death of the testator is not controlling. *Allen v. Watts*, 98 Ala. 384, 11 So. 646; *Meakings v. Cromwell*, 5 N. Y.

vision within one year after the decease of himself and wife, the character of the estate or interest possessed by a beneficiary under the will, who died before actual conversion, was a money legacy to be distributed as her personal estate in the same manner as if a sale or conversion had taken place before her death.

In *Freeman v. Smith*, 60 How. Pr. 311, it was held that, where a testator devised real estate to his wife for life, and directed that upon her death it should be sold and the proceeds distributed among his children or their legal representatives, the equitable conversion does not take place until the time arrives when, under the direction in that behalf, the sale should be had; but that the bequest over to the children was a gift of personality, so that the share of a child predeceasing the widow passed as such to her next of kin.

In *Smith v. McCrary*, 38 N. C. (3 Ired. Eq.) 204, it was held that, where a testator directed his land to be converted into money and mixed with the money arising from the sales of the personal estate for the purpose of division among his children on the death of their mother, the share of one of such children dying during the life tenancy must go to her administrator, equity having impressed on the estate in remainder in the land the character of personal property, which was vested in the children from the death of the testator.

In *Collier v. Grimesey*, 36 Ohio St. 17, it was held that, where a testator directed the sale of certain real estate when his son should arrive at the age of twenty-one, provided that his wife's widowhood should have ceased before that time, the interest of a distributee of the proceeds, who died before the time arrived for the making of the sale, passed to his personal representatives as personality.

In *Parkinson's Appeal*, 32 Pa. 455, it was held that, where a testator gave his wife a life estate in certain property, and, after her death, directed it to be sold for the purpose of making a designated distribution, the interest of the persons entitled to the proceeds will be treated, for purposes of the 20 L.R.A. (N.S.)

136; *Collier v. Grimesey*, 36 Ohio St. 17; *Mellon v. Reed*, 123 Pa. 1, 15 Atl. 906. Where there is a postponement of the sale to a time subsequent to testator's death, the courts are in conflict regarding the time when the conversion takes place; some of them holding that it takes place on the testator's death, and that there is no devise of realty, and others that it does not occur until the time arrives when the change should be made. See *High v. Worley*, 33 Ala. 196; *Rumsey v. Durham*, 5 Ind. 71; *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109; *Hocker v. Gentry*, 3 Met. (Ky.) 463; *Fairly v. Kline*, 3 N. J. L. 754, 4 Am. Dec. 414; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585; *Thomman's Estate*, 161 Pa. 444, 29 Atl. 84; *Ramsey v. Hanlon* (C. C.) 33

will, as if it had been personal estate at the time of the death of the testator.

In *Horner's Appeal*, 56 Pa. 405, it was held that, where a testator devised land to his wife for life, and directed it, at her death, to be sold and the proceeds divided among his children, his will converted his real estate into personality so far as it related to the interests of his children in the proceeds.

In *McClure's Appeal*, 72 Pa. 414, in which the question was as to the disposition to be made of the share of a distributee dying before the time appointed for the conversion, it was held that, where the direction to sell is absolute, it is no exception to the rule that land directed to be sold and turned into money is to be considered as money from the death of the testator, for all the purposes of his will, that the period of sale is remote, and the conversion cannot be made until the time arrives.

In *Thomman's Estate*, 161 Pa. 444, 29 Atl. 84, it was held that, where a testator directed the sale of his farm after his wife's death, and a division of the proceeds thereof among his children, such realty would be treated, in making the distribution, as converted into personality from the testator's death.

In *Heberton's Estate*, 3 Phila. 436, it was held that a direction to sell testator's real estate when the youngest of his children should attain the age of twenty-one worked a conversion of the estate from the death of the testator, so that the interest of a child dying before actual conversion passed as personality.

In *Re Sebastian*, 4 Phila. 236, where a testator, after giving his wife a life estate in all his property, directed its sale after her death and the distribution of the proceeds, it was held that conversion took place from the moment of the testator's death, and the interest of a beneficiary would pass as personality.

In *Byrne v. Stewart*, 3 Desauss. Eq. 135, it was held that, where a testator directed certain real estate to be sold on his youngest son's coming of age, and the money to be divided between his wife and children,

Fed. 425. *Contra*, *Shipman v. Rollins*, 98 N. Y. 311; *Vincent v. Newhouse*, 83 N. Y. 505. Under the doctrine announced by these latter cases, until the time of sale arrives the land is treated as realty; title vesting in the devisees and being subject to any liens which may be created in the interim. See *Sayles v. Best*, 140 N. Y. 368, 35 N. E. 636; *Nelson v. Nelson*, 36 Ind. App. 331, 75 N. E. 679. The Indiana court is not consistent in its holdings. In the *Ramsey Case* it held that the conversion took place at the time of testator's death, while in the *Nelson Case* it held that during the interim between his death and the time fixed for the sale of the land the residuary beneficiary had a vested interest subject to disposition. And in *Simonds v. Har-*

ris, 92 Ind. 505, it is held that this interest is subject to attachment and sale as real estate. See, as further sustaining this latter doctrine, *Eneberg v. Carter*, 98 Mo. 647, 14 Am. St. Rep. 664, 12 S. W. 522. The underlying thought in these cases seems to be that the devisee takes a vested interest subject to the life estate and the executor's power of sale. The great weight of authority is in favor of the proposition that the conversion takes place at the instant of testator's death, and that all property rights must be determined as if the conversion had taken place at that time, and the rights of the parties are adjusted as if the property were personalty. In cases where the doctrine applies either by reason of the act of the parties or by operation of law, the

the interest of the wife, who died before the time fixed for sale, passed as personalty.

In *Green v. Davidson*, 4 Baxt. 488, it was held that where a testator directed land to be sold upon the death of his widow and the proceeds divided among his children, the estate passed to the legatees as personalty, so that upon the death of any of the children during the life of the widow, or before the land was to be sold, their shares would vest in their personal representatives.

A similar conclusion is reached in *Hardin v. Young* (Tenn. Ch. App.) 41 S. W. 1080.

In *Harcum v. Hudnall*, 14 Gratt. 369, where a will directed, in effect, that a conversion should be made when testator's son arrived at the age of twenty-one years, it was held that equity will consider the property devised as stamped with the character of money from and after that period; and that therefore the interest of the person entitled to a share of the proceeds was not an estate, but a mere chose in action.

So, also, in *Effinger v. Hall*, 81 Va. 94, where a testator directed a sale of land after the death of his wife and a division of the proceeds, it was held that the interest of the persons entitled to such proceeds would be considered, in equity, as personalty.

In *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109, affirming 7 D. C. 226, where the rights of the beneficiaries under the will were in question, it was held that, where real estate is directed by will to be converted into money, it is, in equity, regarded as if it were money at the time of the death of the testator; and that it was not to be sold until after the termination of two successive life estates does not affect the application of the principle.

In *Handley v. Palmer*, 43 C. C. A. 100, 103 Fed. 39, where the testator ordered and directed his executors to sell and convey all his real estate at the end of twenty years, it was held that such direction worked a conversion of his real estate into personalty as of the date of his death.

In *Reading v. Blackwell*, 166, Fed. Cas. No. 11,612, where a testator devised his real estate to his executors, directing them

to apply the rents and profits to certain purposes until his grandnephew should attain, or would, if living, have attained, twenty-one years of age, it was held that the proceeds of such sale are to be considered as personal property at the death of the testator, for all the purposes of the will.

In *Rinehart v. Harrison*, 177, Fed. Cas. No. 11,840, where the same testamentary provision was in question, it was held that no exception was created to the general rule as to equitable conversion because the testator had postponed the sale of the real estate to the maturity of his grandnephew; and that, therefore, the share of a distributee who had died before there could be any actual conversion of land into money passed to her personal or legal representatives, and not to her heirs.

That equitable conversion will not take place until the time appointed for a sale, where such is the testator's intention, is shown in *Richey v. Johnson*, 30 Ohio St. 288, where it was said that, although it is true that, where the testator intends the legacy shall vest in interest at the time of his death, though the fund for its payment is to arise from the sale of lands which are directed not to be sold until the happening of a future event which must occur, the conversion will be regarded for all purposes of succession, as made at the testator's death; yet such rule is not applicable where the effect would be to contravene the intention of the testator that the law of succession in respect to the share of a primary legatee dying before actual conversion should be found in the statute of descent, and not of distribution. In this case the testator directed that, after the death of his wife, to whom he devised the use of a farm during her natural life, his executors should sell it and divide the proceeds thereof equally between his brothers and sisters and their heirs; and it was held that, although the gift as to the brothers and sisters was to be regarded as a bequest of personalty, and not a devise of land, yet, so far as the succession of the children of brothers and sisters dying before the time appointed for the sale was concerned, the conversion of

proceeds are regarded as personal property. In other words, this interest passes as personalty, and the legatees have no such estate in the land as is subject to a judgment or lien or to an execution for the sale of real estate. *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303; *Loftis v. Glass*, 15 Ark. 680; *Hammond v. Putnam*, 110 Mass. 232; *McClure's Appeal*, 72 Pa. 414; *Allison v. Wilson*, 13 Serg. & R. 333; *Morrow v. Brenizer*, 2 Rawle, 185; *Turner v. Davis*, 41 Ark. 270; *Paisley v. Holzshu*, 83 Md. 325, 34 Atl. 832; *Mellon v. Reed*, 123 Pa. 17, 15 Atl. 906; *Hunter v. Anderson*, 152 Pa. 386, 25 Atl. 538; *Jones v. Caldwell*, 97 Pa. 43; *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751; *Roland v. Miller*, 100 Pa. 47; *Evans's Appeal*, 58 Pa. 238. However, there may be an equitable assignment by the devisee of his interest as by mortgage or otherwise. *Walker v. Killian*, 62 S. C. 482, 40 S. E. 887; *Henderson v. Sherman*, 47 Mich. 267, 11 N. W. 153; *Snover v. Squire* (N. J. Ch.) 24 Atl. 365; *Allen v. Watts*, *supra*. Of course, this doctrine cannot be extended so far as to defeat the widow of her rights.

In support of the decree of the trial court, it is argued that, as the lands were not devised to the executor or to other trustees in trust, the legal title to the land until ac-

tual sale or conversion was in the heirs, among whom was Jacob H. Beaver, and that his legal interest was subject to execution sale; and some cases are cited in support of this doctrine. Justice Gibson answered this contention in *Allison v. Wilson*, *supra*, in his usual strong and forceful manner in this way: "But, even if this were otherwise, it would not vary the result; suppose the legal estate to descend, and remain subject, as it undoubtedly would, to the power to sell, it would, doubtless, be bound in the hands of the heir by a judgment against him; but for how much? Surely for just as much as descended to him, which would be all that was not disposed of by the will. The judgment creditor could sell, and the purchaser could obtain, no more than what vested in the debtor as heir. Then, when the estate of the purchaser comes to be devested by a sale in execution of the power under the will, what right has he, in virtue of having owned the descended part of the estate, to the money arising from that part of it which never descended, but passed under the will as a personal bequest? Neither the judgment creditor, nor the purchaser, in his stead, is the representative of Lewis Lowman to every intent. It is a maxim that, where two rights meet in the same person, they are to be viewed as if they ex-

the farm into money would not be regarded as taking place at the death of the testator, or at any time prior to the death of his widow.

A case which clearly shows that the intention of the testator was not to make a gift of personalty, and in which, therefore, equitable conversion was held to date from the happening of the event specified, rather than from the time of the testator's death, is *Re Ransom*, 30 N. Y. S. R. 737, 10 N. Y. Supp. 16. There a testator gave a farm, together with stock, horses, etc., thereon, to certain persons as joint tenants, directing that the income and profits of said farm be divided in given proportions among them; and, in the event that the farm should not pay expenses and a dividend to the beneficiaries, the executors were given a power of sale and directed to pay over the proceeds to the same persons, and in the same proportions, as the income was directed to be disposed of; and it was held that from the happening of the event specified there vested in the beneficiaries an undivided interest in the property as personalty, so that the representatives of a beneficiary who died after part of the property had been converted into money were entitled to participate in the proceeds from the sale of the entire property.

The two following cases appear to be at variance with the generally prevailing doctrine:

In *Re Hammond*, 74 App. Div. 547, 77 N. Y. Supp. 783, in which the question was, 20 L.R.A. (N.S.)

Who was entitled to the share of a beneficiary dying before the termination of a life estate? it was held that, where the testatrix reserved, during the lifetime of the life tenant, the house and lot in question from the operation of a power of sale by which she had directed the conversion of her real estate into money, the equitable conversion, if there be one, must date from the time of the sale, instead of from the death of the testatrix, as would ordinarily be the case were the power to sell imperative and no time for its exercise specified in the instrument by which it is created.

In *Liveright v. Sternberger*, 115 N. Y. Supp. 349, it was held that, where the will of a testator indicated that it was not his intention that his real property should be converted into personalty immediately upon his death, but rather that it should be postponed until the death of his widow, unless the executors should sooner sell the same under the discretionary power given them to do so, the share of one entitled to participate in the proceeds upon the final distribution, but whose death preceded that of the widow, was to be considered personalty only as to the proceeds from the sale of real property theretofore sold.

Miscellaneous.

Under this heading may be found a few cases which, from the incidental manner in which the question under discussion was involved, do not lend themselves to the foregoing classification.

isted in different persons. Now, if a different person from Lewis Lowman, the heir, were entitled under the will, how could a judgment creditor of Lewis Lowman claim anything under the will? Hence it is evident that, by virtue of a lien on the land of Lewis Lowman, the heir, his judgment creditor will not be entitled to the personal interest of Lewis Lowman, the legatee. The argument attempted to be raised on this ground therefore fails."

This case also answers another suggestion made by appellees, to the effect that there might, perhaps, be a reconversion of the property by agreement, and, in that event, the judgments would be enforceable. The trial court erred in holding that the judgments were liens upon the land devised or any part thereof. The defendants, however, pleaded a garnishment of the executor, and plaintiffs, without objection, proceeded to try the issue tendered by the answer. In this they pleaded a pretended assignment by Jacob H. Beaver to the wife, Mary Beaver, one of the plaintiffs herein, but they averred that this assignment was fraudulent and made with intent to hinder and delay them in the collection of their judgments. This was submitted to the court, and it made the following order with reference thereto: "And the court further finds that, by rea-

son of the garnishment of the said J. H. Beaver as executor of the estate of the said Israel Beaver, the said execution defendants are entitled to have their said judgments satisfied out of the proceeds of the sale of said real estate belonging to the said J. H. Beaver under and by virtue of the provision of the will of the said Israel Beaver, deceased. It is therefore considered and decreed by the court that the said judgments of the said defendants hereinbefore set out be, and the same are hereby, established as liens upon the interest of the said J. H. Beaver in the said described real estate from the date of the death of the said Israel Beaver; and it is further decreed by the court that said judgments be, and the same are hereby, established as liens upon the interest of the said J. H. Beaver in the proceeds of the sale of the said described real estate in the hands of the said executor. And it is further decreed by the court that, upon the sale of the said described real estate, the same be condemned to satisfy the said several judgments, and that they be applied to the payment and discharge of said several judgments, with costs and accruing costs in full or *pro rata* as hereinbefore found and determined. And it is further decreed that, in the event of the failure of the said J. H. Beaver, executor, to

In *Vincent v. Newhouse*, 83 N. Y. 505, an action brought to obtain a determination of the rights and interests of all the parties under a will, in deciding the question whether any portion of the remainder provided for in the will giving and devising certain property to testator's wife for life, and directing that at her death such property should be sold by the executor and the proceeds equally divided, vested at the death of the testator, it was said that by such provisions the land was equitably converted into money from the time the sale was directed to be made. It will be perceived that this statement, though correct, does not necessarily imply that equitable conversion may not also date from the testator's death.

In *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585, in which the validity of the will was in question, it was held that whether the conversion of property directed to be sold should be deemed to take place on the death of a testator or at some later period depends on his intention as manifested by the provisions of the will, the general rule being that real estate should be deemed converted into personalty as of the date of the death of the testator; and that, where the executrices were directed to sell all the real estate, the time of sale resting in their discretion, they not being required to make the sale until ten years after the death of the testator's widow, such provision disclosed no intention to create an exception to the general rule that a conversion must be deemed to take place at the testator's death.

20 L.R.A. (N.S.)

In *Snell v. Tuttle*, 44 Hun, 324, it is said that, where specific real estate is directed to be converted into money at a future date and the avails divided among legatees, the rules applicable to personal bequests are to control.

In *Mutual L. Ins. Co. v. Bailey*, 19 App. Div. 204, 45 N. Y. Supp. 1069, it is said: "Whether the conversion takes place at the death of the testator, or at some later period, depends upon the intention of the testator. If the will, in terms, provides for a sale at a specified future time, or creates a trust with the discretion to sell only on the happening of a designated event, which might or might not happen, then the conversion takes place on its occurrence. Otherwise the conversion will be deemed to take place as of the date of testator's death,"—citing *Pom. Eq. Jur.* § 1162. A comparison of the foregoing statement within the authority cited shows, however, an alteration of the sense in adapting the passage referred to. There a direction to sell "at some specified future time," instead of being considered as of the same character as "a trust to sell upon the happening of a specified event, which might or might not happen," seems to be put by way of antithesis.

In *Severn's Estate*, 211 Pa. 65, 60 Atl. 492, it is said to be settled law that, if the will shows a clear intention that the estate shall be sold, a conversion will take place though there is not to be an immediate sale.

sell the said described real estate within a reasonable time after the date of this decree, that the said defendants, upon filing a motion herein showing such failure, shall be entitled to the issuance of a special execution for the sale of the interest of the said J. H. Beaver in said real estate for the satisfaction of the said judgments as hereinbefore found and determined." Appellants say that this part of the decree is unwarranted, because defendants have failed to establish the fraud pleaded by them. We have gone over the testimony with care, and fail to find any such evidence of fraud as would justify the setting aside of the assignment made by J. H. Beaver to his wife. The burden was upon the defendants to establish this issue, and, instead of introducing any testimony on their own behalf, they relied exclusively upon that given by the plaintiffs. Unless we are to hold that at least three witnesses wilfully committed perjury, we must conclude that an assignment was made by Jacob H. Beaver to his wife of all interest he had under the will in question in and to his father's property, and that this assignment was in good faith.

In view of this conclusion, it is apparent that the decree rendered by the trial court is erroneous, and it must be, and it is, reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

RE MAJER APPEL, Bankrupt.

EDWIN K. McPECK, Trustee, Petitioner.

(— C. C. A. —, 163 Fed. 1002.)

Bond — ne exeat — breach.

1. A bond filed by a bankrupt to secure his release from arrest under a writ of ne exeat, and conditioned to be void if he will not go or attempt to go into parts beyond

the jurisdiction of the court, and not depart from the district without leave, is not a mere bail bond, but is broken by an attempt to go beyond the jurisdiction without leave.

Bond — breach — release.

2. A bankrupt court may relieve a surety from liability on a bond executed to secure the release of a bankrupt who has been arrested under a writ of ne exeat after it has been broken by the departure of the bankrupt from the jurisdiction, if he has returned and is ready to abide the decrees of the court so that the result sought by the obligation has not failed.

(August 13, 1908.)

PETITION by the trustee in bankruptcy of Majer Appel to revise in matter of law the ruling of the District Court of the United States for the District of Massachusetts to the effect that there had been no breach of a bond given to secure the release of the bankrupt, who had been arrested under a writ of ne exeat. Reversed.

The facts are stated in the opinion.

Argued before Colt, Putnam, and Lowell, Circuit Judges.

Messrs. Lee M. Friedman and Morse & Friedman, for petitioner:

A ne exeat bond is a general undertaking or guaranty by the surety that, if the defendant is set at liberty generally, he will at all times remain within the jurisdiction.

Re Wolfe, 3 N. Y. Leg. Obs. 383; Griswold v. Durant, 13 R. I. 125; Stapylton v. Peill, 19 Ves. Jr. 615; Le Clea v. Trot, Prec. in Ch. 230; Beames, Ne Exeat, 84, note; 2 Dan. Ch. Pl. & Pr. 7th ed. 1403; Musgrave v. Medex, 1 Meriv. 49; Utten v. Utten, 1 Meriv. 51; Harris v. Hardy, 3 Hill, 393; 2 Maddock, Ch. Pr. 284; Zantzing v. Weightman, 2 Cranch, C. C. 478, Fed. Cas. No. 18,202; Wauters v. Van Vorst, 28 N. J. Eq. 103; Dupont v. Goffe, 1 Desauss. Eq. 143; Brayton v. Smith, 6 Paige, 489; Wilson v.

Case Note. — What constitutes breach of ne exeat bond.

In Musgrave v. Medex, 1 Meriv. 49, cited in the foregoing opinion, one of the defendants entered into the usual ne exeat bond and, after putting in his answer, went abroad without permission; subsequently an application was made on behalf of the plaintiff that the other defendant pay into court the sum for which the writ was marked, he having agreed to be answerable for the first defendant; or, in default thereof, that proceedings should be had upon the bond; and it was so ordered. A motion was subsequently made to discharge the order upon the contention that the money had in fact been already paid by the principal on the bond previous to his going

abroad. The Lord Chancellor, however, was of the opinion that that question had nothing to do with the application, and the motion was refused.

In Utten v. Utten, 1 Meriv. 51, also cited in the above opinion, the plaintiff, under similar circumstances to those in the preceding case, moved that the bond be delivered over to him and put in suit by him. It was suggested for the sureties that the money claimed by the plaintiff in the cause was not actually due; and that the defendant had put in an answer which was not excepted to, and that he had gone abroad under a mistake as to the effect of his bond; and it was therefore requested that the sureties be discharged on entering into cognizances to abide the event of

Calculagraph Co. 83 C. C. A. 77, 153 Fed. 961.

Messrs. Elder & Whitman, for respondent:

The writ of ne exeat merely secures bail in equity.

Johnson v. Clendenin, 5 Gill & J. 463; Debazin v. Debazin, 1 Dick. 95; Cox v. Scott, 5 Harr. & J. 384; Burnside v. Blythe, 11 B. Mon. 6; Rice v. Hale, 5 Cush. 238; Cf. Moore v. Valda, 151 Mass. 363, 7 L.R.A. 396, 23 N. E. 1102; Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; Mitchell v. Bunch, 2 Paige. 606, 22 Am. Dec. 689; Dunham v. Jackson, 1 Paige, 629; McNamara v. Dwyer, 7 Paige, 239, 32 Am. Dec. 627; De Rivafinoli v. Corsetti, 4 Paige, 264, 25 Am. Dec. 532; Brayton v. Smith, 6 Paige, 489; Wauters v. Van Vorst, 28 N. J. Eq. 103; Parker v. Parker, 12 N. J. Eq. 105; Ramsay v. Joyce, McMull. Eq. 236, 37 Am. Dec. 550; Commissioner in Equity v. Phillips, 2 Hill, L. 631; Rhodes v. Cousins, 6 Rand. (Va.) 191, 18 Am. Dec. 715; West v. Walker, 6 Blackf. 420; Cf. Hunter v. Nelson, 5 Blackf. 263; Malcolm v. Andrews, 68 Ill. 100; Cable v. Alvord, 27 Ohio St. 654; Dean v. Smith, 23 Wis. 483, 99 Am. Dec. 198; Adams v. Whitcomb, 46 Vt. 712; Gresham v. Peterson, 25 Ark. 377; McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407; Samuel v. Wiley, 50 N. H. 353; Zantzing v. Weightman, 2 Cranch, C. C. 478, Fed. Cas. No. 18,202.

Lowell, Circuit Judge, delivered the opinion of the court:

Majer Appel was adjudged a bankrupt January 23, 1905, and thereafter McPeck was elected his trustee. On July 26, 1906, McPeck filed a petition in the district court, setting out that the bankrupt had fraudulently concealed from the trustee a considerable sum of money belonging to the bankrupt estate; that the bankrupt was a resident of Adams, within the district of Massachusetts, at the commencement of the

bankruptcy proceedings; "that thereafter, and while said proceedings were still pending, said Appel removed to the state of New York, and that he has not since been a resident of Adams, but has continued to keep within the said state of New York; . . . that said Majer Appel is now within the jurisdiction of this court, but . . . is about to remove from the jurisdiction of the court, and has no intention of remaining within said jurisdiction, and that his removal from the jurisdiction will endanger the amount due from said Majer Appel to your petitioner. Wherefore your petitioner prays that a writ of ne exeat may issue for the arrest of said Majer Appel." The writ issued on the same day, and the bankrupt was duly arrested thereupon. On July 27th, he obtained his liberty by executing before a commissioner the following instrument:

Recognizance for Appearance.

[Filed July 30, 1906.]

United States of America, District of Massachusetts, ss.—City of Pittsfield.

Be it remembered that on this twenty-seventh day of July, A. D. 1906, before me, a commissioner duly appointed by the district court of the United States for the said district of Massachusetts, personally came Majer Appel, of Brooklyn, in the state of New York, and David Appel, of the city, county, and state of New York, and jointly and severally acknowledged themselves to owe the United States of America the sum of two thousand five hundred dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:—

The condition of this recognizance is such that, if the said Majer Appel will not go or attempt to go into parts beyond the jurisdiction of the district court of the United States for the district of Massachusetts without the leave of said court or until further order of said court, and then and there abide the judgment of the said court, and

the cause. The Lord Chancellor, however, ordered the money to be paid into court.

A bond in ne exeat proceedings conditioned for the appearance of the defendant in court whenever he should be directed or required to appear to answer any order that might be made in the cause is not violated by the failure of the defendant to pay the amount ordered by the court's final decree. Wauters v. Van Vorst, 28 N. J. Eq. 103.

The sureties upon a bond executed to secure the discharge of a defendant in ne exeat proceedings were held, in Harris v. Hardy, 3 Hill, 393, for the full amount of the penalty, where there was the usual condition of the bond that the defendant should not depart from the state without leave of court, and a breach had occurred 20 L.R.A. (N.S.)

by defendant's departing from and remaining out of the state without such leave.

Johnson v. Clendenin, 5 Gill & J. 463, on a question of the extent of the liability of sureties on a bond in ne exeat proceedings with the usual condition as to remaining in the state, holds that they are not responsible on the bond where the defendant in the writ escaped from confinement after having been duly proceeded against and committed for failure to comply with a final decree of the court, their liability having ended with the making of the decree. And see Debazin v. Debazin, 1 Dick. 95, where the sureties were discharged and their bond canceled although the defendant was in contempt and in custody for not performing the decree.

not depart from said district without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

Majer Appel. [Seal.]

David Appel. [Seal.]

Taken, and acknowledged before me on the day and year first above written.

[Seal.] Arthur H. Wood,

Commissioner of the United States for the District of Massachusetts.

United States of America, District of Massachusetts, ss.—

David Appel, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at 248 East 7th Street, in the city of New York, that he is a freeholder in the city of Brooklyn, New York, that he is worth the sum of three thousand dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of real estate in said Brooklyn. David Appel has deposited with me two thousand five hundred dollars in cash as bail money.

[Affiant's Signature] David Appel.

Sworn to and subscribed before me, this twenty-seventh day of July, A. D. 1906.

[Seal.]

Arthur H. Woods,

Commissioner of the United States for the District of ———.

The deposit of \$2,500 was later handed over by the commissioner to the clerk of the district court.

On March 12, 1907, the judge of the district court affirmed the order of the referee directing the bankrupt to turn over to the trustee \$6,000. On April 29, 1907, the trustee filed a petition in the district court, alleging the arrest and release of the bankrupt, that the bankrupt had "committed various breaches of said bond," and "that demand had been made upon said surety for the penal sum of said bond, and the money deposited in the clerk's office." The trustee, therefore, prayed that the sum of \$2,500 might be ordered to be paid by the clerk of the district court to the petitioner as trustee in bankruptcy. There was a hearing in the district court, at which both the bankrupt and the surety were present. The decree recited "that no breach of the conditions of said bond had been committed, as more fully appears in the opinion of the court," and it denied the petition. On reference to the opinion of the learned judge, we find that he ruled as matter of law that the absence of the bankrupt from the district from time to time after the bond was given did not amount to a breach of the bond. This was the ground upon which the trustee's petition was dismissed. The record, as presented to this court, is informal in several respects, but it appears generally, and both counsel 20 L.R.A. (N.S.)

are agreed, that this court must first answer the following question: Was the learned judge of the district court right in ruling that the bond given for the bankrupt's release was in effect a bail bond, binding him only to abide the decrees and orders of the district court when rendered, and in other respects leaving him free to absent himself from the court's jurisdiction? The trustee contended, in accordance with the wording of the bond, that it was conditioned upon his remaining constantly within the jurisdiction.

An examination of the practice of the English court of chancery, as set out in the decided cases and in accepted text-books, leads us to the conclusion that the bond should receive its grammatical construction, and that it binds the bankrupt not to go into parts beyond the jurisdiction without leave of the court of bankruptcy. *Musgrave v. Medex*, 1 Meriv. 49; *Utten v. Utten*, 1 Meriv. 51; 2 Dan. Ch. Pl. & Pr. 6th Am. ed. p. 1712. This rule has peculiar application to the case of a bankrupt, who is required by the general scheme of the bankruptcy act to be constantly on hand in order that he may assist the trustee in his administration of the estate.

We hold the decree of the district court erroneous and reverse it, because it sets out that the bankrupt's absence from Massachusetts was not a breach of the bond. We hold that this absence was a breach of the bond, but we recognize that weighty courts have held that, while a bond given to procure the release of one arrested under a writ of *ne exeat regno* differs from an ordinary bail bond in requiring the constant presence of the principal within the jurisdiction, yet the chief object of the two obligations is the same, *viz.*, to obtain security that the principal shall abide (not perform) any decree which the court may render against him. 14 Enc. Pl. & Pr. p. 320. The penal sum of the bond in the case at bar is already in the disposition of the district court. In *Harris v. Hardy*, 3 Hill, 393, the supreme court of New York said: "If the defendant leave the state without permission, an order will be granted directing his sureties to pay the money into court, or, in default thereof, that a suit be brought upon the bond. . . . The writ will be discharged, on paying into court the sum for which it is marked, . . . and upon giving security to abide by the decree. . . . The fund is under the control of the court of chancery, and will be disposed of with due regard to the rights of all parties concerned."

The learned district judge seems to have found no evidence that the bankrupt had not always been ready to abide the decrees

of the court of bankruptcy, although he had personally departed from the jurisdiction. Acting either upon the analogy of a court of equity or of the power possessed by courts of the United States in actions at law, a court of bankruptcy has power to chancery a bond. *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 662, 46 L. ed. 366, 377, 22 Sup. Ct. Rep. 240; 8 and 9 Wm. III., chap. 11; Rev. Stat. § 961, U. S. Comp. Stat. 1901, p. 699. It may well be that the district court will refuse to enforce the liability of the surety upon this bond, and will relieve him from that liability, basing its action, not upon the want of a technical breach of the bond, but on the broader ground that the result sought by the obligation has not yet failed. We are not required to pass upon these questions. The record is not full enough. Inasmuch as the decree contains a recital which we deem erroneous in law, we must reverse it; but we do so with leave to the district court to proceed further in the matter in accordance with the rules of equity.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to proceed in accordance with our opinion passed down the 13th day of August, 1908; and the petitioner recovers his costs in this court.

PENNSYLVANIA SUPREME COURT.

MCNEELY COMPANY, Appt.,
v.

BANK OF NORTH AMERICA.

(221 Pa. 588, 70 Atl. 891.)

Bank — forged check — delay in notice — effect.

That a bank which has paid checks upon forged indorsements cannot show that it could have protected itself had it received prompt notice of the forgery will not prevent the failure to give such notice from depriving the depositor of his right to require the bank to make good to his account the amount of payments so made.

(June 2, 1908.)

Case Note. — *Loss or prejudice to bank resulting from negligent failure on part of depositor or correspondent bank to give prompt notice of forgery, as a condition of its right to charge forged checks to latter's account.*

This note presupposes that there was an unreasonable delay on the part of the depositor or correspondent bank in reporting the forgery, due either to negligent failure to discover the forgery, or failure to report after discovery, and presents simply

APPEAL by plaintiff from a judgment of the Court of Common Pleas No. 4 for Philadelphia County in defendant's favor in an action brought to recover the amount represented by forged checks which had been paid by defendant. Affirmed.

The facts are stated in the opinion.

Messrs. B. F. Pepper and G. W. Pepper, for appellant:

To impute notice to appellant from the date of the return of the canceled checks would be to hold it to the exercise of a degree of diligence which the law declares it is not necessary to exercise.

Lewey v. H. C. Fricke Coke Co. 166 Pa. 536, 28 L.R.A. 283, 45 Am. St. Rep. 684, 31 Atl. 261; *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.* 167 Pa. 136, 31 Atl. 484; 25 Cyc. Law & Proc. p. 1190.

The statute of limitations does not begin to run against a depositor until demand has been made upon the bank.

Finkbone's Appeal, 86 Pa. 368; *McGough v. Jamison*, 107 Pa. 336; *Humphrey v. County Nat. Bank*, 113 Pa. 417, 6 Atl. 155.

An account stated can always be reopened for fraud or mistake.

First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

The delay beyond a reasonable time in giving notice to the defendant of these forgeries after their discovery, without proof of damage resulting therefrom, does not work an estoppel.

Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co. 10 Misc. 680, 31 N. Y. Supp. 790; *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun. 475, 27 N. Y. Supp. 1070; *Critten v. Chemical Nat. Bank*, 171 N. Y. 228, 57 L.R.A. 529, 63 N. E. 969; *Bank of British N. A. v. Merchants' Nat. Bank*, 91 N. Y. 106; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Shepard & M. Lumber Co. v. Eldridge*, 171 Mass. 516, 41

the question whether, conceding the above, it must appear in order to hold the depositor or correspondent bank responsible for the loss, that, because of such negligent failure to give notice, the bank was prejudiced in its right of action against the forger or other third parties. The general questions, therefore, as to the duty of the depositor to give notice, and what is reasonable time for that purpose, are not within the scope of the note, except as the latter questions involve the consideration of the question under annotation.

It seems to be the general rule, contrary

L.R.A. 617, 68 Am. St. Rep. 446, 51 N. E. 9; National Bank v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; First Nat. Bank v. First Nat. Bank, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; Pollard v. Wellford, 99 Tenn. 113, 42 S. W. 23; Weinstein v. National Bank, 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; United Security L. Ins. & T. Co. v. Central Nat. Bank, 185 Pa. 536, 40 Atl. 97; Iron City Nat. Bank v. Ft. Pitt Nat. Bank, 159 Pa. 46, 23 L.R.A. 615, 28 Atl. 195; States v. First Nat. Bank, 203 Pa. 69, 52 Atl. 13; Rick v. Kelly, 30 Pa. 527; Leather Mfrs. Nat. Bank v. Morgan, *supra*.

Mr. Alexander Simpson, Jr., for appellee:

Plaintiff cannot recover, as notice was not given to the bank within a reasonable time after the forgeries were discovered.

Myers v. Southwestern Nat. Bank, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; Weissner v. Denison, 10 N. Y. 68, 61 Am. Dec. 731;

Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; Critten v. Chemical Nat. Bank, 171 N. Y. 228, 57 L.R.A. 529, 63 N. E. 969; McColligan v. Pennsylvania R. Co. 214 Pa. 229, 6 L.R.A.(N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792; Dana v. National Bank, 132 Mass. 156; Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702; Lyon v. Phillips, 106 Pa. 66; Howard v. Turner, 155 Pa. 357, 35 Am. St. Rep. 883, 26 Atl. 753; Price v. Neale, 3 Burr. 1354; Rick v. Kelly, 30 Pa. 527; Robb v. Vos, 155 U. S. 40, 39 L. ed. 62, 15 Sup. Ct. Rep. 4; Cooke v. United States, 91 U. S. 389, 23 L. ed. 237; Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634; Weinstein v. National Bank, 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; United States v. Clinton Nat. Bank, 28 Fed. 357; United States v. National Exch. Bank, 45 Fed. 163; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; Iron City Nat. Bank v. Ft. Pitt Nat. Bank, 159 Pa. 46, 23 L.R.A. 615, 28 Atl.

to that laid down in *McNEELY CO. v. BANK OF NORTH AMERICA*, that, before a bank is justified in charging the amount paid on forged paper against the account of a depositor or correspondent bank, because of negligence in discovering or reporting the forgery, it must show that, because of such negligence, it was prejudiced, or lost an opportunity to protect itself by action against the forger or other third party.

Thus, in *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100, it was held that, although the depositor may have been negligent in not earlier examining the returned checks, and discovering the forgery, and notifying the bank thereof, nevertheless, so long as there was no evidence that, in consequence of the depositor's delay, the bank lost any rights or remedies which it might have resorted to in order to save itself from the loss incurred by its own mistake, such negligence on the part of the depositor was no defense to his right to recover against the bank.

So, in *Brixen v. Deseret Nat. Bank*, 5 Utah, 504, 18 Pac. 43, it was held that, even though the depositor was negligent in tendering back a check with a forged indorsement (which the court denied), that fact would not justify the bank in refusing to pay the money to the depositor, until it could show some actual damage caused thereby.

In *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun. 475, 27 N. Y. Supp. 1070, where a check had been paid upon the forged indorsement of the payee, it was held that, although, upon discovery of the forgery, the duty is incumbent on the one detecting the imposition to act promptly in giving notice, he will not be prevented from recovering the damage or injury shown to have been actually incurred, unless there is some proof on the part of the one entitled to notice, of damage from the failure to receive such notice.
20 L.R.A. (N.S.)

This case was followed in *Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co.* 10 Misc. 680, 31 N. Y. Supp. 790, the court remarking that in some states the rule was that a change of circumstances and resulting damage to the bank's interest will be presumed, but that such rule had not been adopted in New York; adding that in the present case, "as a matter of fact, the defendant bank cannot be said to have been damaged in any way by the delayed notice."

To the same effect is *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72, the court expressly declaring that there was no presumption of disadvantage to the bank by reason of the delay, but that it must be affirmatively shown.

The doctrine of the responsibility of the depositor to his bank for the result of failure promptly to notify it of the forgery was held, in *Hurdy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, to rest upon the principle of an estoppel *in pais*, which may be invoked to prevent injustice only by one who can show that he has acted or refrained from acting by the conduct of another which would ordinarily influence other persons; and the court, relying on this doctrine, held that it was incumbent upon the bank to show that it had been actually misled to its injury by the conduct of the depositor.

In *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693, it was held that, even if there was a delay by the depositor in giving information after obtaining such knowledge as to warrant him in making a claim on the bank for the amount paid on the forged paper, there was no good ground for conjecturing that the bank's position was changed on account of the delay, and that, without showing some injury by reason of the delay, the bank could not use it as an estoppel against the depositor.

In *Weinstein v. National Bank*, 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171, an action by a depositor against the bank, a plea

195; *States v. First Nat. Bank*, 203 Pa. 69, 52 Atl. 13; 1849 P. L. 426; *Chambers v. Union Nat. Bank*, 78 Pa. 205; *Corn Exch. Nat. Bank v. National Bank*, 78 Pa. 233; *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 435; *United Security L. Ins. & T. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Knights v. Wiffen*, L. R. 5 Q. B. 660.

The statute of limitations bars the claim as to all checks included in settlements made and checks returned, more than six years before suit brought.

Lewey v. H. C. Fricke Coke Co. 166 Pa. 536, 28 L.R.A. 283, 45 Am. St. Rep. 684, 31 Atl. 261; *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.* 167 Pa. 136, 31 Atl. 484; *Bank of Northern Liberties v. Jones*, 42 Pa. 536; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Phoe-*

nix Bank v. Risley, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. Rep. 322; *Leather Mfrs. Nat. Bank v. Morgan*, supra; *Mifflin County Nat. Bank v. Fourth Street Nat. Bank*, 8 Pa. Dist. R. 477, 199 Pa. 459, 49 Atl. 213; *Link v. McLeod*, 194 Pa. 566, 45 Atl. 340; *Smith v. Blachley*, 198 Pa. 173, 53 L.R.A. 849, 47 Atl. 985; *Guarantee Trust & S. D. Co. v. Farmers' & M. Nat. Bank*, 202 Pa. 94, 51 Atl. 765.

Brown, J., delivered the opinion of the court:

McNeely Company, a corporation, was a depositor with the appellee, the Bank of North America, and had in its employ one Charles S. Reber, who, between April 20, 1897, and February 24, 1903, forged the names of payees on 90 checks issued by it. Some of these checks were paid directly to him by the appellee, and others he deposited to the credit of his account with certain

alleging failure by the depositor to use diligence to detect and denounce certain forgeries of checks within a reasonable time, and that thereby he was estopped from questioning the correctness of the account, was held bad and properly excepted to; in that it contained no averment of any injury or loss to the bank on that account. In this case the court also held that it was properly a matter for the jury, under appropriate instructions, to say whether the bank was injured or not by the depositor's delay.

In *United States v. National Bank*, 2 Mackey, 289, it seems to have been recognized that the reasonableness of the notice depended to some extent at least upon the question whether or not the bank had lost its recourse against other parties. In this case, however, it was expressly held that no recourse against third parties had been lost, and that the notice was reasonable.

The negligent delay of the drawee in discovering the forgery of a check, prompt notice having been given as soon as the forgery was discovered, was held, in *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44, not to preclude it from throwing the loss upon another bank which had negligently cashed the check and received credit therefor from the drawee, it having been found as a fact that the latter's negligence did not in fact prejudice the other bank. The general question, which was also involved in this case, whether a drawee bank which cashes a forged check may, independently of any delay in reporting the forgery, recover from another bank to which it pays the check, is, of course, not within the scope of this note. It will be noticed that in this case the court was not called upon to pass upon the question as to the burden of proof with respect to prejudice.

In *Gloucester Bank v. Salem Bank*, 17 Mass. 33, however, where a bank received from another bank a package of what purported to be its own bank notes, which in 20 L.R.A. (N.S.)

fact were forged, and cashed the same, it was held that its negligence in discovering the forgery was sufficient to prevent a recovery of the money paid, although there was no proof that the other bank could have saved itself from loss if earlier notified. The court said in this connection: "Although there is no evidence in the case from which it can be ascertained that they could have saved themselves if they had received earlier notice, the law will presume that a change of circumstances had taken place which would justify them in resisting the action."

In *United States v. National Exch. Bank*, 45 Fed. 163, where a postmaster, on a forged indorsement of a money order, gave a check on a local bank, it was recognized that, even if the bank could otherwise have been held liable for paying such check, the fact that no notice had been given it by the former for more than a month after discovering the fraud would be sufficient to prevent recovery from the bank, even though the bank had notice of the forgery as soon as the drawer had. The court said: "The notice should have been given without unnecessary delay after discovery of the fraud, to enable the bank to pursue any remedy it might have against the forger or indorsers. . . . It is urged in answer to this objection that the defendant also had notice of the fraud about the same time. But that was not enough. The government did not repay the money until July, and the bank could not assume, without the return of the check and demand of payment, that the government intended to pay, or to hold the bank responsible."

In *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188, an action by a drawee bank against a bank which collected the check, it was held that an unreasonable delay of two months on the part of the drawee bank to notify its correspondent of the forgery was sufficient to prevent its recovery, the court saying that, unless

banks and bankers, who collected them through the clearing house. Each of said checks was charged to plaintiff's account with the defendant, and the amount thereof entered as a charge against its deposit in its bank book when the same was settled. On each settlement the balance was struck and entered, after deducting the amount of the checks paid on the forged indorsements. During the period of these forgeries the bank book of the appellant was settled 76 times, and all checks that had been paid by the bank, including those bearing the forged indorsements, were regularly returned to the appellant at each settlement of its bank book. Reber continued in its employ until April, 1, 1903. Some of his forgeries were discovered on or about January 1, 1904, and within two or three weeks thereafter a very large number of the 90 forged indorsements were discovered. The twenty-fourth finding of fact of the referee is: "No notice was given by the plaintiff to the defendant of the forgeries, or any of them, until April 11, 1904. As stated in finding No. 10, the bank book was settled three times, viz., on February 1, 1904, February 28, 1904, and March 31, 1904, after the discovery of the forgeries and before notice was given thereof on April 11, 1904. During the same period, Robert

K. McNeely, who was a director of the bank, attended directors' meetings weekly from January 4, 1904, to April 11, 1904, a total of 14 meetings, but gave no notice to the bank concerning the forged indorsements or complaining of their payment." Robert K. McNeely, referred to in the foregoing finding, was a director of the company and its secretary and treasurer, having charge of its offices and the examination of its trial balances. Reber was able to conceal his forgeries from his employer by a complicated and ingenious system, which need not be here described, for the referee has found that the appellant was not negligent in failing to discover them sooner, though they extended through a period of nearly six years. The reasons for this finding are unimportant, if the legal conclusion of the referee and court was correct, that the appellant so delayed giving notice to the bank of the forgeries, after it had discovered them, that it cannot recover the amount paid and charged to its account on any of the forged indorsements. The fact that Reber had forged some of the indorsements was, as stated, discovered about January 1, 1904, and, within two or three weeks thereafter, it was known to the appellant that a very large number of the 90 forgeries had

it could be judicially determined that the bank which purchased the check could at a future day command the same facilities for redress which existed when the check was first presented, the unreasonable delay would destroy the equity of the plaintiff's claim.

So, in *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455, a bank check or draft was, before its presentation for payment, fraudulently raised, and largely increased in its amount, and, after certification, finally reached another bank, to which it was paid by the drawee. In an action by the drawee bank to recover the amount so paid, as money paid by mistake, it appeared that, for four or five years after knowledge of the fraud, it had given no notice of it. The court said: "The record does not show that the long delay of nearly five years in giving notice of the raising or altering of the draft has not resulted in loss to appellee. It is to be presumed, under the facts of this case, that there has been a change of circumstances in the position of the parties otherwise liable, and therefore . . . through the negligence of appellant in not promptly notifying appellee of the alteration of the draft the appellee has been prejudiced; and, if prejudiced, it follows that the delay in giving said notice was unreasonable; and, under the authorities, such delay as would preclude recovery."

And see the cases set out and sufficiently reviewed in *McNeely Co. v. Bank of North America*.

In *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 20 L.R.A. (N.S.)

335, the court said that, if the depositor failed in exercising due care to discover forgeries, and the bank is injured in consequence of such omission of duty, the depositor is liable to the bank. But that the extent of the liability is commensurate with the loss sustained in consequence of his neglect of duty, no more and no less. The court, however, was here dealing with the question as to the effect of an actual recoupment of part of the loss by the bank to reduce the depositor's liability. A similar view is taken in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969, holding that a drawee bank could not throw the loss upon the depositor, even if he was negligent in discovering the forgeries, where the drawee still had recourse against the bank in which the check was deposited.

It will be noticed that it was expressly stated in *McNeely Co. v. Bank of North America* that the negligence of the depositor was not in the failure to discover the forgery, but in the giving of the notice thereof after the discovery. However, whether this was an important factor in the decision of the case does not appear, and no other case has been found which called attention to the possibility of such a distinction.

For cases on depositor's right to recover amount of forged or raised checks paid by bank, as affected by the fact that he intrusted the examination of vouchers to the employee who was guilty of the original fraud, see case note to *First Nat. Bank v. Richmond Electric Co.* 7 L.R.A. (N.S.) 744.

been committed; but no notice of this was given to the bank until nearly three months afterwards. The duty of a depositor in a bank, upon discovering that it has paid and charged to his account either a check bearing his forged signature as drawer or his check on the forged indorsement of the payee, is to promptly notify it of the forgery. This notification is not only a duty, but it is what a depositor will instinctively do on discovering, upon the return of his bank book with canceled checks charged to his account, that there are among them some which he never signed or which were not paid to the payees named in them. This duty is not questioned by the learned counsel for the appellant. Their contention is that, for the disregard of it, a depositor is not to be barred from recovering from the bank what it may have paid on his forged signatures or on the forged indorsements of payees named in checks drawn by him, unless, by his failure to promptly notify it of the forgeries, it has lost rights over against other parties, and the burden is upon it to prove such loss. Authorities are not wanting to support this, but the referee and court below did not follow them. Relying upon others, they held that the plaintiff, by reason of its failure to promptly notify the bank of its discovery of the forgeries, could not recover, even though the bank had offered no evidence that it could have protected itself and the plaintiff had not shown that it could not if prompt notice had been given.

The relation between a bank and its depositor is a contractual one. Its undertaking with its depositor is to pay his checks, if he has sufficient funds with it for that purpose; and it assumes all the risk as against him of a mispayment in paying and charging to his account a check which he has not signed or one which he has signed bearing a forged indorsement of the payee. To his account it may not charge such a check. If it does, the depositor can recover from it the amount so charged. No payment by a bank on a forged signature of a depositor as drawer of a check, or on a forged indorsement of his payee, can affect him.... His right is to get back from the bank whatever he has deposited with it, less what has been properly paid out on his orders. The responsibility of the bank to the depositor is absolute, and it can retain no money deposited with it by him to reimburse it for any mispayment it has made out of such deposit; but it can recover from a forger responsible for the mispayment, or from those who, by their indorsement of a check, have vouched for previous indorsements or the genuineness of the signature of the alleged drawer. The right of a bank to recover

from a forger, or from those to whom it may have paid a check bearing the forged signature of one of its depositors, or a forged indorsement, is its only remedy for the fraud practised upon it by the forgery. The depositor's money is not affected by it, and, when he is the first to discover it, it is not reasonable that he should not be required to give prompt notice of it to the bank, if he intends to hold his depository liable for the mispayment, and this without regard to what may or may not result from a prompt effort to recover from the party or parties who may be liable to the bank for the mispayment. The depositor can gain nothing by withholding knowledge of the forgery, but the bank, if kept in ignorance of it after his discovery of it, may lose everything. As soon as a bank learns that it has paid a check on a forged signature of a depositor, or on a forged indorsement on his check, it is its duty to promptly restore to the depositor's account what was improperly taken from it, and its right at the same time is to proceed against those who wrongfully got the money. This right is to proceed immediately, and to the promptness with which a bank is able to exercise it recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and, when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for, by withholding from it what he has discovered, he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but, by prompt proceedings against him, others may become interested in him and come to his assistance, who, after delay, may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right. When an indorser on a promissory note defends on the ground that prompt notice was not given him of its nonpayment, the holder will not be heard in reply that, if notice of the nonpayment had been promptly given, it would not have helped the indorser, because he could have recovered

ered nothing from the maker of the note or prior indorsers. The right of the indorser on a note is to prompt notice of its nonpayment, that he may have an opportunity of proceeding promptly against the maker or prior indorsers, without regard to what may result from his efforts, and, if this right is not given him, his liability is at an end. "The insolvency of the maker of a note, though known to the indorser, ought not to discharge the holder from giving notice. There are various degrees of insolvency, and it rarely happens that a man is totally insolvent. So that there is a chance of getting something by an application to the debtor. Besides, if a man has nothing of his own, he may have friends, who, to relieve him from pressure, will do something for him. The indorser, therefore, has a chance of securing himself, at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice is that notice could be of no use to the indorser; but it is almost impossible to prove that it might not have been of use; therefore it is necessary." *Barton v. Baker*, 1 Serg. & R. 334, 7 Am. Dec. 620. Why should a different rule apply to a bank, which never knowingly pays on a forgery, but, in cases like the one now before us, is always an innocent victim?

Delay by a depositor in giving notice to a bank means not only its enforced delay in proceeding against those liable to it, but means loss of evidence as well; and, if the rule for which appellant contends should prevail, a bank might be deprived of the opportunity of showing that prompt proceeding on its part would have resulted in its recovering for its loss. And, again, in a suit brought by a depositor against a bank to recover the amount which it may have improperly paid on a forgery, the issue is the forgery. This issue ought not to be complicated with another, and a speculative one, as to whether anything might have been recovered from the forger, if prompt notice had been given to the bank of the forgery. The only reasonable and logical rule is the one adopted by the referee and the court below. Our own cases are in harmony with it, and it is approved by high authority. A different one would be putting a premium upon the laches of a depositor, and give to a dishonest one opportunity to help a forger to escape.

In *Rick v. Kelly*, 30 Pa. 527, the plaintiffs below purchased from the defendants notes bearing the genuine signature of George Fox, as maker, but the forged indorsements of the payee. In reversing the judgments in favor of the plaintiffs and announcing the general rule that notice of a forgery within a reasonable time after discovery is necessary for 20 L.R.A. (N.S.)

the maintenance of an action for the recovery of the money paid for such notes, it was said by Porter, J.: "The notes in this suit contained a genuine name. For aught that appears, timely application to that party might have saved the debt, for others thought proper to obtain judgments and sell his property. At some stage of the business the plaintiffs obtained knowledge of the forgery, for they brought the actions and put the fact on record. Why not inform the defendant of his risk, and give him a chance of escape by a direct blow at the maker? What justice could there be in permitting a holder to hold on until the very close of the period of limitation, and then to spring a suit on the seller, when the genuine parties are dead and their estates gone?" In *Meyers v. Southwestern Nat. Bank*, 193 Pa. 1. 74 Am. St. Rep. 672, 44 Atl. 280, in a suit to recover what had been paid by the bank on the forged signature of the plaintiff to checks, judgment on a verdict directed for the defendant was sustained, because the plaintiff had not promptly notified it of the forgeries after he was held to have had notice of them, and we said: "It was not the bank's fault that the first forgeries were not promptly discovered and notice thereof given. If plaintiff's duty to the bank had been performed at the proper time, the fact would have appeared that the bank had charged plaintiff, on his bank book, with the payment of two items (\$300 and \$200) for which no vouchers appeared among the checks handed to him by his clerk. These vouchers, the two forged checks, had been abstracted and destroyed by the latter. No objection having been made at the time of the first settlement, the bank had a right to assume that everything was correct, including the two checks purporting to be signed by him. His silence was tantamount to a declaration to that effect, and, in afterwards honoring checks signed by the same person, the bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff as genuine. While the plaintiff was not chargeable with the knowledge of his clerk that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted, viz., to receive the checks from the bank, take them to his employer's office, compare the amounts thereof with the amounts in the bank book and check book, etc. In view of the uncontradicted evidence as to the foregoing facts, it cannot be doubted that, as between the bank and the plaintiff, the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question, and approve or reject them within a reason-

able time. In contemplation of law the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were claimed. The bank was therefore entitled to have them examined, and, if rejected, returned within a reasonable time. That was not done, and, because of plaintiff's failure to perform his duty in that regard, he should not be permitted to recover. Any other rule would be inconsistent not only with general and long-established custom, but also with well-settled principles of law on the subject. *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 107, 29 L. ed. 811, 816, 6 Sup. Ct. Rep. 657; *United Security L. Ins. & T. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97."

A very learned referee in *United Security L. Ins. & T. Co. v. Central Nat. Bank*, supra, in his report, confirmed by the court, held that the plaintiff was not entitled to recover from the defendant the amounts paid and charged to its account on forged indorsements, because it had not promptly notified the defendant of the forgeries after it had what the referee held to be constructive notice of them. The judgment was reversed solely on the ground that the referee had erred in finding that the plaintiff had had constructive notice of the forgeries on March 27, 1894, and judgment was directed to be entered for it, because, when it actually discovered the forgeries on May 17, 1894, it gave immediate notice to the defendant. What the referee said and what was not held to be error was: "The referee is of opinion that it is not necessary for the defendant to make effective the defense based upon the want of diligence of the plaintiff in giving notice of the forgery to show with certainty that, had notice been given at an earlier day a fund belonging to Williams [the forger] was in existence which could have been attached and held. When it is once shown that the plaintiff failed to give prompt notice of the discovery of the forgery, the plaintiff's right of action is gone. The law assumes, and does not find it necessary to conduct an inquiry to verify the assumption, that, had the notice been given promptly, the Central Bank might have taken steps to protect itself against Williams." A sentence from the opinion in *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 159 Pa. 46, 23 L.R.A. 615, 28 Atl. 195, is pointed to by counsel for the appellant as an expression from this court sustaining their contention. In that case the present chief justice did say that all a bank which has paid a forged check of one of its depositors "need do in any case is to give notice promptly according to the circum-

stances and the usage of the business; and, unless the position of the party receiving the money has been altered for the worse in the meantime, it would seem that the date of notice is not material." This must be read with reference to the facts in that case. As to those in the present one, it is not applicable. There the Fort Pitt National Bank, the defendant, which received the money on the forged check, had paid it out on the check of its depositor, to whose credit it had been placed, and all that we meant to say was that if the bank had not paid it out, and could still have protected itself by withholding it, the date of the notice of the forgery would not have been material.

The rule followed by the learned referee and court below is the only reasonable, logical, and proper one in this class of cases. It is approved by the Supreme Court of the United States in *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, where it is said by Harlan, J.: "If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had, at the time the forgeries were committed or subsequently, property sufficient to meet the demands of the bank. . . . As the right to seek and compel restoration and payment from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it. *Continental Nat. Bank v. National Bank*, 50 N. Y. 583; *Voorhis v. Olmstead*, 66 N. Y. 113, 118; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Casco Bank v. Keene*, 53 Me. 103; *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498."

Other questions raised by the appellant need not be considered in view of the correct conclusion of the court below that its delay in giving the appellee notice of the forgeries bars its right to recover.

The assignments of error are all overruled, and the judgment is affirmed.

WISCONSIN SUPREME COURT.

ED. KING, Respt.,
v.

ANTON GRAEF et al., Appts.

(136 Wis. 548, 117 N. W. 1058.)

Sale — Sunday — consummation.

1. Delivery of a car load of potatoes on Monday, and the payment and receipt of the purchase money, constitute a complete sale and delivery, although the transaction was in pursuance of a parol contract made on Sunday.

Same — sample — warranty.

2. An express warranty of a car load of

potatoes may be found from the fact that at the time of the sale a few bags were opened and examined, and the owner's agent represented that the rest of the potatoes in the car were as good as those examined, on which representation the buyer relied.

(October 20, 1908.)

APPEAL by defendants from a judgment of the Circuit Court for Outagamie County in plaintiff's favor in an action brought to recover damages for breach of warranty in a sale of a car load of potatoes. Affirmed.

Case Note. — Delivery on week day pursuant to contract made on Sunday.

The foregoing case presents rather a unique question. Goods were delivered and paid for under a guaranty upon Monday, but the terms of the sale were discussed and agreed upon on Sunday, and the question is, Will the fact that the terms were talked over and agreed to upon Sunday so taint the sale that the law will refuse to recognize or enforce the contract? This note will be confined to cases involving a similar state of facts, and will not include cases which treat merely of the question of a subsequent ratification of a contract made upon Sunday.

Upon the question of validity of contract partially made on Sunday and perfected on a secular day, see case note to Jacobson v. Bentzler, 4 L.R.A. (N.S.) 1151.

The cases for the most part follow the rule enunciated in KING v. GRAEF, and hold that the mere fact that the terms of the sale were agreed upon on Sunday will not invalidate a contract where the delivery and payment took place upon a secular day, the cases generally holding that the delivery and payment in themselves were sufficient to constitute a complete contract regardless of what may have taken place upon Sunday. And this is true notwithstanding the fact that in many of the jurisdictions the general rule prevails that a contract made and executed upon Sunday is void *ab initio*, and consequently cannot be ratified.

Thus, in Butler v. Lee, 11 Ala. 885, 48 Am. Dec. 230, it was held that, when nothing was done towards the performance or execution of a contract until a subsequent period, the fact that a similar contract had been previously made on Sunday would not bring the subsequent contract within the statute; this would not be a ratification of the contract previously made, but a new and substantive contract.

And in Hopkins v. Stefan, 77 Wis. 45, 45 N. W. 676, it was held that, if goods were shipped by the plaintiff and received by the defendant on a secular day on the faith of the defendant's engagement, made upon such a day, to pay for them, then he would be legally liable to pay for them, though a 20 L.R.A. (N.S.)

similar promise may have been made on a Sunday to the same effect.

Although the prices of the articles set out in an account sued on were agreed upon on Sunday, it was held, in Rosenblatt v. Townsley, 73 Mo. 536, that, as the contract of sale was not completed until the day following, when the goods were delivered, the contract could not be regarded as a contract made on Sunday.

So, in Bloxsome v. Williams, 3 Barn. & C. 232, it was held that the sale of a horse by a delivery thereof and the payment of the agreed price by the vendee upon a secular day is not vitiated by the fact that the terms were agreed to upon Sunday.

Where the vendee retained the privilege of examining the goods before the sale would be completed, which examination took place upon a secular day, when the sale was in fact completed, it was held, in Moseley v. Vanhooser, 6 Lea. 286, 40 Am. Rep. 37, that the fact that the price was agreed upon and the time of delivery was fixed upon a Sunday did not vitiate the transaction.

Possession of goods acquired on a secular day in pursuance of a contract made on Sunday was held, in Smith v. Bean, 15 N. H. 577, to be good as against the vendor, or as against his creditors.

And in Evert v. Kleinhagen, 6 S. D. 221, 60 N. W. 851, it was held that, where parties meet on Sunday, and talk over and substantially agree upon the terms of a purchase and sale of a pair of horses, during which representations are made by the seller which would constitute a warranty of soundness, and then agree that they will meet again on the next day, when secured notes shall be given for the purchase price, and the horses shall then be transferred to the purchaser, which is done, the warranty takes legal effect, as such, only when the trade is completed and the property in the horses passes to the purchaser, and is not void as a Sunday contract.

Although the parties to a bill of sale of a stock of merchandise were employed upon Sunday in taking an account of stock, making a schedule, and preparing a bill of sale, which was perhaps signed upon that day, nevertheless the fact that it was acknowledged and delivered upon Monday was suf-

Statement by Barnes, J.:

This action was brought to recover damages for breach of warranty. The defendants shipped a car load of potatoes from Hortonville to Watertown, in February, 1906, the car arriving at its destination on Sunday morning, February 9th. During the day the agent of the defendants, who was in charge of the car, made an oral agreement with the plaintiff whereby he agreed to sell the plaintiff the car load of potatoes at 58 cents per bushel. The evidence further tended to show that the agent represented that the car of potatoes sold was as good in every respect as other potatoes formerly sold by

the defendants to the plaintiff, and that the potatoes formerly sold were a good merchantable article. Nothing more was done by the parties on Sunday, but on Monday morning the potatoes in the car were weighed, some 20 sacks in the car were opened and examined, and the potatoes were delivered to the plaintiff, and were paid for by him without any further examination, or without any opportunity to examine them except by unloading them from the car and opening the sacks. The testimony also tended to show that on Monday the agent in charge of the potatoes represented to the plaintiff that all of the potatoes in the car

efficient to render the sale valid. *Luebbing v. Oberkoetter*, 1 Mo. App. 393.

So, in *Bland v. Brookshire*, 3 Tex. App. Civ. Cas. (Willson) 539, it was held that a contract of sale was not void because some of its terms might have been fixed on Sunday, or because most of the business out of which the consideration for the contract arose was transacted on that day.

And parol negotiations on Sunday have no effect on the validity of a contract within the statute of frauds which is actually executed in writing and delivered on a secular day. *Tyler v. Waddingham*, 58 Conn. 375, 8 L.R.A. 657, 20 Atl. 335.

In *P. J. Bowlin Liquor Co. v. Brandenburg*, 130 Iowa, 220, 106 N. W. 497, where goods were ordered on Sunday, but were not delivered and accepted until a later day, it was held that the trial court correctly ruled that the sale could not be avoided as having been made in violation of the Sunday law. The court said: "Where the parties to an executory Sunday contract thereafter unite in recognizing its obligation by making and accepting a delivery of the property on a subsequent secular day, they are held to have ratified the agreement, and it may be enforced, according to its terms, to the same extent as if the negotiations had been begun and completed on the day of the delivery."

In *Helm v. Briley*, 17 Okla. 314, 87 Pac. 595, it was held that the payment of \$10 on a secular day upon a debt of \$60, the price of a mule sold on a previous Sunday, was such an acknowledgment of existing indebtedness as to amount to a contract and promise to pay at that time.

Some of the cases, however, are to the contrary. In these cases the court usually takes the position that the subsequent acts were not a complete transaction in themselves, but were merely an attempted ratification of the illegal contract, and therefore did not avail to validate the original contract.

Thus, in *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. 27, it was held that the mere removal of the goods by the vendee in pursuance of the terms of a sale made on Sunday was insufficient to validate the sale; the delivery must be accompanied by circumstances which in themselves supply the

necessary elements of a contract, without depending on the Sunday contract for any essential elements.

So, a contract was held void in *Kountz v. Price*, 40 Miss. 341, where it was fully agreed upon between the parties to it on Sunday, and the goods were delivered on the same day, and nothing was done in the completion of it on a subsequent day but the execution of a note which was wholly in consideration of the sale and delivery of the goods on the previous day. In this case, however, there was apparently nothing more than an attempted ratification of the Sunday contract.

Some other cases may be noted which, although not strictly in point, may throw some light upon the question under discussion. It will be noticed that in each of these cases the recovery was on an implied assumpsit, the court giving recognition to the transactions taking place on the secular day only.

Where pigs were selected and marked on Sunday, and a price agreed upon, and a guaranty as to quality made, but the pigs were weighed and delivered on Monday, it was held, in *Bradley v. Rea*, 96 Mass. 20, that the price fixed on Sunday would not be binding, nor could the defendants avail themselves of the guaranty; but the plaintiff could recover only on an implied assumpsit for a *quantum valebant*. On the second appeal, 103 Mass. 188, 4 Am. Rep. 524, where the plaintiff showed that the pigs were delivered by him and accepted by the defendant with the purpose that they should be sold and paid for, it was held that this would constitute a sale, and, if nothing was said about the price, the law would imply a fair price; but that the defendant could not in any way rely upon the alleged guaranty given upon Sunday.

Where a number of mules were sold and a note given for the price thereof on Sunday, and all but two were delivered on that day, which two were delivered upon the following day, it was held, in *Foreman v. Ahl*, 55 Pa. 325, in an action on an implied assumpsit, that the trial court fell into error in suffering the jury to inquire into more than the liability of the defendant for the two mules.

were as good in quality as those examined, and that plaintiff relied on such statement. Upon unloading the car it was found that 100 bushels of the potatoes contained therein were frozen, and the evidence tended to show that they were frozen in transit, probably because of an accident to the car at Fond du Lac. On February 13th the plaintiff notified the defendants of the condition of the potatoes, and demanded settlement for the worthless potatoes found in the car. Payment was refused, and this action was brought, which resulted in a trial and judgment for the plaintiff for damages sustained by reason of the potatoes in the car being frozen, from which judgment this appeal is taken. Two errors are alleged: (1) That the contract was made on Sunday, and is therefore void, and cannot furnish any basis for recovery in any action; (2) that no express or implied warranty followed the sale, in any event, and that therefore the plaintiff could not recover.

Mr. A. M. Spencer, for appellants:

Agreement as to the terms of sale was reached on Sunday, and what they did thereafter was only carrying out the terms of the contract so made.

Pearson v. Kelly, 122 Wis. 660, 100 N. W. 1064.

The buyer had an opportunity to inspect and failed to do so, and the seller is not guilty of fraud in not pointing out defects.

15 Am. & Eng. Enc. Law, pp. 1220, 1221; Jacobson v. Bentzler, 127 Wis. 566, 4 L.R.A. (N.S.) 1151, 115 Am. St. Rep. 1052, 107 N. W. 7, 7 A. & E. Ann. Cas. 633.

Messrs. Gilles H. Putnam and Gustav Buchheit, for respondent:

The vendors were the owners of the property up to the time of a delivery to the plaintiff or a payment made by him.

Taylor v. Young, 61 Wis. 314, 21 N. W. 408; Harrison v. Colton, 31 Iowa, 16; Adams v. Gay, 19 Vt. 358; Butler v. Lee, 11 Ala. 885, 46 Am. Dec. 230.

Barnes, J., delivered the opinion of the court:

It is well settled that contracts made in violation of the statute forbidding the doing of any business on Sunday are void, and cannot be made the basis of a recovery in the law. **Pearson v. Kelly, 122 Wis. 660, 100 N. W. 1064; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787; Thomas v. Hatch, 53 Wis. 296, 10 N. W. 393; Howe v. Ballard, 113 Wis. 375, 89 N. W. 136; Brown v. Gates, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, 1 A. & E. Ann. Cas. 85.** Neither can a contract made on Sunday be validated by proving acts tending to show a ratification, because such a contract is void, and is not 20 L.R.A. (N.S.)

susceptible of ratification. **Jacobson v. Bentzler, 127 Wis. 566, 4 L.R.A. (N.S.) 1151, 115 Am. St. Rep. 1052, 107 N. W. 7, 7 A. & E. Ann. Cas. 633; Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; Brown v. Gates and Vinz v. Beatty, supra; Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095.** If the acts done on Monday were mere incidents to the Sunday transaction, they would not save it from the condemnation of the statute. **Jacobson v. Bentzler, supra.** It follows that, in determining the rights of the parties here, the Sunday transaction must be eliminated from consideration. In this case the potatoes were not weighed nor delivered until Monday, and no part of the purchase price was paid until Monday. The agreement of Sunday was void under the statute of frauds (Stat. 1898, § 2308), even if it were not subject to any other infirmity. It might, of course, if made on a secular day, be validated by partial or complete performance. It was perfectly lawful for the defendants to deliver, and for the plaintiff to pay for, a car load of potatoes on Monday. These acts were not mere incidents to the transaction on Sunday, but comprehended all the elements necessary to make a complete contract in itself. If the potatoes had been delivered on credit, the Sunday agreement would not govern as to price, but the defendant could recover on *quantum meruit*. The case is akin to an agreement for hire made on Sunday. The employee may not recover the contract price for his work, but he is entitled to recover what it is reasonably worth. **Pearson v. Kelly, supra; Thomas v. Hatch, 53 Wis. 296, 10 N. W. 393.** In **Taylor v. Young, 61 Wis. 314, 21 N. W. 408,** a settlement was agreed upon on Sunday for trespass done by live stock. The consideration was paid on a week day, and was retained by the claimants. The court held that the settlement, being fully performed on a week day, was valid. So, too, it was held in **Vinz v. Beatty, supra,** that, while a lease of premises made on Sunday was void and incapable of ratification, subsequent occupancy and payment of rent by the lessee created a tenancy, the terms of which would depend upon a contract to be implied from the acts of the parties. The delivery of the potatoes on Monday, coupled with the fact that a consideration was paid for them, was tantamount to a sale on that day, and the payment and receipt of a sum of money for such potatoes was tantamount to an agreement upon the price to be paid; and the conclusion therefore follows that the transaction on Monday constituted a complete contract of sale and delivery.

The testimony showed that, at the time of the delivery of the potatoes, they were in sacks; that some of the sacks were opened,

and the potatoes were found to be all right; that all of them could not be examined without unloading the car and opening the sacks, which work would necessitate a considerable expenditure of time,—much more, perhaps, than the agent who made the sale desired to spend at Watertown; and that plaintiff promptly unloaded the car, and found that 100 bushels of the potatoes had been frozen, probably while in transit. A claim for damages was promptly made. The testimony further showed that, at the time the 20 sacks of potatoes were opened and examined, the agent of the defendants represented to the plaintiff that the rest of the potatoes in the car were as good as those examined, and that plaintiff relied upon such representation. This evidence was sufficient to warrant a finding of the jury that there was an express warranty of the potatoes sold and delivered, and that they did not conform to such warranty. If plaintiff were compelled to rely upon an implied warranty, we still think he was entitled to recover under the rule in *Northern Supply Co v. Wangard*, 117 Wis. 624, 98 Am. St. Rep. 963, 94 N. W. 785. Judgment affirmed.

ARKANSAS SUPREME COURT.

M. STERNBERG, Appt.,
v.
FORT SMITH REFRIGERATOR WORKS
et al.

(87 Ark. 56, 112 S. W. 174.)

Mechanics' lien — purchase by architect.

1. A provision in a building contract that, upon neglect of the contractor, the architect will have power to provide materials, the expense of which shall be deducted from the contract price, does not make the architect the agent of the owner, so that his act in

Case Note. — Right to mechanics' lien for labor or material furnished on order of architect before abandonment of contract by contractor.

An extended search has revealed but few cases in point. These cases, while not all resulting in a denial of the right to a lien, are in general accord with the principles announced in *STERNBERG v. FT. SMITH REFRIGERATOR WORKS*, and, like that case, depended upon the decision of the question as to whether the architect, either by express terms of his contract, by direction of the owner, or by implication, became the agent of the owner, so that his act in procuring the materials or labor became the act of the principal, and binding upon him.

In *Seattle Lumber Co. v. Sweeney*, 43 Wash. 1, 85 Pac. 677, where the original 20 L.R.A. (N.S.)

procuring materials will create a lien on the property in excess of the original contract price, to which extent a lien is allowed by statute.

Same — discrimination by owner.

2. Where the owner of a building, after the contractor's abandonment of the contract for its construction, completes it at a cost in excess of the original contract price, and pays the amount due under the contract to some materialmen to the exclusion of others, he may be compelled to pay the latter their *pro rata* share of the original contract price, less the extra cost of completing the building.

(June 29, 1908.)

A PPEAL by defendant from a judgment of the Chancery Court for Sebastian County establishing liens upon the property of defendant for labor and materials furnished in the construction of his building. Reversed.

The facts are stated in the opinion.

Messrs. Winchester & Martin, for appellant:

The appellees are not entitled to a lien under the statute, the claims having exceeded the contract price.

Barton v. Grand Lodge, I. O. O. F. 71 Ark. 35, 70 S. W. 305; *Long v. Charles T. Ables & Co.* 77 Ark. 158, 93 S. W. 67; *Cost v. Newport Builders' Supply & Hardware Co.* 85 Ark. 407, 10 S. W. 509.

Messrs. Brizzolara & Fitzhugh, for appellee Refrigerator Works:

The architect ordered the material for the owner, and the owner is liable therefor.

Crockett v. Chattahoochee Brick Co. 95 Ga. 540, 21 S. E. 42; *Gibson County v. Motherwell Iron & Steel Co.* 123 Ind. 364, 24 N. E. 115.

Appellee has a lien upon the premises.

Cost v. Newport Builders' Supply & Hardware Co. 85 Ark. 407, 10 S. W. 509.

Messrs. Read & McDonough for appellee Kenney Brothers.

order for materials for the construction of a building was given by an architect before the contract was let, and such materials were paid for by the owner, and other materials, called "extras," were furnished in part while the original contractor was in charge of the construction work, and in part after he had absconded, and while the owner and his employees were in charge, no provision having been made in the original contract for the necessary material, it was held that the materials were furnished to the owner's agent, authorized to purchase material on his account, and that the materialmen were entitled to a mechanics' lien therefor under 2 Ballinger's Anno. Codes & Statutes, § 5900, providing that every person furnishing material to be used in the construction of any building shall have a lien therefor.

McCulloch, J., delivered the opinion of the court:

One S. K. Robinson entered into a written contract with appellant, Sternberg, to furnish material and construct two cottages, in the city of Ft. Smith, for the latter, at and for the sum of \$3,950. The contract provided that the houses should be constructed in accordance with certain plans and specifications prepared by Sullenger, an architect, which are referred to in the contract, and expressly made a part thereof. The specifications contained the following: "Supplying labor, etc. Should the contractor, at any time

during the progress of the work, refuse or neglect to supply a sufficiency of materials or workmen, the architect will have power to provide materials or workmen after three days' notice having been given in writing to furnish said materials and workmen. In case of noncompliance, the expense arising from such action shall be deducted from the contract price, the back percentage shall be forfeited, and, if necessary, the work relet. The materials and implements on the premises shall hereby become forfeited and sold if necessary to finish the work." Robinson abandoned the work before completing the

In *Crockett v. Chattahoochee Brick Co.* 95 Ga. 540, 21 S. E. 42, the court, in allowing foreclosure of a mechanics' lien for material furnished upon the order of the architect, who was the agent of the defendant only for the purpose of drawing plans and seeing that proper material was used, before the abandonment of his contract by the contractor, but upon the owner's credit, pledged by the architect, said: "Whether an architect who furnishes designs and undertakes to superintend the construction of a building is also such an agent of the owner as to bind him personally for material furnished to a contractor who undertakes to construct the building depends upon the contract between the owner and the architect; but, whether originally so authorized or not, if the architect assumes to act as such agent, and purchases material upon the credit of the owner, with his full knowledge and assent, the latter thereby ratifies the assumed agency of the architect, and is bound for the price of the material thus purchased." This judgment, however, seems to have been based upon a finding of the jury that the owner assented to the materials being furnished upon his credit.

But in *Bouton v. McDonough County*, 84 Ill. 384, it was held that subcontractors who had refused to complete a courthouse for a county unless paid directly by the county, the original contractor being insolvent, were not entitled to a mechanics' lien even though they finished the building in reliance upon a promise by the architect and superintendent that they would be so paid, as it was not shown that the architect and superintendent had any authority from the county to make such arrangement. A mechanics' lien was denied in this case on the further ground that the courthouse was a public building within the meaning of the lien law, against which a lien will not lie.

And in *Lewis v. Slack*, 27 Mo. App. 119, it was held that a contractor who had furnished extras at the order of an architect who was the "architect, agent, and superintendent" appointed by the principal "to erect and build" the building was not entitled to a mechanics' lien for the extras so furnished, as the architect had no right, as such, to direct extra work to be done, it being only such extra work as the defendant

directed to be done, or authorized the architect to have done after the original contract with the plaintiff contractor was made, or such as was done with her knowledge or consent, knowing that it was extra work, that she could be charged for.

As bearing somewhat on the foregoing decisions, the principles involved being in the main similar, the following cases, in which the action was on contract for labor or material furnished on the order of the architect, are set out, although not strictly within the scope of this note:

Thus, in *Campbell v. Day*, 90 Ill. 363, where an architect who was only employed to supervise and direct the work to be done by the contractor ordered a subcontractor to substitute stone piers for defective brick ones which had been constructed in compliance with the original contract, it was held that, in the absence of proof that the principal authorized his architect to bind him for the work, he had no authority to employ another than the original contractor to do work which the contractor had undertaken to do.

And in *Stuart v. Cambridge*, 125 Mass. 102, where the contract provided that it should be lawful for the architect to direct in writing for additions to or deviations from the original plans, additional work performed at the oral direction of the architect "to go ahead and do the work as he directed, and that they would be paid for it," could not be recovered for, as the direction therefor, being oral, was not in conformity with the terms of the contract.

But in *Gibson County v. Motherwell Iron & Steel Co.* 123 Ind. 364, 24 N. E. 115, where the board of commissioners let a contract for the construction of a courthouse, and appointed an architect, giving into his hands full supervision of the construction, it was held that such architect became the agent of the county, and that he could bind the county for work done at his order by a subcontractor, beyond that contemplated by the original contract, although there was no agreement as to the price of the extra work, and the order therefor was not in writing and attached to the original contract, as provided for in case additions or omissions should be desired in the construction of the building.

houses, and the same were completed by other parties employed by appellant, in accordance with the contract. At the time of the abandonment appellant had paid out, on certificates of the architect, for labor and material, the sum of \$2,913.33, and it cost him the additional sum of \$1,369 to complete the houses, making an excess, which he paid out over the contract price. Appellees, Ft. Smith Refrigerator Works and Kenney Bros., instituted suits in equity, to recover the price of material furnished for use in the buildings, and to have liens declared on the buildings and lot. The chancellor found in their favor, and entered a decree accordingly.

Robinson got sick during the progress of the work on the buildings, but the work was continued, for a time, under supervision of the architect, before final abandonment, when appellant relet the contract for completing the buildings to other parties for the sum named above. During the time Robinson was sick, and before he finally abandoned the work, appellees furnished the material in question upon orders given by the architect. The chancellor found that the orders were given without any authority from appellant, except the authority implied from the terms of the contract with Robinson, and we think the proof sustains the finding. Appellant expressly declined to bind himself to pay for material to be furnished by one of the appellees, and as to the other, he was not consulted. The chancellor decided that the contract itself constituted sufficient authority, from appellant to the architect, to purchase the material for him, and to bind him for the payment thereof. The conclusion of the chancellor is stated in the following language: "The purchases thus made by the architect became a debt, in favor of Sternberg, against the contractor, and the claim must take its place, and assume the chances of payment, as if furnished by an independent materialman; but each is a basis for a lien against his building under the circumstances, the same as if there had been no contract between him and Robinson, or as if he had made a direct personal purchase of the material." We think that this interpretation of the contract was erroneous. The stipulation in question did not constitute the architect the agent of the owner for the purpose of procuring labor and material for the building. The builder obligated himself in the contract to furnish these, and to complete the building for a stated price; and, in this particular clause of the contract, he expressly agreed that, if he failed to furnish sufficient labor and material, the architect might do so, and deduct the cost from the contract price. The statute would give a lien, as to subcontract-

ors, to the extent of the original contract price, for labor or material furnished under these circumstances. But the clause of the contract in question did not authorize the architect to bind the owner, or to create a lien on the building, beyond the original contract price. This feature of the contract was manifestly inserted for the benefit of the owner, so that the architect could require the furnishing of labor and material pursuant to the contract; but, until work was abandoned by the contractor, and the owner took charge for the purpose of completing the building, or unless he authorized the architect to procure labor and material for the building, he cannot be held liable, nor can liens be asserted against his building beyond the original contract price. The contract did not constitute the architect the agent of the owner for the purpose of procuring labor and material, as that was within the obligation of the builder. We are therefore of the opinion that the chancellor erred in holding appellant liable, beyond the contract price, for material furnished.

Under the rule laid down by this court in *Long v. Charles T. Abeles & Co.* 77 Ark. 156, 93 S. W. 67, all who furnish, to a principal contractor, labor or material used in the construction of a building, are entitled, on equal footing, to liens on the building, to an amount not exceeding the original contract price; or, where work has been abandoned by the principal contractor, to the amount of the contract price after deducting the cost of completing the building, in accordance with the contract; and the owner cannot discriminate between persons who perform labor or furnish material, but must prorate the contract price between them. To this extent the case of *Barton v. Grand Lodge*, 1 O. O. F. 71 Ark. 35, 70 S. W. 305, was overruled. The amount paid out by appellant for labor and material before Robinson abandoned the work, together with the amount necessarily expended in completing the building after abandonment, exceeded the original contract price. Appellee Ft. Smith Refrigerator Works, according to the proof in the record, received its *pro rata* of the amount paid by appellant, and is entitled to no more; but it does not appear that Kenney Bros. have been paid anything at all. So, under the rule in *Long v. Charles T. Abeles & Co.* they are entitled to their *pro rata* of the difference between the contract price and the amount paid out by appellant in completing the buildings after Robinson abandoned the work. We cannot, from the proof before us, ascertain precisely what their property share is.

The decree is reversed, with directions to dismiss the complaint of Ft. Smith Refrigerator Works for want of equity, and to as-

certain the amount of *pro rata* of the contract price due Kenney Bros., and decree a lien therefor, in accordance with this opinion.

FLORIDA SUPREME COURT.

BENEDICT PINEAPPLE COMPANY,
Plff. in Err.,
v.

ATLANTIC COAST LINE RAILROAD
COMPANY.

(55 Fla. 514, 46 So. 732.)

Pleading — demurrer — specification of grounds — sufficiency.

1. A demurrer, or a ground thereof, that in effect merely states that a declaration or

Headnotes by WHITFIELD, J.

Case Note. — Proximate cause; weather conditions as an independent, intervening, efficient cause.

This note is confined to cases which discuss the question whether a weather condition or atmospheric change which intervenes, in time, between a negligent act and a subsequent loss, is to be deemed the proximate cause of the loss. Cases involving the proximate cause of losses in respect to contracts, as in insurance, for instance, have been excluded. And cases have also been excluded which involve the question of the proximate cause of the loss of goods which, by a negligent delay on the part of a carrier, have been exposed to loss or injury by flood, etc.

Upon the question of anticipation as an element of proximate cause, see case note to *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684.

Negligent fires spread by wind.

A large number of cases involving the question of weather conditions as an independent, efficient, intervening cause have to do with a wind which facilitates the spread of a fire which has been negligently started. The cases generally hold that an ordinary wind, even though it is a high wind, cannot be considered as an independent, intervening cause, nor is a mere change in the direction of the wind so considered; but, where the wind is extraordinary and unusual, some cases hold that it so breaks the causal connection between the negligent act and the resulting loss as to relieve the defendant from the effects of his negligence.

In *Union P. R. Co. v. McCollum*, 2 Kan. App. 319, 43 Pac. 97, the distinction between an ordinary wind and one of extraordinary force is thus set out: "One setting out a fire on the prairie is bound to take into consideration any such merely natural occurrences. If the winds did not fan the flames and sweep them with such destructive and often uncontrollable force, prairie fires would not leave so many black-
20 L.R.A. (N.S.)

a count therein is bad in substance, or fails to allege a cause of action, does not comply with the statute requiring the substantial matters of law intended to be argued to be stated, and will not avail as a demurrer, unless it plainly appears from a reading of the declaration or count that it does not, by direct statements, or by fair inferences drawn therefrom, contain all the essentials of a cause of action.

Railroads — injury to property — duty in operating.

2. The right of a railroad company to run its engines and trains over its tracks is coupled with the duty to so operate the engine as not to negligently injure the property of others near the track. The duty arises by implication of law out of the relation of the parties to each other and the circumstances of the case.

Negligence — proximate cause.

3. The negligent act or omission for which

ened ruins in their paths. But it cannot be said in such cases that a wind which is neither unusual nor extraordinary is an independent, intervening cause of the spread of the flames. It is simply a natural force which is exerted upon almost every fire, as a contributing cause, to the doing of more or less damage. When two causes combine to produce an injury, both of which are proximate in their character, the one being the result of culpable negligence and the other an occurrence for which neither party is responsible, the negligent party is liable if the injury would not have been sustained but for such negligence. If there had been the intervention of such an extraordinary force as a whirlwind, as was the case in *Marvin v. Chicago, M. & St. P. R. Co.* 79 Wis. 140, 11 L.R.A. 506, 47 N. W. 1123, a different question would be presented. The independent, intermediate agency which may become the proximate cause, and thus stand between the injurious results and a prior wrongful act, must also be a force whose intervention or contribution in bringing about the results could not have been foreseen by the exercise of reasonable diligence on the part of the wrongdoer."

As was suggested, the cases generally hold that an ordinary and not unusual wind, although it may cause the fire to spread to a greater extent than it would had there been no wind, is not to be deemed an independent, efficient, intervening cause. And the mere fact that the wind is high does not change the rule, provided that it is not an extraordinary and unusual wind.

Thus, in *Lillibridge v. McCann*, 117 Mich. 84, 41 L.R.A. 381, 72 Am. St. Rep. 553, 75 N. W. 288, it was held that a wind existing at the time a building is set on fire is not an intervening cause of the burning of another building to which the fire is carried.

So, in *East Tennessee, V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828, it was held that a high wind, unless shown to be extraordinary, by which a fire negligently started was facilitated in passing from one

a party is liable in damages in one that proximately, i. e., in ordinary, natural sequence, causes, or contributes to causing, an injury to another, when no independent, efficient cause intervenes, and the injured party is not at fault.

Same — results.

4. Liability for negligence extends to all its natural, probable, and ordinary results. An injury that, under the circumstances, is the natural, probable, and ordinary result of a negligent act or omission is, in law, held to have been contemplated by the negligent party as a probable and proximate result of the negligence, when he is informed, or by ordinary observation would have been informed, of the facts and circumstances attending the negligence.

Same — contributing causes — weather conditions.

5. The ordinary conditions or forces of nature, such as ordinary wind, cold, heat, and the like, that are usual at the time and place

side to the other of roads traversing the district, would not be considered an intervening, efficient cause.

And, in *Missouri P. R. Co. v. Cullers*, 81 Tex. 382, 13 L.R.A. 542, 17 S. W. 19, it was held that a railroad company was not relieved from liability for injuries caused by fire started through its negligence, by the facts that the fire had traveled over considerable space and had been revived by a strong wind after having apparently gone out before doing the damage which occurred the day after the fire had started.

So, in *Indiana, I. & I. R. Co. v. Hawkins*, 81 Ill. App. 570, the court said: "We are of opinion the proximate cause of the damage to appellee was not the act of God or inevitable accident, but resulted solely from human agency, for which appellant was responsible. . . . It is matter of common experience and observation in this western prairie country that just such gusts of wind as this apparently was are liable to spring up at any time, especially when a fire is started in dry grass and weeds, such as accumulate in the fall of the year. Fire is a dangerous element, and one who sets it out upon the open prairie must be prepared to take care of it and prevent its escaping and doing damage to others, or be liable for the consequences."

Where, from the evidence, it was not clear whether the plaintiff's buildings were set on fire by sparks from the defendant's engine or by sparks carried by a high wind from a pile of sawdust which had previously been fired by sparks from the engine, the court said, in *Alabama G. S. R. Co. v. Johnston*, 128 Ala. 283, 29 So. 771: "In either case the cause was not so remote as to relieve the defendant from liability. That winds might occur sufficient to carry fire from the sawdust to those premises was an event the defendant ought reasonably to have expected and guarded against, to the extent, at least, of using due care to prevent an unnecessary escapement of sparks; and its failure to do so, if proven, shows

and under the circumstances, and that reasonably should have been expected or foreseen as probably to occur, are not, in general, independent, efficient causes, when they affect or operate upon a negligent act or omission in causing an injurious result.

Same — contemplation.

6. Those who are negligent are held in law to know the usual effect of ordinary, natural conditions and forces upon a negligent act or omission, and to have contemplated the probable effect of such conditions and forces upon their negligence or upon its proximate results, and to be liable in damages for the natural and probable proximate results of the negligence.

Same — contributing cause.

7. Where an action is brought for an injury that is the result of the negligence of the defendant and of some other contributing cause not an independent efficient cause, and the result could not have been produced in the absence of either contributing cause,

negligence supporting the complaint. The wind was but a natural condition establishing the connection between the alleged negligence, if proven, and the injury; and was not, in a legal sense, an intervening cause breaking such causal connection."

So, in *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 9 L.R.A. 750, 22 Am. St. Rep. 582, 26 N. E. 51, it was held that an ordinary wind is not an independent, intervening cause so as to relieve a railroad company from the consequences of its negligent act in permitting a fire in a peat bed upon its own premises to extend to the plaintiff's premises.

And the *Nitsche* Case was cited with approval, and followed, in a number of cases wherein fire was carried by an ordinary wind from the place where it was started to the plaintiff's premises. *Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. 696; *Chicago & E. R. Co. v. Lesh*, 158 Ind. 423, 63 N. E. 794; *Chicago & E. R. Co. v. Luddington*, 10 Ind. App. 636, 38 N. E. 342; *Chicago & E. I. R. Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451.

And the *Nitsche* Case was followed in *Ft. Wayne Cooperage Co. v. Page* (Ind. App.) 82 N. E. 83, where it was held that the wind which blew steam negligently permitted to escape from the defendant's mill across the street, and frightened the plaintiff's horse, was not an independent, intervening cause.

In *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71, where a railroad company negligently, but unintentionally, set fire to one of its buildings, and the flames were carried by the wind to the plaintiff's building, which was destroyed, it was held that the wind should be considered as an intervening, independent agency, without which the fire would not have extended to and consumed the plaintiff's property. The court said: "The unexpected intervention of the wind, even when the fire is voluntarily set upon the premises of the person setting it, has generally been accepted as

the defendant's negligence is a proximate cause of the injury, if, under the circumstances attending the defendant's negligence, the injury was a probable, natural, and usual result of the two contributing causes that the defendant is held to have contemplated, and the plaintiff or those for whom he is responsible did not contribute proximately to the injury.

Same — destruction of safety appliance — liability.

8. Where a means, such as a cover, has been provided by the owner of property to protect it from an injury that will probably occur, and such cover is, without the fault of the owner, injured or destroyed by the negligence of another, who, under the circumstances of the case, knew, or should have known, of the use to which the cover was applied and of the injury that would probably result from the destruction of the cover; and the destruction of the cover defeats the sole purpose for which it was used,—damages may be recovered for injuries to the

property that was so protected, which proximately follow or result from the destruction of the cover provided for the protection of the property injured.

Railroads — fires — negligence — liability.

9. Owners of property have a right to use it in any manner desired that is not inconsistent with the rights of others. This includes the right of those having land near a railroad track to place a canvas cover over plants growing on the land, and the mere fact that the cover is within the reach of sparks of fire emitted from locomotive engines passing on the track near by does not relieve the railroad company from liability for its negligence in permitting sparks to escape from the engine and burn the cover.

Negligence — fires — damages — intervening cause — act of God.

10. Where a cover is put over growing plants and fruit to protect them from ordinary and usual cold and frost, and the cover is burned by the negligence of another,

the intervention of a new and independent agency, and this inference from the intervening force of the wind ought, we think, to have a much stronger and more general application to cases of merely accidental or unintentional fires." But in *Louisville, N. A. & C. R. Co. v. Nitsche*, supra, the court said that the decision in the *Whitlock Case* was to be confined to the particular facts of the case, and in *Chicago, St. L. & P. R. Co. v. Williams*, supra, the *Whitlock Case* was expressly disapproved in part at least.

And a mere change in the direction of the wind is usually not considered to be an independent, intervening cause.

Thus, in *Northern P. R. Co. v. Lewis*, 2 C. C. A. 446, 7 U. S. App. 254, 51 Fed. 658, reversed on other grounds in 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831, the court said: "A simple and not unusual change in the direction of the wind cannot be said to disturb the unbroken connection between the wrongful act and the injury, and hence is not an intervening cause."

So, also, in *Florida East Coast R. Co. v. Welch*, 53 Fla. 145, 44 So. 250, it was held that, conceding the fact that there was a change in the direction of the wind so as to blow the fire onto the land of the plaintiff and into his grove, the mere change in the direction of the wind was not an intervening cause, so as to deprive the plaintiff of his right to recover.

And in *Poeppers v. Missouri, K. & T. R. Co.* 67 Mo. 715, 29 Am. Rep. 518, it was held that the fluctuation of the wind could not be deemed an independent, intervening cause between the negligent starting of a fire and the burning of plaintiff's buildings 5 miles away, to which place the fire had been driven by the wind. And to the same effect was the decision in *Hightower v. Missouri, K. & T. R. Co.* 67 Mo. 726, where the loss was occasioned by the same fire. And to the same general effect was the decision in *Kenney v. Hannibal & St. J. R. Co.* 70 Mo. 252.

20 L.R.A. (N.S.)

Where, in an action for damages for negligently allowing fire to escape from the premises of the defendant, the defense is that the loss was occasioned by a sudden shift of the wind, it is held in *Mahaffey v. J. L. Rumbarger Lumber Co.* 61 W. Va. 571, 8 L.R.A. (N.S.) 1263, 56 S. E. 983, that it must be shown, in order that such defense may avail, that the change of wind was unusual and extraordinary, and such as in its nature not reasonably to be expected.

But, to the contrary was the decision in *Read v. Nichols*, 118 N. Y. 224, 7 L.R.A. 130, 23 N. E. 468, where a high north wind carried sparks from defendant's chimney to a tall building situated some distance to the south. The wind changed to the south, and several buildings between the building where the fire originated and the defendant's shop, from which the sparks came, including the plaintiff's houses, were burned. There was a lack of proper fire-fighting apparatus. The court held that the original negligence was the remote cause of the plaintiff's loss, and the change of the wind, lack of apparatus, etc., were to be deemed the proximate causes. In the decision the court followed *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49, in which the essential point determined was that the defendant could not have anticipated that a fire would spread from building to building, and consequently was not liable for the loss of plaintiff's building, which took fire from a shed in which a fire was negligently started by the defendant.

In a few cases in which a fire negligently started has been spread by a high or unusual wind, the wind has been held to be an independent, efficient, intervening cause.

Thus, in *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349, 14 Am. Rep. 13, where a fire was started by a spark from a locomotive and was carried from one building to another, the court said: "If loss has been caused by the act, and it was, under the circumstances, a natural consequence which

injury to the growing plants and fruit by ordinary and usual cold and frost that should have been expected at the time and place of the negligence is not such an act of God as will relieve from liability the party who negligently burned the cover.

Pleading — declaration — essentials.

11. Where negligence is the basis of recovery, the declaration should contain allegations of the negligent act or omission of the defendant, and also allegations of facts to show injury to the plaintiff, and that such injury was a proximate result of the negligence alleged.

Railroads — fires — pleading — damages.

12. A declaration which states that the defendant railroad company "so carelessly and negligently managed and operated one of its locomotives . . . that fire escaped therefrom and set fire to the canvas cover or cloth with which a pinery belonging to the plaintiff and situated near to the track of the defendant . . . was covered, and

any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency,—if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind,—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible." And this case is cited with approval, and followed, in *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572.

And a strong wind which arises while a fire is in progress, and carries it where it could not otherwise have spread, and there destroys property, was held, in *Marvin v. Chicago, M. & St. P. R. Co.* 79 Wis. 140, 11 L.R.A. 506, 47 N. W. 1123, to be an intervening cause which will relieve the party responsible for the original fire from liability for the loss of such property.

The decision in *Tyler v. Ricamore*, 87 Va. 406, 12 S. E. 799, is to the contrary, but it is a rather extreme case. It was there held that the court did not err in refusing to instruct the jury that, although the defendant had started the fire by negligent conduct, yet, if the fire was propagated and carried farther on by a high and unusual wind, breaking the continuity of the fire, then the injury was too remote and the plaintiff could not recover. The court said: "In the first place, the instruction was not applicable to this case, except that it was a very windy day and the fire was carried before it, as was to be expected, as the usual and ordinary consequence; and, in the second place, if the wind had been unusual and peculiar, it would not have been proper. Having once set the fire, the injury resulting

burned a large part, to wit, about 1 acre of said cover;" and alleges damages in a stated amount,—is sufficient to authorize a recovery of general damages or such as necessarily result from the burning of the canvas cover to the extent of its value within the stated amount.

Negligence — pleading — materiality.

13. In an action for damages, where it is, in effect, alleged that in the month of January the defendant negligently burned the cover used to protect growing plants and fruit from injury by ordinary cold and frost usual "in the winter season" at the place of the negligence, of which use to prevent probable injury the defendant knew, or should have known, that, shortly after the burning of the cover, the plants and fruit were injured by frost and cold, which injury defendant should have anticipated; and that the injury "was caused by the negligence of the defendant in burning part of the cover as aforesaid;" and damages are claimed,—it is not necessary to allege "that, at the time of

therefrom was proximate, and not remote, if the burning was naturally and reasonably to be expected from the setting of the fire in the place where it was set."

In some cases it has been held that the question whether the wind was an independent, efficient, intervening cause was a question for the jury.

Thus, in *Henry v. Southern P. R. Co.* 50 Cal. 176, it was held that, in view of the long, dry season in California and the prevalence of certain winds in the valleys there, it might be left to the jury to determine whether the spreading of a fire from one field to another was not the natural, direct, or proximate consequence of the original firing.

So, also, in *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57, it was held that whether a loss occasioned by a fire negligently started by a railroad, but carried along by a high wind, was too remote to authorize a recovery from the railroad company was a question for the jury.

And in *Gram v. Northern P. R. Co.* 1 N. D. 252, 46 N. W. 972, it was held that, in an action for damages caused by a fire which escaped from one of defendant's trains and ignited upon defendant's right of way, and which spread over adjoining land, and finally destroyed plaintiff's property, whether the fire started by the defendant was the proximate cause of the injury complained of, or whether such injury was the result of another and independent cause, was, under the evidence, a question of fact for the jury; and the court did not err in submitting such question to the jury, with proper directions as to the law. This is true where the wind shifts or increases in violence after the fire starts, and before the damage is done. And to the same general effect was the decision in *Pennsylvania & N. Y. Canal & R. Co. v. Lacey*, 89 Pa. 458.

Accidents occasioned by winds.

It is difficult to formulate any rule which

the occurrence of the fire, the weather was such that cold and frost could be anticipated by the defendant," or "that in the month of January cold and frost of such character as to damage growing plants ordinarily occurred." The court knows judicially that January is in the winter season. If frost or cold of any degree injured the plants and fruit, as a proximate result of the defendant's negligence, under the circumstances as alleged, the extent of the cold or the condition of the weather at the time of the negligence is not material.

Same — sufficiency.

14. An allegation that injury to growing plants and fruit by frost and cold occurred after and as a result of the negligent burning of the cover used to protect the plants

will govern cases where a negligent act is followed by an injury, immediately occasioned, however, by a wind of greater or less velocity. Much depends upon the strength of the wind and the character of the negligent act.

Thus, a very violent wind which blew down defendant's uncompleted barn and injured the plaintiff was held, in *Valiquette v. Fraser*, 9 Ont. L. Rep. 57, to be an independent, intervening cause, which would protect the defendant from his alleged act of negligence in leaving the barn in an insecure condition.

So, in *Sutphen v. Hedden*, 67 N. J. L. 324, 51 Atl. 721, it was held that the owner of premises would not be liable for injuries caused by the blowing down of barriers around an excavation if the wind was of such extraordinary violence that a reasonably careful person would not be bound to have anticipated it.

And a high wind which blew down a tree, making an opening in a fence between the defendant's land and plaintiff's, and not the defendant's negligence in leaving open a gate from his premises to the right of way of a railroad, was held, in *Strobeck v. Bren*, 93 Minn. 428, 101 N. W. 795, to be the proximate cause of the loss of plaintiff's cattle, which passed through the opening in the fence, and through the open gate onto the tracks, and were killed.

A furious wind which blew a car from the track was held in *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 615, 22 Am. St. Rep. 403, 25 Pac. 702, to be the proximate cause of the loss of goods destroyed by a fire which immediately followed, without negligence on the part of the carrier, as the result of the overturning of the car, in which were burning a lamp and a coal fire.

But where a long ladder, the lower end resting in a village street outside the sidewalk, the upper end inclining over and across the walk and resting upon a building, was blown down in an unusual wind, and injured a passer-by, it was held, in *Moore v. Townsend*, 76 Minn. 64, 78 N. W. 880, that the negligence of the owner and occupants of the building in allowing the ladder to remain across the walk, and of the village

and fruit from frost and cold sufficiently connects by ordinary, natural sequence the negligence and the injury.

Railroads — contributory negligence — presumption — effect.

15. In view of the peculiar risks and duties of railroad companies in the use of dangerous machinery running rapidly and carrying fire along the lines of road, the statutes of the state provide that railroad companies shall be liable for any damage to property by the running of trains or other machinery, unless the companies shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the companies; and that, if the complainant and the agents of the companies are both at

authorities, after knowledge of the facts, was the proximate cause of the injury, and not the unusual wind.

And, where certain walls were negligently left unprotected by iron work, and were blown down in a storm, it was held, in *Meyer v. Haven*, 37 App. Div. 194, 55 N. Y. Supp. 864, that the negligence in failing to protect the walls was a concurring cause with the storm, and the party guilty of the negligence was liable for the loss.

So, in *Detzur v. B. Stroh Brewing Co.* 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, it was held that an ordinary wind which blows broken glass out of a window is not the proximate cause of an injury caused by the fall of the glass, when there was negligence in leaving the window in such a condition that the glass was liable to fall out.

Dangerous walls left unprotected after a fire.

Where a fire has destroyed a building, and dangerous walls have been left standing, which have been blown down by a wind, a few cases have held that the wind would be a remote cause only, unless the owner has done all in his power to render the walls safe.

Thus, in *Nordheimer v. Alexander*, 10 Can. S. C. 248, where a wall left standing after a fire destroyed the remainder of the building, was blown down by a wind, injuring plaintiff's premises, it was held that the wind could not be considered a *vis major* unless the accident could not have been anticipated or prevented.

And the negligence of the owner of premises upon which were standing the walls of a building destroyed by fire was held, in *Schwarz v. Adsit*, 91 Ill. App. 576, to be the proximate cause of injuries resulting from the falling of the walls during a high wind, where the owner had not done all in his power to render them safe or to remove them.

Miscellaneous cases.

Where the plaintiff's intestate was killed by a bolt of lightning which passed through a transformer which defendant had permitted to become defective, in *Quincy Gas & Electric Co. v. Schmitt*, 123 Ill. App. 647,

fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to the complainant. Under these statutes, a complainant has a right of action for the negligence of a railroad company, even if he has also been negligent; but the amount of recovery is affected by the complainant's negligence.

Pleading — demurrer — declaration good in part.

16. Where a declaration states a cause of action for any recovery, a demurrer thereto should be overruled.

(April 20, 1908.)

ERROR to the Circuit Court for Orange County to review the sustaining of a de-

the court, in discussing the question of proximate cause, said that, if the death of the plaintiff's intestate was caused by an act of God unmixed with the alleged negligence of the appellant as a proximate cause, the latter cannot be held liable; if, however, he was negligent, and such negligence as a proximate cause alone, or, concurring with an act of God, caused the death, then the appellant is liable.

In *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339, where the defendant negligently permitted water to flow onto the plaintiff's premises, where it froze, which freezing caused injury to the plaintiff, the court said: "But, to claim exemption from liability for the consequences of such an act of nature, it must be such as could not have been foreseen and prevented by the exercise of any ordinary care and prudence. . . . Appellant must be held to have known that the water would freeze upon appellant's land at the time it was turned on it, it being a fact occurring in the course of nature, and be chargeable with the consequences resulting from the known action of frost in freezing water in combination with appellant's own act. The injury was one which might reasonably and naturally have been expected to result."

Where a storm caused cattle to travel to a washout and excavation negligently left by the defendant in a dangerous and unguarded condition, and the cattle were injured, it was held, in *Big Goose & B. Ditch Co. v. Morrow*, 8 Wyo. 537, 80 Am. St. R. p. 955, 59 Pac. 159, that the negligence of the defendant, and not the storm, was the proximate cause of the injury, as the result was one which might reasonably and naturally have been anticipated.

In *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909, it was held that a loss by flood or storm is a loss by act of God, and a common carrier is excused when the damage results from this cause immediately; and, if it is charged that the carrier's negligence contributed to the loss, the proof of this must come from those who assert or rely upon it.

In *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65, it was held that, un-
20 L.R.A. (N.S.)

murrer and the entering of judgment upon plaintiff's refusal further to amend a declaration in an action to recover damages for injuries caused by fire alleged to have been the result of the negligent operation of one of defendant's locomotives. Reversed.

Statement by Whitfield, J.:

On a former writ of error the original declaration in this cause was held to be defective, and a judgment obtained against the railroad company was reversed. *Atlantic Coast Line R. Co. v. Benedict Pineapple Co.* 52 Fla. 165, 42 So. 529.

The amended declaration is as follows:

"The Benedict Pineapple Company, a cor-

der a policy of insurance which exempted the insurance company from losses due to explosions, the company was not liable for a loss by fire which was started by an explosion in another building situated across the street. The court said: "The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause." This case, however, is not strictly within the scope of this note, which, as was stated in the beginning, is confined to cases of negligence, and does not include cases of contracts.

In an action for damages for the breach of a contract to thresh grain, which is not entered into under such special or exceptional circumstances that it may be reasonably inferred that other than the ordinary liability was contemplated by the parties, it was held, in *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 251, that the loss of grain by exposure to storm is a remote, and not a proximate, consequence of the breach, and will not sustain a recovery, although such loss would not have occurred had the contract been carried out within a reasonable time.

In *McClary v. Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631, it was held that the fact that a train was running three quarters of an hour behind time was not the proximate cause of injuries to a passenger, received by reason of the train being upset by a sudden gust of wind which crossed the track, but not the part of the track where the cars would have been had they been on time.

And a storm which sinks a barge in a lake is the proximate cause of the loss of the barge, notwithstanding the fact that but for the negligent delay of the owner of a tug the barge would have been in a place of safety at the time of the storm. *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264.

poration existing under the laws of the state of Florida, by Massey & Warlow, its attorneys, sues the Atlantic Coast Line Railroad Company, a corporation:

"For that the defendant is a railroad corporation operating a railroad through the city of Orlando, and in the winter season, to wit, on or about the 7th day of January, A. D. 1905, it so carelessly and negligently managed and operated one of its locomotives while drawing a train through said city, in Orange county aforesaid, that fire escaped from said locomotive and set fire to the canvas or cloth with which a pinery belonging to the plaintiff and situated near to the track of the defendant in the city aforesaid was covered, and burned a large part, to wit, about 1 acre, of the said cover.

"And the plaintiff says, also, that in the said pinery a large number of pineapple plants were set and growing, some of which had on them fruit at various stages of development, and that pineapple plants and fruit were likely to be damaged by frost and cold in the said city of Orlando (in which said pinery was situated) and the latitude thereof in the winter season, and that it was usual and customary in and about the said city and latitude to cover pineries with canvas or cloth in order to protect the plants and fruit growing thereon from damage by frost and cold, and also to keep in the heat produced or generated by fires maintained in the pineries during spells of frost and cold which ordinarily come in the winter season on short notice, and which otherwise would damage the plants and fruits; and that, in accordance with said custom, the plaintiff had provided its said pinery with a good canvas or cloth cover for the purpose aforesaid, and had also provided stoves and fuel in the said pinery ready and sufficient (if the pinery were covered as aforesaid) to heat the said pinery immediately upon the coming of cold and frost dangerous to the said plants and fruit, and thus preserve them from damage therefrom. And the plaintiff says that, shortly after the burning of the portion of the cover as aforesaid, and before the plaintiff, by exercise of any reasonable diligence by it, could replace the part of the cover which had been burned through the negligence of the defendant as aforesaid, the plants and fruit were damaged by frost and cold for want of the complete cover and the subsequent inability of the plaintiff to control the temperature within said pinery.

"And the plaintiff says that the defendant well knew, or ought to have known, that pineapple plants and fruit in the city of Orlando and in the latitude thereof were likely to be damaged by frost and cold in the winter season, and that it was usual

and customary to cover the pineries aforesaid with canvas or cloth in order to protect the plants and fruit from damage by frost and cold, and also to keep in the heat produced or generated as aforesaid, during spells of frost and cold as aforesaid; and well knew, or ought to have known, the purpose for which the plaintiff's said pinery was covered with canvas or cloth as aforesaid, and that damage to plants and fruit therein was likely to happen at that season by the burning of a large part of the said cover as aforesaid. And the plaintiff says that, but for the burning of a large part of the cover through the negligence of the defendant as aforesaid, it, the said plaintiff, could have saved its said plants and fruit from damage by the particular frost and cold which damaged them, which damage was caused by the negligence of the defendant in burning part of the cover as aforesaid.

"And, also, for that the defendant is a railroad corporation operating a railroad through the city of Orlando, and in the winter season, to wit, on or about the 7th day of January, A. D. 1905, it ran a train through said city, in Orange county aforesaid, drawn by a locomotive which was so carelessly and negligently equipped and provided with proper apparatus to prevent the escape of fire from said locomotive that fire did escape therefrom and set fire to the canvas or cloth with which a pinery belonging to the plaintiff and situated near to the track of the defendant in the city aforesaid was covered, and burned a large part, to wit, about 1 acre, of the said cover.

"And the plaintiff says, also, that in the said pinery a large number of pineapple plants were set and growing, some of which had on them fruit at various stages of development, and that pineapple plants and fruit were likely to be damaged by frost and cold in the said city of Orlando (in which said pinery was situated) and the latitude thereof in the winter season, and that it was usual and customary in and about the said city and latitude to cover pineries with canvas or cloth in order to protect the plants and fruit growing therein from damage by frost and cold, and also to keep in the heat produced or generated by fires maintained in the pineries during spells of frost and cold which ordinarily come in the winter season on short notice, and which otherwise would damage the plants and fruit; and that, in accordance with said custom, the plaintiff had provided its said pinery with a good canvas or cloth cover for the purpose aforesaid, and had also provided stoves and fuel in the said pinery, ready and sufficient (if the pinery were covered as aforesaid) to heat the said pinery immediately upon the coming of cold and frost dan-

gerous to the said plants and fruit, and thus preserve them from damage therefrom. And the plaintiff says that, shortly after the burning of the portion of the cover as aforesaid, and before the plaintiff, by exercise of any reasonable diligence by it, could replace the part of the cover which had been burned through the negligence of the defendant as aforesaid, the plants and fruit were damaged by frost and cold for want of the complete cover and the consequent inability of the plaintiff to control the temperature within said pinery.

"And the plaintiff says that the defendant well knew, or ought to have known, that pineapple plants and fruit in the city of Orlando and in the latitude thereof were likely to be damaged by frost and cold in the winter season, and that it was usual and customary to over the pineries aforesaid with canvas or cloth in order to protect the plants and fruit from damage by frost and cold, and also to keep in the heat produced or generated as aforesaid during spells of frost and cold as aforesaid, and well knew, or ought to have known, the purpose for which the plaintiff's said pinery was covered with canvas or cloth as aforesaid, and that damage to plants and fruit therein was likely to happen at that season by the burning of a large part of the cover as aforesaid. And the plaintiff says that, but for the burning of a large part of the cover through the negligence of the defendant as aforesaid, it, the said plaintiff, could have saved its said plants and fruits from damage by the particular frost and cold which damaged them, which damage was caused by the negligence of the defendant in burning part of the cover as aforesaid. And the plaintiff claims \$10,000.00."

The following demurrer was interposed to the declaration:

"Now comes the defendant in the above suit, and says that the declaration and each count thereof is bad in substance and in law, and demurs thereto.

"Sparkman & Carter.

"And, for substantial matters of law to be argued to the court, says:

"First. That neither the declaration as a whole, nor either count thereof in itself, states a cause of action against the defendant.

"Second. That each count in the said declaration shows that the damage, if any, suffered by the plaintiff, was not the proximate result of any negligence on the part of the defendant.

"Third. That each count in the said declaration shows that the damage claimed by the said plaintiff, was caused by an act of God, and was not the proximate result of 20 L.R.A. (N.S.)

any negligence chargeable against the defendant.

"Fourth. That neither count in said declaration alleges or charges any facts bringing home to the defendant the knowledge that the freeze which caused the damage to plaintiff might be reasonably expected by the said defendant.

"Fifth. That neither count in said declaration alleges facts to bring home to the defendant the knowledge that the freezing of the pineapple plants might be reasonably expected to follow directly and naturally from the burning.

"Sixth. That neither count in said declaration charges such a state of facts as would show that the damage suffered by the plaintiff might be reasonably expected from burning the canvas charged to have been burned."

The demurrer was sustained, and, the plaintiff not desiring to further amend the declaration, judgment for the defendant was entered, and the plaintiff on writ of error assigns as errors the sustaining of the demurrer and the entering of judgment for the defendant.

Messrs. Massey & Warlow for plaintiff in error.

Messrs. Sparkman & Carter for defendant in error.

Whitfield, J., delivered the opinion of the court:

It is suggested that the first ground of the demurrer, that neither the declaration nor a count thereof states a cause of action, is in effect but a mere repetition of the statutory form of a demurrer, and is insufficient.

The General Statutes of 1906 contain the following provisions as to demurrers in pleadings at law: Section 1430, originally part of § 15 of chapter 1096, p. 28, Laws 1880-81: "No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer." Section 1444, originally § 36 of chapter 1096: "Either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defense, or reply." Section 1444, originally § 36 of chapter 1096: "The form of a demurrer shall be as follows, or to the like effect: 'The defendant (or plaintiff) says that the declaration (or plea) is bad in substance.' And the substantial matters of law intended to be argued shall be stated; and, if any demurrer shall be delivered without such statement or with a frivolous statement, it may be set aside by the court." Under this last section the demurrer to a pleading is the averment

that it "is bad in substance." The statute originally required some substantial matter of law intended to be argued to be stated in the margin of the demurrer. The present statute does not specify how the substantial matters of law intended to be argued shall be stated, but it is usual to state them as grounds of the demurrer, as in this case. Any such grounds or specifications of matters of law that do not comply with the statute, or that are frivolous, may be disregarded by the court, and, if the demurrer contains no statement of substantial matters of law, or if the statements are frivolous, the demurrer may be set aside by the court as the statute provides.

Before the enactment of the statute first above quoted, the defects in a pleading that could be objected to by special demurrer were those relating to the form or manner of stating the matters contained in the pleadings, and not to the sufficiency in substance of the matters alleged as a ground of action, defense, or reply. The effect, therefore, of § 1430, is to dispense with the use of demurrers except to test the sufficiency of the matters of substance pleaded, without reference to the form or manner of statement. Sections 1441 and 1444, above quoted, refer to demurrers to test the sufficiency of the matters of substance stated as the ground of action, defense, or reply, without reference to the form or manner of statement.

Rule 30 of circuit-court common-law rules provides that, "upon demurrer to any declaration or other pleading, the party plaintiff or defendant may admit the cause of demurrer by filing an amended declaration or pleading, which shall do away with the cause of demurrer."

A purpose of the above statutory provisions and rule is to require that a demurrer presented to test the sufficiency of the substance of a pleading shall contain a statement of the substantial matters of law intended to be argued, so that the opposite party may be advised by the pleading itself of the particulars wherein the pleading is said to be insufficient, to the end that the party whose pleading is demurred to may amend or be prepared to sustain his pleading by argument on the demurrer. This course facilitates the hearing and aids the court in the disposition of causes in the interest of justice. *Sledge v. Swift*, 53 Ala. 110, text 114; *Moore v. Heinke*, 119 Ala. 627, 24 So. 374; *Cowan v. Motley*, 125 Ala. 369, 28 So. 70.

Defects of mere form and irrelevant or improper matters in a pleading in an action at law that prejudice or embarrass or delay the fair trial of the action may be reached by proper motion under § 1433 of the Gen-20 L.R.A. (N.S.)

eral Statutes of 1906. *Florida C. & P. R. Co. v. Ashmore*, 43 Fla. 272, 32 So. 832; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 711, 44 So. 230.

A demurrer or a ground thereof that in effect merely states that a declaration or a count therein is bad in substance, or fails to state a cause or right of action, does not comply with the statute requiring the substantial matters of law intended to be argued to be stated, and will not avail as a demurrer, unless it plainly appears from a reading of the declaration or count that it does not contain by its direct statements, or by fair inference from the direct statements, all of the essentials of a cause of action, or unless it plainly appears from the direct statements of the declaration, or count, or by fair inference therefrom, that the plaintiff has no cause or right of action, or has lost it, if it ever existed. In short, a demurrer or a ground thereof that in effect merely states that a declaration or a count therein does not allege a cause of action, or is bad in substance, will not be sustained, unless, upon a bare inspection of the declaration or count, it is clear that it fails to state the essentials of a cause of action, or shows that the plaintiff has no cause of action, *e. g.*, if damages are claimed for negligence, and no negligence or no damage is alleged by direct statements or by fair inference from the allegations, or if all the essentials of a cause or right of action are alleged, and it appears from the declaration or count that the action is barred or destroyed by the act or default of the plaintiff, or otherwise. See *State ex rel. Kittel v. Jennings*, 47 Fla. 302, text 307, 35 So. 986; *Florida C. & P. R. Co. v. Ashmore*, 43 Fla. 272, 32 So. 832; *Crawford v. Feder*, 34 Fla. 397, 16 So. 287; *Camp v. Hall*, 39 Fla. 535, 22 So. 792; *Jacksonville Electric Co. v. Schmetzer*, 53 Fla. 370, 43 So. 85; *Atlantic Coast Line R. Co. v. Benedict Pineapple Co.* 52 Fla. 165, 42 So. 529, concurring opinion and authorities.

If it clearly appears that no cause or right of action is stated, the court may and should dismiss the action of its own motion; but, if it does not clearly appear that no cause or right of action is alleged, the court is not called upon to sustain a demurrer that in effect merely states that no cause of action is alleged, or that the declaration or count is bad in substance, without stating the substantial matters of law intended to be argued as required by the statute. The defendant's right to have the sufficiency in law to the pleading passed upon by the court depends upon the proper presentation of the matter to the court. The court may not act of its own motion or upon insufficient application, except in plain cases that require lit-

tle more than a bare inspection of the pleading to determine.

Grounds of demurrer to a pleading that are in effect mere repetitions of the statutory form of a demurrer, *i. e.*, that the pleading "is bad in substance," will not be considered unless upon an inspection it is clear that the pleading is fatally defective in substance. It does not appear from an inspection of the declaration in this case that it is fatally defective in substance. Therefore the first ground of the demurrer, that neither the declaration nor any count thereof states a cause of action, is of no avail.

The main questions presented are whether the negligent burning of a canvas cover used to protect growing pineapple plants and fruit from injury by cold and frost is a proximate cause of injury by cold and frost to the growing plants and fruit before the burned cover could, by reasonable diligence, be restored, so as to give the owner a right to recover damages for the injury to the plants and fruit by cold and frost; and whether the declaration sufficiently states that the alleged negligent act or omission of the defendant, whereby fires escaped from a passing locomotive, setting fire to the cover, and burned it, is a proximate cause of the injury to the growing plants and fruit from frost and cold.

The defendant railroad company had a right to run its engine and train over its tracks, but such right is coupled with the duty to so operate the engine as not to negligently injure the property of others near the track. The duty arises by implication of law out of the relation of the parties to each other and the circumstances of the case.

To entitle a party to recover damages for his property injured or destroyed through or by the negligent act or omission of another, the negligence complained of must be shown to have been a proximate cause of the injury. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661.

Negligence is a proximate cause of an injury when in ordinary, natural sequence it causes, or contributes to causing, the injury, without an intervening independent cause.

The negligent act or omission for which a party is liable in damages is one that proximately, *i. e.*, in ordinary, natural sequence, causes, or contributes to causing, an injury to another, where no independent efficient cause of the injury intervenes, and the injured party is not at fault.

A negligent act or omission may be the proximate cause of injury, whether such injury necessarily or immediately follows the negligence or not, if the negligence is in ordinary, natural, unbroken sequence the cause of the injury. *Shearm. & Redf. Neg.* § 26; 20 L.R.A. (N.S.)

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.

Liability for negligence extends to all its natural, probable, and ordinary results. Any injury that, under the circumstances, is the natural, probable, and ordinary result of a negligent act or omission is in law held to have been contemplated by the negligent party as a probable and proximate result of the negligence, when he is informed, or by ordinary observation would have been informed, of the facts and circumstances attending the negligence.

Results that follow in ordinary, natural, continuous sequence from a negligent act or omission, and are not produced by an independent efficient cause, are proximate results of the negligence, and for such results the negligent party is liable in damages, even though the particular results that did follow were not foreseen.

Where the injury is caused by the intervention of an independent efficient cause to which the defendant did not contribute and for which he is not responsible, or is caused by the act or omission of the plaintiff, the negligence of the defendant is not the proximate cause of the injury. If the plaintiff contributes proximately to causing the injury, he cannot recover, unless otherwise provided by statute.

The ordinary conditions or forces of nature, such as ordinary wind, cold, heat, and the like, that are usual at the time and place and under the circumstances, and that reasonably should have been expected or foreseen as probable to occur, are not, in general, independent, efficient causes, when they affect or operate upon a negligent act or omission in causing a result. Those who are negligent are held in law to know the usual effect of ordinary natural conditions and forces upon a negligent act or omission, and to have contemplated the appearance and the effect of such conditions and forces upon their negligence or upon its proximate results, and to be liable in damages for the natural and probable proximate results of the negligence. 13 Am. & Eng. Enc. Law, 2d ed. 457 et seq.; 1 Thomp. Neg. 136; Wharton, Neg. § 97.

If the natural condition or force that affects the negligent act or omission is unusual or extraordinary, the negligent party will not, in general, be held to have known of or contemplated it, unless the circumstances of the particular negligent act or omission are such that the negligent party should have known of or contemplated the probable appearance and effect of such unusual or extraordinary natural condition or force. If the injury was caused by some extraordinary or unusual natural force or condition that could not have been foreseen,

or that would have caused the injury if there had been no negligence, the negligence is not the proximate cause of the injury.

Where the injury complained of is the result of the negligence of the defendant and of some other contributing cause not an independent efficient cause, and the result could not have been produced in the absence of either contributing cause, the defendant's negligence is a proximate cause of the injury, if, under the circumstances attending the defendant's negligence, the injury was a probable, natural, and usual result of the two contributing causes that the defendant is held to have contemplated, and the plaintiff or those for whom he is responsible did not contribute proximately to the injury. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. supra*; *Moore v. Lanier*, 52 Fla. 353, 42 So. 462.

Where a negligent act or omission is a proximate cause of an injury, the negligent party is liable in damages for the usual and natural consequences of the injury, whether the particular consequences that followed the negligence were actually contemplated or not. For such losses as necessarily follow the injury as the result of the negligence, recovery may be had under a claim for general damages. Losses that are the natural and proximate, but not the necessary, result of the injury, may be recovered as special damages when sufficiently stated and claimed. *Jacksonville Electric Co. v. Batchis*, 54 Fla. 192, 44 So. 933.

If, by a wind that is ordinarily likely to occur, a fire started by the negligence of a railroad company is communicated to and destroys property of another, the company is liable in damages for the property so destroyed, since it is held to have contemplated all the natural and ordinary consequences of the negligence. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. supra*; *Florida East Coast R. Co. v. Welch*, 53 Fla. 145, 44 So. 250.

Where a railroad company allows water from its tank to run upon the premises of another in the winter season, and the water subsequently freezes and injures property on such premises, the company is liable in damages for the injury, since the negligent escape of the water from the tank in ordinary, natural sequence caused a result that, under the circumstances, should have been expected. The negligence of the company in permitting the water to run on the premises was the proximate cause of the injury to the property from the freezing of the water. *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.

Where a means such as a fence or a cover, or the like, has been provided by the 20 L.R.A. (N.S.)

owner of property to protect it from an injury that will probably occur, and such means are, without the fault of the owner, injured or destroyed by the negligent act or omission of another, who under the circumstances of the case knew, or should have known, of the use to which the means was applied and of the injury that would probably result from the destruction of such means, damages may be recovered for injuries to the property that was so protected, which proximately follow or result from the destruction of the means provided for the protection of the property injured. *Garrett v. Sewell*, 108 Ala. 521, 18 So. 737; *Krebs Mfg. Co. v. Brown*, 108 Ala. 508, 54 Am. St. Rep. 188, 18 So. 659; *Miller v. St. Louis, I. M. & S. R. Co.* 90 Mo. 389, 2 S. W. 439.

The declaration alleges that the defendant so carelessly and negligently managed and operated one of its locomotives that fire escaped therefrom and set fire to and burned the canvas or cloth covering to a pinery of growing plants 'situated near to the track of the defendant.'

Owners of property have a right to use it in any manner desired that is not inconsistent with the rights of others. This includes the right of those having land near a railroad track to place a canvas cover over plants growing on the land, and the mere fact that the cover is within the reach of sparks of fire emitted from a locomotive engine passing on the track near by does not relieve the railroad company from liability for its negligence in permitting the sparks to escape and burn the cover. While those having property are charged with the duty of caring for it, there is no obligation to constantly guard and protect it from injury by the negligence of others. See *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. R. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661.

It is alleged that the canvas cover placed over growing pineapple plants and fruits to protect them from injury by cold and frost was destroyed by the negligence of the defendant, who should have known the use of the cover and the protection it afforded, and that, because of the destruction of the cover, a cold and frost that ordinarily should have been expected as likely to occur at the time and place did occur and injured the plants and fruit without the fault of the plaintiff.

If the negligent burning of the canvas cover to the growing pineapple plants and fruit defeated the sole object for which the cover was used, and such negligent burning of the cover in ordinary, natural sequence caused the injury to the growing plants and fruit by cold and frost that, un-

der the circumstances, should have been expected as likely to occur and injure the plants at the time and place of the negligent burning of the cover, such negligent burning was the proximate cause of the injury to the growing plants and fruit from cold and frost.

Injury to growing pineapple plants and fruit by ordinary cold and frost that should have been expected as likely to occur is not such an act of God as will relieve from liability for such injury a railroad company that negligently burned the cover over the plants and fruit, which cover was used solely to protect the plants and fruit and would have prevented the injury. See *Norris v. Savannah F. & W. R. Co.* 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475; *Texas & P. R. Co. v. Coggin & Dunaway*, 44 Tex. Civ. App. 423, 99 S. W. 1052.

If the injury would not have resulted from the cold and frost but for the negligent burning of the cover, the defendant is liable, as such negligence made effective and injurious an ordinary natural condition that should have been contemplated and that would otherwise have been harmless.

Under the allegations of the declaration, the negligent burning of the cover was a primary and efficient act that in ordinary, natural sequence caused the injury to the growing plants and fruit by cold and frost; such injury not being the result of an intervening independent, efficient cause, or of an extraordinary or unusual frost and cold that could not have been foreseen, or that would have injured the plants if the cover had not been burned by the negligence of the defendant. If this is proved, the plaintiff may recover damages for the injury.

The count of the original declaration upon which recovery was had was held to be "fatally defective in not alleging negligence, either of commission or omission, on the part of the defendant in communicating the fire" to the canvas cover, and also in not alleging facts "sufficient to bring home to the defendant that such burning might reasonably have been expected to result directly and naturally in damage to the plants and fruit by cold and frost." *Atlantic Coast Line R. Co. v. Benedict Pineapple Co.* 52 Fla. 165, 42 So. 529.

Where negligence is the basis of recovery, the declaration should contain allegations of the negligent act or omission of the defendant, and also allegations of facts to show injury to the plaintiff, and that such injury was a proximate result of the negligence alleged.

The declaration now in the first count alleges that the defendant "so carelessly and negligently managed and operated one of its locomotives while drawing a train of

cars . . . that fire escaped from said locomotive and set fire to the canvas or cloth with which a pinery belonging to the plaintiff and situated near to the track of the defendant . . . was covered, and burned a large part, to wit, about 1 acre, of the said cover." This is a sufficient allegation of a negligent act of the defendant in communicating fire to the canvas cover, and of injury resulting proximately therefrom to the plaintiff when taken with the claim for damages, to authorize a recovery of general damages or such as naturally and necessarily result from the burning of the canvas cover to the extent of its value.

As special damages resulting from the negligent act alleged, the first count further states: "That, in the said pinery, a large number of pineapple plants and fruit were growing and were likely to be damaged by frost and cold in the" stated vicinity and "the latitude thereof in the winter season; and that it was usual and customary in and about the said" vicinity "and latitude to cover pineries with canvas or cloth in order to protect the plants and fruit growing therein from damages by frost and cold," and to keep in the heat supplied by fires maintained in the pineries during spells of frost and cold which ordinarily come in the winter season on short notice and would otherwise damage the plants and fruit; that, in accordance with said custom, plaintiff provided said pinery with a good canvas or cloth cover, and also provided stoves and fuel therein, ready and sufficient within the covered pinery to heat the same immediately upon the coming of frost and cold dangerous to the plants and fruit, and thus preserve them from damage therefrom; "that, shortly after the burning of the portion of the cover as aforesaid, and before the plaintiff, by exercise of any reasonable diligence by it, could replace the part of the cover which had been burned through the negligence of the defendant as aforesaid, the plants and fruit were damaged by frost and cold for want of the complete cover and the subsequent inability of the plaintiff to control the temperature within said pinery; that the defendant well knew, or ought to have known," of the custom, conditions, and circumstances alleged; and that the "damage was caused by the negligence of the defendant in burning part of the cover as aforesaid." Damages are claimed in \$10,000.

As the defendant is liable for such injurious results as were likely to and did naturally and proximately follow its negligence, it was not necessary to allege as contended, "that at the time of the occurrence of the fire the weather was such that cold or frost could be anticipated by the de-

fendant," or "that in the month of January cold or frost of such character as to damage pineapple plants ordinarily occurred." That the month of January, when the fire occurred, was "in the winter season," the court knows judicially, and there are allegations, that pineapple plants and fruit are likely to be damaged by frost and cold in the vicinity stated in the winter season, that it was usual and customary there to cover the growing plants with canvas to protect them from damage by frost and cold, and, that the defendant knew, or should have known, of all the circumstances alleged. If the frost or cold of any degree injured the plants or fruit under the circumstances alleged, as the proximate result of the defendant's negligence, it is not necessary to state the extent of the frost or cold necessary to the damage, or that such frost or cold was likely to come at the time the fire occurred, because of the then condition of the weather, as is insisted by the defendant in error.

If the defendant was negligent in burning the cover, it cannot be relieved from liability for the proximate results of such negligence on the ground that an ordinary natural condition, *i. e.*, frost and cold, intervened, when such ordinary cold and frost should have been expected as probably to occur at the time and place of the negligence. The declaration in effect alleges that the cold which injured the plants should, under the circumstances, have been contemplated by the defendant as likely to occur, that the injury was the natural result of the cold, and that such injury would not have resulted but for the negligence of the defendant that caused the fire to destroy the covering to the plants. The demurrer admits this. It is, in effect, alleged that, by ordinary, natural sequence the negligence of the defendant in starting the fire burned the covering, thereby exposing the growing plants and fruit to an injurious cold and frost that, under the circumstances stated, should have been expected as likely to occur, and the plants and fruit were injured by such cold and frost without the fault of the plaintiff, because the covering was destroyed by the fire started by defendant's negligence. It is sufficiently alleged that the negligence of the defendant was the proximate cause of the injury to the plants and fruit by cold and frost.

The cold that injured the plants was not an independent, efficient cause occurring between the negligence of the defendant and the injury by cold and frost, as such injury was the natural and ordinary result of cold and frost that it is alleged should have been expected as likely to occur as

an ordinary or usual natural condition that would not have been harmful to the plants if the covering had not been destroyed by the fire negligently started by the defendant.

The allegation that the damage to the plants from frost and cold occurred after and as a result of the negligent burning of the cover sufficiently connects by ordinary, natural sequence the negligence of the defendant and the injury by cold to the plants and fruit. If the plaintiff was negligent in not using reasonable diligence to protect the plants after the fire occurred, and before the frost or cold caused the damage, such negligence of the plaintiff is a matter of defense in mitigation of damages under the statute. Negligence or fault of the plaintiff does not appear from the declaration; but, on the contrary, it is alleged and admitted by the demurrer that the damage occurred "before the plaintiff, by the exercise of any reasonable diligence by it, could replace the part of the cover which had been destroyed through the negligence of the defendant."

In view of the peculiar risks and duties of a railroad company in the use of dangerous machinery running rapidly and carrying fire along the lines of its road, the statutes of this state provide that "a railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." Gen. Stat. 1906, §§ 3148, 3149. If the railroad company negligently caused the injury complained of, the complainant may recover; but, if the complainant contributed to the injury by his own fault or negligence, the damages to be recovered are affected by the default or negligence attributable to the complainant. *Florida C. & P. R. Co. v. Williams*, 37 Fla. 406, 20 So. 558.

The demurrer admits all the allegations of the declaration that are well pleaded. The negligence of the defendant in causing the burning of the canvas cover and the in-

jury to the growing plants and fruit by cold as a natural, probable, and proximate result of the burning of the cover that should, under the circumstances, have been known to and contemplated by the defendant, may have been stated in more positive and affirmative terms; but the allegations are sufficiently direct and certain to state a cause of action requiring a response from the defendant.

The second count of the declaration is subject to the above conclusions.

The judgment is reversed, and the cause is remanded.

Shackleford, Ch. J., and Cockrell, J., concur.

Taylor, Hocker, and Parkhill, JJ., concur in the opinion.

FLORIDA SUPREME COURT.

NANCY E. HOBBS et al., Appts.,
v.

JOSEPH W. FRAZIER, Trustee, etc., of
J. W. Hobbs, Bankrupt.

(— Fla. —, 47 So. 929.)

Partition — bankrupt's estate — trustee.

1. A trustee in bankruptcy having legal title with no beneficial interest in undivided property, and no duties with reference to the undivided property requiring partition

Headnotes by WHITFIELD, J.

Case Note. — Right of trustee in bankruptcy, or assignee for creditors, to maintain partition.

While the case reported appears to be one of first impression upon the question therein decided, the right of an assignee for the benefit of creditors to bring partition has, in a few instances, been the subject of adjudication.

In *Jewett v. Perrette*, 127 Ind. 97, 26 N. E. 685, it is held that, while the assignee of an insolvent debtor cannot maintain an action for partition as a matter of course, he may, upon a proper showing, obtain an order from the court to bring and maintain an action for partition; and this it is his duty to do whenever it will be found to the interest of the estate so to do.

In *Van Arsdale v. Drake*, 2 Barb. 599, it was held that since at common law, as well as by statute, partition between tenants in common of real property is matter of right where both parties cannot, or either of them will not, consent to hold and use the property in common, an assignee for creditors, seized by virtue of the assignment of the interest of a tenant in common, has an absolute right to a decree of partition. It is said that cases going to show that a power of sale is not well executed by a partition do 20 L.R.A. (N.S.)

for the benefit of a *cœtui que trust*, is not in general such a tenant in common as authorizes him to sue for partition.

Same — trustee — rights.

2. The Federal bankruptcy statute (act July 1, 1893, chap. 541, 30 Stat. at L. 544. U. S. Comp. Stat. 1901, p. 3418) contains no express authority to a trustee in bankruptcy to sue for partition of the property of the bankrupt, the title to which is by the law vested in the trustee in bankruptcy for the purpose of paying the debts of the bankrupt, and the nature of the trustee's power and duties does not necessarily make the right to sue for partition exist by implication. A sale of the bankrupt's interest may be made without partition, and this may be sufficient for debt-paying purposes.

Same — necessity.

3. The statutes of the state do not contemplate that partition may be enforced except when required by the demands or the interests of a beneficial owner, or when shown to be necessary to protect the rights of those beneficially interested.

Same — trustee — rights.

4. Where a trustee in bankruptcy sues for partition of property, and merely alleges that he "is desirous of obtaining a partition and division of the said premises;" and it does not in any way appear that partition is essential to the statutory duties of such trustee, or that the bankruptcy court has authorized the proceeding, or that it is necessary to fully protect the rights of those interested in the estate of the bankrupt, the right of the trustee in bankruptcy to sue for partition is not apparent.

(December 8, 1908.)

not interfere with this right, because assignees for creditors have something more than a mere power, but are absolutely seized of a legal estate.

In *Horstman v. Ritter*, 6 Ohio N. P. 470, it is held that, under a partition statute providing that "tenants in common and coparceners of any estate in lands, tenements, or hereditaments within the state, may be compelled to make or suffer partition thereof," an assignee in trust for the benefit of creditors, who takes title, for the purposes of his trust, of an undivided interest in real estate, may maintain an action in partition; the court saying: "That an assignee might be compelled to suffer partition cannot be doubted. If so, it is difficult to see why he should not make it himself."

In this connection, reference may also be made to a few *dicta* and *nisi prius* decisions as to the right of a receiver appointed in supplementary proceedings to bring partition.

In *Powelson v. Reeve*, 2 N. Y. Week. Dig. 375, it is held that a receiver of a tenant in common, appointed in proceedings supplementary to execution, may maintain an action for partition of real estate; but in *Dubois v. Cassidy*, 5 N. Y. Week. Dig. 210, it is held that the title

APPEAL by defendants from a judgment of the Circuit Court for Hillsborough County in complainant's favor as trustee in bankruptcy in an action brought to partition certain properties. Reversed.

The facts are stated in the opinion.

Mr. G. B. Wells for appellants.

Mr. F. M. Simonton for appellee.

Whitfield, J., delivered the opinion of the court:

Joseph W. Frazier, as trustee in bankruptcy of the estate of J. W. Hobbs, under the bankruptcy laws of the United States (act July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418) approved July 1, 1898, filed a bill against Nancy E. Hobbs, J. W. Hobbs, and H. P. Porter for the partition of certain lands and personal property alleged to be owned and possessed in equal undivided shares by complainant as trustee in bankruptcy and the defendant H. P. Porter. It is alleged that the defendant Nancy E. Hobbs claims some interest in the premises, but that the complainant's interest as trustee in bankruptcy is superior thereto. A demurrer by J. W. Hobbs and H. P. Porter to the bill of complaint was overruled. Nancy E. Hobbs answered, claiming to be the owner in fee simple of an undivided one-half interest in the land. J. W. Hobbs answered, disclaiming any interest in the property. Replications were filed to these answers. Testimony was taken and a partition between complainant as trustee and Porter was decreed. Nancy E. Hobbs and J. W. Hobbs appealed.

If the trustee in bankruptcy is not authorized to compel partition of lands which the bankrupt and another owned as cotenants or as partners, it will not be necessary to consider other questions.

At common law only coparceners who derive their title by the involuntary method of inheritance could compel partition by judicial process. Ancient English statutes extended the right to joint tenants and tenants in common, and eventually to all

cotenants, whether of freehold or less estates in possession.

Under our statute, any one or more of several joint tenants, tenants in common, or coparceners may compel partition by suit in equity. The joint tenants, tenants in common, and coparceners contemplated by the statute are those who are in some way the owners of a beneficial estate in the land, or whose status and duties are of such a nature as require the exercise of the right to compel partition by judicial proceedings. Joint tenants have unity of interest, title, time, and possession. Tenants in common may have unity of possession only. Coparceners derive their title by inheritance. A trustee in bankruptcy is not a coparcener. Nor is he a joint tenant with the wife or the partner of the bankrupt. A trustee having legal title with no beneficial interest in undivided property, and no continuing duties with reference to the undivided property for the benefit of a *cestui que trust*, is not in general such a tenant in common as authorizes him to sue for partition. A trustee with power to sell may not authorize partition. 1 Lewin, Tr. 8th ed. * 427. See 1 Perry, Tr. § 769; *Brassey v. Chalmers*, 16 Beav. 223; *Bradshaw v. Fane*, 3 Drew. 534.

A statutory trustee has only such title and authority as is conferred by the law. The Federal bankruptcy law vests the trustee by operation of law with the title of the bankrupt, coupled with the duty to reduce to money the property of the estate for which he is trustee, under the direction of the court, and to close up the estate as expeditiously as is compatible with the best interests of the parties in interest. While this statutory provision vests the title of the bankrupt in the trustee, it is so vested only for the purpose of paying debts.

The power to sell is under the direction of the court, and the trustee has no authority with reference to the estate to which he has the statutory title, except such as is expressly or impliedly given by the law.

There is no express authority given by

of a receiver in supplementary proceedings is not such that he can bring an action for the partition of real estate of the judgment debtor,—citing *Scott v. Elmore*, 10 Hun, 68, in which it is held that the order appointing a receiver in supplementary proceedings does not vest him with title to the debtor's real estate, although the debtor may be compelled to transfer it to him.

In *Dubois v. Cassidy*, 75 N. Y. 298, the court, although declining to decide the question, expressed the opinion that a receiver in supplementary proceedings does not obtain such a title to real estate as will enable him to maintain an action for partition.

90 L.R.A. (N.S.)

And in *Miller v. Levy*, 14 Jones & S. 207, the court, although finding it unnecessary to pass upon the question whether a receiver in supplementary proceedings, to whom a conveyance has been made by the judgment debtor, can, as such, maintain an action for a partition, said: "He holds the property as an officer of the court, to discharge some designated duty in respect to it, subject to its order and approval. That it should be his right, or duty, as such, to institute an action in partition, does not seem to have been contemplated by the legislature, or approved by the courts, any more than in the case of a sheriff, or a referee, appointed to sell."

the statute to a trustee to sue for partition of the property of the bankrupt the title to which the law vests in the trustee for sale to pay debts with, and the nature of the trustee's power and duties does not necessarily make the right to sue for partition exist by implication. A sale of the bankrupt's interest may be had without partition, and this may be sufficient for debt-paying purposes.

Under the bankruptcy law, the trustee has "rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his [bankrupt's] property." The bankrupt's right to partition does not arise out of contract. Partition does not involve unlawful taking or detention of, or injury to, property.

The bankruptcy law vests the title to the property of the bankrupt in the trustee in bankruptcy, and requires the trustee under the supervision of the bankruptcy court to reduce the property to money for debt-paying purposes. The possession of one cotenant is the possession of all cotenants when the rights of none are denied. If in this case Porter is in possession and denied the right of the trustee, the latter, having the legal title, could bring ejectment to establish his right to possession. But, as the title of the trustee is not denied by Porter, the possession follows the title, and partition is not shown by any allegation in the bill to be necessary to a reduction of the property to money for purposes of paying debts, or that it will be advantageous to the interest of creditors to have partition thereof. There is no showing that partition is necessary or expedient to protect the rights of the trustee in bankruptcy or those whom he represents. The allegation is that the trustee in bankruptcy "is desirous of obtaining a partition and division of the said premises." The statutes of the state do not contemplate that partition may be enforced except when required by the demands or the interests of a beneficial owner, or when shown to be necessary to protect the rights of those beneficially interested. It is not shown that the interests of the beneficial owners here require partition. The defendants in the partition proceedings did not consent to the partition, but by demurrer questioned the trustee's right, under the showing made by the bill, to partition.

The bankruptcy law does not expressly authorize partition proceedings by the trustee of the bankrupt; and, as such a proceeding is not shown here to be essential to the statutory duties of such a trustee, and no such duty appears to have been imposed by the bankruptcy court, the statute of this state relating to partition should 20 L.R.A. (N.S.)

not be unreasonably extended to cover trustees in bankruptcy who have the bare legal title, but only special statutory duties to perform in connection with such title, who have no beneficial interest in the estate of the bankrupt, and where there is no allegation that partition is necessary to fully protect the rights of those interested in the estate of the bankrupt.

The decree is reversed and the cause remanded.

Shackleford, Ch. J., and Cockrell, J., concur.

Taylor, P. J., and Hocker and Parkhill, JJ., concur in the opinion.

KENTUCKY COURT OF APPEALS.

JOE SCHNEIDER, Sr., Appt.,
v.

COMMONWEALTH OF KENTUCKY.

(33 Ky. L. Rep. 770, 111 S. W. 303.)

Hotel — license — bona fides.

1. One is not shown not to be a bona fide tavern keeper by the fact that the receipts from his bar are in excess of those from the tavern proper.

Same — necessity — evidence.

2. The existence of hotels in a city a mile away does not establish the non-necessity of a tavern at a river landing where one has existed for thirty years, and the receipts from it, exclusive of the bar, amount to from \$16 to \$20 per week, and a number of reputable citizens testify to its necessity, although there is testimony to the contrary.

Same — disorderly house.

3. The keeping of a disorderly house by a man of good character who has been a tavern keeper for thirty years is not shown by the fact that a few negroes congregated about his place, that drunken people have been seen on a neighboring highway, and that in two cases liquor had been sold to minors.

(June 11, 1908.)

Case Note. — What constitutes hotel or tavern within liquor-license law.

In *Re Brewster*, 39 Misc. 689, 80 N. Y. Supp. 606, it was held that, within the liquor-tax law, it was sufficient to constitute a house a hotel if all who came to the house without any previous agreement as to duration of their stay or terms of their entertainment were received as guests; and that it was not necessary that the house be kept only for the reception of travelers, or that it have a register for guests, or that it have stable accommodations. This case was reversed on other

A PPEAL by applicant from a judgment of the Circuit Court for Warren County reversing an order of the County Court granting a tavern license. Reversed.

The facts are stated in the opinion.

Messrs. J. B. Grider, D. W. Wright, and S. D. Hines for appellant.

Mr. Thomas W. Thomas, for appellee:

Appellant was not a bona fide tavern keeper.

Ky. Stat. §§ 4203-4214; *Hodges v. Metcalfe County Ct.* 117 Ky. 619, 78 S. W. 177, 460; *Caudill v. Com.* 23 Ky. L. Rep. 2139, 66 S. W. 723; *Simpson v. Com.* 30 Ky. L. Rep. 132, 97 S. W. 404.

grounds in 85 App. Div. 235, 83 N. Y. Supp. 504.

In *People v. Jones*, 54 Barb. 311, it appeared that, by chap. 628, Laws 1857, it was provided that no license to sell intoxicating liquors to be drunk on the premises should be granted to any person, unless such person proposed to keep an inn, tavern, or hotel; and it was held that the terms "inn, tavern, or hotel" were used synonymously to designate what was ordinarily or popularly known as an inn, or tavern, or place for the entertainment of travelers, and where all their wants could be supplied.

In *Re Application for License*, 19 W. N. C. 359, it was held that a hotel under the Pennsylvania liquor license act of March 22, 1867, was a place where every well-behaved stranger or traveler who was willing to pay reasonable rates for accommodations was entitled to receive food, drink, and lodging.

In *Cullinan v. Clark*, 46 Misc. 188, 93 N. Y. Supp. 256, it was held that the mere presence of some guests who made a stipulated engagement as to the duration of their stay, or as to the rate of compensation they should pay, did not deprive that which was a hotel of its character as such; that the test was what the landlord was willing to do, and sometimes did, in the way of receiving visitors, without any agreement as to rate or time, and not what he did with other visitors in the way of making such engagements in advance.

In *Ebner's Petition*, 1 Woodw. Dec. 21, where it appeared that a license to keep a tavern carried with it the right to furnish the guests with intoxicating liquors, and, under the law, such licenses were to be granted only to the proprietors of houses which were kept for the entertainment of travelers, it was held that the keeper of an eating house or restaurant, who occasionally accommodated strangers and travelers, and was provided to a reasonable extent with the means of affording such accommodations, was not the keeper of a hotel, inn, or tavern, so as to be entitled to a license.

The keeper of a restaurant, who has no beds for the accommodation of travelers, is not an innkeeper. *Kelly v. Excise Comrs.* 54 How. Pr. 327.

20 L.R.A. (N.S.)

Clay, C., delivered the opinion of the court:

Appellant, Joe Schneider, has a tavern located at Delafield, Warren county, Kentucky, at what is generally known as the "boat landing." At the November term, 1907, of the Warren county court, he made application for a tavern license with the privilege of selling spirituous, vinous, and malt liquors. No question was made as to his having filed proper notices as required by law; but, as there was an oral protest against granting the license, the court, without objection by anyone, set out by metes and bounds the neighborhood in

A mere lodging house, in which no provision is made for supplying the lodgers with their meals, is not an inn or hotel, although the proprietor may send out and procure cooked food for his guests. *Ibid.*

Where the guest pays so much per day for his room, and takes his meals or not, as he thinks proper, in a restaurant which forms a part of the establishment, paying separately for each meal as he takes it, it is an inn. *Ibid.*

A free lunch at the bar will not transform a drinking saloon into a hotel. *Ibid.*

A house which does not contain the means of preparing food for the table in the ordinary way has not "the necessary accommodations to entertain travelers," within the provisions of the liquor license law. *Ibid.*

Under the "Raines" liquor license law of 1896, a building was not a legal hotel unless it had six rooms furnished as bedrooms, with independent access by door from the hall, exclusive of the bedrooms occupied by the proprietor's family and his servants. *Re McMonagle*, 41 Misc. 407, 84 N. Y. Supp. 1068; *Re Brewster*, 85 App. Div. 235, 83 N. Y. 504.

Under this statute, rooms were not bedrooms, so as to make the building a hotel, where they were only 7 ft. 3 in. long and varied in width from 5 ft. 8 in. to 7 ft. 2 in., furnished with single beds, and divided by 1-inch board partitions papered on both sides, which were only 7 feet high, while the ceiling was 9 feet high, and every alternate room was without any window. *Re Place*, 27 App. Div. 561, 50 N. Y. Supp. 640, affirmed without opinion in 156 N. Y. 691, 50 N. E. 1121.

This law was amended in 1897 so as to require ten bedrooms independent of those used by the servants and family. *Re Purdy*, 40 App. Div. 133, 57 N. Y. Supp. 629; *Re Clement*, 117 App. Div. 5, 102 N. Y. Supp. 37.

For a valuable discussion of the derivation and meaning of "inn" and "hotel," see *Cromwell v. Stephens*, 2 Daly, 15.

As to whether the furnishing of food to guests is an essential characteristic of a hotel or inn, see case note to *Nelson v. Johnson*, 17 L.R.A. (N.S.) 1259.

which the sense of the legal voters might be obtained as to whether or not the application of appellant should be granted. No written protest was filed, but on the day of the hearing several persons were in court to protest against the granting of the license. After hearing the testimony, the county court granted the license. The commonwealth then appealed to the circuit court, and the circuit court decided that appellant was not entitled to the license. From that judgment, he prosecutes this appeal.

It appears from the record in this case that appellant is a man of good character, and that he has kept a tavern at Delafield for a period of about thirty years. The place where he sells liquors is located on the road, while his residence, consisting of about six rooms, is situated 50 yards to the rear of where the liquors are sold. Near his residence is also another large room, in which four beds are kept. It is the contention of the commonwealth that appellant is not a keeper of a tavern in good faith, and that there is no real necessity for a tavern at that point. In addition to this, the commonwealth insists that he has not kept an orderly house. Delafield, it seems, is a small river town on Barren river, at the head of navigation, about 1 mile from Bowling Green. Considerable business is transacted at that point. Steamboats ply from Bowling Green to Evansville, Indiana, and also up Green river. The boat landing is the harbor for the fleet of United States boats that are frequently engaged in improving the river. The proof shows that appellant's place was the only tavern in Delafield, and that it was continuously patronized by people going away or coming in on boats; that shippers of hogs and cattle depend almost solely upon Schneider's tavern and premises. It is true appellant stated that he frequently kept personal friends for nothing, and that he let people hitch their horses in his yard without making any charge therefor. It seems, too, that he never kept any books showing his receipts from guests independently of the bar. He does swear, however, that his receipts, aside from the bar, amounted to \$16 or \$20 per week. It is argued that, because the receipts from his bar were far in excess of that amount, the keeping of a tavern was a mere device to enable him to conduct a saloon. We are unable to say that, because the receipts from the bar were larger than those from the tavern proper, the owner is not a bona fide tavern keeper. If such were the rule, no man could be said to be a keeper in good faith of a tavern or a hotel, for it is

a well-known fact that the bar privilege in many instances carries with it returns much larger than are received from the accommodation of guests in other respects.

Nor do we think there is anything in the argument that appellant was not prepared to receive women. True, his family occupied the most of his residence, but, in case of an emergency, we doubt not that his family could be doubled up in such fashion as to enable him to take care of women guests.

Counsel for appellee earnestly insists that because Bowling Green is situated about a mile distant from Delafield, and the former city has hotels which could accommodate the patrons who go to Delafield, there is no necessity for a tavern at Delafield. We do not think, however, that the question depends upon whether or not accommodation can be secured at another place. It depends upon whether or not there are persons who, in going to Delafield, naturally seek or desire accommodation at appellant's tavern. Where a tavern has existed at one place for about thirty years, and the proof shows that the receipts from it, exclusive of the bar, amount to from \$16 to \$20 per week, and a number of reputable citizens testify that, in their opinion, there is a necessity for a tavern at the place in question, we are unable to say that no such necessity exists, even though an equal number of citizens testify that in their opinion there is really no need for such tavern.

The only other point attempted to be made against the granting of the license was that Schneider did not keep an orderly house. There was some proof to the effect that at times large crowds of negroes assembled around the tavern. There was also some proof to the effect that drunken men were seen occasionally on the pike beyond Schneider's tavern. It does not appear, however, that they became or were drunk at Schneider's tavern. Appellee relies principally upon the fact that appellant was twice convicted of selling liquor to minors, claiming that under the rule laid down in *Caudill v. Com.* 23 Ky. L. Rep. 2140, 66 S. W. 723, this fact showed that Schneider did not keep an orderly house. In that case Caudill had applied for a merchant's license to sell spirituous liquors. The applicant had been engaged in the illegal sale of liquor both to adults and minors. This court held that the county court was given a judicial discretion as to when a license to sell liquors should be granted; that as it was an admitted fact that the applicant had sold without license, and, in further violation of the law, there was no abuse of the legal discretion confided to the court in refusing the applicant a license. In the case cited there were

numerous violations of the law on the part of the applicant. Here we have two isolated cases of illegal sales of liquor to minors, made by the proprietor's clerk in the proprietor's absence. This court has held in a large number of cases that the county court has a discretion in granting tavern licenses, and, unless it is shown that that discretion has been abused, there is no cause of complaint. *Lupe v. Barbee*, 18 B. Mon. 9. Where, then, an applicant has been a tavern keeper for thirty years, is a man of good character, and the only evidence of his having kept a disorderly house is the fact that a few negroes congregated about his place, that drunken people were seen upon the road,—it not being shown, however, that they became drunk at his establishment,—and that he in two instances had sold liquor to minors, we do not feel authorized in reversing the action of the county court, which, in the exercise of the discretion vested in it by law, held that the applicant was entitled to a license. No doubt the fact that Bowling Green has recently gone "dry" has made the opposition to a tavern at Delafield all the more pronounced, and in the opinion of many substantial people it is not desirable to have a tavern there. That being the case, the law has provided, means whereby the sale of liquor at that point may be prevented.

For reasons given, the judgment is reversed, and cause remanded, with directions to grant appellant a license.

KENTUCKY COURT OF APPEALS.

CITY OF BARDWELL, Appt.,

v.

SOUTHERN ENGINE & BOILER WORKS.

(— Ky. —, 113 S. W. 97.)

Sale — price — defects — repair.

1. The buyer of an engine cannot avoid payment of the contract price because of the existence of defective parts therein, so long as the seller is ready and willing to perform his contract to replace defective parts without charge.

Municipal corporation — debt limit — purchase — lien — enforcement.

2. One selling machinery to a municipal corporation for use in its public affairs at a time when the contract for purchase is unenforceable because exceeding the constitutional debt limit, but who retains a lien on the machinery for the purchase price, may enforce his lien by sale of the machinery for satisfaction of the purchase-money debt.

(November 5, 1908.)

20 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Circuit Court for Carlisle County in plaintiff's favor in an action brought to recover the purchase price of machinery purchased by defendant. Affirmed.

The facts are stated in the opinion.

Messrs. J. M. Nichols & Son for appellant.

Mr. W. H. Biggs, with Mr. J. E. Kane, for appellee.

One who keeps and uses a defective machine with knowledge of the defect is liable for the purchase price, being estopped to rely on a breach of warranty.

Wisdom v. Nichols & S. Co. 29 Ky. L. Rep. 1128, 97 S. W. 18; *Sprout, W. & Co. v. Hunter*, 30 Ky. L. Rep. 380, 98 S. W. 1006.

If a municipal corporation has incurred debts up to the point fixed by the Constitution, it still has the power and authority to exercise all corporate powers possessed by it, provided it does so upon a cash basis.

La Porte v. Gamewell Fire Alarm Teleg. Co. 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588; *Earels v. Wells*, 94 Wis. 285, 59 Am. St. Rep. 886, 68 N. W. 964; *Voss v. Waterloo Water Co.* 163 Ind. 69, 66 L.R.A. 95, 106 Am. St. Rep. 201, 71 N. E. 208, 2 A. & E. Ann. Cas. 978; *Addyston Pipe & Steel Co. v. Corry*, 197 Pa. 41, 80 Am. St. Rep. 812, 46 Atl. 1035.

The effect of the lien provision was to leave the title in the seller, fully paid for.

Case Note — Right of seller of property to municipal corporation under invalid contract to retake or remove the property upon refusal of payment.

The note does not include cases involving the right of holders of invalid obligations of municipal corporations for money loaned to follow the money into property purchased therewith by the municipality, and to have an equitable lien declared thereon for the loan. Such cases depend upon somewhat different principles from those applicable to an action or suit to recover the specific property sold or conveyed.

The few cases that have passed upon the subject agree that a municipality cannot acquire property under an invalid contract and plead the invalidity of the contract as a defense to an action thereon, and also retain the property where it is still in existence and in its possession. In such cases the courts will, in a proper proceeding, allow the seller of the property, if he has acted in good faith in the matter and without fraud, to recover possession.

This was the doctrine of *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62, which held that the

and to give to it the right to enter and take possession of the property upon the failure of appellant to pay the balance of the purchase price when due.

Benjamin, Sales, §§ 425 et seq. *Chism v. Woods, Hardin (Ky.)* 531, 3 Am. Dec. 740; *Vaughn v. Hopson*, 10 Bush, 337; *White Sewing Mach. Co. v. Conner*, 111 Ky. 827, 64 S. W. 841; *Ramsey v. W. W. Kimball Co.* 22 Ky. L. Rep. 597, 58 S. W. 471.

Carroll, J., delivered the opinion of the court:

In June, 1905, the appellant city of Bardwell purchased from appellee an engine to be used in operating its electric-light plant. It contracted to pay for the

engine \$1,550. Six hundred dollars of this amount was paid in cash, \$150 in an old engine, and for the remaining \$500 the city executed its note due in June, 1906. The note, as well as the contract, contained the stipulation that the city had received the engine from the Southern Engine & Boiler Works "with the express agreement and understanding that the title of said machinery is now and shall remain in the said Southern Engine & Boiler Works until the note is paid in full; and it shall have the right, in case of nonpayment at maturity of said note, or at any time it deems itself insecure, or if the property is sold or removed from the district where located, to enter and retake immediate possession of said property wherever it may

grantor of real estate to a county on conditions in the contract which it was impossible for the county to perform, because in excess of the authority of its officers to make, could rescind the agreement upon which the deed was made, and thus convert the county into a trustee of the title for his benefit. A rescission of the contract and restoration of the title was therefore decreed, unless the balance due on the purchase price was paid, although the property had greatly increased in value and large improvements had been made thereon by the county since acquiring it. In reaching the foregoing conclusion the court said: "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh v. Fulton County*, 10 Wall. 676-684 (19 L. ed. 1040-1042), and repeated in *Louisiana v. Wood*, 102 U. S. 294-299 (26 L. ed. 133-135): 'The obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'" (Neither of the cases quoted from comes within the scope of this note.)

Following the doctrine of *Chapman v. Douglas County*, supra, it was held in *Wrought-Iron Bridge Co. v. Utica*, 17 Fed. 316, that a bridge company which had been defeated in an action in the state courts against two townships to recover on a contract for the erection of a bridge on the ground that the township officers had not proceeded according to law in making the contract was entitled in equity to remove the bridge unless paid therefor. As a condition precedent to removing it, however, the decree provided that the company must repay that portion of the purchase price received by it. The court said: "The delivery of this bridge to the towns of Utica and Deer park passed to them the apparent

legal title, but they have never become the equitable owners. The bridge has not been paid for, and they have therefore no equitable right to keep it without paying for it."

In sustaining the right of a builder of a bridge, erected under an invalid contract with the commissioners of a county, to remove the same because of nonpayment of the purchase price, the court, in *Lee v. Monroe County*, 52 C. C. A. 376, 114 Fed. 744, said: "While the law affords no remedy, equity, although it will not enforce the contract or create a contract between the parties on account of the acceptance and retention of the property, when the property is in existence, and in the hands of the defendant, will not allow it to retain that to which it has no title whatever, and prevent the owner from reclaiming it. The case presented by the bill shows no moral turpitude in the transaction, and, although the bridge company should have ascertained whether each step provided by the statutes had been properly taken, the law placed upon the defendant the duty of taking those steps. It was necessary for it to comply with every provision of the statutes in that behalf before entering into these contracts, and it represented to the bridge company that it had so complied, and thus misled the bridge company into entering into the agreement, the carrying out of which placed these bridges in the hands of the defendant. The complainant has no remedy at law, and to deny him equitable relief would be to enforce the contract on the part of the bridge company, and to allow the defendant to repudiate its part of the same contract, and thereby appropriate, without compensation, property to which it had no legal or equitable right."

In *Berlin Iron Bridge Co. v. Wilkes County*, 111 N. C. 317, 16 S. E. 314, one who had erected a bridge under an invalid contract with a county, and who sued the county commissioners on a *quantum meruit* for its value, was held not entitled to a judgment for the return of the bridge where there was no allegation of a demand on his part for the bridge, or refusal thereof on the part of the county.

be, and remove the same." The contract also contained the following guaranty: "The material and workmanship entering into the construction of this engine shall be first class in every respect, and any defective part will be replaced by us without charge. We also guarantee this engine to run smoothly with close regulation under varying loads and steam pressure and to be as economical in the use of steam as any engine of its class." Failing to pay the note at maturity, the appellee instituted this action against the city. It asked for judgment for its debt, interest, and costs, and that it be adjudged a lien on the engine to secure the payment of the same. To this petition the city answered that the engine was not constructed of first-class material, but that much of the material entering into its construction was defective in many respects, and also alleged that the workmanship was inferior, and that, by reason of these defects, the engine was not worth over \$500 when delivered to the city. It made its answer a counterclaim, and asked that the note sued on be canceled, and that it have judgment over against the company for \$550.

To this pleading the engine company replied that it had repeatedly offered to fully perform its guaranty by replacing without charge any defective or inferior parts, but that the city had refused to permit it to do so, and it renewed its offer to fully perform its contract obligation. A rejoinder was filed by the city, in which it stated that it was willing to accept such an engine as the company warranted the engine purchased to be, but that, if the company would not do this, then it offered to rescind the contract, provided the company would return to it the \$1,050 paid on the purchase price and surrender the note sued on. Subsequently the city filed an answer, setting out that at the time the contract was entered into, and the note sued on executed, it was indebted largely in excess of the constitutional limit as fixed in §§ 157 and 158 of the Constitution, and that the indebtedness assumed in the purchase of the engine was unauthorized and the note executed as evidence of it void. The case, after being prepared for trial, was submitted to the court, and a judgment ren-

While the specific question under annotation was not passed upon in the following cases, it was, however, recognized and stated that one who sold property to a municipal corporation under an unenforceable contract might recover the property if the municipality refused to pay for it.

Thus, in *Harrison County Court v. Smith*, 15 B. Mon. 155, in denying the right to a contractor to recover of the county the contract price of a jail erected on county land under an invalid contract, the court said that at all events the builder might remove the building unless paid therefor.

So, in *Salt Creek Twp. v. King Iron Bridge & Mfg. Co.* 51 Kan. 520, 33 Pac. 303, a contract by the township for the erection of a bridge was held invalid because not purchased as provided by statute, and because the indebtedness attempted to be created thereby was in excess of the statutory amount of indebtedness which the township was authorized to create. The court, however, said that, as the bridge was constructed upon the highway with the permission of the authorities, the company erecting it might remove it; and that, as the township refused to pay for it, it could have no interest or right to keep it.

Language to the same effect was used in *LaFrance Fire Engine Co. v. Syracuse*, 33 Misc. 516, 68 N. Y. Supp. 894, wherein a contract by a municipality for the purchase of an aerial truck was held invalid because certain formalities in executing it, required by statute, were not complied with. While denying the company the right to recover the purchase price, the court said that it did not follow that it was entirely without redress; that it was clear that it might at least recover possession of the truck.

20 L.R.A. (N.S.)

And in *Clark v. District No. 1*, 78 Ill. 474, although holding that an order by a school district for a set of stereoscopic views and a scope was invalid because *ultra vires*, the court said that the plaintiff could reclaim the property.

The right to remove property sold to a municipal corporation has sometimes been denied on the ground that such relief, because of the nature of the property and its situation, could not be had without injuring or destroying other property of the corporation to an amount greatly in excess of the amount of the claim. This principle was recognized in *Gamewell Fire-Alarm Teleg. Co. v. Laporte*, 42 C. C. A. 405, 102 Fed. 417. In this case it was apparently conceded, however, that for the foregoing reasons the right to remove a fire-alarm system sold to a city would not be enforced by equity; but the court was asked to declare an equitable lien upon the entire system in favor of the seller of the system. Such relief was denied, as it would create and enforce a contract between the parties radically different from that which was intended and entered into, and would place the plant and its control in private hands, together with a perpetual franchise to maintain and operate the system.

On this theory, *Grady v. Landram*, 23 Ky. L. Rep. 506, 63 S. W. 284, held that one who had a balance due him under a contract for the erection of a school building, the terms or nature of which were not given, was not entitled to have the building either removed or divided where a division would practically destroy it. The district had paid over \$2,000 on the building as it stood, and the balance due was about \$600.

dered in favor of the engine company for the amount of its note and interest; and it was further adjudged that, to secure the payment of the same, it had a lien upon the engine. Of this judgment the city complains.

In respect to the question that the city had no authority to purchase the engine because its indebtedness at the time exceeded the limitation provided in the Constitution, we may say that the evidence indicates that the contention of the city upon this point is correct. So that we will consider the case as if the city had no authority to buy the engine or create any indebtedness for that purpose.

Upon the issue presented as to whether or not the engine fulfilled the guaranty, the evidence is conflicting. Indeed, the weight of it tends to support the conclusion that the engine in some particulars, especially in material, was not what it was guaranteed to be. The engine was installed as a part of the electric plant in July, 1905, and the evidence shows that it operated the plant continuously from the time it was installed until the last depositions in the case were taken in the summer of 1907. Presumably the city as it superseded the judgment is yet using the engine for the purpose for which it was bought. Soon after the engine was installed, the city notified the engine company that the engine was not rendering satisfactory service, and pointed out several defects in its material and construction. In response to this letter, the company sent one of its agents to inspect the engine. After making an inspection, he reported to the company that the engine fully came up to the stipulations contained in the contract, and that he found no defects either in material or construction, although a number of witnesses who testified for the city, some of them being experienced machinists, were able to discover defects in both these particulars. It may, however, be here remarked that the defects in material or construction, although causing some inconvenience and annoyance, as well as additional expense, did not seriously interfere with the running of the engine, or prevent it from performing the work it was desired it should do. Subsequent to this, and before the institution of this action, in October, 1906, considerable correspondence passed between the city and the company in respect to other indebtedness of the city to the company, and also concerning the engine. Finally, in June, 1906, for the purpose of definitely ascertaining whether or not the engine fulfilled the contract, it was agreed between the city and the engine company that two experts, one to be se-

lected by each of the parties, should examine the engine and report the result of their inspection. The correspondence between the parties leading up to the selection of these experts clearly shows the attitude of the engine company. In July, 1906, it wrote to the city that it was perfectly willing to make good any defects that existed in the engine, and offered to send an experienced and competent machinist to examine it and supply any defects, and stay with it until the city was satisfied that it was the kind of an engine the city bought. It further wrote that it sold the Coyliss engine to be in first-class condition, and that was the kind it proposed to make it if it was not such. In reply to this, the city wrote that it wished to have a competent man go over the machinery with the expert from the company, and agreed to abide by what this man reported. In July, 1906, these experts met and inspected the engine. At this time it had been in use by the city for about one year.

The expert selected by the city reported to it as follows: "As requested by Mr. Ponder, a member of your board, I made an examination of the Coyliss engine at electric-light plant at Bardwell, Kentucky. I found it running smoothly and a steady light from lamp spoke well for speed regulation. The cylinder head and two of valve bonnets are honeycombed, and should be replaced by better castings. Your engineer said that (the engine was running and I could not examine it) the cross heads come so close or strikes the gland when the stuffing box is full. This should be remedied by the builders before engine is accepted. He also complained that the stuffing box was back so deep in the frame that he could not get to it while running. This, of course, is annoying to the man running the engine, and may cause him to stop sometimes to adjust the glands; but I can see no remedy for this. Aside from the defective casting and the closeness of the cross-heads to the cylinder head, I consider it a well-built, substantial engine." The expert selected by the company made the following report to it: "Met Mr. Harrison, their expert from Cairo, this evening, and, after going over the engine into details, could only find a few minor faults as to defective castings. The only one we found was a cylinder head which had a spongy place in it about the size of a dime right in the fillet, which was disclosed by oil seeping through. Found the crank end stem broken across lower half of housing, would not say it broke from defective casting from nature of break. I would say was broken by being caught in some manner or dash-pot rod had been lengthened

out, which would cause it. Found grab claws had been taken off and set crews put in, which makes them look very bad. The only other fault he had to find, and that was in the design, was piston-rod nut ran too close to stuffing box. He suggested that we replace cylinder head, also face off piston-rod nut, and stuffing-box gland, which would give more clearance, and that he would make written report to board to that effect. In his opinion that would make engine first-class job; and I would suggest we furnish new pair of grab claws to replace those that have been ruined. Also set of die plates."

Immediately upon receiving the report from its expert, the company wrote the city the following letter: "The machinist sent by Southern Engine & Boiler Works to examine the engine sold you some time ago has returned, and made his report to the company. He reports that he found the engine in comparatively good condition, and for all practical purposes no defects in same that would in any way impair its usefulness. He reports that there is a defective casting in the cylinder head which will permit oil to ooze through; that he found that the grab claws had been taken off, and some set screws put in their place; and also the end of the crank where grab claws had been broken. I now write to say that a new cylinder head will be replaced and a new pair of grab claws put on, as well as a new crank end for the grab claws. We will also turn off face of piston-rod nut and stuffing-box gland to give more clearance for the piston rod. These matters are to be done without any additional cost to you, and done whenever it may suit your convenience, and, when demanded by you, it will be whenever you will give permission to do so. We are ready and willing to do this." It seemed that the city did not answer this letter, nor did it notify or inform the company of the report made by its expert, nor have sent to it a copy of his report, and a few weeks afterwards the company again wrote, expressing its willingness to supply all the defects of which it had notice, and also said: "If there are any defects connected with this machinery under the contract, the Southern Engine & Boiler Works has the right to make it good, but, of course, they are entitled to be notified what they are. And, as stated above, I understand you had an expert to examine it for this purpose, and certainly the Southern Engine & Boiler Works should be informed of all the defects that he may have found, so that they could replace it or make it good." In reply to this letter, the city, in August, 1900, wrote the following: "I am requested to reply to yours of 20 L.R.A. (N.S.)

the 30th of July and the 21st, and say that it is the opinion of the board that you cannot patch this engine in question enough to make a first-class one, and therefore they prefer that you do not begin to repair it. And in their opinion it will be necessary to fulfil the contract. It is plainly evident to the writer that a considerable compromise on the part of your company will be necessary for us to ever come to a settlement." This concluded all efforts to adjust the matter between the parties without litigation.

Assuming that there were defects in the material used in the construction of the engine, and the evidence shows that there were, it became the duty of the company under its contract to cure these defects by supplying other pieces of machinery to take the place of the inferior ones. That it was somewhat negligent in this respect may be conceded, but it is also true that the defects were not of such a character as to prevent the operation of the engine, and it may safely be said that those reported by the expert selected by it are the only ones that are definitely and certainly pointed out as being necessary to remove in order to bring the engine up to the guaranty. When the city received the report of its expert, it should have sent to the engine company a copy, and demanded of it that his recommendations be complied with. The correspondence shows that the city did not do this; and, further, that the company was ready and willing to perform its contract and supply any deficiencies in the engine. This was all its contract obliged it to do, and all that the city had a right to demand. It is apparent that the city authorities, doubtless feeling that the engine company had not primarily complied with its contract, wished to rescind it, and for this reason refused to permit the company to make the needed repairs. So that, unless the constitutional question raised presents an obstacle in the way of the affirmance of the judgment of the lower court, our conclusion is that it is correct. Upon this question the argument is strongly pressed that the city had no authority to create the indebtedness in the purchase of the engine, that, therefore, the contract was void, and the only remedy of the company was to apply to the court for a mandamus to compel the municipal authorities to levy a tax to pay the debt. If, however, it be a fact, as is stated in the pleading on behalf of the city and in the argument of its counsel, that the city at the time it purchased this engine had already incurred indebtedness in an amount exceeding 3 per centum of the value of the taxable property estimated by the assessment next before the last as-

assessment previous to the incurring of the indebtedness, the remedy suggested would be of no avail, because the court could not compel the city authorities to levy a tax when the limitation provided in § 158 of the Constitution had been exceeded, when the indebtedness for which it was sought to impose a tax was created. Although the court might compel municipal authorities to levy a tax to pay a debt that they had the power to create, we do not understand that it could require them to levy a tax in direct violation of the Constitution. So that, if the appellee company has any remedy at all, it is the one adopted by the lower court. A rescission would not afford adequate or satisfactory relief, and § 157 of the Constitution provides in part that "no county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two thirds of the voters thereof voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made, nor shall such municipality ever be authorized to assume the same." We have then presented this condition of affairs: The city has the use and is in the possession of a valuable engine that it purchased from the appellee company; but, when the company attempts to collect the note executed by the city for the purchase price of the engine, the city responds: "We have your property. We are using it for public and governmental purposes. We have not paid for it, and do not intend to. You cannot compel us to levy a tax to pay your debt because our tax rate exceeds the constitutional limit. You cannot take a personal judgment against the city because the contract was made in violation of the Constitution, and is not enforceable, and you cannot take the engine upon which you have a lien because it is used in connection with our electric-light plant and is necessary in its operation. Therefore you are remediless unless you accept our offer to rescind the contract." There is no constitutional or statutory law in this state that will permit municipalities in cases presenting facts like this to retain possession of property and refuse to pay for it or afford relief, unless the seller will accept a rescission upon equitable terms. Within the constitutional limitation, the city had the right, under § 3637 of the Kentucky Statutes of 1903, to purchase an engine for use in connection with its water and light

plant; and, as between the company and the city, the company, under its contract, had a lien upon the engine to secure the payment of the note, and this lien it had the right to enforce by sale of the engine for the satisfaction of its purchase-money debt. This identical question was before this court in *Fordsville v. Postel*, 121 Ky. 67, 123 Am. St. Rep. 184, 88 S. W. 1065. In that case the trustees of Fordsville established a school and issued bonds to the amount of \$4,000 on behalf of the district for the purpose of providing it with a lot, schoolhouse, and suitable furniture. The bonds were sold and the proceeds used for this purpose. The bonds were issued without a vote being taken authorizing the issue, and were adjudged to be void. Thereupon the holders of the bonds instituted an action in equity asking that the lot, house, and furniture, which were purchased with the proceeds of the bonds, be sold to satisfy them. In granting this relief the court said: "The money which the plaintiffs paid is distinctly traced into the schoolhouse and lot and furniture, and no other money went into them. This property can be reclaimed without taking any other property with it or injuring any other person or interfering with his rights. . . . No liability, direct or indirect, may be imposed upon the school district under the bonds in question. It is not liable on the bonds, nor can it be made liable by indirection in any way; but, if we ignore the bond transaction altogether, what have we? The district received \$4,000 from the bondholders. The bonds being void, the district should have returned the money to the bondholders. If the bondholders had learned of the invalidity of the bonds while the district still had the \$4,000 in its treasury, which they had paid to it, manifestly a court of equity would have required the district to pay back their money to them. It was money obtained by a mutual mistake. While, under the Constitution, no liability would attach to the district for the money if it had lost it, or if it had spent it, and the fund could not be identified and followed, where it may be followed and identified, there is no more reason why property which represents the fund should not be returned than there would be for not returning the money if it had been placed in a bag and the district had the bag locked up in its safe. The purpose of the Constitution is not to enrich municipalities at the expense of innocent people who deal with them, and, when they repudiate their bonds, they must act honestly. A loss must not be placed upon the district, but, when justice may be done without inflicting any loss upon the district, equity will lay hold

of the conscience of the parties, and make them do what is just and right. . . . We see no reason why the right to follow a fund should not be applied against municipalities under the clause of the Constitution above quoted just as it is against other persons obtaining the property of another under a void contract, where the fund may be identified, and is separated from other property of the municipality." This opinion, sound in law as well as morals, is conclusive of the question we are now considering. There is no difficulty in identifying the property. There are no other liens on it. Nor does it appear that any other property will be seriously injured by the sale of it. True, if the engine should be removed, the city might be deprived of the use of its electric-light plant until it obtained another engine; but, except in this particular, the removal of the engine will not impair the value of the plant. It would be manifestly unjust and inequitable under the circumstances presented by this record to permit the city to keep this engine and not pay for it. The constitutional provision in question is one of the most valuable clauses in the instrument, and it is not our purpose to in any wise impair its usefulness or deprive the taxpayers and citizens of municipalities of the protection it affords. But it was not designed to enable cities or towns to perpetrate fraud.

The judgment of the lower court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JEREMIAH M. MORAN et al.

v.

THOMAS F. GALLAGHER.

(199 Mass. 486, 85 N. E. 579.)

Intoxicating Liquors — license — owner of street — objection.

The owner of the fee of a street at the point where it abuts on property, to sell liquor upon which an application has been made for license, is within the provisions of a statute authorizing owners of real estate within 25 feet of such property to object to the granting of the license.

(September 4, 1908.)

Note. — Upon the question of the ownership of the fee in a public street within the distance prescribed by statute, as entitling the owner to consent or object to the granting of a license for the sale of intoxicating liquors, no other cases are to be found. 20 L.R.A. (N.S.)

RESERVATION by the Supreme Judicial Court for Worcester County for the opinion of the full bench of a petition for certiorari to set aside an order revoking a license to sell intoxicating liquors. Dismissed.

The facts are stated in the opinion.

Messrs. David I. Walsh and Thomas L. Walsh, for petitioners:

A statute will be given a reasonable construction so as to carry out the intent of the legislature, though such construction may seem contrary to the letter of the statute.

Opinion of Justices, 22 Pick. 571; *Cleveland v. Norton*, 6 Cush. 380; *Somerset v. Dighton*, 12 Mass. 383; *Staniels v. Raymond*, 4 Cush. 314; *Elliott v. Elliott*, 137 Mass. 116; *Chase v. Walker*, 167 Mass. 293, 45 N. E. 916; *Com. v. Kimball*, 24 Pick. 366; *Com. v. Intoxicating Liquors*, 172 Mass. 311, 52 N. E. 389; *Re Kilby Bank*, 23 Pick. 93.

The legislature never intended that the owner of the fee in a public highway within 25 feet of licensed premises should have the right to object to the granting of such license within the meaning of the statute.

Spaulding v. Smith, 162 Mass. 543, 39 N. E. 189.

Messrs. Charles F. Baker and Emerson W. Baker, for defendant:

The owner of the soil in the street retains the title and right to make any use of the same not inconsistent with the public use thereof as a street.

Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159; *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Robbins v. Borman*, 1 Pick. 122; *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261; *Hollenbeck v. Rowley*, 8 Allen, 473; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Com. v. Morrison*, 197 Mass. 199, 14 L.R.A. (N.S.) 194, 83 N. E. 415; *Read v. Leeds*, 19 Conn. 182; *Woodruff v. Neal*, 28 Conn. 167; *Cortelyou v. Van Brundt*, 2 Johns. 357, 3 Am. Dec. 439; *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363.

The right to object in such cases was clearly contemplated, and the statute must be so construed.

Rev. Laws, chap. 8, § 5, chap. 100, § 15: *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629.

Knowlton, Ch. J., delivered the opinion of the court:

This is a petition for a writ of certiorari to set aside an order of the police court of

Fitchburg, revoking a license of the petitioners to sell intoxicating liquor to be drunk on the premises. The order was made under Rev. Laws, chap. 100, § 15. It is undisputed that the Simonds Manufacturing Company, the applicant before the police court for a revocation of the license, had duly objected to the granting of the license, as an owner of real estate within 25 feet of the premises described in the application for the license. The only question that arises under the present petition is whether it was such an owner of real estate within the meaning of the statute.

It appears that it was the owner of the real estate on the opposite side of the street which was 40 feet wide at that point, and it was also the owner of the fee of the entire street in front of the property described in the application for a license. It had a perfect title to the land in the street, subject to an easement of the public to use it for travel. The precise question is whether the existence of such an easement in land within 25 feet of the premises described in an application for a license leaves the owner of the fee with such a title as is necessary to constitute him an owner of the real estate, within the meaning of the statute.

There is no doubt that in a general sense he is the owner, and "has a right to the enjoyment of any use of his estate consistent with the servitude to which it is subjected, and may maintain trespass for any interruption of his enjoyment." *Van O'Linda v. Lothrop*, 21 Pick. 292-297, 32 Am. Dec. 261; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1-11, 6 Am. Rep. 181. He may build his cellar under the highway. *Allen v. Boston*, 159 Mass. 324-335, 38 Am. St. Rep. 423, 34 N. E. 519. See also *Com. v. Morrison*, 197 Mass. 199, 14 L.R.A.(N.S.) 194, 83 N. E. 415. If the highway or street is discontinued his title immediately becomes absolute.

If the contention of the present petitioners could be maintained, there would be ground for a similar contention against an owner of land subject to the easement of a private way, especially if the persons entitled to use the way were numerous. It might be argued that other burdensome easements would have the same effect to deprive the owner of his right, under the statute, to object to the issuing of a license.

We are of opinion that the Simonds Manufacturing Company was plainly the owner of the land in the street, within the ordinary meaning of the word. There is no good reason for holding that the word is used in the statute otherwise than in its ordinary signification, and the entry must be—

Petition dismissed.

20 L.R.A.(N.S.)

PENNSYLVANIA SUPREME COURT.

THOMAS PAINTER et al., Appts.,

v.

PETER PAINTER.

(220 Pa. 82, 69 Atl. 323.)

Will—equitable conversion — failure of scheme.

1. The doctrine of equitable conversion does not apply in case of a devise of real estate to testator's wife for life, and directing that at her death the property be sold and the proceeds divided between testator's daughters, where they die without issue after testator but before their mother's death, so that testator's scheme has failed; but the property will descend as real estate to testator's heirs at law.

Equitable conversion — creditors.

2. Equity never enforces the doctrine of equitable conversion for the benefit of creditors.

(Brown, Potter, and Stewart, JJ., dissent.)

(January 20, 1908.)

Case Note. — *When is there such a failure of testator's purpose or object as to preclude the application of the doctrine of equitable conversion.*

The general principle is well established that a power of sale in a will, if inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not operate as a conversion where the scheme or purpose fails. It is also well established that, though there may be a failure of a specific object, the doctrine of equitable conversion will nevertheless apply where a clear intention can be collected from the will that the distribution of the testator's estate shall be made in money at all events. The inquiry to which this note is addressed is, therefore, as to under what circumstances there is such a failure of the testator's purpose or object that the property directed to be sold will be deemed to retain its original character.

There is clearly such a failure, altogether or *pro tanto*, where conversion is directed for the purpose of paying a legacy which has lapsed by reason of the death of the legatee. See *Trippe v. Frazier*, 4 Harr. & J. 446; *Canfield v. Canfield*, 62 N. J. Eq. 578, 50 Atl. 471; *Wright v. Methodist Episcopal Church*, Hoffm. Ch. 202 (*arguendo*); *Lindsay v. Pleasants*, 39 N. C. (4 Ired. Eq.) 320; *Worsley's Estate*, 4 Pa. Dist. R. 177.

It has also been held in numerous instances that, where conversion is directed for the purpose of a bequest for charitable or religious purposes, which is void for uncertainty or want of capacity in the legatee, the property will be considered as retaining its original character. See *State use of Wiltbank v. Bates*, 2 Harr. (Del.) 18; *State*

APPPEAL by complainants from a decree of the Court of Common Pleas for Butler County dismissing a bill filed to secure partition of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. H. H. Goucher and Jacob M. Painter for appellants.

Messrs. W. D. Brandon, William Z. Murrin, and John Murrin for appellee.

Mestrezat, J., delivered the opinion of the court:

This is a bill filed in the court below for the partition of 120 acres of land and the undivided one-seventh interest in another tract of 60 acres situate in Buffalo township, Butler county. George W. Painter died seised of the land on May 22, 1899,

use of *Derrickson v. Walter*, 2 Harr. (Del.) 151; *Rizer v. Perry*, 58 Md. 112; *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 26 N. E. 730; *McCarty v. Deming*, 4 Lans. 443; *Fifield v. Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446; *McHugh v. McCole*, 97 Wis. 166, 40 L.R.A. 724, 72 N. W. 631.

The same doctrine has been applied where the charitable bequest, in behalf of which the conversion was made is rendered invalid by statute because made within a month of the testator's death (*Luffberry's Appeal*, 125 Pa. 513, 17 Atl. 447); or because, having a wife, testator's bequest of nearly all of his estate for charitable purposes was valid only as to one half (*Jones v. Kelly*, 170 N. Y. 401, 63 N. E. 443).

Such is also the case where the provision runs counter to the statute restricting the suspension of the power of alienation. *Hawley v. James*, 7 Paige, 213, 32 Am. Dec. 623; *DePeyster v. Clendinning*, 8 Paige, 295. affirmed on other points under title of *Bulkley v. DePeyster*, 26 Wend. 21; *Giraud v. Giraud*, 58 How. Pr. 175.

Where a testator directs the sale of real estate for the purpose of paying debts or legacies for which the personal estate proves sufficient, so that a sale is unnecessary for the purpose of accomplishing his object, the doctrine of equitable conversion does not apply. *Sweeney v. Warren*, 127 N. Y. 426, 24 Am. St. Rep. 468, 28 N. E. 413; *McCarty v. Terry*, 7 Lans. 237; *North v. Valk*, Dud. Eq. 212; *Pratt v. Taliaferro*, 3 Lelgh. 419 (where the case is put by way of analogy).

Where the purpose of a conversion directed by a will is to enable the executors to sell if necessary to support and educate the family of the testator, but the personal estate is ample for that purpose, so that extent the purpose fails, and the land retains its original character. *Gourley v. Campbell*, 66 N. Y. 169.

The failure of testator's purpose or object was also considered as precluding the application of the doctrine of equitable conversion, in the following cases:

Where a testator whose estate consisted almost entirely of realty authorized the sale

leaving to survive him a widow, Mary E., and two daughters, Minnie R. and Helen M., and as brothers and sisters the plaintiffs, and Peter Painter, the defendant in the bill. By his last will George W. Painter directed an appraisement and sale of his personal property and the application of the proceeds to his debts and funeral expenses, and then provided as follows: "I give and bequeath to my beloved wife, Mary E. Painter, the farm on which we now reside situate in Buffalo township, Butler county and state of Pennsylvania, containing one hundred and twenty-two acres less or more. She to have the use and occupancy of said farm so long as she lives and remains my widow, then and in either case the farm aforesaid and also my un-

of his real estate by his executors, in their discretion, and directed that, when his son should attain the age of twenty-one, his executors should take the sum of \$10,000 to invest, and pay the interest and dividends arising and accruing therefrom to the son, and at his death pay said sum of \$10,000 to his children, and the son died after becoming of age, without issue, so that, though the testator's purpose that his son, during his lifetime, should have the income arising from the money was accomplished, the main purpose of the conversion failed,—the property was held to pass as undisposed realty. *Roy v. Monroe*, 47 N. J. Eq. 356, 20 Atl. 481.

Where a testator, after giving the rents and profits of his entire estate to his wife during widowhood, directed a conversion of it into cash to be placed out at interest for the benefit of his son during his lifetime, and, after the wife's death, gave and devised his estate to children of his son; and the son died before the mother,—the object of the power failed, and the property came to the children of the son at the death of the testator's widow, as real estate. *Slocum v. Slocum*, 4 Edw. Ch. 613.

Where a testator devised the remainder of his estate, for the purpose of administering which he authorized the sale of his real estate, to the lawful issue of his daughter; and the daughter died without issue,—the proceeds of any real estate sold by the executor retained the character of undisposed real estate. *Wood v. Keyes*, 8 Paige, 365.

Where a testator authorized and empowered his executors, upon the death of his wife, to sell the residuary realty and divide the proceeds equally between his two children or their issue; and one of them died in the testator's lifetime without issue, thereby obviating the necessity for a division,—the purpose fell, and the estate remained unconverted. *Re Rudy*, 185 Pa. 359, 64 Am. St. Rep. 654, 39 Atl. 968.

Where a testator directed a sum of money to be laid out in land to be divided between six of his children; and further provided that, if any one of his children should marry into a certain family, the preceding provision should be revoked; and one of such

divided one-fourth interest in another farm of sixty acres situate in Buffalo township, Butler county, Pennsylvania, be sold and the money arising from said sales of land, together with all the rest, residue and remainder of my estate of whatsoever kind or nature the same may be I give and bequeath to my two daughters, Minnie R. and Helen M. Painter to be equally divided between them share and share alike. The said sales of land to be made as my daughters, aforesaid, shall see proper. I further direct that my two daughters, Minnie R. and Helen M. Painter shall have a good and comfortable home on my farm on which we now reside so long as they remain single." He appointed his wife and daughter Minnie R. executrices of the will. Minnie R.

Painter died on June 27, 1901, intestate, unmarried, and without issue, leaving to survive her her mother and sister. Helen M. Painter married J. L. M. Halstead, and died November 29, 1903, intestate, and without issue, leaving to survive her her husband, J. L. M. Halstead, and her mother, Mary E. Painter. The latter died June 17, 1905. This bill was filed by the brothers and sisters of George W. Painter, who claim that on the death of his widow and daughters the land descended to them and their brother Peter Painter, one of the defendants. Halstead, the husband of Helen M. Painter, and the two sisters of Mary E. Painter, the widow, intervened and became defendants in the action, and claim that the will of George W. Painter worked

children did contract the prohibited marriage.—the object of the conversion, to the extent of the provision made for her, failed, and consequently the undisposed-of portion of the fund directed to be invested resulted, in its unconverted form as personality, to the executors, for the residuary legatees other than herself. *Phillips v. Ferguson*, 85 Va. 509, 1 L.R.A. 837, 17 Am. St. Rep. 78, 8 S. E. 241.

In this connection, see also *Fifield v. Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446, where it is said: "It seems to be established by the weight of authority that, where a testator directs his real estate to be sold, and the mixed fund arising from the proceeds of the realty and personality to be applied to certain specified purposes, if any part of the disposition fails, either because void *ab initio* or by lapse, then, in proportion to the extent or amount which the real estate would have contributed to that disposition, the proceeds thereof retain the quality of real estate for the benefit of the heir, although the real estate has been in fact sold."

As hereinbefore noted, the failure of a specific purpose is not always conclusive that the doctrine of equitable conversion is not to be applied, as sometimes the will is regarded as evincing an intention that a conversion of the estate into money shall take place at all events. Such a situation appears to have been presented in the cases following:

In *Lash v. Lash*, 209 Ill. 505, 70 N. E. 1049, where a testator directed the sale of his land after his wife's death, and the division of the proceeds among his children in specific amounts, it was held that the fact that the directed distribution of the proceeds among the children was not according to the statute of descent disclosed an intention on the part of the testator that his land should not descend to his heirs; and that therefore the death of one of the testator's children before his own death did not destroy the equitable conversion of the lapsed bequest, which went to those entitled to take as intestate personal property.

In *Shaw v. Chambers*, 48 Mich. 355, 12 20 L.R.A. (N.S.)

N. W. 486, it was held that, where a testator directed that, for the more efficient execution of the provisions of his will, and for the purpose of securing a larger income and a better support for his wife, his property should be exchanged for money or for interest-bearing securities, an equitable conversion was effected, notwithstanding the death of the beneficiaries before such conversion took place.

Where a testator directed his executors to sell his real estate, and, after giving certain pecuniary legacies, and directing certain expenditures, gave and bequeathed the residue to be equally divided among certain persons, it was held that the direction to convert was absolute and unqualified, and the share of a legatee whose legacy lapsed upon her death in the lifetime of the testator went to the testator's next of kin, though composed partly of the proceeds of the real estate. *Hand v. Marcy*, 28 N. J. Eq. 59. This decision is criticized in *Canfield v. Canfield*, 62 N. J. Eq. 578, 50 Atl. 471, where it is said that the only case cited in support of the proposition is not to the point, but relates to equitable conversion by a contract for the sale of real estate.

In *Gourley v. Campbell*, 6 Hun, 218, it is held that, where a testator directed his real estate to be converted into a pecuniary fund, to be held by trustees for purposes indicated in the will, the death, before the execution of the power, of the person entitled to the proceeds, does not change the character of the estate, which continues to be deemed to be personality, there being no failure of the object of the conversion, which was simply to establish one character for the whole body of the estate.

This case was, however, reversed upon appeal in 66 N. Y. 169, upon the ground that language of the will did not disclose an intent to make an absolute conversion of the real estate into money; and the further ground that the testator's purpose was to provide for the support and maintenance of his widow and children.

Where a direction of a testator that his real estate should be converted into money, and that the proceeds therefrom should be

an equitable conversion of the land into personality; that it vested in his daughters as such; and that on the death of Minnie R., intestate and without issue, her share vested in her mother, Mary E. Painter, absolutely, and at the latter's death intestate it vested in her two sisters. Halstead, for the same reason, claim the interest of his wife, Helen M., the other daughter of George W. Painter. The right, therefore, of the plaintiffs to maintain this bill and have the real estate in question partitioned depends upon whether the will of George

W. Painter worked an equitable conversion of the land into personality. If it did, the bill cannot be maintained; if it did not, the real estate descended to the brothers and sisters of George W. Painter, and they have the right to have it partitioned.

The doctrine of equitable conversion is a creature of equity, and is wholly unknown to the law. It is based on the familiar maxim that what ought to be done will be considered or treated as already done. It is now a well-recognized rule of equity

used in paying his indebtedness, legacies, and charities, and that the balance be divided between the residuary legatees named, was very explicit, it affected an absolute conversion, for all purposes, into personal property, of his whole estate, which should be distributed as personal property even if the special object intended by the testator should fail. *Hutchings v. Davis*, 68 Ohio St. 160, 67 N. E. 251.

In *Evans's Appeal*, 63 Pa. 183, it was held that, where a testator directed the sale of certain real estate and the application of the proceeds to a charitable use, and the gift was void, the real estate was, nevertheless, equitably converted into personality where the power given to the executors to sell the real estate was in the most positive and direct terms, and it appeared to have been the intention of the testator to turn all his property into money.

Where a testator authorized and empowered his executors to convert his estate into cash upon the expiration of a life estate given to his wife, and to distribute the proceeds among certain charitable institutions, it was held that the evident intention of the testator, and the necessity of treating the land as personality in order to carry out that intention, would work an equitable conversion, although the bequest of the residuary estate should be void as having been made within one calendar month before testator's death. *Hodges's Estate*, 5 Pa. Co. Ct. 283.

The effect of failure of the testator's purpose or object is discussed in *Harrington v. Pier*, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 922, 82 N. W. 345, as follows: "The will requires the executrix to convert the real property of the testatrix into money, and to distribute the entire estate as personal property in the manner indicated therein. In the absence of any circumstances sufficient to do away with the force of that direction, it worked an equitable conversion of the testatrix's real property into personality, and required the will and every part of it to be treated as if dealing with property of the latter character in law and in effect, as of the death of the testatrix. . . . True, a general direction to sell all the real property for some one or more purposes named in a will does not always work a conversion thereof into personality where a necessity therefor does not exist and there is not a clear intent that 20 L.R.A. (N.S.)

at all events the testator's purpose was to distribute his estate as personal property. If it appear that the direction to convert the realty into money was coupled with and to merely effect some particular purpose susceptible of satisfaction by a sale of part of the realty only; or if the bequest for such purpose be void, and the will evidences that the execution of the power of sale was made dependent upon the purpose to be accomplished,—the application of the doctrine of equitable conversion of realty into personality ends where the absence of necessity for it begins. The mere circumstance, however, that bequests can be satisfied without a full execution of the power of sale, or be coupled with invalid bequests, is not so inconsistent with an intent that the whole estate shall be treated as personal property as to preclude the application of the doctrine of equitable conversion in such circumstances, if that be manifestly necessary to effect the testator's intent gathered from the entire will. As said in *Given v. Hilton*, 95 U. S. 591, 24 L. ed. 458, the blending of real estate and personal property in one fund for all the purposes of the will is generally regarded as evidencing intent that the whole estate shall be treated as personal property, even though a necessity therefor does not exist, but such evidence is not conclusive on the question." And it was held that, in view of the condition of the estate, of the fact that the will contemplated the blending of real and personal property for every purpose mentioned in it,—the payment of debts, expenses of administration, and funeral expenses, as well as the final division of the net proceeds,—the entire estate must be dealt with as personal property, irrespective of the validity of a bequest of a share of the net proceeds.

In *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 26 N. E. 730, it is said that nothing short of a clear intention, to be collected from the will, that the land shall be sold and converted into money before division, whether the particular purpose fail or not, will be sufficient in equity to change the character of the property; and that while in England even this is not sufficient to exclude the heir, in the absence of an express gift of the proceeds away from him, in this country the courts do not seem to hold so strict a doctrine.

jurisprudence, and is in constant application in courts exercising chancery jurisdiction. The master of the rolls states the principle in *Fletcher v. Ashburner* (1779) 1 Bro. Ch. 497, a leading case on the subject, as follows (page 499): "Money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted." The rule is operative whether the direction is contained in a will or other instrument of writing. Its sole purpose, however, as declared in textbooks and the adjudicated cases, is to effectuate the intention of the testator or parties to the instrument. The crucial test in the application of the doctrine always is whether it is absolutely necessary to carry out the purpose and object of the testator or settlor. If its interposition is a necessity, then it may be invoked with all its legal consequences. Before the rule can operate, however, in the case of a will, the purpose of the testator must be ascertained. Until this is done there is no room for the application of the doctrine. The intent of the testator being ascertained, then so far, and only so far, as there is a necessity to carry that into effect, will there be conversion, though an actual sale of the land has taken place. The doctrine is not an inexorable rule of law to control the inheritance of estates, or to defeat the intestate laws of the state which direct the disposition of the estates of the dead. It is not an inheritance law, nor is it a rule, enforceable at law or in equity, by which a court can divert the transmission of real property from the inheritable channel provided by the laws of the commonwealth. It is simply a fiction, a creation of equity, to carry into effect the purpose in the disposition of his real estate which a testator has expressed in his will, and which, without its application, would be defeated. These principles are well settled, and are recognized by the courts in the application of the doctrine. Mr. Justice Sharswood states the rule with its limitations in *Foster's Appeal*, 74 Pa. 391, 15 Am. Rep. 553. In delivering the opinion of the court he says (page 397 of 74 Pa.): "Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *In fitione juris semper subsistit equitas* has redoubled force in application to it. It follows of necessity that it is limited to its end. . . . There must be some purpose recognized as lawful to be accomplished by a conversion before equity will permit it to have place. 20 L.R.A. (N.S.)

. . . When the purpose of conversion is attained, conversion ends." In *Lorillard v. Coster*, 5 Paige, 172 Chancellor Walworth, delivering the opinion of the court, said (page 218): "Upon the principles of equitable conversion, money directed by the testator to be employed in the purchase of land, or land directed to be sold and turned into money, is in this court, for all the purposes of the will, considered as that species of property into which it is directed to be converted, so far as the purposes for which such conversion is directed to be made are legal and can be carried into effect."

While the doctrine of equitable conversion is well settled on principle and reason, and is recognized in numerous cases determined by this court, the sphere or limitation of its application is equally well established, and should be observed. The sole purpose of the doctrine in the case of a will being to effectuate the intention of a testator, it cannot be invoked when his intention fails or is incapable of accomplishment. The reason of the rule then ceases, and the rule itself no longer obtains. This principle is as well settled on reason and authority as the doctrine of equitable conversion itself. It is the logical consequence of the doctrine which cannot be applied unless there is an existing purpose of the testator to be carried into effect. The testator's intention in regard to the disposition of his property, as declared in his will, having failed, an alternative, undisclosed intention cannot take its place, and the doctrine of equitable conversion be invoked to carry it into effect. The court is not at liberty to surmise what the intention of the testator would have been, and what disposition he would have made of his property if he had anticipated the failure of the disposition which he makes in his will. He is dead, and no one can speak for him and declare an alternative intent in the disposition of his property. Any other purpose than that named in the will is necessarily unknown, and the doctrine of equitable conversion cannot be applied to carry out his unknown intention. Hence the necessity for enforcing the rule stated by Mr. Scott, afterwards Lord Eldon, in his argument in the leading English case of *Ackroyd v. Smithson*, 1 Bro. Ch. 503, that, the reason of the intention ceasing, the intention should be taken to have ceased.

This limitation upon the doctrine of equitable conversion is settled by a uniform current of decisions in this country and in England. In *Re Rudy*, 185 Pa. 359, 64 Am. St. Rep. 654, 39 Atl. 968, a life interest in land was given the widow, and at her

death the executors were to sell and divide the proceeds of sale equally between his son and daughter, "if they be living, or the issue of such of them as may then be deceased." The son died before the testator, the daughter after the testator, but before the life tenant, leaving a husband and two children, one of whom died before the life tenant. It was held that the surviving child of the daughter, subject to the life interests of the widow and father, took the lapsed share as heir, and the residue as sole devisee. In the opinion of the court below in that case, which we adopted, it is said (page 301 of 185 Pa.): "But the intention to effect a sale was auxiliary to another and paramount intention,—to effect a convenient transmission of testator's property to the devisees. The one intent affected the means, and the other the end, and if, for any reason, the means were useless towards attaining the end, the lesser intent should be discarded. The purpose of a sale, and therefore of a conversion, was that the estate might be divided. If there was no necessity for a division, the purpose fell, and the estate remained unconverted." In *Morrow v. Brenizer*, 2 Rawle, 185, Mr. Justice Huston, speaking of the admitted limitations or qualifications of the doctrine of equitable conversion, said (page 193): "The rule does not apply where the object for which the sale was to be made ceases. The power to sell is then at an end, and lands continue lands. . . . The power to sell ceases when the object ceases. It ceases when the right to the money and the land unite in the same person. It always ceases where one of the devisees dies so that the legacy lapses; and so far the heir takes. And, where the money to be raised is to go to the heir, the descent is never broken for a moment." In *Nagle's Appeal*, 13 Pa. 260, Mr. Justice Bell, in delivering the opinion, after giving the rule as stated by Mr. Cox in his note to *Cruse v. Barley*, 3 P. Wms. 20, that the question of conversion out and out depends on whether the testator meant to give to the produce of real estate the quality of personalty to all intents, or only so far as respected the particular purpose of the will, said (page 265 of 13 Pa.): "The authorities from which he deduces this doctrine, to be sure, have relation to lapsed bequests; but I take it the principle is equally applicable where, from any cause, conversion to meet the exigencies of a will is prevented." In *Luffberry's Appeal*, 125 Pa. 513, 17 Atl. 447, the bequest to the charities in the will failed by reason of the testator's death within one calendar month after the execution of the will. For this reason it was held that the power to sell

to pay these bequests became inoperative, and the land remained unconverted and descended to the testator's heirs at law. In that case it is said in the opinion of the court below, approved by this court, that "conversion, as is well settled, is an equitable doctrine, and founded upon some good and sufficient reason for declaring land to be money and money land. Where this fails to apply, the doctrine is inapplicable, and equity refuses its aid, because it would be unreasonable and consequently inequitable."

In *Lindsay v. Pleasants*, 39 N. C. (4 Fred. Eq.) 320, Mr. Justice Daniel, delivering the opinion of the supreme court of North Carolina, said (page 323): "It is a clear rule in equity that, where real estate is directed to be converted into personal for any express purpose which fails, to consider the disappointed interest as realty (although the land has been sold), and resulting to the heir. The rule equally applies to cases where the real proceeds are blended and bequeathed with the personalty (after answering particular objects), and the context of the will affords no manifestation of the testator's intention to convert the real into personal estate out and out." And in *Wood v. Cone*, 7 Paige, 471, Chancellor Walworth says (page 476): "Upon the principles of equitable conversion, the proceeds of the real estate directed by the testator to be sold is only considered as converted into personalty for the purposes of the will. And, if any estate or interest in this converted fund was not legally and effectually disposed of by the will, there was a resulting trust as to such estate or interest in favor of . . . the heir at law." Judge Hare, in his notes to *Ackroyd v. Smithson*, in 1 White & T. Lead. Cas. in Eq. 1171, says, after a review of the numerous authorities on the subject: "It may be regarded as well settled that a direction to sell for a particular object, or with a view to a contingent event, will not work a conversion, if the object cannot be accomplished, or the contingency does not happen, unless the testator plainly intended that the sale should be an end, and not merely a means." The Supreme Court of the United States recognizes the same limitation of the doctrine of equitable conversion. In an elaborate opinion in *Craig v. Leslie*, 3 Wheat. 563, 4 L. ed. 460, Mr. Justice Washington says (page 582): "The whole of this doctrine proceeds upon a principle which is incontrovertible, that, where the testator merely directs the real estate to be converted into money for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the de-

vise from taking effect), results to the heir at law as the old use not disposed of."

In England the limitation upon the doctrine is well settled. The leading case is *Ackroyd v. Smithson*, 1 Bro. Ch. 503, 1 White & T. Lead. Cas. in Eq. 1171. The elaborate argument of Mr. Scott, afterwards Lord Eldon, convinced Lord Chancellor Thurlow, and firmly settled the doctrine in that jurisdiction, that, where a testator directs his real estate to be sold and the proceeds to be applied to a special purpose, which wholly or partially fails, the undisposed of beneficial interest will go to his heir at law, and not to his next of kin, although the land may have been actually converted into money. In *Ripley v. Waterworth* (1802) 7 Ves. Jr. 425, in the opinion it is said (page 435): "There is an obvious difference from all the cases which establish this general principle, that, where a person dealing upon his own property only has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails the intention fails, and this court regards him as not having directed the conversion." In stating the principle announced in the adjudicated cases in his opinion in *Hill v. Cock* (1813) 1 Ves. & B. 173, Lord Eldon said (page 175): "Where a testator means, with regard to a particular purpose, to convert his real estate into personal, if that purpose cannot be served the court will not infer an intention to convert the estate for any other purpose not expressed." In *Taylor v. Taylor* (1853) 3 De G. M. & G. 190, it was held that, where one of the beneficiaries died in the lifetime of the testator, his share of the proceeds of sale was to be decreed real estate, and went to the heir at law. Lord Cranworth, delivering the opinion, said (page 195): "The rule is established by the cases of *Digby v. Legard*, 3 P. Wms. 22, note, and *Ackroyd v. Smithson*, that, if a testator disposes of his property, realty and personalty, as a mixed fund, and as to part of it his will cannot take effect,—the heir at law will take so much as was the produce of real estate, upon the principle that the heir at law cannot be disinherited without express words." And in 1864 it was determined by the House of Lords, in *Bective v. Hodgson*, 10 H. L. Cas. 656, that in the application of the principle ruled in *Ackroyd v. Smithson* it is immaterial whether the conversion directed by the will has or has not actually taken place; that, so far as the beneficial purpose fails, the real estate or the money, as the case may be, retains its original character for the purpose of ascertaining the ownership of it. The same rule prevails in New York, and is announced in *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 20 L.R.A. (N.S.)

748, 26 N. E. 730, where Andrews, Ch. J., speaking for the court, observes: "The case falls within the general principle declared in many cases, that a power of sale in a will, however peremptory in form, if it can be seen that it was inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not operate as a conversion, where the scheme or purpose fails by reason of illegality, lapse, or other cause. In that case the property retains its original character, and it goes to the heir or next of kin as real estate or personalty, as the case may be." The same rule is universally recognized by text writers. Mr. Jarman (1 Jarman, Wills, 6th. ed. 589) says: "Every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin." Says Mr. Bispham (Eq. § 315): "Where the purposes of the conversion have totally failed, the property will devolve according to its original character." Mr. Pomeroy (3 Pom. Eq. Jur. § 1170) says: "Where a conversion . . . is directed, . . . and the purposes and objects for which such conversion was intended totally fail before the directions for a conversion are carried into effect, the property . . . will remain in its original condition, . . . [and] will result in its original unchanged form to the heirs, or to the personal representatives of the testator, . . . as the case may be."

It is clear, therefore, that, under all the authorities, when the purpose of the testator as disclosed by his will has failed or is incapable of accomplishment, the operation of the rule of equitable conversion ceases, the property retains its original character, and goes to the heir or next of kin, as the case may be. It is conceded, as held in *Ackroyd v. Smithson*, 1 Bro. Ch. 503, and *Taylor v. Taylor*, supra, that, where real estate is directed to be sold and the proceeds to be paid to certain individuals, and one of the beneficiaries dies in the lifetime of the testator, as to his share a conversion does not take place, and it goes to the heirs at law. We are unable to distinguish between such a case and where the purpose fails subsequent to the death of the testator and prior to the time when the actual conversion can take place. The reason of the rule would clearly extend it to the one case as well as to the other. If the conversion fail because the purpose of the testator fails, and hence cannot be carried out, it logically follows, we think, that there is no conversion if the pur-

pose of the testator fail prior to the time when the actual conversion of the property can take place. The doctrine is a fiction to aid the testator in the accomplishment of his purpose; and, when the purpose ceases for any cause and at any time, it necessarily follows that the fiction becomes inoperative, and cannot be invoked to accomplish something which cannot be done. It is clearly not the purpose of the doctrine of equitable conversion to effect results antagonistic to the law in whose realm it has no abiding place. To hold, however, that the doctrine is applicable where the purpose of the testator fails subsequent to his death is to permit it to defeat the intestate laws of the state, and to establish another and different channel for the transmission of estates of intestate decedents. It would strike down the declared policy of the state as embodied in the statute wherein it is provided that no person who is not of the blood of the ancestor or other relative from whom any real estate descended, or by whom it was given or devised, shall take any estate of inheritance therein. Such would frequently be the manifest result of applying the doctrine of equitable conversion in cases where the purposes of the testator or settlor had failed at a period subsequent to his death. It would produce such a result in the present case. We cannot assent to give it this effect. The legal consequences of so holding, as well as the reason for the rule itself, imperatively demand that the application of the doctrine cease whenever the purpose that commands its intervention has ceased. Our conclusion as to the application of the doctrine of equitable conversion does not impair or defeat the doctrine itself. It simply limits its enforcement to cases where the facts warrant its intervention. In the cause for invoking it in any particular case exists,—that is, if its application is necessary to effectuate the intention of the testator or settlor,—then it may be invoked. If such cause does exist, but has ceased before the actual conversion takes place, then it cannot be applied.

The obvious intent which George W. Painter had in converting his real estate into money after his widow's death was, as expressed in his will, that he might give it to his "two daughters, Minnie R. and Helen M. Painter, to be equally divided between them, share and share alike." His widow was to retain possession of the land during her life, permitting, however their two daughters to reside there while single; and, for the purpose of making a division between his two daughters after her death, he directed the land to be converted "as my daughters aforesaid shall see proper." The necessity for converting it for this purpose

entirely failed upon the death of the two daughters prior to their mother's death, when the actual conversion was to take place by a sale of the land. With the death of his two daughters, the purpose he had in converting the land ceased to exist, and thereafter there was no purpose or intent of George W. Painter with regard to his land which the doctrine of equitable conversion could operate upon. It was still land, and whoever took it took it unconverted and in its original character. Equity will not, under such circumstances, interpose to defeat the intestate laws of the commonwealth, and declare that the land shall be considered as personality, so as to vest its title in the next of kin of the widow, who is not of the blood of the party through whom it came. It may be argued that the construction we put upon the doctrine of equitable conversion will frequently defeat the rights of creditors. Equity, however, never enforces the doctrine for the protection of creditors. It acts solely in the interest of the testator or settlor to carry out his intention, and can never be invoked for the purpose of placing title to property in anyone in order that his creditors may be benefited. It may be suggested in this connection that it is a well-established rule that a beneficiary may accept the property in its unconverted condition. This may and frequently does prevent the creditor of the beneficiary from enforcing his claim.

It follows from what has been said that at the death of the survivor of the daughters of George W. Painter, the legatees to whom the proceeds of the real estate were to be distributed, the purpose for which the testator directed conversion of the real estate ceased, and that thereafter, on the death of the widow, who had a life estate therein, it descended as real estate to the heirs of George W. Painter. They, therefore, being the owners of the real estate, have a right to have it partitioned among themselves.

The decree of the court below dismissing the bill is reversed, and the bill is reinstated with a procedendo.

Stewart, J., dissenting:

The will in this case contains an imperative and unconditioned direction for the sale of testator's real estate upon the death of the widow, to whom a life estate is given. With nothing to countervail or qualify this positive direction, the undoubted effect would be a conversion of the real estate into money. The contention is that the direction to sell, though imperative, has regard to a conversion for a limited special purpose, that is to say, for convenience of division and distribution between testator's two daughters, to whom the will gives the entire proceeds of

the sale; that, inasmuch as both daughters died without issue, one unmarried, during the widow's life tenancy, a sale is not required for the purpose of the will; in other words, that the direction to sell was but a means to a definite end, and, the object failing, the incident fell with it.

The doctrine of equitable conversion is undoubtedly subject to the qualification here expressed. Whether the present case falls within the qualification is the determining question here. A conversion directed by a testator is conversion only for the purposes of the will. When the purpose is limited and special, the conversion takes place only so far as it may be consistent with, and is related to, the purpose indicated. It is universally allowed that, when the purpose or object of the conversion fails, the estate remains unconverted to the extent of such failure. But what is meant by failure of purpose or failure of object? Both by text writers and in the adjudicated cases these terms are used interchangeably, and each may be regarded as the other's equivalent. We can perhaps turn to no authoritative definition of either, yet an examination of the cases will show a fixed and definite meaning which has never been departed from. This much may be safely affirmed,—that in every adjudication where failure of purpose or object has been allowed to defeat a positive direction to sell, failure was held to mean failure in the gift itself by lapse or other certain avoidance, the payment of which was the object and purpose of the direction. In no case has the qualification been applied where the gift had become effective by the vesting in the donee. In the leading and initial case of *Ackroyd v. Smithson*, 1 Bro. Ch. 503, the disposition of money to arise from the sale of the real estate was originally completed, but lapse by the death of two of the residuary legatees in the lifetime of the testator caused the failure of the disposition as to their two shares, which, although actually converted into money, resulted to the heir at law as undisposed real estate. This case established the rule, since invariably followed, in cases of lapsed gifts. It was in turn followed by cases where the qualification was applied to defeat the general rule, on the ground that the gift was illegal and therefore failed, as where the gift offended against the rule relating to perpetuities. It was applied, also, where the gift failed because it was made to depend on a contingency that never happened, and to cases where the direction was to sell for the purpose of paying debts, which the testator, subsequent to the making of his will, had himself paid. These cases define the limits of the qualification as fixed by English authorities, and nothing can be found in our 20 L.R.A. (N.S.)

own cases that gives countenance to any wider application. While the qualifying doctrine has frequently been recognized in our cases it has rarely happened in Pennsylvania that the qualification has been applied to defeat or avoid a positive direction to sell. *Luffberry's Appeal*, 125 Pa. 513, 17 Atl. 447, is an instance where it was applied, on the ground that a charitable gift for the payment of which the property directed to be sold was void, because the testator did not survive the statutory period required in such case. *Re Rudy*, 185 Pa. 359, 64 Am. St. Rep. 654, 39 Atl. 968, is another. This latter case is supposed to make for appellants' contention; but an examination will show that it is in no respect a divergence from the rule as we have stated it to be. In that case, following the direction to sell upon the death of the widow, was a gift of the proceeds of the sale to testator's two children, Sarah K. and George W., "if they be living, or the issue of such of them as may be deceased." George W. died in the lifetime of the testator. Sarah survived the testator, but died during the life tenancy leaving a husband and two children. The husband, as life tenant of the undivided fourth in the realty, petitioned for an order of sale and a division of the proceeds agreeably to the provisions of the will. The petition was denied because the admitted purpose of the direction to sell was to effect a convenient division and transmission of testator's property, and, inasmuch as the share of George W. had lapsed, he having died in the testator's lifetime, with the result that the entire estate passed to Sarah K., there was an entire failure of purpose, and the conversion was therefore avoided. The lapsing of the gift to George W. was the determining factor, as is fully indicated in the opinion of the court below, upon which the decree dismissing the petition was affirmed. Referring to the fact that the retention of the quality of the estate which the testator intended to transmute into another different quality may work a radical change in the interests of his beneficiaries, the learned judge says: "But that consideration can have no weight when we reflect that what has happened was outside of his contemplation altogether. He supposed that more than one person would share the residue. . . . How can we, with any show of propriety, speculate upon what, if he had foreseen the actual event, he would or would not have done either by way of preferring the heir on the one hand or the next of kin on the other? The share which is in controversy lapsed by operation of law. Its disposition cannot be referred to the intention of the testator, because he had no intention with regard to it." The case of *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186, also relied upon by the appellants, is not in point. The

ground upon which the decision there rests is that the direction to sell was not imperative and peremptory, and consequently did not work a conversion. Whatever other cases there are in Pennsylvania where a direction to sell has been avoided because of failure of purpose, it may confidently be affirmed that upon examination each will be found to rest upon the insufficiency of the will to make effective some particular disposition of all or part of testator's estate. In the present case there was no failure of the gift, and therefore no failure of purpose, notwithstanding the fact that before actual conversion of the land others had succeeded to the rights of the beneficiaries named in the will. Immediately upon the death of the testator the gift which was the proceeds of the sale vested in the two daughters. It comes to nothing that they never had actual enjoyment of it. It vested in them, and was theirs to do with as they pleased. As was said of a similar bequest in *Morrow v. Brenizer*, 2 Rawle, 185, it vested as money, not by the magic of a fiction, and contrary to the dictates of common sense, but by the express provisions in the will which impressed upon it that particular character. Here, as there, it requires a fiction to make it anything else. It is a mere assumption to say that the testator's purpose contemplated nothing but equality of division between his two daughters. Had they or either of them died leaving issue, it would hardly be pretended that the testator's provision did not have regard to division among such issue. Neither gift nor the incident of sale was made dependent upon their having issue. Admitting that the purpose of the direction was for distribution of the proceeds of sale, there is nothing in the will that gives support to the theory that no distribution was intended except in the event of the two daughters surviving the period of sale.

It is idle to contend that the decision in the present case does not mark a wide departure from long-established principles. The plain logic of it is that, notwithstanding a testator has directed in unequivocal and unconditional terms that his real estate be sold, this direction is to be wholly disregarded if, by reason of the happening of certain events after testator's death, a sale is unnecessary to effectuate a purpose not expressed in the will, but one which to the judicial mind seems to have been the purpose the testator had in view in directing the sale. If there be any authority for so conditioning the application of the doctrine of conversion, my attention has not been directed to it.

I dissent from the view expressed in the majority opinion in this case.

Brown and Potter, JJ., join in the dissent.
20 L.R.A. (N.S.)

FLORIDA SUPREME COURT.

SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.

ABRAHAM SIMON et al.

(— Fla. —, 47 So. 1001.)

Statute — title — subject.

1. Where the subject embraced in the body of an act is less comprehensive than, but is included within, the subject expressed in the title, the provision of the Constitution that each law shall embrace but one subject and matter properly connected therewith, which subject shall be expressed in the title, may not be violated, when the subject expressed in the title is not misleading.

Due process of law — corporate property — protection.

2. The provision of the state Constitution that no person shall be deprived of property without due process of law, and the provisions of the 14th Amendment of the Constitution of the United States as to property right, extends to the property held and

Headnotes by WHITFIELD, J.

Case Note. — *Constitutionality of legislation affecting the amount of liability or penalty for delay in delivery, or for destruction, of freight.*

For other cases on the question of the validity of state statutes imposing penalties upon common carriers for a failure to settle claims for delay or destruction of freight as an interference with interstate commerce, see the case note to *Morris v. Southern Exp. Co.* 15 L.R.A. (N.S.) 983.

It was held in *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.* 146 N. C. 167, 15 L.R.A. (N.S.) 985, 59 S. E. 667, that a statute imposing a penalty upon common carriers for a delay of ninety days after demand to adjust and pay a valid claim for damages to goods shipped from points without the state does not deny common carriers equal protection of the laws by arbitrarily discriminating against them.

As such act imposes a burden upon common carriers for a local default arising after the termination of transportation, it does not impose a burden on interstate commerce, and is a valid exercise of the state legislative power. *Ibid.*; *Raleigh Iron Works v. Southern R. Co.* 148 N. C. 469, 62 S. E. 595; *Frasier v. Charleston & W. C. R. Co.* 73 S. C. 140, 52 S. E. 904.

Neither does such act infringe the 14th Amendment to the United States Constitution. *Raleigh Iron Works v. Southern R. Co.* supra.

And, as Congress has not attempted to regulate such matters, the act does not violate the interstate commerce clause. *Bagg v. Wilmington, C. & A. R. Co.* 109 N. C. 279, 14 L.R.A. 596, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 569, 14 S. E. 79, followed and applied in *Currie v. Raleigh &*

used by corporations, since the beneficial ownership of such property is in natural persons, and the law forbids the doing by indirection that which is forbidden to be directly done.

State courts — due process of law — Federal laws.

3. The legality of classifications adopted for legislative regulation may be determined with reference to the due process of law provision of the state Constitution; but, as such determination involves a Federal question, the decisions of the Supreme Court of the United States control.

Constitutional law — class legislation — classification — validity.

4. Classifications adopted for legislative regulation should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary; and all similarly situated, or having similar legal duties and obligations in regard to the subject regulated, should be included in one class,—at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare.

Same — class legislation — railroads.

5. The legal duties of persons, firms, or corporations operating railroads may be of a peculiar nature and essentially different from the duties of other common carriers, and, as to such matters, they may be sepa-

ately classified for purposes of legislative regulation.

Same — railroads — unreasonable classification.

6. Where the subject of regulation, as in chapter 5424, p. 104, Acts of 1905, is payment for goods lost in transit by a common carrier, a subject as to which the legal duties of all common carriers are similar, and there appears to be no reasonable basis for imposing the burden of the regulation upon railroads alone, a statute making such regulation applicable to railroads only provides for an unreasonable classification, that, in effect, denies to those operating railroads due process of law and the equal protection of the laws, in violation of constitutional rights, and such statute is inoperative.

(December 8, 1908.)

ERROR to the Circuit Court for Jefferson County to review a judgment in plaintiffs' favor in an action brought to recover for sugar lost while being transported by defendant. Judgment modified.

The facts are stated in the opinion.

Mr. George P. Raney for plaintiff in error.

Mr. T. M. Puleston, for defendants in error:

As the statute classifies the subjects of its penalty, not as certain corporations or persons, but those conducting a certain

A. Air Line R. Co. 135 N. C. 535. 47 S. E. 654.

In *Lexington Grocery Co. v. Southern R. Co.* 136 N. C. 396, 48 S. E. 801 (an intrastate shipment), and *Reid v. Southern R. Co.* (N. C.) 63 S. E. 112 (an interstate shipment), it was held to be within the police power to impose a penalty upon a railway company for each day's delay in shipping, or neglect to ship, or refusal to receive freight for shipment.

But it was held in *Hickory Marble & Granite Co. v. Southern R. Co.* 147 N. C. 53, 60 S. E. 719, that a statute imposing a penalty for delaying freight, which seeks to deal with the entire transit from time of shipment until destination is reached, must be limited to intrastate traffic.

In *Branch v. Wilmington & W. R. Co.* 77 N. C. 347, a statute imposing a penalty of \$25 per day for a delay of local shipments of freight beyond five days was held a valid exercise of police power. It may be noted that this decision was rendered prior to the passage of the interstate commerce act.

As a failure of a carrier to notify a consignee of the arrival of freight is the neglect of a duty occurring after transportation of an interstate shipment is completed, an act imposing a penalty for such delay is not an interference therewith. *Hockfield v. Southern R. Co.* (N. C.) 64 S. E. 181.

A statute imposing a penalty upon a railroad company for delay in the delivery of 20 L.R.A. (N.S.)

freight does not deprive it of property without due process of law by reason of singling out railroad companies from all common carriers engaged in such business. *McCutchen v. Atlantic Coast Line R. Co.* 81 S. C. 71, 61 S. E. 1108. The court distinguishes this case from that of *Gulf, C. & S. F. R. Co. v. Ellis*, *infra*, in that the statute under consideration sought to enforce a public duty, while in the *Ellis* Case this was not so. The court, in the course of its opinion, further said: "The evil sought to be remedied was the frequent delay in the transportation of freight by railroads, and all such carriers are included within the statute. It is manifest that regulations which would be entirely reasonable with respect to transportation of freight by railroads would be unreasonable as applied to express companies and carriers by water, due to the difference in the conditions and instrumentalities. Express companies in this state employ the rapid service of passenger trains, and delays which would be regarded as reasonable and excusable with regard to ordinary freight would not be reasonable or excusable with respect to express. On the other hand, carriage by water is subject to many contingencies which do not affect carriage by railroads, and it would not be reasonable to subject both alike to the same regulations as to time."

Neither does such statute violate the equality clause of § 1, art. 14, of the United

business, to wit, operating a railroad, it is clearly not such a classification as would make the statute conflict with the state or United States Constitution.

Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *New York ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 52 Fla. 646, 12 L.R.A. (N.S.) 506, 41 So. 705; *Dell v. Marvin*, 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; *Bloxham v. Florida C. & P. R. Co.* 35 Fla. 625, 17 So. 902; *Miller v. Birmingham*, 151 Ala. 469, 44 So. 388; *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; *Covington & L. Turnp. Road Co. v. Sanford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; *State ex rel. Lamar v. Jacksonville Terminal*

Co. 41 Fla. 363, 27 So. 221; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 569, 50 L. ed. 604, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Western Turf. Asso. v. Greenburg* 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384.

Whitfield, J., delivered the opinion of the court:

In an action in the circuit court for Jefferson county to recover for sugar lost while being transported by the railroad company in March, 1907, the court, at the request of the plaintiff, gave the following instruction to the jury: "The court instructs you to find for the plaintiffs the value of the sugar, to wit, \$145, and allow them, in addition thereto, 25 per cent per annum on said sum from the date when plaintiffs' claim was filed with defendant." The defendant excepted thereto. Verdict and judgment were rendered for the plaintiffs in accordance with the instruction above quoted. A motion for new trial covering the charge was overruled. The defendant excepted and took writ of error.

The only question presented for determination is whether the statute authorizing the allowance of 25 per cent per annum in addition to the value of the goods is not un-

States Constitution or of the state Constitution. *Sanford v. Seaboard Air Line R. Co.* 79 S. C. 519, 61 S. E. 74.

A statute imposing a penalty upon railroad companies for a refusal to deliver freight upon payment or tender of freight charges, as shown by the bill of lading, is not repugnant to the Texas Constitution and Bill of Rights, by reason of being confined to railroads and excluding other common carriers. *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) 25 S. W. 435.

Neither does such statute discriminate by reason of not applying to all carriers under like circumstances and conditions; nor does it deprive a railroad company of property without due process of law. *Ibid.*

And such legislation is a valid exercise of the police power. *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 7 L.R.A. 478, 16 Am. St. Rep. 826, 12 S. W. 1001.

And such statute is justified under constitutional authority to "pass laws to correct abuses and prevent unjust discrimination and extortion in" freight and passenger rates. *Houston & T. C. R. Co. v. Harry*, 63 Tex. 256.

But such statute, when applied to interstate shipments originating in another state, is an unlawful interference with interstate commerce. *Houston, E. & W. T. R. Co. v. Peters*, 15 Tex. Civ. App. 515, 40 S. W. 429. *Contra, Hockfield v. Southern R. Co.* supra.

A statute providing that, in actions against railroad companies, *inter alia*, for damages to or overcharges on freight, when 20 L.R.A. (N.S.)

not exceeding \$50, which was not paid within thirty days after a verified claim was served upon the railroad company, an attorney's fee may be recovered by the claimant in addition to the actual damages and cost, was held, in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 660, 17 Sup. Ct. Rep. 255, reversing 87 Tex. 19, 26 S. W. 985, to deprive railroad companies of their property without due process of law by an arbitrary classification. The court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them when, for like delinquencies, it punishes no others. . . . Further, the penalty is imposed, not upon all corporations charged with the quasi public duty of transportation, but only upon those charged with a particular form of that duty. So, the classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties."

However, a statute was held constitutional in *Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653, which imposes an attorney fee in favor of one successfully prosecuting an action, for the failure of a common carrier safely to transport goods.

constitutional. because the classification adopted is such that it deprives the company of property without due process of law and denies to it the equal protection of the laws.

Chapter 5424, p. 104, Acts 1905, provides "that any person, firm, or corporation operating any railroad in this state" shall, within ninety days after the filing of a claim for the loss of, or damage to, any shipment, pay the claim, and, upon failure to so pay, "then they shall pay to said claimant the sum of 25 per cent per annum on the principal sum of said claim, and, when the said claimant shall bring suit and recover for his claim, . . . he shall be allowed in said suit the said 25 per cent per annum in addition to the principal sum of said claim, and have judgment therefor;" provided the recovery is greater than the sum that had been tendered in settlement of the claim before the expiration of the said ninety days.

The title to the chapter is "An Act Providing that Any Common Carrier Transporting Freight shall Pay Claims for a Loss or Damage to Any Shipment Received by Said Common Carrier within a Certain Time from the Filing by the Shipper of Said Claim with the Common Carrier, and when, under Certain Conditions, They Fail so to Pay Said Claim, the Said Common Carrier shall Pay Interest on the Said Claim at the Rate of 25 per cent per Annum, and, under Certain Conditions, shall be Allowed Judgment for the Said Interest in Addition to Said Claim."

While the title of the statute extends to the comprehensive class of "any common carrier," the body of the act covers only "any person, firm, or corporation operating any railroad in this state."

Where the body of a statute covers a subject affecting a class not covered by the title, the constitutional provision that "each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title," may be violated; but, where the class affected by the subject contained in the body of the act is not as broad as, but is included within, that expressed in the title, the quoted provision of the organic law may not be violated. The body of the act should not contain and operate upon a subject affecting a class that is broader and more comprehensive than the one expressed in the title of the act; but the subject covered by the body of the act may be more restricted, if included within the subject expressed in the title, when the title is not misleading. The title may be broader than the act; but the act should not be broader than the title. Otherwise, the subject embraced in the act may not be ex-

pressed in the title, as required by the provision of the organic law.

Common carriers of goods ordinarily include all persons, firms, or corporations operating a railroad; but persons, firms, or corporations operating a railroad do not ordinarily include all common carriers of goods. The class affected by the subject embraced in the statute is not as broad as, but is included within, that expressed in the title. See Lewis's Sutherland, Stat. Constr. § 124; 26 Am. & Eng. Enc. Law, 2d ed. p. 582; State ex rel. Moodie v. Bryan, 50 Fla. 293, 39 So. 929.

The legality of classifications adopted for legislative regulation may be determined with reference to the due process of law provision of the state Constitution; but, as such determination involves a Federal question, the decisions of the Supreme Court of the United States control.

The provision of the state Constitution that "no person shall . . . be deprived of . . . property without due process of law" extends to the property held and used by corporations, since the beneficial ownership of such property is in natural persons, and the law forbids the doing by indirection that which is forbidden to be directly done. Upon the same principle of law, the provisions of the 14th Amendment to the Constitution of the United States, relating to due process of law and the equal protection of the laws, being intended to be complete in its effectiveness, apply to the property held and used by corporations. State v. Atlantic Coast Line R. Co. (Fla.) 47 So. 969.

The requirements of due process of law relate to rights, as well as to remedies, and extend to all the powers of government. The guaranty of due process of law afforded by the Constitution forbids the arbitrary exercise of governmental power by the legislature.

An unreasonable classification of persons or corporations for the purposes of a legislative regulation that will be burdensome to those included in the class regulated, leaving others who are similarly conditioned with reference to the subject regulated free from the regulation and burden, may be an arbitrary exercise of governmental power.

The language of the statute in this case is explicit in limiting its operation to only one class of common carriers of goods, to wit, persons, firms, or corporations operating railroads; and the validity of the act with reference to the classification must be determined by a consideration of its plain and unambiguous terms. The subject regulated is not peculiar to railroads, but is equally and similarly applicable to all common carriers of goods, whether the service is ren-

dered by the use of railroads, boats, or other means.

If this statute is enforced, and two entirely similar shipments are made at the same time between the same points, one by means of a railroad and the other by means of a steamboat, and both shipments are lost in transit, the shipper may, under the circumstances stated in the act, recover from the operators of the railroad 25 per cent per annum in addition to the value of the goods lost by it; while, under exactly similar circumstances, only the value of the goods may be recovered from the operators of the steamboat. This is clearly an unjust discrimination against those operating the railroad, since there is apparently no real difference between the two common carriers with reference to the subject regulated, which is the payment of goods lost in transportation by a common carrier.

The more general use of railroads as common carriers of goods, the absence of steamboat or other competition in some portions of the state, and the amount of business done by railroads, do not appear to furnish a sufficient difference for a reasonable separate classification, including only those who operate railroads, for the purposes of the regulation here considered.

Authority to fix the rate of interest or additional compensation to be paid upon contractual or legal obligations because of delay in settlements is properly exercised by the lawmaking department of the state government; and the power of the legislature in the premises is limited only by applicable provisions of the state and Federal Constitutions. The organic law contains no express limitations upon the power of the legislature to fix compensatory rates; but this governmental function must be so exercised as not to violate any provision or principle of organic law for the protection of property rights. Like all other statutes imposing regulations, such laws should be based upon a just classification of persons and corporations with reference to the subject regulated, and such classification should not be purely arbitrary.

Great latitude should be accorded to the legislature in the exercise of its proper powers. *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272. But, if a statute clearly violates any limitation upon the lawmaking power contained in the state or the Federal Constitution, it is the duty of the courts to so announce when it is duly made to appear. *State ex rel. Loftin v. McMillan*, 55 Fla. 246, 45 So. 882.

Where persons or corporations engaged in the same character of business under practically the same legal duties and obligations are subjected to different restrictions or bur-

dens with reference to the duties and obligations of such business, and there are no legal or natural, practical, and reasonable differences of a material or substantial nature in the duties owed by them in the subject regulated, which justify a difference in regulations of the duties and obligations with reference to the business engaged in by all, the different restrictions or burdens imposed on some and not on all similarly conditioned may operate as a deprivation of property without due process of law and as a denial of the equal protection of the laws. See 8 Cyc. Law & Proc. p. 1073.

The constitutional guaranties of due process of law and of equal protection of the laws do not prevent the making of just and reasonable classifications of persons and corporations with reference to subjects for legislative regulation. See *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hayes v. Walker*, 54 Fla. 163, 44 So. 747.

In determining the legality of classifications for legislative regulation, the subject to be regulated, the character, extent, and purpose of the regulation, the classes of persons legally and naturally affected by the regulation, and the particular classification and regulation adopted by the statute, should be considered. Difficulty is often experienced in determining whether all those belonging to the classes legally and naturally affected by the regulation are included in the classification made, or whether any are illegally excluded from the particular classification adopted by the statute.

The classification adopted should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary; and all similarly situated, or having similar legal duties and obligations in regard to the subject regulated, should be included in one class,—at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare. See *McGehee, Due Process of Law*, 56 et seq.; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Re Van Horne* (N. J. Ch.) 70 Atl. 986; *Indianapolis Traction & Terminal Co. v. Kinney* (Ind.) 85 N. E. 954.

The legal duties of persons, firms, or corporations operating railroads may be of a peculiar nature, and essentially different from the duties of other persons, firms, or corporations, or even different from other common carriers, such, for example, as the fencing of tracks, the operation of trains, construction of tracks, maintenance and operation of terminals, depots, or crossings,

protection of employees, and the like. As to such matters peculiar to railroads, they may be separately classified for purposes of legislative regulation. See *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 535, 9 Sup. Ct. Rep. 207; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 919, 19 Sup. Ct. Rep. 609; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Calvert, Regulation of Commerce*, 163 et seq.; *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Yazoo & M. Valley R. Co. v. Harrington*, 85 Miss. 366, 37 So. 1016, 3 A. & E. Ann. Cas. 181, and cases cited; 8 Cyc. Law & Proc. p. 1069.

Because of the peculiar rights, duties, and responsibilities applicable to all common carriers of goods, their obligations to compensate for failure to properly discharge their contractual or legal duties to the public are regarded as being sufficiently different from others to justify a classification including only common carriers. See *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.* 146 N. C. 167, 15 L.R.A. (N.S.) 983, 59 S. E. 667.

There appears to be no real difference between the legal duty of those who operate railroads and those otherwise engaged as common carriers of goods to pay for goods lost or injured in transportation.

The rights, duties, and responsibilities of all common carriers of goods as to compensating for goods lost in transit are in law practically the same, whether the service is rendered by the use of a railroad, a boat, or other instrumentality. The loss of goods to the shipper is the same, and the usual remedies afforded by law are the same.

While courts will not needlessly inquire into the legislative motives or policy, and will not hold a statute to be inoperative because unconstitutional, unless it is clear beyond a reasonable doubt that the organic law has been violated, yet, where constitutional provisions have been violated in the enactment or in the provisions of a statute, it is the duty of the courts to so declare in a proper proceeding. The constitutional guaranty of due process of law requires that statutes shall operate upon all alike under practically similar conditions; and if a statute, in providing a regulation, arbitrarily or unjustly discriminates between persons or

corporations that are similarly conditioned with reference to the duties regulated, the organic provisions securing property rights may be violated. No greater burdens should be laid upon one than are laid upon others in the same calling and condition with reference to the subject regulated. See *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

In *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 52 Fla. 646, 12 L.R.A. (N.S.) 500, 41 So. 705, the subject of regulation pertained exclusively to railroads. In *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 363, 27 So. 221, the subject of regulation was appellate proceedings in cases subject to reasonable classification. In *Dell v. Marvin*, 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188, the subject of regulation could reasonably be applied to a peculiar class of cases. In *Bloxham v. Florida C. & P. R. Co.* 35 Fla. 625, 17 So. 902; *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176, the subject was taxation, and the peculiar character of railroad properties justified a separate classification of them. In other cases cited by counsel the subject of regulation was peculiar to the limited class covered by the regulation.

The subject of regulation in this case is not the operation of railroads, but it is the payment for goods lost in transportation by a particular kind of common carrier. The character and purpose of the regulation are fairly and naturally applicable to the legal duties and obligations of all common carriers of goods as a comprehensive class, though the advantages of the regulation may be more pronounced in regard to railroads, because of their more general use, or otherwise. The particular classification adopted by the statute is limited to those operating railroads. If the nature and the purpose of the regulation are naturally and logically applicable alike to the legal duties and obligations of all common carriers of goods, and there is no practical and essential difference between railroads and other common carriers of goods with reference to the subject of regulation, so as to make a separate classification of railroads for the purpose of such regulation reasonable and necessary for the public welfare, the classification made, being limited to railroads, may not be warranted by law.

The practical advantages possessed by those who operate railroads may enable them to more successfully defer the discharge of their legal duties and obligations with reference to compensation for goods lost in transit; but this difference is only in degree, and it does not now appear to be sufficient to justify a separate classification of

railroads for regulating duties that are applicable alike to all common carriers of goods. The more general use of railroads and the greater volume of business done by them do not appear to justify a separate classification of railroads for the purpose of regulating the payment for goods lost in transit. If so, then railroads could be classified for this purpose with reference to the amount of business done by each of them.

There appears to be no valid reason for making regulations for railroads materially different from those made for express companies, steamboats, and perhaps other common carriers of goods in a subject that is legally and naturally and universally applicable to all common carriers alike.

In the particulars where the legal duties of those who operate railroads essentially differ from other common carriers, they may be separately classified for legislative regulation without offending the due process of law and the equal protection of the laws clauses of the organic law; and in cases of doubt the legislative will should be enforced in deference to the lawmaking power. But, under the decisions of the Supreme Court of the United States, where there appears to be no just basis for a classification adopted, and the regulation imposes a material burden upon a part only of a comprehensive class with reference to legal duties and obligations that pertain in substantially the same manner to all of the class, the classification is not in accord with the requirements of the Constitution as to due process of law and the equal protection of the laws. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The principles announced in the last-cited case have not been rejected, but have been recognized or approved in many later cases. See *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *Dell v. Marvin*, 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; *Efland v. Southern R. Co.* 146 N. C. 135, 59 S. E. 355; *State v. Ide*, 35 Wash. 576, 67 L.R.A. 280, 102 Am. St. Rep. 914, 77 Pac. 961, 1 A. & E. Ann. Cas. 634; *Standard Oil Co. v. Spartanburg*, 68 S. C. 37, 44 S. E. 377. See also *Ex parte Sohncke*, 148 Cal. 262, 2 L.R.A.(N.S.) 813, 113 Am. 20 L.R.A.(N.S.)

St. Rep. 236, 82 Pac. 956, 7 A. & E. Ann. Cas. 475.

A common carrier has possession of goods it is transporting, has a right to compensation for the transportation and a lien therefor, and has other privileges and advantages with reference to the public service that warrant valid regulations affecting the legal duties and obligations of common carriers as a distinct and comprehensive class. Chapter 5618, p. 101, approved June 30, 1907, appears to be designed for this purpose.

In providing for the regulation of settlements for goods lost in transportation, a subject applicable alike to all common carriers of goods, chapter 5424, p. 104, Acts 1905, makes a separate classification of persons, firms, or corporations operating railroads that is not based upon legal or natural, practical, and reasonable differences in conditions with reference to the subject regulated. The regulation does not cover a subject in which the duties of those who operate railroads legally differ from other common carriers of goods, and there appears to be no natural, practical, and substantial difference between railroads and other common carriers of goods with reference to the duty to pay for goods lost in transit that is a reasonably sufficient basis for the classification.

In making this special classification for the purposes of this regulation the constitutional guaranties of due process of law and the equal protection of the laws are violated, and the statute for this reason must be held to be inoperative. Without a valid statute, 25 per cent per annum cannot be allowed on a recovery from a common carrier for goods lost in transit. As the statute is invalid, the instruction given at the request of the plaintiff was not authorized by law. For this reason the judgment is erroneous.

The loss of the goods by the carrier and their value being admitted, and the amount added to the verdict and judgment by virtue of the statute herein declared inoperative being capable of definite ascertainment, it is ordered that, if the defendants in error do, within thirty days, enter a remittitur for the amount so added under the statute, the judgment will be affirmed; otherwise, the judgment stands reversed. The costs on this writ of error will be taxed against the defendants in error.

Shackleford, Ch. J., and Cockrell, J., concur.

Taylor, P. J., and Hocker and Parkhill, JJ., concur in the opinion.

KENTUCKY COURT OF APPEALS.

LOUISVILLE RAILWAY COMPANY,
Appt.,
v.

WILLIAM JOHNSON, Admr., etc., of Alonzo Dow Johnson, Deceased.

(— Ky. —, 115 S. W. 207.)

Evidence — res gestæ — statements of motorman.

1. The statement of a motorman in charge of a car which killed a person on the track, immediately after the accident when he had reached the body of deceased, that he saw the man and tried to stop, but could not, is admissible in an action against the street car company to recover damages for the death as part of the *res gestæ*, when one controversy in the case is whether deceased was struck by the front of the car, or fell, or was pushed against the side of it.

Same — statement by conductor.

2. The statement by the conductor of a car which kills a man on the track, made when he and the motorman had reached deceased, admonishing the motorman to make no statements, is not admissible as *res gestæ*.

Case Note. — Does the fact that one was not a participant or actor in an accident or affray render his statements or exclamations inadmissible as *res gestæ*.

It will be noted that the question which is the subject of this annotation presupposes the existence of all the other conditions and elements essential to make the statements or exclamations in question admissible as *res gestæ*. Therefore, cases holding that certain statements or declarations were not admissible as *res gestæ*, for reasons other than that they were made by one not an actor or participant, although they were in fact made by such a person, are not strictly in point. Many of these cases, however, have been referred to for the purpose of distinguishing them and showing that they lend no support to any general doctrine excluding the declarations or exclamations of nonactors or participants, merely because they are such, from the rule as to *res gestæ*. The particular reason assigned for the exclusion of the statements or exclamations in these cases is referred to merely for the purpose of showing that the decisions do not rest on any such doctrine, and there is no intention to indicate any opinion as to the soundness or unsoundness of the particular reason assigned, or to gather the authorities as to any reason, except the single reason that the declarant was not a participant or actor.

The note is further confined to declarations or exclamations the admission of which as *res gestæ* would—to employ Professor Wigmore's phrase (3 Wigmore, Ev. § 1745)—involve "a real exception to the hearsay rule;" in other words, statements or declarations the testimonial value of which in

in an action against the street car company to recover damages for the death, since it does not tend to throw light upon any phase of the controversy.

Appeal — erroneous evidence — error.

3. The erroneous admission, in an action against a street car company to recover damages for the death of a person killed on the track, of evidence of a statement by the conductor at the time of the accident admonishing the motorman to make no statement, is not sufficiently prejudicial to require a reversal of a judgment against the company.

Evidence — res gestæ — statements of bystanders.

4. Statements of bystanders at the time of the killing of a person by a street car are not admissible in evidence as part of the *res gestæ* in an action to hold the street car company liable for the death.

Street railway — lookout.

5. A motorman in charge of a street car must keep a lookout for persons on the track, and for those so near thereto as to be in danger of being injured by the car.

(January 13, 1909.)

elucidating the issue depends upon their truth or falsity, and not upon the bare fact that they were uttered or made. To illustrate the distinction in its bearing upon the scope of the note: If the issue is whether a passenger jumped from the platform of a street car or was pushed therefrom by the conductor, and the case deals with the admissibility of the declarations or exclamations of a bystander tending to elucidate that point, it is within the scope of this note,—assuming that the decision turned upon the point that the declarations or exclamations were made by one who was not an actor or participant; whereas, if the issue is whether a passenger acted negligently in jumping from a car in apprehension of a threatened collision, and the case merely deals with the admissibility of declarations or exclamations of bystanders as tending to show the influences operating on the plaintiff's mind and the reasonableness of his conduct in the premises, it is not within the scope of the note. In the former case the statements or declarations are entirely irrelevant except as they tend to establish the existence of the facts which they affirm; in the latter case the very fact that they were made, irrespective of any question as to truth or falsity, may be relevant. The importance of the distinction, of which many other concrete illustrations might be given, in connection with the subject under discussion, is obvious.

Questions as to admissibility of statements or declarations of bystanders for the purpose of corroborating or impeaching the testimony of a witness, or their admissibility as tending to show an implied admission of a party in whose presence they were made, are, of course, beyond the scope of the note.

There is a sense in which it is clear that

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Fairleigh, Straus, & Fairleigh, for appellant:

The testimony as to statements made and conversation had with the motorman and conductor was incompetent and prejudicial.

Southern R. Co. v. Thurman, 121 Ky. 716, 2 L.R.A.(N.S.) 1108, 90 S. W. 240; Illinois C. R. Co. v. Watson, 117 Ky. 374, 78 S. W. 175; Reem v. St. Paul City R. Co. 77 Minn. 503, 80 N. W. 638, 778; Butler v. Manhattan R. Co. 143 N. Y. 417, 26 L.R.A. 46, 42 Am. St. Rep. 738, 38 N. E. 454.

The testimony as to the bystander's state-

ment was competent, and the trial court erred in excluding it.

Gulf, C. & S. F. R. Co. v. Tullis, 41 Tex. Civ. App. 219, 91 S. W. 317; State v. Kaiser, 124 Mo. 651, 28 S. W. 182; Gulf, C. & S. F. R. Co. v. Moore, 69 Tex. 157, 6 S. W. 631; State v. McLaughlin, 149 Mo. 19, 50 S. W. 315; Johnson v. St. Paul & W. Coal Co. 126 Wis. 492, 105 N. W. 1048; Louisville & N. R. Co. v. Carothers, 23 Ky. L. Rep. 1675, 65 S. W. 833, 66 S. W. 385; Louisville & C. Packet Co. v. Samuels, 22 Ky. L. Rep. 979, 59 S. W. 3.

It was error to instruct that it was the duty of the motorman in charge of the car to keep a lookout ahead for persons on the track, or so near thereto as to be in danger of being injured by the car.

Lexington R. Co. v. Vanladen, 32 Ky. L.

the person from whom the statements or exclamations proceed must be an actor or participant in the transaction to which they relate in order to make them admissible as *res gestæ*, since a statement or exclamation, by whomever made, to be admissible as *res gestæ*, must be so close in point of time to the event or transaction of which it speaks, and of so spontaneous and unreflective a character, that it may, in a figurative or rhetorical sense at least, be regarded as a part of that event or transaction, as distinguished from a mere narrative or account of it; and in the same sense, of course, the person by whom the statement or exclamation is uttered must be an actor or participant. The necessity that the declarant be an actor or participant in this sense does not involve any external requirements or conditions, but is inherent in the other conditions essential to the applicability of the rule as to *res gestæ*. It is obvious, however, that the doctrine of LOUISVILLE R. CO. v. JOHNSON and other cases hereinafter cited, that the person uttering the declarations or exclamations must be an actor in the occurrence in order to make them admissible as *res gestæ*, has reference to something quite different, and mean for practical purposes that the declarant must be either a victim of the act or event to which his declarations or exclamations relate, or have some part in bringing the same about, or at least some responsibility with respect to the matter; and it is in this sense that the question is treated in this note. But even this doctrine, of course, does not require that the declarant be a party to the action.

While, as subsequently shown, there is clear authority, not only in the earlier Kentucky cases, but also in cases from other jurisdictions in support of the doctrine of LOUISVILLE R. CO. v. JOHNSON, that exclamations or declarations, to be admissible as *res gestæ*, must proceed from an actor or participant in the practical sense just referred to, that doctrine appears to be against the clear weight of authority, when

the distinctions already referred to are observed and the cases in which the declarations or exclamations, though made by one not a participant or actor, were excluded, not for that reason, but for other reasons, are eliminated. So far as the latter cases are in point at all, they would seem to bear against, rather than in favor of, that doctrine, since, if the mere fact that the declarations or exclamations were made by one not an actor or participant were sufficient to exclude them as *res gestæ*, there would be no necessity for invoking any other ground to justify their exclusion; hence the implication, which in some of the cases is quite strong, that their exclusion could not have been justified on that ground alone.

It may, perhaps, be questioned whether the notion that the declarant must have been an actor or participant in the transaction in the practical sense intended in LOUISVILLE R. CO. v. JOHNSON, and other cases which support the doctrine of that case, did not grow out of a misapprehension of the language employed by the earlier cases and text writers to express the inherent necessity that the declarations must have been so close in point of time and of so spontaneous and unreflective a character as to make the declarant, as it were, an actor or participant in the transaction. There seems to be but little real reason for such a condition—at least as a universal condition—in any other sense.

Assuming that the subject-matter of declarations or exclamations was equally within the knowledge or observation of both persons, if there is any difference at all, it would seem that the apparently involuntary, spontaneous, and contemporaneous declarations or exclamations of a bystander who had just witnessed an accident or affray in which he had otherwise no part or connection would be entitled to greater credence than similar exclamations or declarations by one who was an actor or participant therein, and who might therefore have had an interest in giving a particular aspect or color to the event, because of the greater

Rep. 1047, 107 S. W. 740; Louisville & N. R. Co. v. McCombs, 21 Ky. L. Rep. 1238, 54 S. W. 179; McLain v. Esham, 17 B. Mon. 756; Breeding v. Taylor, 13 B. Mon. 487; Mayes v. Farish, 11 B. Mon. 41.

Messrs. Fred Forcht, Jr., and D. W. Baird also for appellant.

Messrs. Marion W. Ripy and Bennett H. Young, for appellee:

The evidence as to the motorman's and conductor's statements admitted as part of the *res gestæ* was clearly competent.

Louisville & N. R. Co. v. Shaw, 21 Ky. L. Rep. 1041, 53 S. W. 1048; Illinois C. R. Co. v. Houchins, 31 Ky. L. Rep. 95, 101 S. W. 924; Hermes v. Chicago & N. W. R. Co. 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; Butler v. Manhattan R. Co. 143 N. Y. 417, 26 L.R.A. 46, 42 Am. St. Rep. 738, 38 N. E.

454; Leahy v. Cars Ave. & F. G. R. Co. 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58; Keefer v. Pacific Mut. L. Ins. Co. 201 Pa. 448, 88 Am. St. Rep. 822, 51 Atl. 366; Louisville & N. R. Co. v. Molloy, 122 Ky. 219, 91 S. W. 688; Cincinnati, N. O. & T. P. R. Co. v. Evans, 33 Ky. L. Rep. 596, 110 S. W. 845.

To instruct the jury as to the motorman's duty of keeping a lookout was proper.

Greene v. Louisville R. Co. 119 Ky. 862, 84 S. W. 1154, 7 A. & E. Ann. Cas. 1126; Louisville R. Co. v. Boutellier, 33 Ky. L. Rep. 484, 110 S. W. 357.

Carroll, J., delivered the opinion of the court:

On the night of August 11, 1907, Alonzo Dow Johnson was struck and killed by one

probability in the former case than in the latter that the exclamations or declarations which were in appearance spontaneous and involuntary were in fact such, and not the products of rapid reflection and consideration. It may happen, of course, that the declarations or exclamations are of such a nature, or the facts which they affirm of such a character, that, coming from an actor or participant, they are properly regarded as spontaneous declarations as to a matter of fact and as such admissible as *res gestæ*, whereas, coming from a mere bystander, they would necessarily be mere expressions of opinion, and therefore inadmissible for that reason. To illustrate: If the question is whether one jumped from a platform of a car, or fell therefrom during a momentary attack of vertigo, his own spontaneous declaration or exclamation that he had a sudden attack of vertigo and fell would apparently relate to a matter of fact, and therefore perhaps be admissible as *res gestæ*, whereas a similar declaration by the third person would necessarily be a mere matter of opinion, and, for that reason, not admissible as *res gestæ*. It is apparent, therefore, that a decision excluding as *res gestæ* the declarations or exclamations of one not an actor or participant, even if the opinion concedes that similar declarations or exclamations proceeding from an actor or participant would have been admissible, is not necessarily an authority for the general doctrine that the mere fact that one was not a participant or actor will necessarily, under all circumstances, exclude his exclamations and declarations as *res gestæ*.

In spite, however, of the various possible ways of reconciling the exclusion of declarations or exclamations of nonactors under particular circumstances with their admission under other circumstances, there are quite a number of cases, especially from Arkansas, Kentucky, and Louisiana, which apparently sustain the doctrine of Louisville R. Co. v. JOHNSON, by which the mere fact that declarations or exclamations of

the kind that fall within the scope of this note as above outlined were made by one not an actor or participant will exclude them as *res gestæ* although all the other conditions necessary to make them admissible as such are present.

The Arkansas supreme court, in Flynn v. State, 43 Ark. 293, clearly sustains the doctrine of Louisville R. Co. v. JOHNSON, as applied to declarations or exclamations within the scope of this note. The court says: "It often becomes difficult to determine when declarations shall be received as part of the *res gestæ*. In cases like this words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself, and, if they are relevant, may be proved as any other fact without calling the party who uttered them. And, if the assaulted party should flee, as it is argued that Pruitt [the party alleged to have been assaulted] did here, what he says in his flight under the apprehension of immediate danger is admissible for the same reason. All declarations, however, must come from a participant in the transaction which the declarations are intended to explain or enlarge, to come within the rule. [Citing authorities.] The declarations of a bystander are not admissible in evidence." In this case a witness, to sustain the issue that the shots were fired by defendant at Pruitt, testified that, immediately after the shots were fired, he and some other persons ran back into a little alleyway to keep out of line of the shots, and that a man (identified as Pruitt) came up scared and excited and declared that defendant was shooting at him. These declarations were held inadmissible for the reason that it did not appear where Pruitt was at the time the shots were fired, or that he was a party, passive or otherwise, to the assault. The court said, in effect, that, if he had been connected with the main fact of the assault by testimony tending to show a participation in

of appellant's street cars just outside the city limits of Louisville, while on his way to the city in company with a large crowd of people who had been spending the evening at Fountain Ferry park, a pleasure resort near the city. For some reason, street-car traffic was delayed, and a number of persons started to walk into the city in the road over which the street cars run. They had gone some distance, when a large motor car carrying a trailer came along. These cars were crowded with people, and, according to the testimony of several witnesses, were running at an unusually high rate of speed at the time Johnson, who was in the road with the other people, was struck. The theory of appellee is that Johnson was struck by the front end or fender of the first car;

while appellant contends that he was walking on the roadway adjacent to the track and in no danger from the cars, but that, after the front end of the car had passed him in safety, he ran into, or fell or was pushed by one of his companions against, the side or middle of the motor car, causing him to fall between the motor car and the trail car attached to it. Each party introduced evidence in support of its theory of the accident, and, the jury having found against the appellant, it prosecutes this appeal from the judgment entered on the verdict.

It is complained that the court erred in admitting incompetent evidence and in rejecting competent evidence, in giving instructions to the jury, and that the verdict

or connection with it, his declarations would have been admissible as *res gestæ*; but that until linked with the affair in some way he was only a bystander, and what he said was hearsay.

Statements (apparently made by a bystander) with respect to a collision between a street car and a team, made after the car had left the scene and the injured person had been carried across the street, to a witness who had traveled several blocks to the scene of the accident after hearing of it, were held, in *Hot Springs Street R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245, not admissible as *res gestæ*, but only for the purpose of contradicting the testimony of the person by whom they were made. The ground of the decision does not appear, and, if the case stood alone, the decision might, perhaps, be accounted for on the ground that the statements were too remote in time.

Exclamations made by the wife of the defendant at the time of the affray: "Quit! Don't shoot;" whereupon defendant ordered her to let him alone and fired one more shot,—were held admissible in *Appleton v. State*, 61 Ark. 590, 33 S. W. 1060. The decision, however, was upon the ground that the declarations were not admitted to prove certain facts and to supply the place of other testimony, but only to explain and throw light upon the subsequent words and conduct of defendant; and therefore, for reasons given at the beginning of the note, the case is not in conflict with the *Flynn* Case, which dealt with another class of declarations.

The same is true of *St. Louis & S. F. R. Co. v. Murray*, 55 Ark. 248, 16 L.R.A. 787, 20 Am. St. Rep. 32, 18 S. W. 50, holding that the language and acts of other passengers before the plaintiff jumped from a train in apprehension of danger from a collision were admissible as showing the situation as it appeared to him at the time.

It is not so easy, however, to reconcile with the *Flynn* Case the decision in *Beale-Dovle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053, that the excited declarations of a child to his father while plain-

tiff was lying injured at the bottom of an elevator shaft and before he had been discovered, that a man had pushed the elevator door open and walked in, were admissible as *res gestæ* on the issue whether the door was left open. It is to be noted, however, that the declarations were objected to upon the grounds that they merely narrated a past incident, and that the child was of too tender an age to be competent as a witness, and there seems to have been no objection on the broad ground that the declarant was not an actor or participant in the transaction.

With the possible exception of *Louisville & N. R. Co. v. Carothers*, 23 Ky. L. Rep. 1675, 65 S. W. 833, 66 S. W. 385, which is commented upon in the opinion in *LOUISVILLE R. Co. v. JOHNSON*, the Kentucky cases seem quite consistently to support the doctrine of *LOUISVILLE R. Co. v. JOHNSON*. Thus, in *Bradshaw v. Com.* 10 Bush, 576, the court said: "Contemporaneous expressions or exclamations of the assailant, or of his coadjutors, or of the deceased, in cases of homicide, may be proved for the purpose of illustrating the character or quality of the act. . . . We are aware of no case in

which it was held that the cries or exclamations of persons in no way connected with the main fact were admissible as part of the *res gestæ*." The question in this case was whether the deceased was shot and then thrown from the platform of a car, or accidentally fell therefrom; and declarations of persons on the platform at the time, to the effect that defendant had shot the deceased and thrown him off, were held not admissible as *res gestæ*, for the reason that they did not proceed from either of the parties engaged in the affray, or from anyone acting in concert with either of them.

So, what is said by a participant during a transaction is a part of the *res gestæ*; but the statement of a bystander is not a part of the *res gestæ*. *French v. Com.* 7 Ky. L. Rep. 748.

And, in a prosecution for homicide, exclamations coming from mere bystanders, giving expression to the opinion that defendant ought to be hung, are not admis-

is not sustained by the evidence. Taking up these points in the order named, the first error assigned is in permitting W. H. Kahl and F. J. Owens to testify as to the statements made by the motorman and conductor in charge of the car immediately at the time of the accident. These witnesses said they were present in the crowd that was walking up the street when the accident occurred, and were among the first persons to go to Johnson after he was struck; that, about the same time they reached the body, the conductor and motorman came up, and they said to the motorman, "You have killed a man back there," and the motorman said, "Well, I seen the man, I seen his fate and all, and tried to make the stop, but couldn't make it," and the conductor said to the mo-

torman, "Keep your damned mouth still, and don't make any statement until you are called upon to make one." The conductor and motorman both denied that they made the statements attributed to them, which were admitted as evidence over the objection of appellant; the trial court holding that the testimony was competent as a part of the *res gestæ*. It is not seriously contended that these statements were not made close enough to the time of the accident to be admissible as a part of the *res gestæ*; but it is insisted that the statement of the motorman threw no light on the accident, and did not explain or illustrate how it occurred, but was merely a narrative of what had happened, while the remark attributed to the conductor is said to have no connection

sible as *res gestæ*. Kaelin v. Com. 84 Ky. 366, 1 S. W. 594.

And the fact that the person whose declarations were admitted as *res gestæ* was an actor or participant in the transaction was emphasized in Colley v. Com. 11 Ky. L. Rep. 346, 12 S. W. 132, the court remarking incidentally that the "statement of a bystander in no way acting in concert with either of the parties to a transaction does not constitute a part of the *res gestæ*."

So, in admitting as *res gestæ* exclamations of the deceased's son at the time of and immediately after the shot, "Don't shoot pap," the court remarked that the son evidently tried to prevent defendant from shooting his father, and "in that sense he was a participant, though a peaceable one, in what occurred." Kennedy v. Com. 30 Ky. L. Rep. 1063, 100 S. W. 242.

And in Louisville & N. R. Co. v. Molloy, 122 Ky. 219, 91 S. W. 686, holding declarations of the driver of a vehicle in which deceased was riding at the time he was killed in a collision with a train admissible as *res gestæ*, the court remarked that the declarant "was an actor in the transaction."

So, in Selby v. Com. 25 Ky. L. Rep. 2203, 80 S. W. 221, where it appeared that defendant, while intoxicated, was handling a pistol, and another member of the party grabbed it, whereupon it instantly fired killing a third member of the party, the court, in holding that the remark of such second party as he rose with the pistol in his hands, "Boys, you see that it was an accident," was admissible as *res gestæ*, said that the declarant was a party to the occurrence, and, upon that ground, distinguished the case from others holding that the declarations of bystanders are not admissible.

In O'Donnell v. Louisville Electric Light Co. 21 Ky. L. Rep. 1362, 55 S. W. 202, an action for the death of a lineman, it was said that the evidence of what the foreman said just at the time the decedent fell was admissible. It does not appear, however, what the foreman said, nor what his connection with the occurrence, if any, was, nor even that his declarations were admitted

on the ground that they were *res gestæ*.

Remarks made by persons who arrested plaintiff during and immediately after an assault upon him by employees of the carrier were held admissible in Sherley v. Billings, 8 Bush, 147, 8 Am. Rep. 451; but these remarks were apparently of the nature of verbal acts and therefore not of the class that fall within the scope of this note.

The exclamations of the wife and daughter of the person alleged to have been shot and wounded by defendant, immediately after the shooting, were held admissible as *res gestæ*, in Collins v. Com. 24 Ky. L. Rep. 884, 70 S. W. 187; but the nature of the exclamations does not appear.

There is an apparently irreconcilable conflict among the Louisiana decisions on the point, and the cases from that state will therefore be cited chronologically.

Exclamations, tending to identify accused charged with burglary, made by a person who was in the house at the time, and immediately after an assault upon another person, were held admissible as *res gestæ* in State v. Horton, 33 La. Ann. 289.

And exclamations of a child who had been left to mind a store while the proprietor momentarily stepped to the rear, "You are robbed," were held admissible as *res gestæ*, in State v. Moore, 38 La. Ann. 66, in a prosecution for entering a store with intent to steal, and for petty larceny.

And in State v. Corcoran, 38 La. Ann. 949, the court expressly said: "Nor is it true that only the acts and declarations of the actual participants in a combat or *melee* can be proved as part of the *res gestæ*. The *res gestæ* may also embrace the contemporaneous acts and declarations of others present." It was specifically held in this case that it was improper to exclude a question of the witness as to what he and another did at the time and place of the affray between defendant and decedent.

But in State v. Oliver, 39 La. Ann. 470, 2 So. 194, it was expressly declared that declarations by a bystander at a homicide are not admissible as *res gestæ*.

And again, in State v. Riley, 42 La. Ann. 995, 8 So. 469, the court said: "While the

whatever with the transaction, and, for this reason, was clearly incompetent.

No hard and fast rule can be laid down as to the admissibility of evidence as a part of the *res gesta*. The facts and circumstances of each case are different, and the courts have come to the point of adjudging this question as it is presented by the particular case under consideration. This is well illustrated in the numerous decisions that may be found on the subject, as is the further fact that the courts are not harmonious in their treatment of the principle upon which the admissibility of the evidence rests. In some jurisdictions a liberal practice prevails, while in others the ancient rule has not been relaxed. But, generally speaking, the rule in this state is

acts and sayings of participants in the transaction at the time of the homicide form part of the *res gesta*, and, as such, may be proved by third persons, the comments and criticisms of mere observers cannot be so proved, but such persons must be themselves called and examined."

In *State v. Desroches*, 48 La. Ann. 428, 19 So. 250, however, the court held that the impulsive exclamation of a little child while a man was in the house shooting her father, and in his presence: "That is (naming defendant)" was admissible, apparently as *res gesta*.

The syllabus by the court in *State v. Ramsey*, 48 La. Ann. 1407, 20 So. 904, apparently goes back to the doctrine of *State v. Riley*, being to the effect that the court affirms the rule that the statements of observers not participants in the act, the subject of investigation, are not admissible as *res gesta*. And it is said in the opinion: "The statement in this case was that of an observer. It announced his opinion. In either view his statement was inadmissible." The declaration referred to was that "Nick Ramsey had shot Jim Moffitt, and shot him down for nothing." In another part of the opinion, however, the court expressly said that it was not required to lay down the rule with respect to declarations of parties present at the time, not participants, for the reason that the declarations sought to be given in evidence announced the declarant's opinion of the guilt of the accused, and that it was not the narration merely of the fact itself, but the expression of an opinion as to its character.

Whatever may be thought of the last case, the doctrine of *State v. Riley* is clearly reaffirmed in *State v. Bellard*, 50 La. Ann. 594, 69 Am. St. Rep. 461, 23 So. 504. The court there said: "While there are expressions in some of the text writers that seem to favor the admissibility of the statements of third persons, as constituting *res gesta*, when accompanying the crime under investigation, it must be conceded the general rule is against the admissibility of such statements."

The same doctrine is reiterated in the recent *L.R.A. (N.S.)*

that declarations which would otherwise be incompetent to be admissible as a part of the *res gesta* must be made by one of the actors in the affair, contemporaneous in point of time with the principal transaction under consideration, be made at or near to the place of its occurrence, and illustrate or explain how or what caused it to happen; but, if a declaration is so far removed in point of time from the main fact under investigation as to make it a mere narrative of a transaction that has happened, or if it does not illustrate or explain the principal fact, or was made at some distance from the place of its occurrence, or by a bystander or third party, the declaration is not admissible as substantive evidence or as a part of the *res gesta*.

cent case of *State v. Howard*, 120 La. 311, 45 So. 260. In this case the court said: "The question is, Is the evidence offered that of the event speaking through the participants, or that of the observers speaking about the event? In the first case what was said can be introduced without calling those who said it; in the second case they must be called." It was accordingly held that declarations of a bystander made immediately after and within 100 feet from the scene of the affray were not admissible. The court remarked that the ruling in *State v. Corcoran*, supra, was not, when considered in connection with the facts, in conflict with this view; but does not otherwise undertake to reconcile the two cases.

While, as above shown, there is some apparent conflict among the Arkansas and Louisiana decisions, the three jurisdictions, Arkansas, Kentucky, and Louisiana, may fairly be said to be committed to the doctrine that the declarations or exclamations of a bystander, or one not a participant or actor in the transaction to which the declarations or exclamations relate, are not admissible as *res gesta*. There are also intimations to the same effect in Georgia, but the decisions as a whole in that state do not seem to support the doctrine.

Thus, in excluding, in *Macon & W. R. Co. v. Davis*, 27 Ga. 113, declarations made by one not an actor in the occurrence, a considerable time after the occurrence, the court said that it was extending the principle a great way to allow declarations made at any point of time, by one who is not a party nor an agent of a party, and who is living, and whose evidence may be procured by reasonable diligence.

In excluding, in *Marsh v. South Carolina R. Co.* 56 Ga. 274, the declarations of an employee of a railroad company who was a spectator of a fatal injury to another employee, as to its cause, the court said: "He [the declarant] was a mere spectator. His conduct was not to be illustrated, but the conduct of other persons. What he said immediately afterwards could give character to nothing that happened,—could neither qualify nor explain it."

Greenl. Ev. § 107; Elliott; Ev. § 542; Floyd v. Paducah R. & Light Co. 23 Ky. L. Rep. 1077, 64 S. W. 653; McLeod v. Gintner, 80 Ky. 399; Illinois C. R. Co. v. Houchins, 31 Ky. L. Rep. 93, 101 S. W. 924; Louisville & N. R. Co. v. Ellis, 97 Ky. 330, 30 S. W. 979; Louisville & N. R. Co. v. Molloy, 122 Ky. 219, 91 S. W. 685; Cincinnati, N. O. & T. P. R. Co. v. Evans, 33 Ky. L. Rep. 596, 110 S. W. 844; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; 24 Am. & Eng. Enc. Law, p. 660. Tested by this rule, we have no doubt that the statements of the motorman were competent as substantive evidence. It was coincident in time with the accident. It was made at the very place where the accident occurred, by one of the principal actors,

And in Carr v. State, 76 Ga. 593, in excluding the remark of a bystander that it was his impression that defendant was not trying to hurt the prosecutor, the court said, in effect, that what a disinterested bystander who witnesses a conflict going on between the defendant and the party assaulted may say during the heat of the engagement is not in evidence,—especially when the declarations amount to nothing more than the declarant's opinion as to the defendant's motive or purpose for engaging in and prosecuting the fight: such declarations from such a source and such a case not being part of the *res gestæ*. The effect of this language is considerably qualified, however, by the remark that, had the declarant been present and sworn in court, he would not have been allowed to testify to his impression, at least without stating the facts on which it was found—indicating that the declarations were excluded not so much because they proceeded from a third person as because they merely expressed his opinion.

But a remark by a bystander while a fight was going on, that he knew defendant had a knife, was held admissible as part of the *res gestæ* in Barrow v. State, 80 Ga. 191, 5 S. E. 64.

And declarations by the father of prosecutrix in a prosecution for assault with intent to rape, made at the time he discovered defendant and his daughter together, suggestive of voluntary intercourse, were held admissible as part of the *res gestæ*, in Merritt v. State, 107 Ga. 675, 34 S. E. 361.

And declarations of a child too young to testify as a witness, made immediately after a shot was heard: "Huss (referring to defendant), you have shot mamma,"—were held admissible as *res gestæ*, in Grant v. State, 124 Ga. 757, 53 S. E. 334.

And in Fuller v. State, 127 Ga. 47, 55 S. E. 1047, evidence was held admissible that, just after the shooting took place, a person present said to the accused that he had made a mistake and ought not to have shot the boy, to which accused replied that he had done wrong. The court does not

and illustrated or explained a material point in the case by showing that the deceased was struck by the front end of the motor car, and not thrown or pushed against the side of it. The remark of the conductor was not competent, because it did not illustrate or explain how or what caused the accident; but neither was it prejudicial. It was addressed to the motorman. The admonition of the conductor that the motorman ought not to make a statement until he was called on to make one could not have influenced the jury either one way or the other. It was an idle speech that had no connection with the case and did not throw any light on any phase of it. In Illinois C. R. Co. v. Watson, 117 Ky. 374, 78 S. W. 175, the court said: "The [trial]

say, however, whether the evidence was admissible as an implied admission by the accused, or as *res gestæ*.

Apparently some support for the doctrine of LOUISVILLE R. CO. v. JOHNSON is furnished by Morello v. People, 226 Ill. 388, 80 N. E. 903, where, in holding that what a brother of deceased said at the time he was disarmed and after deceased had been shot was not admissible as *res gestæ*, the court said that it did not appear that deceased and his brother were acting in concert, and that the activities of the brother seem to have been directed, not against the defendant, but against a third person.

But declarations of persons surrounding defendant at the time of the alleged assault, the nature of which does not appear, were held admissible as part of the *res gestæ*. Davids v. People, 192 Ill. 176, 61 N. E. 537.

And in Haines v. People, 138 Ill. App. 49, it is held that oral statements or declarations made either by defendant or by those standing by, referring to the commission of a crime, contemporaneously with or immediately before the commission of such crime and in any way connected with or explanatory thereof, are admissible as part of the *res gestæ*.

In Indianapolis Street R. Co. v. Whitaker, 160 Ind. 125, 66 N. E. 433, it was held that a witness should not be allowed to testify that, just after plaintiff had fallen, she (witness) stated to the conductor that it would not have occurred if he had stopped the car and let her off. The court said: "Utterances and exclamations of participants, or of persons acting in concert, made immediately before or after or in the execution of an act, which go to illustrate the character and quality of the act, are usually admissible on the ground that they are a part of the *res gestæ*, and provable like any other fact that elucidates the issue. The rule, however, seems to be exclusive, that, to render the expression or declaration of another admissible, the party making it must have been so related to the occurrence as to make his declaration a part of it. The test seems to be that, to render the utterance or declaration of another admissible,

court erred in allowing the plaintiff to prove by Fred Collins that he said to the engineer, about two minutes after the accident, 'It looks like that engine could have been stopped before that,' and that the engineer said, 'Well, damn it, that won't bring the boy back.' What Collins thought about the stopping of the engine was immaterial, and the answer of the engineer was a statement of no fact and was incompetent." If the remark made by the conductor was prejudicial, its admission over the objection of the defendant would be reversible error; but, although incompetent, the error is too trifling to justify a reversal upon this ground. In the Watson Case a reversal was had, not because the court admitted the evidence mentioned in the excerpt from the

opinion, but upon the ground that the verdict was palpably excessive.

The defendant company offered to prove by a witness that, immediately after the accident, he got off the car before it stopped and went to the place where the body of deceased was lying, and heard a man who was in the crowd surrounding the body, but whom he did not know, say, not in answer to any question, but as a spontaneous exclamation, "No wonder he was hurt, the way you fellows were wrestling." The trial judge refused to admit the statement heard by this witness, and of this ruling appellant complains. In support of the proposition that this evidence was competent, our attention is called to Louisville & N. R. Co. v. Carothers, 23 Ky. L. Rep. 1675, 65 S. W.

it must flow from one of the actors, or from one sustaining some relation to the transaction, and be so intimately connected with the litigated act as to be the act speaking of itself through the witness, and not the witness speaking the words of another, employed concerning the act." It is doubtful, perhaps, whether the court meant anything more than that the declarations or exclamations must be closely connected with the event, and of such a character as to be in a sense parts of the event itself, and the declarant in the same sense an actor or participant in the event.

Upon the authority of the last case, it was held in Indianapolis Street R. Co. v. Taylor, 164 Ind. 155, 72 N. E. 1045, the question being whether a car which struck plaintiff was run without lights, that it was not competent for witness to testify that, immediately after the accident, he talked to the motorman, "You ran without lights; you were running dark."

But it is declared in Surber v. State, 99 Ind. 71, that what a bystander says during an occurrence and in the presence of the actors is competent as part of the *res gestæ*.

In Kupersmidt v. Metropolitan Street R. Co. 47 Misc. 352, 94 N. Y. Supp. 17, the court, in excluding the declarations of a bystander addressed to the driver of the car, "Why don't you stop the car," the issue being whether plaintiff's injury was received immediately upon a collision between a street car and his wagon, or whether it resulted from the persistence of the motorman in pushing the wagon ahead, said that the declarant did no act which contributed to the accident, and was in no wise associated with its happening, but was a mere spectator.

There is a conflict among the Texas cases on the point, though it is clear that as a whole they are opposed to the doctrine which excludes as *res gestæ* the declarations or exclamations merely because they are made by one not an actor or participant.

In Felder v. State, 23 Tex. App. 477, 50 Am. Rep. 777, 5 S. W. 145, it was held that the declarations of a bystander just after a shooting, "There is the man that did

the shooting," not shown to have been overheard by the defendant, were not admissible, apparently on the broad ground that the declarations of bystanders not connected with the transaction are not admissible as *res gestæ*.

And a similar position was taken in Holt v. State, 9 Tex. App. 571, holding that the remarks or observations of a crowd present at the commission of an offense were not admissible as *res gestæ*.

And in Casey v. State, 50 Tex. Crim. Rep. 392, 97 S. W. 496, the court declared that declarations of bystanders are not admissible as part of the *res gestæ*, and accordingly excluded the declarations of a boy, the son of defendant, made within 15 feet of the place of the killing, and about one and one half minutes thereafter, and while he was greatly agitated and crying, that deceased snapped his pistol at his father twice, and that the latter then grabbed the gun away from him and shot deceased.

But in Gulf, C. & S. F. R. Co. v. Moore, 69 Tex. 157, 6 S. W. 631, the court said that declarations of a stranger are sometimes admissible; but they should be shown to be a part of the thing done, contemporaneous with it or so connected with it as to give it character.

And in Gulf, C. & S. F. R. Co. v. Coopwood (Tex. Civ. App.) 96 S. W. 102, it was held competent, in an action against the carrier for mistreatment of a passenger, to show that while the employees of defendant were carrying her to the baggage car a stranger walked up and told them not to put the lady in the baggage car, such declaration being admissible as part of the *res gestæ*. The court said: "This was a declaration or exclamation uttered by a bystander or person present at the time of the transaction to which it related, and calculated to throw light upon the purposes and intention of the parties to it, and was clearly admissible as a part of the *res gestæ*."

And in Missouri K. & P. R. Co. v. Vance (Tex. Civ. App.) 41 S. W. 167, upon the issue whether or not the train stopped before entering upon a crossing, it was held competent for one who lived near the crossing

833, 66 S. W. 385. That was an action brought by a passenger on a train to recover damages for personal injuries received in a collision, and it was said: "The fact that there were exclamations, outcries, or screams by the other passengers may be shown as part of the *res gestæ*; but the particulars of what they said do not seem to have been material to any issue in the case. The opinion in the Simpson Case was intended to go no further than this, and the opinion in this case is modified to this extent." In the Simpson Case (Louisville & N. R. Co. v. Simpson, 111 Ky. 754, 64 S. W. 733), which was an action to recover damages for injuries sustained in the same collision in which Carothers was injured, the court said: "It was also shown by some of the witnesses

that outcries and screams were made by passengers in this coach when the collision occurred, and that in the darkness great confusion reigned. None of this was objected to by appellant, so far as the record shows. The outcries and exclamations by others than appellee were not relevant matters to go to the jury, but we cannot reverse for errors not excepted to at the time." In Louisville & C. Packet Co. v. Samuels, 22 Ky. L. Rep. 979, 59 S. W. 3, also cited by counsel for appellant, which was an action for damages for personal injuries sustained by the breaking of a plank, the plaintiff was permitted to prove that, just before the plank broke, some one holloed, "Look out, that plank is cracked." In commenting on this evidence, the court held it to be incompe-

and in sight thereof, and who testified that the train did not stop, to state that when he saw it approaching the crossing without stopping, and before the collision, he remarked to his wife that the train had entered upon the crossing without stopping, and that there would be a collision there some day; as the statement is admissible as *res gestæ*.

Other Texas cases, some admitting and some excluding exclamations or declarations of third persons, are subsequently cited.

In State v. Robinson, 12 Wash. 491, 41 Pac. 884, the majority, though expressing some doubt upon the point, held that it was competent for witnesses, in connection with their testimony as to conditions surrounding the place of the homicide, to state what was said as to such surroundings by persons who were present at the time of the examination; or at least that there was no prejudicial error in admitting such testimony.

And the same court, in Dixon v. Northern P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 A. & E. Ann. Cas. 620, held that the trial court did not abuse its discretion in excluding statements made to a witness by a stranger at the time and place of an accident as to the manner of its occurrence, there being nothing to show that the stranger, who could not be found at the time of the trial, was in any way connected with the accident, or prompted by any circumstances to speak the truth in regard to it.

And in Sullivan v. Seattle Electric Co. (Wash.) 97 Pac. 1109, the court, in excluding declarations of a bystander upon the ground that they were mere matters of opinion, expressly refrained from deciding whether exclamations of a mere bystander, in no way connected with the principal transaction, are ever admissible as *res gestæ*.

Most of the cases that have held the declarations or exclamations of one not an actor or participant admissible as *res gestæ* have apparently assumed, without discussing the point, that the mere fact that they proceed from one not a participant or actor, is not in itself a sufficient reason for ex-
20 L.R.A. (N.S.)

cluding them as *res gestæ*. These cases will be subsequently cited. In the meantime, however, attention is called to a number of cases which have expressly declared that the exclamations and declarations of bystanders, not otherwise actors or participants in the transactions; may, if otherwise proper, be admissible as *res gestæ*.

Thus, the Missouri supreme court, in State v. Walker, 78 Mo. 386, expressly declares that exclamations made at the time of the occurrence or immediately thereafter, and immediately and naturally connected therewith, form part of the *res gestæ* whether such exclamations proceed from one of the participants to the transaction or from a bystander. In this case the exclamations of a bystander, directed to defendant in a prosecution for homicide, "Don't strike him (deceased) for you have shot him now," were held admissible as *res gestæ*. The same principle is expressly declared in State v. Gabriel, 88 Mo. 631.

And in State v. Elkins, 101 Mo. 344, 14 S. W. 116, the court, while excluding declarations because the declarant was not present at the time of the shooting, incidentally said that remarks of bystanders may be admissible as *res gestæ*.

So, exclamations of third persons present are as much a part of the *res gestæ* as those of the parties themselves. State v. McCourry, 128 N. C. 594, 38 S. E. 883 (admitting declarations in the immediate presence of accused at the very time of the fatal blow, charging him with having given it); Seawell v. Carolina C. R. Co. 133 N. C. 515, 45 S. E. 850 (admitting testimony of witness that, just after an assault upon plaintiff at a railroad station, he told plaintiff that he saw one of the defendant's employees throw an egg at him).

In Coll v. Easton Transit Co. 180 Pa. 618, 37 Atl. 89, holding that declarations made by a lineman in the employment of defendant who was riding upon the front platform of a car and jumped off and ran ahead before the deceased was struck, that he had run ahead to pull the deceased off the track and did not have time to do it, were admissible, they having been made immediately

tent, although its admission under the circumstances was not a reversible error. With the exception of the rather misleading statement in the Carothers Case, we know of no Kentucky case holding that the exclamations of bystanders are admissible. In *Stroud v. Com.* 14 Ky. L. Rep. 179, 19 S. W. 976, the court, in considering a question like this, said: "Whatever is said by a party to the occurrence or a coadjutor, in cases of homicide, is competent to show the character or quality of the act; but the statement of a bystander, who is in no way acting in concert with the parties to the transaction, does not constitute a part of the *res gestæ*." In *Bradshaw v. Com.* 10 Bush, 576, the court, in holding evidence of this character incompetent, said: "It is clearly hearsay,

and does not fall within any of the exceptions to the general rule that hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. . . . The cries or exclamations allowed to be proved did not proceed from either one of the parties engaged in the transaction, nor from anyone acting in concert with either of them. They do not constitute part of the *res gestæ*." To the same effect is *Kaelin v. Com.* 84 Ky. 354, 1 S. W. 594.

In our opinion, it would be a dangerous enlargement of the *res gestæ* rule to permit the declarations of bystanders in cases like this to be received as evidence. It would open wide the door for the admission of

after the accident and before the body of deceased had been removed from the track, the court said that it was not necessary that the declarant should have been in the employment of defendant for the purpose of running its cars, or for any purpose, in order to make the declarations admissible as part of the *res gestæ*, and, in this connection, quoted from Wharton on Evidence, 2d ed. § 259, to the effect that *res gestæ* "may consist of speeches of anyone concerned, whether participant or bystander; . . . their sole distinguishing feature is that they should be necessary incidents of the litigated act."

So, sudden exclamations and outbursts of bystanders, as well as of participants, are parts of the *res gestæ*, and as such may be properly brought forward in evidence whenever an occurrence producing them is undergoing judicial investigation. *O'Rourke v. Citizens' Street R. Co.* 103 Tenn. 124, 46 L.R.A. 614, 76 Am. St. Rep. 639, 52 S. W. 872, admitting cries of children offered to corroborate testimony of a passenger's violent expulsion from a car.

While, as already stated, and as subsequently shown in detail, there are many cases excluding exclamations or declarations of one not an actor or participant as *res gestæ*, which lend no support to the general doctrine that declarations or exclamations, to be admissible as *res gestæ*, must proceed from an actor or participant, it, of course, is true that all the cases which have held that declarations or exclamations of the class that fall within the scope of this note were admissible, although made or uttered by one not otherwise a participant or actor in the transaction, are opposed to that doctrine. In addition to the cases already cited to the same effect, declarations or exclamations, though proceeding from one not an actor or participant, were held admissible in the following cases, under the circumstances indicated, the list of cases being by no means exhaustive:

Upon an issue whether insured committed suicide, declaration of a person, since deceased, made while coming out of the room where deceased was found, to the effect

that a man had shot himself. *Newton v. Mutual Ben. L. Ins. Co.* 2 Dill. 154, Fed. Cas. No. 10,191, reversed in 22 Wall. 32, 22 L. ed. 793, on another ground.

Exclamation of a bystander, after defendant had shot deceased and the rest of the crowd had run off a few steps, "Come back, it was an accident." *Young v. State.* 149 Ala. 16, 43 So. 100.

Declarations of the mother of the plaintiff (an infant), within thirty or sixty seconds after the accident, that it was all her fault. *Atlantic Coast Line R. Co. v. Crosby.* 53 Fla. 400, 43 So. 318. (The mother may, however, have been regarded as an actor or participant.)

Declarations of woman found with deceased and defendant immediately after she had cried out to the witness to come out that defendant had knocked deceased in the head. The declarations were held admissible both as an implied admission by defendant and as *res gestæ*. *McUin v. United States.* 17 App. D. C. 323.

Exclamations addressed to defendant by his mother, immediately after the occurrence, "Now see what you have done." *People v. McArron.* 121 Mich. 1, 79 N. W. 944.

A remark made by defendant's wife in his presence shortly after his affray with deceased: "Joe, don't let George go at the old man any more." *People v. Hossler.* 135 Mich. 384, 97 N. W. 754.

Acts and outcries of other passengers and bystanders at the time a passenger jumped from a street car in apprehension of a collision with a train, not only to show reasonable apprehension of danger, but also as descriptive of the occurrence and as part of *res gestæ*. *Kleiber v. People's R. Co.* 107 Mo. 240, 14 L.R.A. 613, 17 S. W. 946.

Declarations of third persons, made at the time they heard a revolver fired, although they were in the house at some distance from the occurrence. *State v. Sexton.* 147 Mo. 89, 48 S. W. 452.

The remark of the proprietor of the saloon in which the homicide occurred, to an officer, at the same time pointing out defendant, "There is the man that did it."

reckless or thoughtless or ill-considered exclamations, and at the same time would put it out of the power of the party whose interest they adversely affected to investigate, impeach, contradict, or explain the situation, temperament, character, or position of the declarant. To permit a person to testify that he heard a bystander state how or what caused an accident would sanction the admissibility of hearsay evidence of the most unreliable and unsatisfactory character. The declarations of agents and servants of a corporation, for whose acts the principal is responsible, when brought within the *res gestæ* rule, are permitted to be introduced for the purpose of fixing liability upon the principal, and upon these statements, if they are sufficient to sustain a verdict, the jury may

rest their finding. And so the declarations of a party injured, if brought within this rule, are competent in his behalf; but to these actors in the occurrence the admissibility of evidence as a part of the *res gestæ* should, except in rare cases, be limited. The bystander in this case, who made the remark attempted to be introduced as evidence, was not a party to the transaction. He had no connection with it. The declaration was merely an expression of opinion on the part of the declarant. It did not describe anything he saw or did. If he had been introduced as a witness, it would not have been competent to have permitted him to make the statements attributed to him, and its inherent incompetency would have been aggravated by permitting another person to

State v. Duncan, 116 Mo. 288, 22 S. W. 689.

Exclamations by a bystander while assailants were yet in sight and just leaving their victim. "Hurry up; they have about killed this man." State v. Kaiser, 124 Mo. 651, 28 S. W. 182.

Exclamations of persons with deceased just before the shooting, "There he (referring to defendant) comes with a gun." State v. Biggerstaff, 17 Mont. 510, 43 Pac. 709.

Remarks by bystanders at the time of an affray. Castner v. Sliker, 33 N. J. L. 97.

Upon the question of negligence of an engineer killed in an attempt to run his engine over a trestle at the time of a flood, exclamations of a bystander just before the trestle gave way. "Jake is safe." Harrill v. South Carolina & G. Extension R. Co. 132 N. C. 655, 44 S. E. 109.

A statement addressed to deceased by a bystander just after defendant, following some words with deceased, had passed around to the other side of a wagon, and immediately before he returned and shot deceased. "You had better keep your eyes open. That man is going to hurt you." Baysinger v. Territory, 15 Okla. 386, 82 Pac. 728.

In action for injury to passenger struck by a car, held competent for a bystander to testify that he "hollered" when he saw the imminence of the danger, and his reasons therefor. Oliver v. Columbia, L. & N. R. Co. 65 S. C. 1, 43 S. E. 307.

Upon issue as to speed of train just before it was derailed, exclamations of fellow passengers as to short period consumed in passing between two points. Missouri P. R. Co. v. Collier, 62 Tex. 320.

Statements of persons present at the time of an accident, to an employee, as to the defective condition of an appliance which he was using. St. Louis Southwestern R. Co. v. Schuler (Tex. Civ. App.) 102 S. W. 783.

Upon issue as to insulting conduct of negro employee of carrier to female passenger while in a station, the exclamation of her small children, "Mamma, let's get out 20 L.R.A. (N.S.)

of here." Gulf, C. & S. F. R. Co. v. Luther, 40 Tex. Civ. App. 517, 90 S. W. 44.

Exclamations of conductor a few seconds after an accident in which a brakeman was killed, to another brakeman, "My God! Go back and see if you can find Leach. The bridge knocked him off." (The conductor, may, however, have been regarded as an actor or participant in the transaction, in view of the fact that he had ordered the injured brakeman to go on top of the car.) Leach v. Oregon Short Line R. Co. 29 Utah, 285, 110 Am. St. Rep. 708, 81 Pac. 90.

The act of an eyewitness in pointing out to another the exact place of an accident, a few minutes after it occurred. Reed v. Madison, 85 Wis. 667, 56 N. W. 182.

An exclamation by one who, so far as appears, was not an actor or participant, "The hook hit him," when a boy fell through the hatch of a vessel. Johnson v. St. Paul & W. Coal Co. 126 Wis. 492, 105 N. W. 1048.

It will be noted that the cases next cited, while excluding declarations or exclamations of third persons under the particular circumstances, either admit, or expressly refrain from denying, that declarations or exclamations may be admissible as *res gestæ* under some circumstances though they proceed from one not an actor or participant.

Thus, Benjamin v. State, 148 Ala. 671, 41 So. 739, while conceding that acts and declarations of third persons are often admissible, held that cries of "Murder, murder," by persons who pursued defendant after an affray were not admissible as *res gestæ*.

So, in Nashville, C. & St. L. R. Co. v. Moore, 148 Ala. 63, 41 So. 984, the court, while remarking that there were authorities holding that, under some circumstances, exclamations of bystanders are admissible as *res gestæ*, said that requests made by passengers to a conductor to remove another passenger did not come within the rule.

So, Ganaway v. Salt Lake Dramatic Assn. 17 Utah, 37, 53 Pac. 830, while holding that the exclamation of a disinterested onlooker amounting to no more than a mere opinion upon the very question to be decided was incompetent, cited Wharton on Evidence, § 200, to the effect that ex-

repeat it. Third parties are permitted to testify concerning what they saw, or what they did; but their declarations are not admissible. Although there is authority from other courts holding a contrary view, the cases in which declarations of bystanders have been admitted will generally be found to be actions against common carriers by passengers to recover damages for injuries received in jumping off of cars in anticipation of a collision or other imminent peril. In this class of cases the outcries and exclamations of other persons are properly admitted to show the danger that confronted the passengers, and that they acted with reasonable prudence in escaping. *Kleiber v. People's R. Co.* 107 Mo. 240, 14 L.R.A. 613, 17 S. W. 946; *Twomley v. Central Park, N. & E. River R. Co.* 69 N. Y. 158, 25 Am. Rep. 163; *St. Louis & S. F. R. Co. v. Murray*, 55 Ark. 248, 16 L.R.A. 787, 29 Am. St. Rep. 32, 18 S. W. 50; 24 Am. & Eng. Enc. Law, p. 684; *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Indianapolis Street*

R. Co. v. Whitaker, 160 Ind. 125, 66 N. E. 433. But, whatever may be the practice in other jurisdictions, we are satisfied with the soundness of the rule laid down by this court excluding the declarations or statements of bystanders, and are not disposed to depart from it in cases similar to the one under consideration.

The next complaint is that the court erred in saying to the jury, as a part of instruction No. 1, that it was the duty of the motorman "to keep a lookout ahead for persons on the track, or so near thereto as to be in danger of being injured by the car." There is no merit in this criticism. It is the duty of a motorman, from the time and immediately before the car starts, until it comes to a stop, to be constantly on the lookout for persons and vehicles on the track, or so near thereto as to be in danger of being injured by the car; and this duty has been repeatedly declared by this court.

There was sufficient evidence to support the verdict, and the judgment is affirmed.

clamations of bystanders, if instinctive, are admissible as *res gestæ*.

In *Kehan v. Washington R. & Electric Co.* 28 App. D. C. 108, the majority of the court, while stating that they were not prepared to say that there may not be instances in which immediate exclamations by bystanders, or remarks addressed to an actor in the occurrence, are admissible as part of the *res gestæ*, held that, upon the question whether a car had stopped before the plaintiff had attempted to alight, the statements of her brother at the time she was being picked up, to the effect that the car had not stopped, were not involuntary exclamations made during the occurrence, but were mere expressions of opinion relating to a past occurrence, and so not admissible as *res gestæ*. *McComas, J.*, was of the opinion that the statements were admissible as part of the *res gestæ* whether the plaintiff's brother be regarded as an actor or merely a bystander. The majority opinion emphasizes the fact that he was not a party to the actual occurrence.

So, while the declarations or exclamations which were held in the following cases not to be admissible as *res gestæ* were in fact made by persons who were not actors or participants, their exclusion does not appear to rest upon that ground, but upon other grounds, which in some instances are expressly indicated and in others may be inferred from the nature of the declarations or the circumstances under which they were uttered. (The list of cases does not purport to be exhaustive.)

In an action for death of a person struck by a train, remarks by person who saw the train on the morning in question, about its running fast, it not being shown that the remarks were made contemporaneously with the passing of the train. *Norfolk & W. R. Co. v. Ashcraft*, 48 Ala. 15; *Indianapolis Street*

Co. v. Gesswine, 75 C. C. A. 214, 144 Fed. 56.

Statement, by a bystander to the captain immediately after the drowning of a member of the crew, intimating his opinion that the failure to save the man was due to the fault or negligence of the crew. *Puget Sound Nav. Co. v. Lavender*, 160 Fed. 851. (Not admissible.)

Remark of wife of decedent, addressed to her husband some time after he was shot, to the effect that he said he would kill defendant. *Dean v. State*, 105 Ala. 21, 17 So. 28.

Statement of "transfer agent" from two to five minutes after an accident that "he (the conductor) would get in trouble," and "that he started without my authority." *Metropolitan R. Co. v. Collins*, 1 App. D. C. 383.

Declarations of a bystander who witnessed an accident to a boy who jumped from a street car while in motion, made to the conductor about one minute after the accident and while the boy was being carried to the sidewalk. The reason assigned was that the declarations were in the nature of history, and were not a part of the incident itself. *Chicago City R. Co. v. White*, 110 Ill. App. 23.

Declarations of driver of vehicle in which plaintiff was riding at the time of collision with a street car,—not shown to have been made at or immediately after the accident. *Edwards v. Foote*, 129 Mich. 121, 88 N. W. 404.

Statement by defendant's wife after the arrival of the police on the scene, that the victim of the homicide had a knife in his hand which she had seen during the transaction. The decision was on the ground that the statement was the narration of a

past transaction. *State v. Gallehugh*, 89 Minn. 212, 94 N. W. 723.

Exclamation of a child just after the affray and while deceased was lying where he had fallen, "Mr. Long (deceased) had a knife in his hand." *State v. Brown*, 64 Mo. 367.

Cries of "murder" by a woman upon seeing a crowd gathering around a street car after it had struck a boy. *Lenhey v. Cass Ave. & F. G. R. Co.* 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58.

Remarks by miner three quarters of an hour after injury to another miner by the falling of the roof of the mine, abusing the pit boss and charging him with failure to provide props. *Wojtylak v. Kansas & T. Coal Co.* 188 Mo. 260, 87 S. W. 506.

Conversation by bystanders after an accident at a railroad crossing about the absence of a flagman, and declarations by one of them "that he did not attend to his business good." So far as appears the declarant in this case did not witness the accident and that was perhaps the ground for the exclusion. *Felska v. New York C. & H. R. R. Co.* 152 N. Y. 339, 46 N. E. 613.

Remark of bystander after plaintiff had been helped out of the basement of defendant's building, addressed to the defendant's employee: "That is a very careless way to leave that (referring to the trapdoor), young fellow." The decision was apparently upon the ground that the remark was not made until after the accident, and was merely an expression of opinion. *Kirkpatrick v. Briggs*, 78 Hun. 518, 29 N. Y. Supp. 532.

Statements of unknown man to conductor before latter ejected plaintiff, that he had no right to eject him, and that he (declarant) saw plaintiff get off one car and take the next car that passed. The court said that the statement was not that of a third person characterizing an act occurring at the time, but a mere statement of an alleged past fact. *Woods v. Buffalo R. Co.* 35 App. Div. 203, 54 N. Y. Supp. 735.

Exclamations of one sitting at a window at the time of an accident in which a street car passenger was fatally injured, "Oh! I have seen a woman thrown from a car." *Ehrhard v. Metropolitan Street R. Co.* 69 App. Div. 124, 74 N. Y. Supp. 551.

Statements as to origin of fire, made fifteen or twenty minutes after it started, by persons unknown to witness. *Lyman v. Southern R. Co.* 132 N. C. 721, 44 S. E. 550.

Declarations of person driving the vehicle in which the injured person was riding at the time it was struck by a railroad train. The decision seems to be upon the ground that the declarations were not intimately enough connected with the accident. *Gosa v. Southern R. Co.* 67 S. C. 347, 45 S. E. 810.

Declarations of the companion of one fatally injured while attempting to board a moving train, that no one was to blame but themselves. The decision was on the ground that the declarations were not shown to have been so intimately connected with

the transaction as to be part of the *res gestæ* if otherwise admissible for that purpose. *Galveston H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

Upon an issue whether insured caused his property to be set on fire, declarations by bystanders at the time of the fire about arresting all of the insured's clerks for complicity in the fire. The court said that the declarants were not shown to have been so connected with the transaction or with the persons whose interests were affected as to make them admissible as *res gestæ*. *Dwyer v. Continental Ins. Co.* 63 Tex. 354.

Declarations of bystanders at a fire as to the origin of the fire. *Texas & N. O. R. Co. v. Bellar (Tex. Civ. App.)* 112 S. W. 323.

Statements made an hour or two after railroad collision by railroad men and others, as to cause of accident,—too remote. *Missouri P. R. Co. v. Ivy*, 71 Tex. 409, 1 L.R.A. 500, 10 Am. St. Rep. 758, 9 S. W. 346.

Remark of a passenger to a companion at the time of the alleged misconduct of the conductor toward another passenger, to the effect that his conduct was uncalled for and rude. *Eddy v. Lowry (Tex. Civ. App.)* 24 S. W. 1076.

Declarations by bystanders at the time of and subsequent to homicide, as to the sanity of defendant. *Carlisle v. State (Tex. Crim. App.)* 56 S. W. 365.

Remarks of bystanders, not heard by participants in a difficulty. *Baker v. State*, 45 Tex. Crim. Rep. 392, 77 S. W. 618.

Remark of bystander to the effect that defendant shot deceased. *Ex parte Kennedy (Tex. Crim. App.)* 57 S. W. 648.

Cry of cab driver, "There he goes," referring to the defendant, when an officer went to make the arrest. *Evers v. State*, 31 Tex. Crim. Rep. 318, 18 L.R.A. 421, 37 Am. St. Rep. 811, 20 S. W. 744.

Upon the question whether car was moving when plaintiff attempted to board it, or started just as she put her foot on the step, conversation between stranger and motorman. The decision was apparently on the ground that there was too long a delay between the incident and the declarations. *Blue Ridge Light & P. Co. v. Price*, 108 Va. 652, 62 S. E. 938.

The decisions in the cases just cited, having been rendered upon grounds other than that the declarant was a nonactor or non-participant, if they bear either way, must be regarded as opposing rather than supporting the doctrine of *LOUISVILLE R. CO. v. JOHNSON*.

NORTH CAROLINA SUPREME COURT.

T. M. SMALL et al., Appts.,
v.

COUNCILMEN OF EDENTON.

(146 N. C. 527, 60 S. E. 413.)

Municipal ordinance — reasonableness — removal of awnings.

1. A municipal ordinance requiring the

removal of stationary awnings from over its sidewalks is reasonable.

Trial—reasonableness of ordinance—court.

2. The court, and not the jury, must determine the question of the reasonableness of a municipal ordinance requiring the removal of stationary awnings from over the sidewalks where the question of the good faith of the municipal authorities is not involved.

Highway—awning—removal—owner.

3. The power of a municipal corporation to remove stationary awnings from over its sidewalks is not dependent upon their being found to be nuisances, but upon the power of the municipality to make such a requirement under its authority over its streets, and upon the reasonableness of the requirement.

(February 19, 1908.)

APPEAL by plaintiffs from a judgment of the Superior Court for Chowan County in defendant's favor in a suit to enjoin the removal, under a municipal ordinance, of a certain stationary awning extending over the sidewalk. Affirmed.

The facts are stated in the opinion.

Messrs. C. S. Vann, Aydlett & Ehringhaus, and W. M. Bond for appellants.

Messrs. Pruden & Pruden and Shepherd & Shepherd for appellee.

Case Note.—*Puicer of municipal corporation to compel removal of awnings or signs encroaching on streets.*

As shown by the cases cited in the notes to *Augusta v. Burum*, 26 L.R.A. 340, and *Hagerstown v. Witmer*, 39 L.R.A. 667, the power of a municipal corporation to require the removal of awnings which encroach upon a street or sidewalk is generally sustained, except in Missouri, where it is held that it is necessary, in order to justify the removal of an awning, to show that it is a nuisance *per se*.

It was held in *Augusta v. Burum*, 93 Ga. 68, 26 L.R.A. 340, 19 S. E. 320, that a municipal corporation possesses power to require the removal of wooden awnings maintained over the city streets.

But it was further held that an awning erected under an express or implied license from the municipality could not be removed until such time as the licensee had realized in the way of use and enjoyment a fair return from his outlay in the construction thereof. *Ibid*.

But the municipality may require the removal of a wooden awning erected under such a license after its use has been enjoyed from nine to twenty years. *Ibid*.

In *Hilbard v. Chicago*, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256, affirming 59 Ill. App. 470, the power of a municipality to require the removal of an awning was upheld notwithstanding it was erected with

Clark, Ch. J., delivered the opinion of the court:

The councilmen of the town of Edenton, after full notice and full public discussion, and after hearing petitions for and against it, adopted the following ordinance: "All stationary awnings (that is, awnings with posts resting on the sidewalks) in the town of Edenton be removed by February 1, 1907. Any person, firm, or corporation owning such awning who fails to comply with said ordinance shall be fined \$50, and the constable of Edenton shall remove such awning." The plaintiffs were a firm who had a stationary awning in front of their store extending over the sidewalk. This is an action seeking a perpetual injunction against the town to restrain it from removing plaintiffs' awning under the authority of said ordinance.

It was contended here that the posts upon which the awning rested were placed beyond the edge of the sidewalk; but the testimony of Mr. Bond, one of the plaintiffs, was that the sidewalk was 15 or 16 feet wide, and that the posts were set in the ground 14 feet from the wall of the plaintiffs' store, and it is admitted in the record by plaintiffs that Mr. Bond's testimony on this matter is correct. The plaintiffs asked no instructions based on a contrary state of facts. Besides, it would not be a material circumstance, for the ordinance is clearly

the permission of the municipality at an expense of \$3,000, such license being revocable at any time.

An ordinance declaring a swinging sign or stationary awning across the whole or any portion of a sidewalk within designated limits of a city to be a nuisance is not open to the objection of being unreasonable, special in its character, and discriminatory in its effect, because limited to a portion only of a city, such restriction being necessary for the public convenience in a crowded city. *Ivins v. Trenton*, 68 N. J. L. 501, 53 Atl. 202, affirmed without opinion in 69 N. J. L. 451, 55 Atl. 1132.

Such ordinance is justified under authority to prevent or regulate the erection of any signpost or projection in, over, or upon any street, and to remove the same when already erected. *Ibid*.

And in *Sands v. Trenton* (N. J. L.) 57 Atl. 267, a writ of certiorari to review such ordinance was refused the owner of a swinging sign projecting over a sidewalk, upon authority of *Ivins v. Trenton*, supra.

It was held in *Brown v. Carrollton*, 122 Mo. App. 276, 99 S. W. 37, that power "to prevent and remove nuisances," being applicable only to such as were nuisances *per se* at common law, would not justify a municipality in requiring the removal of a wooden awning supported by posts resting upon the sidewalk or curb, as an awning is not a nuisance *per se* unless so con-

intended to require the removal of "stationary awnings" extending over the sidewalk, because of their obstruction in putting out fires, and the often dilapidated condition and unsightliness of many of them, and for other reasons; and whether the posts were placed just inside or just outside the edge of the sidewalk does not affect the scope and purpose of the ordinance or its application. The ordinance was within the powers of the governing board of the town, and was properly held by his Honor to be reasonable. If it does not meet the approval of the citizens of the town, they can secure its repeal by instructing their town council to that effect, or by electing a new board. Such local matters are properly left to the people of a self-governing community to be decided and determined by them for themselves, and not by a judge or court for them. The true rule is well stated by Burwell, J., in *Tate v. Greensboro*, 114 N. C. 399, 24 L.R.A. 671, 19 S. E. 768: "It is not for a court and jury to review the conduct of the proper municipal authorities in such a matter as that now under consideration. In *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440, it is said: 'The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the regulation of grades, and the opening of new, and the closing of old,

streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done.' The wisdom of this rule is well illustrated by this action. Complaints were made, it seems, by citizens, that these trees were injurious to the public way, and in their effects, perhaps, to the public health. The proper authorities of the city, clothed with the power to repair the streets and protect the public health, listened to these complaints, and in the exercise of their best judgment, so far as appears, decided that the interest of the community required their removal. The proposition of the plaintiff is that a jury shall judge of the correctness of this conclusion, and, if they find that the officials committed what they think was an error, they and the city shall be mulct in damages. 'The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them, not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints.'" *Cooley*, Const. Lim. 6th ed. 255. Suppose another owner on this street with similar awnings were to bring suit, and it was left to a jury; the jury in each case might decide differently, and here would indeed be

structed or maintained as to interfere with the public easement, or become a menace to the public safety; and even then it cannot be summarily abated.

A municipal ordinance preventing the placing of show boards and signs upon sidewalks so as to obstruct them was upheld in *Com. v. McCafferty*, 145 Mass. 384, 14 N. E. 451, under authority conferred upon a municipality to make necessary orders and by-laws for the direction and management of their prudential affairs, preserving peace and good order and maintaining the internal police thereof, as may be judged most conducive to the welfare of the town, as the tendency of displaying such signs may be to collect crowds, and interfere with the public use of sidewalks, and lead to disaster.

An ordinance declaring it a misdemeanor to erect or thereafter to maintain any sign, sign box, illuminated sign, lettered lamp, or other fixture extending over or upon any sidewalk for more than 18 inches from the building line or inside of a sidewalk is reasonable and valid upon its face; as it is for a municipality to determine what the interests of the public are in a crowded city. *St. Louis v. St. Louis Theatre Co.* 202 Mo. 620, 100 S. W. 627.

Such ordinance is not rendered unreasonable by reason of the fact that such illuminated sign lighted the entrance of one's place of business. *Ibid.*

20 L.R.A. (N.S.)

No vested right which cannot be destroyed by the subsequent passage of such an ordinance, to maintain illuminated signs over a sidewalk, is acquired by reason of the fact that it was erected at a considerable expense. *Ibid.*

A billboard erected without municipal permission, at the side of a street, and encroaching thereon 4½ inches, is a nuisance under an ordinance declaring that every obstruction of any street, alley, or walk, except by authority of an ordinance or permission granted by the municipality, shall be deemed a common nuisance. *Wilkes-Barre v. Burgher*, 7 Kulp, 63.

But in *State v. Higgs*, 126 N. C. 1014, 48 L.R.A. 446, 35 S. E. 473, it was held that an ordinance making it a penal offense to maintain a sign suspended or projecting over a sidewalk was not justified by charter power to open streets and keep streets and sidewalks free and clear from obstructions.

And such ordinance was held to be unreasonable, oppressive, and void as applied to a sign which does not impede, delay, obstruct, or in any way endanger the use of the sidewalk. *Ibid.*

The power of a municipal corporation to abate as a nuisance a sign board attached to a shed erected over a sidewalk, in order to protect pedestrians during the demolition of a building, is recognized in *C. J. Sullivan Advertising Co. v. New York*, 61 Misc. 425, 113 N. Y. Supp. 893.

an anomaly in government. Revisal 1905, § 2930, provides that the town council "shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best." The reasonableness of an ordinance is for the court; the jury only being called in to find the facts, when in dispute. Abbott, Mun. Corp. § 545; Smith, Mun. Corp. § 1133.

Upon the whole testimony in this case, the court properly instructed the jury that this ordinance was reasonable. As there was not the slightest evidence of malice or bad faith, the reasonableness of the ordinance was purely a matter for the court. The town authorities are vested with large discretionary powers, and especially in respect to streets; and, if every ordinance were subject for approval upon the verdict of juries, it would be impossible to regulate the streets and sidewalks so as to secure uniformity, convenience, protection from fire, proportion and sightliness, and other necessary things incident to the growth and development of modern municipalities. These views are distinctly declared in *Tate v. Greensboro*, 114 N. C. 399, 24 L.R.A. 671, 19 S. E. 767, which case is really decisive of this. That authority has often been cited, and we adhere to it. *State v. Higgs*, 126 N. C. 1026, 48 L.R.A. 446, 35 S. E. 473, relied on by plaintiffs, is in conflict with it, and is overruled. The latter case was based, as this is, upon the assumption that the removal of the sign projecting into the street was dependent on it being a nuisance. If so, the conclusion would have followed that the issue of nuisance should have been found by the jury. But the real question was as to the power of the city authorities to pass such ordinance and its reasonableness. These were matters for the court, and, under *Tate v. Greensboro*, the authorities of the town were within their right. The only fact was whether the defendant had violated the ordinance, which was not disputed.

No error.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PIERCE M. GREGG et al., Apts.,

v.

GEORGE H. MITCHELL et al.

(— C. C. A. —, 166 Fed. 725.)

Bankruptcy — dairymen.

A farmer is not taken out of the class engaged principally in farming, which cannot, under the provisions of the bankruptcy act, be subjected to involuntary bankruptcy proceedings, by the fact that he maintains cows

from the produce of his farm and that bought elsewhere, and sells the milk at retail, although he also purchases and distributes milk of other producers.

(January 20, 1909.)

A PPEAL by defendants from an order of the District Court of the United States for the Southern District of Ohio, Eastern Division, adjudging defendant Henry C. Wilson a bankrupt. Reversed.

The facts are stated in the opinion.

Argued before Lurton and Severens. Circuit Judges, and Knappen, District Judge.

Messrs. Murray & Emery and Booth, Keating, & Peters, for appellants:

Defendant was a person chiefly engaged in farming, within the meaning of the bankruptcy act.

Bank of Dearborn v. Matney, 132 Fed. 75; *Hoffschlaeger v. Youngnap*, 12 Am. Bankr.

Case Note. — Engaging in other business as affecting exemption of farmer from involuntary proceedings in bankruptcy.

The question being almost wholly one of fact, it is not practicable to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming, and each case must be decided on its own circumstances. *Re Mackey*, 110 Fed. 355.

The generally accepted test, however, is. Which business is of paramount importance to the defendant, and on which he chiefly relies for his livelihood or as the means of acquiring wealth?

In *Wulbern v. Drake*, 56 C. C. A. 643, 120 Fed. 493, it is said: "It does not matter . . . if the person may have other business or other interests, if his principal occupation is that of an agriculturalist, if that is the business to which he devotes more largely his time and attention, which he relies upon as a source of income for the support of himself and family, or for the accumulation of wealth, although, as before suggested, he may have other interests or other investments, yet the conclusion must be that his chief business is that of farming or tillage of the soil."

The question is also discussed in *Re Mackey*, supra, as follows: "A person engaged chiefly in farming is one whose chief occupation or business is farming. The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small. That one may principally devote his physical exertions or his time to a given pursuit, while one of the factors entitled to consideration, is not in all cases determinative of the question whether that pursuit is his chief occupation or business. One may own,

Rep. 510; Re Thompson, 102 Fed. 287; Rise v. Bordner, 140 Fed. 566; Re Slade, 122 Cal. 434, 55 Pac. 158; Wulbern v. Drake, 56 C. C. A. 643, 120 Fed. 493; Simons v. Lovell, 7 Heisk. 516; Flickinger v. First Nat. Bank, 76 C. C. A. 132, 145 Fed. 162; Re Drake, 114 Fed. 229; Re Hoy, 137 Fed. 175; Re Mackey, 110 Fed. 355.

Mr. J. H. Dyer for appellees.

Severens, Circuit Judge, delivered the opinion of the court:

On March 12, 1907, certain creditors of Henry C. Wilson filed a petition in the district court, praying that he be adjudged a bankrupt upon the allegations contained in

reside on, and operate a farm, and at the same time be engaged in the business of buying and selling stocks and other securities. The latter occupation may consume only an hour or two and the balance of the day be devoted by him to his farm, yet it does not follow that his chief occupation or business is not dealing in stocks or other securities. If such dealing is of principal concern to him and chiefly relied on by him for his subsistence and financial advancement, and if he treats it as of paramount importance to his welfare, he would not be within the category of persons chiefly engaged in farming, even were his farm to yield him some profit. Nor does the amount of capital invested necessarily determine in all cases what one's chief occupation or business is. It, like the amount of time devoted, is undoubtedly a factor to be considered, but often is not conclusive. One may erect a palatial residence in the country, and own the farm on which it stands. It becomes part of the farm, and the farm may be skillfully operated and yet not yield in profits a hundredth part of the interest on the investment. The owner may be engaged in profitable manufacturing or mercantile pursuits which enable him to pay in full the cost of his house, and thereafter maintain it from the profits on his business capital, though less than such cost. No one would in such case contend that the owner of the farm was chiefly engaged in farming because most of his capital was invested in it. It is evident that it is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming, and that each case must be decided on its own circumstances. It may, however, legitimately be stated, generally, that, if it appears in a given case that one's occupation or business which is of principal concern to him, not ephemeral, but of some degree of permanency, and on which he mainly relies for his livelihood and financial welfare, be other than farming, he is not 'a person engaged chiefly in farming.'

One who had been engaged in farming 830 acres of land, of which 330 were under plough and devoted to the production of corn, wheat, and other small grains, the re-

said petition, among which was one averring that he was "by occupation a trader, grain and feed merchant, and dairyman," "and is neither a wage-earner nor a person engaged principally in farming or the tillage of the soil." In his answer Wilson denied this allegation, and said that "he avers the truth to be that he is a person engaged chiefly in farming and the tillage of the soil, and has been so engaged for many years next preceding the time of filing the petition herein, and that he should not be declared a bankrupt for any cause in said petition alleged." But he was nevertheless adjudged bankrupt upon the proof produced before the referee and a review thereof of the district judge,

mainder being used for hay and pasture lands, upon which farms he had 250 head of cattle which he was fattening for sale upon the market by feeding to them the grass, hay, and corn produced upon the farm, buying from others whatever was needed over and above that produced by himself, was held to be engaged chiefly in the business of farming. Re Thompson, 102 Fed. 287.

One who managed and controlled plantations containing over 1,100 acres, part of which was cultivated by hired labor and the remainder by tenants, residing on the farm and superintending all the farming operations, as well those of the croppers and tenants as those conducted by himself, and attending personally to gathering and selling the crops, and whose principal income was derived from his farming operations, was "engaged chiefly in farming," although he maintained a supply store, almost all of the patronage of which was from his tenants and employees, no trade being solicited outside of those on his farms, although he sold goods to such persons as applied. Wulbern v. Drake, 56 C. C. A. 643, 120 Fed. 493, affirming Re Drake, 114 Fed. 229.

The finding of a referee that one was chiefly engaged in farming, notwithstanding he was also a private banker, was sustained in *Couts v. Townsend*, 126 Fed. 249, in which it is said that the conclusion reached could fairly be drawn from the testimony, the nature of which, however, is not indicated.

One who conducted a farm of 470 acres from which the gross income during an unfavorable year was over \$1,800, was held to be chiefly engaged in farming, although he also maintained an office in a neighboring town for the purpose of conducting a law and collection business from which his total earnings for two years did not exceed \$450, and were little, if any, above his expenses, where he at all times directed the work on the farm and spent a good deal of his time there, and the great bulk of his indebtedness was incurred in the purchase of improvements and stocking of his farm, and little, if any, was incurred in connection with his law or collection business. Re Hoy, 137 Fed. 175.

One owning 240 acres of land which he

and he has appealed from the adjudication. Both sides agree "that the sole question for adjudication here, as in the court below, is: Was Henry C. Wilson, in the month of February, 1907, and prior thereto, a person chiefly engaged in farming?" And we agree that this is a question of fact, and we also

agree to the statement of the rule quoted by counsel for appellees as substantially correct, as follows: "Where the trial court has considered conflicting evidence, and made its finding and decree thereon, it will be taken as presumptively correct, and will not be disturbed on appeal unless an obvious error

managed himself, employing such help as he needed, upon which he raised wheat, oats, corn, and sold milk, the total farm products being valued at from \$1,000 to \$1,200, was chiefly engaged in farming, although he had a small store from which his income was only about \$60 or \$70 a year, and which, when the farm demanded his attention, he gave over to the care of his wife, and though he also sold, as an agent, \$200 or \$300 worth of fertilizers. *Rise v. Bordner*, 140 Fed. 566.

Reference may also be made to *Re Rugsdale*, Fed. Cas. No. 12,123, in which it was held that one engaged in farming and buying and selling live stock was not a tradesman, within a provision of a bankruptcy act making the failure of a merchant or tradesman to keep proper books of account a ground for refusing a discharge in bankruptcy.

On the other hand, one owning and operating a farm the total value of the produce of which for sale did not exceed \$1,700, and who devoted two and one-half days each week to the conducting of a market stall in a neighboring city, from which he sold calves and lambs purchased and slaughtered by him, and other farm produce, some of which was sold on commission, the value of which during the year in question was not less than \$6,000, and not more than \$850 of which was the produce of his farm, and a large proportion of whose indebtedness, aside from amounts representing purchase money for his farm, was incurred in the other branches of his business, was not "a person engaged chiefly in farming" in the sense of the bankruptcy act. *Re Mackey*, 110 Fed. 355.

One whose time and energies of body and mind were principally devoted to the matter of buying and marketing live stock as the chief source of his livelihood, and to which he chiefly looked for financial success, and whose crops cultivated bore comparatively little relation, in proportion, to the amount he paid for live stock or feed, and the great bulk of whose indebtedness was for moneys borrowed for cattle speculation, was held not to be engaged chiefly in farming, in *Bank of Dearborn v. Matney*, 132 Fed. 75, where the question of the extent to which a farmer may engage in the business of feeding and marketing live stock is discussed as follows: "If he find it more profitable to feed his agricultural products or his grasses to live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purpose to what he may breed or rear on his farm. For this purpose he may rely entirely upon the purchase of such live stock

from his neighbors or on the market, and utilize his farm products in feeding and fattening such 'feeders' for market. Neither, in my opinion, should the act be so construed as to restrict the farmer entirely, under all circumstances and conditions, to the corn and hay and grasses he may produce for rearing such feeders and preparing them for market. In other words, where he relies largely upon his pasture lands for grazing his cattle, and his crops of corn may not be sufficient to carry them through the particular winter and the feeding season, he may supplement these by purchasing from without sufficient corn, and the like, to meet the requirement. But certainly there should be apparent such relation between his method of farming and the buying and feeding of cattle, hogs, and the like, for market, as to reasonably indicate that his farming is not made principally subsidiary to the business of buying and selling cattle. So that, if his chief business is that of thus trading in cattle, using his lands as a mere feeding station, relying upon the purchased feed from the market for preparing them for sale much more than on his agricultural products, he may cross the dividing line between farming as his chief business and trading in cattle as his chief source of livelihood. No hard and fast rule can safely be laid down by the courts indifferently applicable to all cases. Each must depend more or less upon its own particular facts."

One who resided on a farm of 300 acres, to which he held the legal title, but on which he had paid little or nothing, cultivating about 80 acres of it, renting some and having the rest in pasture, and who has been accustomed to buy finely bred cattle, take them to the farm, and, after keeping them for a time, to sell them at auction sales, in which business a large part of his indebtedness was incurred, is not engaged chiefly in farming. *Re Brown*, 132 Fed. 706.

In *Flickinger v. First Nat. Bank*, 76 C. C. 132, 145 Fed. 162, it was held that one actively engaged in the business of a manufacturing corporation of which he was a stockholder, director, president, general manager, and who also owned and cultivated a farm, which was managed by him, to which he went once or twice a week, and telephoned his orders when he was otherwise engaged, buying whatever was bought on the farm and selling all his products, was engaged in two kinds of business, manufacturing and farming, of which the former was the chief, until he ceased to be actively occupied with the affairs of the manufacturing concern, when farming became his chief occupation.

has occurred in the application of the law, or a serious and important mistake has been made in the consideration of the evidence."

But we are constrained to hold that the case before us falls within the proviso. There was no material conflict in the testimony. Wilson had lived for many years on a large farm owned by him near a village 14 miles west of Columbus, and, for as many as five years previous to these proceedings, he had been occupying that farm and other farming lands belonging to his mother and sister, and leased by him from them. The whole amounted to some 1,700 acres. He had some other small parcels which he leased to others on shares. These 1,700 acres were improved land, which he devoted to cultivation and grazing. He had and used thereon about 20 horses, and an equipment of farming tools, wagons, and machinery in quantity corresponding to his operations, and employed from 7 to 15 men; and he supervised and controlled all the operations of raising the ordinary crops of agriculture. He had a large number of cattle and hogs, and during the preceding year raised 80 calves, and he kept about 100 cows. This live stock was maintained upon the crops which he raised. But at times he bought malt from breweries for his cows. The crops not so used were sold. He kept the cows principally for their milk, which he sent by his wagons to Columbus, where it was sold part of the time on the street at retail, and afterwards he provided a large refrigerator at Columbus, in which he stored his milk and employed men to retail it. Sometimes he bought milk from others and mingled it with his own. He built silos on his farm, and used them for storing and preserving forage raised on it, which he fed to his cows and other stock, and sometimes he bought stock from others, which he fattened on the grain and other produce from the farm, and then sold it off.

The foregoing are samples of his business operations. To enumerate all the details of it would require the statement of the particulars of the operations of diversified farming on a large farm. The only exception to this that we can see is his buying of milk from other parties and selling it. This was a comparatively small matter, and bore no considerable proportion to his other business. From the best information that we can get, we judge that the total value of the yearly products of his farm, other than from his dairy business, was about \$17,500, and from that not more than \$10,000. He had no other occupation than that of farming, unless it be that his keeping a dairy was another occupation. The court below thought that he was more of a dairyman than a farmer. We should think otherwise, 20 L.R.A. (N.S.)

even if all he did in carrying on the dairy business was to count as a distinct business from farming.

But it seems to us, that the court took an overnice distinction between the business of operating a farm and carrying on a dairy. In the vast majority of cases the keeping of a dairy is a mere incident, or, at most, a branch, of farming business; and in such cases it is a misdescription to classify the man as a dairyman, and not as a farmer. The general name of the latter includes the former. It is well known that all over the country farmers from time to time are changing their lines of industry, the uses to which they put their lands, and give their attention, sometimes principally to raising grains, sometimes to grazing, sometimes to the production of milk, butter, and cheese, all according to their judgment as to what is the most profitable way of using their farms.

Doubtless a man might be a dairyman, and not be a farmer, as if he were to build a barn, buy a herd of cows, and buy from others the grain and other forage to feed them, and sell their milk or other products; and, if this was his principal business, he would not be exempt from proceedings in bankruptcy because he was a farmer. But if, while farming, he establishes, as one of the departments of his industry, a dairy to utilize the products of his farm and convert them to profitable uses, he is none the less a farmer; nor does he cease to be one until he reaches the end by disposing of the ultimate product. His farming business includes all this. He may sell it at wholesale or at retail, as he finds to his best advantage. We do not think that, in storing his milk and selling it at retail, as he did, or if he sold his other products of his farm at retail, he was out of his legitimate sphere as a farmer. He did this, we must suppose, because it was the most profitable way of disposing of his products. We know of no reason for putting a strained construction upon this provision of the act, or restricting it within narrower bounds than the language imports when read in its common meaning. It exempts a certain class of persons, those engaged principally in a certain business, and that business is one which is not restricted to the simple raising of crops or other common products of farms, but extends to the results of turning them to account.

These views we think are in accord with the general trend of decisions. *Re Thompson* (D. C.) 102 Fed. 287; *Re Mackey* (D. C.) 110 Fed. 355; *Bank of Dearborn v. Matney* (D. C.) 132 Fed. 75; *Re Drake* (D. C.) 114 Fed. 229, and in circuit court of appeals sub nom. *Wulbern v. Drake*, 56 C. C. A. 643, 120 Fed. 493; *Re Hoy* (D. C.)

137 Fed. 175; *Rise v. Bordner* (D. C.) 140 Fed. 566; *Flickinger v. First Nat. Bank*, 76 C. C. A. 132, 145 Fed. 162.

Certain cases are cited to support views slightly different. But no one of them goes so far from the lines we think correct as to sanction the order here appealed from. We add, however, that, if it were conceded that, in respect of the dairy business, Wilson was not engaged in farming, still the fact remains that he was principally engaged in farming.

The order must be reversed, with costs.

VERMONT SUPREME COURT.

SYLVESTER A. PLOOF

v.

HENRY W. PUTNAM.

81 471
(— Vt. —, 71 Atl. 188.)

Ship — mooring — justification.

1. A shipowner may be justified by necessity in mooring to another's wharf to escape the fury of a tempest.

Pleading — sufficiency — negating exceptions.

2. The absence of other available mooring place is sufficiently pleaded by a declaration in an action to recover damages for casting off a vessel necessarily moored to defendant's wharf, by an averment that a tempest compelled mooring to the defendant's wharf.

Same — authority of agent — exceptions.

3. That the servant of the owner of a wharf was acting within the scope of his employment in casting off a vessel moored there is sufficiently alleged in a declaration for damages for injuries thereby caused, by allegations that the wharf was in charge of the servant, and that defendant, by his servant, wilfully and designedly, negligently, carelessly, and wrongfully unmoored the vessel.

(October 2, 1908.)

Case Note. — May entry upon land which would otherwise constitute a trespass be justified by private necessity.

The justification which necessity may offer for trespassing upon the lands of another divides itself into two classes. These need no more definition than the terms themselves imply, viz., public and private necessity. In this note it is intended to deal only with the latter class of decisions although in some instances classification is to some extent a matter of personal opinion. Cases passing upon the question of the obstruction of a highway and the effect of the trespass in turning aside to avoid the obstruction base their holding in some instances upon the right of the general public to use the road, but they are included here 20 L.R.A. (N.S.)

EXCEPTIONS by defendant to rulings of the Chittenden County Court overruling a demurrer to a declaration filed to recover damages for the alleged wrongful unmooring of a vessel moored to defendant's wharf. Judgment affirmed.

The facts are stated in the opinion.

Messrs. Batchelder & Bates for defendant.

Messrs. Martin S. Vilas and Cowles & Moulton, for plaintiff:

Entry upon land of another by reason of necessity, without fault of the party entering, is not a trespass; and defendant had no right to cast off the mooring rope.

Bigelow, Torts, 6th ed. 225; *Dike & Dunston's Case*, Y. B. 6 Edw. IV.; *Millen v. Fandrye*, Popham, 161; *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500.

The destruction of goods, when necessary for the preservation of life, is not a trespass.

Mouse's Case, 12 Coke, 63; *Metropolitan Asylum Dist. v. Hill*, L. R. 6 App. Cas. 193.

Entry upon lands of another adjoining a highway, when the highway has suddenly become impassable, is not a trespass.

Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811; *Hyde v. Jamaica*, 27 Vt. 443; *Campbell v. Race*, 7 Cush. 408, 54 Am. Dec. 728; *Tisdale v. Norton*, 8 Met. 388; *Holmes v. Seely*, 19 Wend. 507; *Absor v. French*, 2 Shower, 28; *Asser v. Finch*, 2 Lev. 234; *Young v. —*, 1 Ld. Raym. 725; *Henn's Case*, W. Jones, 296; 3 Bl. Com. 209.

Even if plaintiff was a trespasser, the defendant was not justified in casting off the mooring rope under the conditions as they then existed.

1 Hale, P. C. 663; *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18; *State v. Morgan*, 25 N. C. (3 Ired. L.) 186, 38 Am. Dec. 714; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *State v. Barr*, 11 Wash. 481, 29 L.R.A. 154, 48 Am. St. Rep. 890, 39 Pac. 1080; *Jay v. Whitfield*, cited in 3 Barn. & Ald.

because the question of personal necessity would seem to be an important factor. A line of decisions concerning the mutilation of shade trees by a telephone or telegraph company as constituting legal trespass has been excluded because the necessity which compels the trespass in such a case finds its justification in a franchise granted by public authority and for a public convenience.

In addition to the cases included here, attention is called to other early English cases cited in the above opinion.

It was held in *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500, that one who entered upon a sea beach for the purpose of saving a boat in danger of being carried off by the sea and restored it to its lawful owner had committed no trespass.

Where the removal of a party wall was directed by building inspectors, one of the

308; *Bird v. Holbrook*, 4 Bing. 628; *Wallace v. United States*, 162 U. S. 466, 40 L. ed. 1039, 16 Sup. Ct. Rep. 859; *James v. Hayes*, 63 Kan. 133, 65 Pac. 241; *Everton v. Esigate*, 24 Neb. 235, 38 N. W. 794; *Montgomery v. Com.* 98 Va. 840, 36 S. E. 371; 1 *Jaggard, Torts*, 151 ff; note to *Missouri P. R. Co. v. Keys*, 49 Am. St. Rep. 254.

Munson, J., delivered the opinion of the court:

It is alleged as the ground of recovery that, on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and

owners may enter upon the land of the other for the purpose of placing supports under the floors of the building preparatory to taking down the wall, without being guilty of trespass on the property. *Buck v. Weeks*, 194 Pa. 522, 45 Atl. 325.

It is held in *Cool v. Crommet*, 13 Me. 250, that persons engaged in constructing a road were not guilty of trespass because oxen used in scraping had necessarily entered upon the plaintiff's land.

An involuntary entry upon lands adjoining a highway, made necessary by the escape onto such lands of cattle driven along the highway by their owner, does not constitute a trespass. *Rightmire v. Shepard*, 36 N. Y. S. R. 768, 12 N. Y. Supp. 800; and see *Richardson v. Anthony*, 12 Vt. 273.

The fact that the flow of surface water is endangering the wall of one's house does not justify an entry upon a neighbor's property for the purpose of filling and grading thereon so as to turn the flow of water. *Grant v. Allen*, 41 Conn. 150.

To whomsoever the soil of the bank of a river may belong, every man of common right may justify the going of his servants or his horses upon the banks of navigable rivers for towing barges, etc.; and, if the water of the river impairs and decreases the banks, then he shall have reasonable way for that purpose in the nearest part of the field next adjoining the river. *Young v. —*, 1 Ld. Raym. 725.

A plea by the defendant that the plaintiff was violently assaulting his (plaintiff's) wife and child in his own house, and that the defendant entered to prevent plaintiff committing said breach of peace, was held not to constitute legal justification for the trespass. *Rockwell v. Murray*, 6 U. C. Q. B. 412; but in *Handcock v. Baker*, 2 Bos. & P. 260, breaking and entering another's house was justified where a felony was about to be committed.

A hunter in pursuit of wild and dangerous animals is not justified by necessity in pursuing them onto the land of another; and 20 L.R.A. (N.S.)

two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries. This claim is set forth in two counts,—one in trespass, charging that the defendant, by his servant, with force and arms wilfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant, by his servant, to permit the

his act in doing so is a trespass. *Glenn v. Kays*, 1 Ill. App. 479.

Where the obstruction of a public highway renders it impassable to travelers, one traveling thereon in avoiding the obstruction may pass over adjoining land without being guilty of trespass. *Campbell v. Race*, 7 Cush. 408, 54 Am. Dec. 728; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

In *Absor v. French*, 2 Shower, 28, the action was for trespass, and judgment was for the defendant where his plea was that the plaintiff stopped a highway so that he could not pass and was compelled to go over the plaintiff's close, doing as little harm as he could.

And it is held in *Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176, that, where a landowner obstructs a prescriptive right of way over his land, a reasonable necessity is created which justifies the owner of the private way in passing over the adjoining land without committing a trespass.

An action for trespass will not lie where one having a right of way over the land of another is compelled to go upon the latter's property by the stoppage of the way, which had been in common use, although the same had never been limited or defined. *Farnum v. Platt*, 8 Pick. 339, 19 Am. Dec. 330; *Leonard v. Leonard*, 2 Allen, 543.

But one using a private way over another's land by necessity in the absence of a specific grant may not go upon the adjoining land if the way is impassable, and excuse his trespass on the plea of necessity. *Holmes v. Seely*, 19 Wend. 507.

And, where a right of way is given by specific grant, the grantee who turns aside therefrom because the road is covered with water is a trespasser upon the adjoining land. *Taylor v. Whitehead*, 2 Dougl. K. B. 745; and see *Williams v. Safford*, 7 Barb. 309.

Again, in *Bullard v. Harrison*, 4 Maule & S. 387, the right to go on adjoining lands because of an obstruction of the road is held not to extend to private ways.

plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest; but that the defendant, by his servant, in disregard of this duty, negligently, carelessly, and wrongfully unmoored the sloop. Both counts are demurred to generally. There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine.

In *Millen v. Fandrye*, Popham, 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that, as soon as the sheep were off his land, he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground; but the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that, as the defendant had done his best to recall the dog, trespass would not lie. In trespass of cattle taken in A, defendant pleaded that he was seised of C and found the cattle there damage feasant, and chased them towards the pond, and they escaped from him and went into A, and he presently retook them; and this was held a good plea. 21 Edw. IV., 64; Vin. Abr. "Trespass," H. a., 4 pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Abr. "Trespass," K. a., pl. 1. A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity. *Henn's Case*, W. Jones, 296; *Campbell v. Race*, 7 Cush. 408, 54 Am. Dec. 728; *Hyde v. Jamaica*, 27 Vt. 443 (459); *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811. An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII., 27; Vin. Abr. "Trespass," H. a., 4, pl. 24, K. a., pl. 3. In *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea; and it was held no trespass. 20 L.R.A. (N.S.)

See also *Dunwich v. Sterry*, 1 Barn. & Ad. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Herf. VII., pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In *Mouse's Case*, 12 Coke, 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took 47 passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that, if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, everyone ought to bear his loss to safeguard the life of a man. It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

The defendant insists that the counts are defective, in that they fail to show that the servant, in casting off the rope, was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not imply authority to do an unlawful act, and

that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "wilfully, and designedly" in one count, and "negligently, carelessly, and wrongfully," in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Enc. Pl. & Pr. p. 922; Voegeli v. Pickel Marble & Granite Co. 49 Mo. App. 643; Wabash R. Co. v. Savage, 110 Ind. 156, 9 N. E. 85. See also Palmer v. St. Albans, 60 Vt. 427, 6 Am. St. Rep. 125, 13 Atl. 569. Judgment affirmed, and cause remanded.

ARKANSAS SUPREME COURT.

M. LEVY, Appt.,
v.
WALTER NASH.

(87 Ark. 41, 112 S. W. 173.)

Surface water — damming back — liability.

The owner of city property has the right to improve it in such manner as to protect it from surface water flowing from adjacent land, even to the closing of a drain which he had constructed across it and which he discovers to be injurious to his land, without liability to the owners of adjoining lands for injury caused by the backing of the water upon them.

(June 29, 1908.)

Case Note. — Obstruction of surface water in city.

This note is limited strictly to those cases passing on the question whether the owner of a servient tenement in a city has the right so to use his property as to obstruct the flow of surface water naturally passing over the same, causing it to be diverted or dammed back to the injury of adjoining property. It will be noticed that this includes, also, those cases which state the proposition from the view point of the rights of the owner of a dominant tenement, — that is, whether or not the latter has the right to have the surface water falling on his land flow uninterrupted over the servient tenement. It therefore, does not include those cases which merely pass on the question whether an upper owner is liable in damages because he, by the grading of his lot or erection of buildings, causes surface water not theretofore flowing in that direction to overflow the land of his neighbors, since, even conceding that in these cases the 20 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Chancery Court for Pulaski County requiring him to reopen a drain across his property. Reversed.

The facts are stated in the opinion.

Mr. John H. Cherry, for appellant:

The common-law rule is that "surface water is a common enemy, which any landowner may get rid of as best he can."

Gould, Waters, §§ 265, 267; Flagg v. Worcester, 13 Gray, 601; Gannon v. Hargadon, 10 Allen, 100, 87 Am. Dec. 625; Bates v. Smith, 100 Mass. 182; Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526, 62 N. W. 859; Churchill v. Beethe, 48 Neb. 87, 35 L.R.A. 442, 66 N. W. 992; Chadeayne v. Robinson, 55 Conn. 345, 3 Am. St. Rep. 55, 11 Atl. 592; Grant v. Allen, 41 Conn. 150; Franklin v. Fisk, 13 Allen, 211, 90 Am. Dec. 194; Cedar Falls v. Hansen, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585; Jones, Easements, §§ 759, 760; Pettigrew v. Evansville, 25 Wis. 228, 3 Am. Rep. 50; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; O'Connor v. Fond du Lac, A. & P. R. Co. 52 Wis. 526, 38 Am. Rep. 753, 9 N. W. 287; Waters v. Bay View, 61 Wis. 642, 21 N. W. 811; Luther v. Winisimmet Co. 9 Cush. 171; Ashley v. Wolcott, 11 Cush. 192; Gillett v. Johnson, 30 Conn. 180; Rawstron v. Taylor, 11 Exch. 369; Palmer v. Waddell, 22 Kan. 352; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Greeley v. Maine C. R. Co. 53 Me. 200; Bowsby v. Spear, 31 N. J. L. 351, 86 Am. Dec. 216; Curtiss v. Ayrault, 47 N. Y. 73; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 693; Goodale v. Tuttle, 29 N. Y. 466; Phillips v. Waterhouse, 69 Iowa, 199, 58 Am. Rep. 220, 28 N. W. 539; Vanderwiele v. Taylor, 65 N. Y. 346.

owner of the servient tenement would not have the right to obstruct the flow of surface water naturally coming from other property onto his, there might still be a question whether the upper owner could so grade his land as to cause the surface water falling thereon to flow on that of his neighbors. Those cases have also been excluded which deal with the rights and duties of municipal corporations with respect to surface waters, they being gathered in a subject note to Johnson v. White, 65 L.R.A. 250.

For cases on right to hasten flow of surface water along natural drain ways, see case note to Manteufel v. Wetzels, 19 L.R.A. (N.S.) 167.

The importance of the question whether a proprietor of a servient tenement in a city has the right so to grade or improve his property as to cause surface water naturally flowing thereon from adjacent and higher property to be dammed up to the injury of his neighbors depends to some extent at least upon the further question whether,

The alley in the rear of plaintiff's lot is not a water course.

Gibbs v. Williams, *supra*; Stanchfield v. Newton, 142 Mass. 110, 7 N. E. 703; 30 Am. & Eng. Enc. Law, 2d ed. p. 333.

No lapse of time could give a prescriptive right to anybody to have this culvert maintained across defendant's lot.

Pettigrew v. Evansville and Rawston v. Taylor, *supra*.

Messrs. Marshall & Coffman, for appellee:

Natural drainage must be kept open, and the lower estate is subject to a servitude for this purpose.

3 Farnham, Waters, §§ 877, 882, 889; Little Rock & Ft. S. R. Co. v. Chapman, 39 Ark. 463, 43 Am. Rep. 280; Baker v. Allen,

within the particular jurisdiction, the rule of the common and civil law prevails. or the Massachusetts rule, which was subsequently enlarged by New Jersey into what is known as the common-enemy doctrine. Under the common, as well as under the civil, law, the rule was that water must be allowed to follow its natural drain way, and any stoppage or damming up of this drain way to the injury of the higher land gave a right of action. See Farnham, Waters, § 889b. The reason for the rule loses some of its force in cities where sewers are provided as convenient means for disposing of surplus water, and there has been a tendency on the part of some courts to relax the rule in consequence. The grounds upon which they have done so are not entirely uniform. Some courts have mistaken the Massachusetts rule for that of the common law, and have justified the ruling permitting interference with the drainage under the belief that they were following the common law. The extent of this mistake is illustrated by Garland v. Aurin (Garland v. Aurin) 103 Tenn. 555, 48 L.R.A. 862, 76 Am. St. Rep. 699, 53 S. W. 940, where the court said: "Two distinct rules have been administered in the various states of the Union with respect to the right of a lower proprietor to obstruct and repel surface water flowing from the land of a higher proprietor,—one being called the common-law rule, and the other the civil-law rule. Under what is known as the common-law rule, the holding is that the right of the lower proprietor to occupy and improve his land in such manner and for such purposes as he may see fit, either by changing the surface or by the erection of buildings or other structures thereon, is not restricted or modified by the fact that such improvements or occupation will obstruct and repel surface water that would otherwise naturally flow thereon from adjacent and higher land, even though the land of the upper proprietor may be injured thereby. . . . On the contrary, by the rule of the civil law, the proprietor of the lower land may not obstruct, by any means, the natural flow of surface water, and turn it back, to the 20 L.R.A. (N.S.)

66 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511; Little Rock & Ft. S. R. Co. v. Wallis, 82 Ark. 447, 102 S. W. 390.

Defendant did not "so use his own as not to injure another."

Gray v. McWilliams, 98 Cal. 157, 21 L.R.A. 593 and note, 35 Am. St. Rep. 163, 32 Pac. 970; Albany v. Sikes, 94 Ga. 30, 26 L.R.A. 653, 47 Am. St. Rep. 132, 20 S. E. 257; Wharton v. Stevens, 84 Iowa, 107, 15 L.R.A. 630, 50 N. W. 562; Mininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Shane v. Kansas City, St. J. & C. B. R. Co. 71 Mo. 238, 36 Am. Rep. 480.

The rules of drainage insure plaintiff against the closing of the artificial drain below him.

Johnson v. Lewis, 47 Ark. 66, 14 S. W.

injury of the higher lands of his neighbor; the latter owner having, by the law of nature, an easement or servitude of drainage over the lands of the former for the flow of surface waters."

It will be noticed that in those jurisdictions where the Massachusetts rule prevails the question whether the property overflowed is urban property or agricultural lands is of very little importance, since, even in case of the latter, it is held that the owner of the lower premises may obstruct surface water naturally flowing thereon, and, if that rule is applied as to agricultural lands, there certainly can be no less reason for holding that the same rule would apply to urban property.

In the following cases, decided in jurisdictions cited in Garland v. Aurin, *supra*, as supporting the common-law rule, it has been held, or so recognized, that the proprietor of lower premises in a city has the right to embank against surface water naturally flowing thereon from adjacent and higher property, to protect his own property, although he thereby causes such water to remain on or flow over the lands of another to his damage. Bryant v. Merritt, 71 Kan. 272, 80 Pac. 600; Bangor v. Lansil, 51 Me. 521; Parks v. Newburyport, 10 Gray, 28; Mehonray v. Foster, 132 Mo. App. 229, 111 S. W. 882; Gross v. Lampasas, 74 Tex. 195, 11 S. W. 1086; O'Connor v. Fond du Lac, A. & P. R. Co. 52 Wis. 526, 38 Am. Rep. 753, 9 N. W. 287; Lessard v. Stram, 62 Wis. 112, 51 Am. Rep. 715, 22 N. W. 284. Among this class of cases would also seem to be the New York cases cited and sufficiently set out in Levy v. Nash. And see 30 Am. & Eng. Enc. Law, 2d ed. p. 331.

To the same effect is Chadeayne v. Robinson, 55 Conn. 345, 3 Am. St. Rep. 55, 11 Atl. 592, where it was held that the owner of a village lot may erect a permanent barrier against the passage onto it of surface water from higher land. Another case, evidently holding to the same effect, is Ostrom v. Sills, 28 Can. S. C. 485.

This rule was also accepted as the law by the court in Grant v. Allen, 41 Conn. 156, where the question arose whether a lot

466; *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Shepardson v. Perkins*, 58 N. H. 354; *Vannest v. Fleming*, 79 Iowa, 638, 8 L.R.A. 277, 18 Am. St. Rep. 387, 44 N. W. 906.

Battle, J., delivered the opinion of the court:

This suit was brought in the Pulaski chancery court by Walter Nash against M. Levy. He alleged in his complaint as follows: "That he is the owner of lot 6, in block 18, in Pope's addition to Little Rock, Arkansas, which is on the southwest corner of Fourth and Sherman streets; that he has built a house thereon fronting on Sherman street, and one on the alley, fronting Fourth street; that, about one year ago, Fourth street was graded between Sherman and Com-

merce streets, and at the end of said alley a large tile drain was placed under and across said Fourth street to carry off the water, said work of tiling and grading being done under the authority and direction of the city of Little Rock; that running down said alley, and for quite a distance from the south, is a natural drain or water course or swale, which carries off large quantities of water, being the outlet for the water falling on several acres of ground; and that, prior to the grading of said Fourth street, said drain ran across the same in a northerly direction, where the drain pipe is now situated.

"That defendant owns the property on the northwest corner of said Fourth and Sherman streets, lying on the opposite side of

owner has the right to go upon his neighbor's land and so fill in a depression or change the grade as to prevent surface water from running upon his own land, the court saying: "The right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow."

In *Goodale v. Tuttle*, 29 N. Y. 450, a case which involved the drainage of a couple of marshy lots in a village, Chief Justice Denio said: "And, in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it."

In *Edwards v. Charlotte, C. & A. R. Co.* 39 S. C. 472, 22 L.R.A. 246, 39 Am. St. Rep. 746, 18 S. E. 58, where a railroad constructed a sand bank as a protection to its right of way, resulting in the backing up of surface water on plaintiff's lot, it was held generally that the rule that surface water is a common enemy which a landowner may, when necessary for the protection of his property, throw back on neighboring land to the damage of the owner thereof, exists in South Carolina, under a statute adopting the common law of England. Since the common-law rule was the exact reverse of this, the decision was plainly erroneous, the court being misled by the attempt of Massachusetts and New Jersey to denominate their rule the common-law rule.

The confusion with respect to the subject is well illustrated by a recent Wisconsin decision. In *Johnson v. Chicago*, 31 P. M. & O. R. Co. 80 Wis. 641, 14 L.R.A. 495, 27 Am. St. Rep. 76, 50 N. W. 771, it was held generally that surface water on one's premises, including that which has been thrown thereon from higher levels by embankments, ditches, drains, and culverts, may be lawfully turned and diverted from 20 L.R.A. (N.S.)

his land to the land of another, and the only remedy of the latter is to pass it on again to other lands. The court seemed to be under the impression that it was applying the Massachusetts rule, while it was in fact applying the rule of the common and civil law as well as that of nature, that water naturally seeks a lower level and therefore each landowner may assist it along its natural course to its final resting place.

Where, however, what is called in *Garland v. Aurin*, supra, the civil-law rule, but which is also that of the common law, prevails, the question whether the property is urban or agricultural takes on considerable importance, since in many of these jurisdictions, because of the great difference in the conditions of the surroundings and in the use of the two kinds of property, the courts, among which is *Levy v. Nash*, have seen the necessity of making an exception to the rule in favor of urban property; and it is therefore held in these cases that the owner of a lot in a city or town, over which the surface water falling and accumulating upon an adjacent upper lot flows to a common outlet, has the right to fill his lot so as to render it fit for building upon or other purposes, without becoming responsible in damages to the upper lot owner for injuries sustained by the consequent backing of the water upon his lot.

Of this class of cases are *Middlesborough Town Co. v. Helwig*, 14 Ky. L. Rep. 430; *Hall v. Rising*, 141 Ala. 431, 37 So. 586; *Kohn v. Moore*, 4 Legal Gaz. 46; *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265; and *McMahon v. Thornton*, 5 Pa. Super. Ct. 495. A possible exception to the application of this rule seems also to be recognized in favor of the city or village lots, in *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412, and *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424.

In *Los Angeles Cemetery Asso. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375, the doctrine allowing a servitude in the lower tenement in favor of the upper or dominant tenement for the flow of surface water is said to have had no application to lots held in cities and towns where changes and alter-

Fourth street from plaintiff's property; and there is and has been for a long time a covered culvert running northeastwardly and under defendant's said property and the sidewalk adjoining, which for a long time carried off the water of said drain, whence it was carried across the adjoining property, and so on until it reached the town branch.

"That, for about two months after the grading and tiling of Fourth street, as aforesaid, the water was carried off by said tiling and culvert when defendant closed the end of said culvert at the curb line where it joined the said tiling by placing plank across the same, thereby completely obstructing the flow of the water of said drain. That with heavy rains large quantities of water accumulate at and about the end of said alley on the south side of Fourth street, submerging his sidewalk and backyard, and retaining wall, and frequently standing for several days before it evaporates or soaks up in the soil, creating a nuisance and obstructing the travel on said sidewalk on that side, and often rising high enough to run across Fourth street and the north sidewalk there-

of, thereby injuring and obstructing the same.

"The defendant refuses and fails to open said culvert, though often requested to do so. Wherefore plaintiff prays for a mandatory injunction requiring defendant to remove said obstruction and open said drain for the free access and flow of the water through the same, and that he be permanently enjoined from again closing up or obstructing or in any way interfering with said drain or the water through the same, and for costs and all proper and general relief."

The defendant answered, and, among other things, said:

"(4) Defendant denies that there is any stream or channel or water course running across said block 18, or across the block on which defendant resides; but says that the only water flowing northwardly across or from said block 18 is surface water from rainfall or melting snows, and there is a slight depression through or near the center of said block 18, through and over which the greater portion of said surface water falling

ations in the surface are essential to the enjoyment of such lots.

In *Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585, it was held that an owner of a city lot through which there is a natural depression, and through which water has been discharged because of the digging of ditches by the city, has the right to bring such lot to grade, although the flow of surface water is thereby diverted to lots owned by other persons.

In *Phillips v. Waterhouse*, 69 Iowa, 199, 58 Am. Rep. 220, 28 N. W. 539, it was held that the owner of a city lot has the right so to construct the buildings thereon or to improve the lot as to cast the rain water falling upon them upon the adjoining street or alley at the established grade; and he will not be liable for injuries caused by the flow of such water upon a neighbor's lot below grade.

On the other hand, many cases have failed to see any difference in principle between the reciprocal rights and duties of adjacent urban proprietors and those of adjacent rural proprietors, and have refused to apply one rule to agricultural lands and a different rule to city lots.

Thus, in *Garland v. Aurin* (*Carland v. Aurin*) 103 Tenn. 555, 48 L.R.A. 862, 76 Am. St. Rep. 699, 53 S. W. 940, the court, in an exhaustive opinion, held that the owner of a city lot has not the right to fill in or raise the surface so as to prevent the natural flow upon it of surface water from the higher ground of an adjoining owner, but is subject to the same rule which governs rural property.

So, in *Cincinnati, H. & D. R. Co. v. Ahr*, 13 Ohio Dec. Reprint, 1035, it was held that the principle announced by the supreme 20 L.R.A. (N.S.)

court, that, where two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a servitude to the upper, to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude, applies to parcels of land in cities and towns as well as to such parcels in the country.

In *Goldsmith v. Elsas*, 53 Ga. 186, it was held that, where two city lots adjoin, the lower lot owes a servitude to the higher so far as to receive the water which naturally runs from it, provided the owner of the latter does no act to increase such flow by artificial means.

In *Gormley v. Sanford*, 52 Ill. 159, the rule applicable to agricultural lands was held, also, to be applicable to city property, although the court recognized that, where a city has established an artificial sewerage of which property owners can reasonably avail themselves, it will probably be held to be their duty to do so. It should also be noted that in this case the property was situated in a very thinly populated part of the city, and that one lot was used for purposes of fruit growing while the other was used for mining coal.

In *Pickerrill v. Louisville*, 30 Ky. L. Rep. 1239, 100 S. W. 873, the court, without calling attention to the fact that the property in question was city property, held that a railroad company owning property subject to the servitude of receiving the natural flow of surface water from an upper estate is not entitled to fill up its property in order to make it fit for the prosecution of business, if the effect is to retard the flow of

on said block 18 passes northwardly toward the town branch; that it flows through no channel, but spreads over the lower land in a northerly direction until it reaches the town branch.

"(5) It is true that there has been a small culvert or underground drain across the rear of defendant's lot, as well as the ground north of his, extending northwardly to Third street, which culvert was inadequate to carry off the surface water coming across the street from the block above, and which underground drain was made for the sole purpose of subdrainage, and to prevent the rear yard's from being wet or marshy; but defendant says he is not obliged by law or otherwise to keep the same open to drain off the surface water that falls or flows upon plaintiff's land, and that he has closed and kept the same closed against said surface water, as he has a lawful right to do."

"(6) Defendant further says that the natural flow of said surface water would not be over or across the defendant's said land, but would be across the lands in rear of his, which are lower than his; that he has done

and is doing nothing in respect thereof except protecting his said land from being overflowed by the surface water falling upon the land of the plaintiff and other owners of lands in block 18, and this he has a lawful right to do."

After hearing the evidence, the court ordered the defendant to remove at his own expense any and all obstructions to the free passage of water through the underground culvert on his land, and perpetually enjoined him from closing the same.

The evidence shows that the defendant was forced to close the underground culvert to protect his own lot against overflows by surface water on account of the obstruction of water flowing through the same by the owners of lots below him.

The lot of the defendant is in the midst of a populous city. The rule which governs the right to dispose of surface water in agricultural districts does not apply to such property. It is set apart, held, and owned for building purposes. To make it useful for this purpose the owner has the right to fill it up, elevate it, to ditch it, to construct

such water and to turn it back on the upper ground.

In *Rielly v. Stephenson*, 222 Pa. 252, 70 Atl. 1097, while it was conceded that the owners of a lot in a city, as distinguished from rural property, had the right so to grade their property as to obstruct the flow of surface water naturally finding its way thereon, it was contended that in doing so the owner of the lot must take care not to injure or damage the other or adjacent landowners. The court said, however: "The owners of lots in cities and towns buy and own with the manifest condition that the natural or existing surface is liable to be changed by the progress of municipal development. All such owners have equal rights neither lessened nor increased by priority of improvement, and the primary right of each owner is to protect himself and his lot from loss or inconvenience from the flow of surface water. The owner at the foot of the slope is under no obligation to allow his lot to continue as a reservoir for the surplus water of the neighborhood. He may shut it out by grading or otherwise, and the fact that thereby he may incidentally increase the flow on the adjoining lot neither makes him answerable in damages, nor affects the adjoining owner's right, in his turn, to shut out the original, plus the increased flow on his lot. The owner cannot be coerced as to time or manner of improvement by risk of having put upon him the burden of providing for the flow upon others. Some things, of course, he may not do. He may not proceed negligently so as to do unnecessary damage to others. But, so far as he acts upon his right to protect his enjoyment of his own property, any in-

cidental loss to his neighbor is *damnum absque injuria*."

In *Whitney v. Sanders*, 3 Pittsb. 226, it was not only recognized that a lower urban lot when built upon is not under a natural-flowage servitude for surface water from a higher adjoining lot, but at least part of the language of the court would seem to indicate that the owner of the higher lot is bound to see that the rain falling on his lot will not injure the lower lot or buildings.

In *Franklin v. Durgee*, 71 N. H. 186, 58 L.R.A. 112, 51 Atl. 911, it was held that the owner of land adjoining a highway in a city cannot fill depressions in his land, which are natural outlets to drain the water from the highway, if the effect will be to cast the water back onto the highway and injure it, and if such use of his land is unreasonable under all the circumstances. The court in this case evidently ignores the distinction between agricultural lands and city property in regard to the applicability of a different rule concerning the obstruction of surface water, but makes as its test the reasonableness, under all the circumstances of the case, of the use of the property.

In *Beard v. Murphy*, 37 Vt. 90, 86 Am. Dec. 693, it was held that, where filthy water is thrown from the kitchen and runs onto adjoining property, the owner of such property may peaceably erect an obstruction so as to prevent this injury, even if it results in turning back the surface water onto the guilty party's land; and he is not compelled to seek such redress as he can get by resorting to litigation.

On the general question regarding rights as to flow of surface water, see subject note to *Gray v. McWilliams*, 21 L.R.A. 593.

Buildings on it in such a manner as to protect it against the surface water of an adjoining lot. If in so doing he prevents the flow of surface water upon his lot, the owner of the higher lot has no cause of action against him. This is a necessary incident to the ownership of such property. A contrary rule would operate against the advancement and progress of cities and towns and to their injury, and would be against public policy.

Judge Dillon, in his work on Municipal Corporations, says: "On the one hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from his premises onto the street; and, on the other hand, the municipal authorities may exercise their lawful powers in respect to the graduation, improvement, and repair of streets, without being impliedly liable for the consequential damages caused by surface water to adjacent property." 2 Dill. Mun. Corp. 4th ed. § 1040.

In *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, the syllabus is as follows: "The parties owned adjacent lots on a street near a village. The natural formation of the land was such that surface water from rain or melting snows would descend and accumulate in the street in front of plaintiff's lot, and in times of unusual accumulations would run off over a natural depression across defendant's lot and other low lands to a river. Defendant built a house on his lot, filled in the lot and graded up the sidewalk in front of it, so as to cut off the surface water, and thereafter, there being an unusually large accumulation in the street, it flowed upon plaintiff's premises and into his cellar. In an action to recover damages for the injuries, held, that defendant was not liable." *Vanderwiele v. Taylor*, 65 N. Y. 341.

In this case the defendant closed up an underground drain which he made on his own lot when he discovered it was injurious. He was in the legitimate exercise of his rights for his protection, and is not liable for damages.

Decree reversed and cause remanded with directions to the court to dismiss complaint for want of equity.

Hart, J., being disqualified, did not participate.
20 L.R.A. (N.S.)

CONNECTICUT SUPREME COURT OF ERRORS.

JAMES M. YOUNG, Trustee of P. E. Hendrick, Bankrupt,
v.

JOSEPH A. LEMIEUX, Appt.

(79 Conn. 434, 65 Atl. 436.)

Appeal — vacation — effect.

1. The filing of the necessary papers to make or complete a record on appeal during the months of July and August is not prevented by a statutory provision that all proceedings to make or complete the record on appeal shall be suspended during those months.

Bulk sale law — independent business.

2. The sale by a merchant of a drug store which he conducts in a separate building and under a separate name from that in and under which his general business is conducted must comply with the statutes providing for the sale by a merchant of the whole or a

Case Note. — Constitutionality of "bulk sale" legislation.

The earlier cases on this subject are covered in a subject note to *Everett Produce Co. v. Smith*, 2 L.R.A. (N.S.) 331. The cases decided since that note disclose the same conflict of views as to the constitutionality of this class of legislation that is revealed by that note. The constitutionality of the Connecticut statute, as amended by the act of 1903, which is upheld by the Connecticut supreme court in *YOUNG v. LEMIEUX*, was also sustained by a decision of the Federal court in *Re Paulis*, 144 Fed. 472, as against objections based on the constitutional guaranties of due process of law and the equal protection of the laws. In the light of the distinction made in some of the other cases, it is to be noted that the Connecticut statute passed upon in these cases declares that a sale in violation of its terms shall be void as against creditors, and does not merely, as in some states, prescribe a rule of evidence by creating a rebuttable presumption of fraud.

It will be observed that the New York "bulk sale" act of 1902, which was held unconstitutional in *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263, declared that a sale in violation of its terms "shall be" fraudulent and void as against the creditors of the seller; and that the provision in this respect of the Oklahoma statute, the constitutionality of which was upheld in *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 2 L.R.A. (N.S.) 334, 82 Pac. 496, 6 A. & E. Ann. Cas. 970, is that a sale in violation of the act "will be presumed to be fraudulent and void as against the creditors of the seller;" it being expressly held in the latter case

large part of his stock in trade, since it is to be regarded as the sale of an independent business.

Same—police power.

3. Requiring a retail merchant to file notice of intention to sell the whole or a large part of his stock seven days prior to the sale, under penalty of the sale being voidable at the instance of creditors, is within the police power of the state.

Same—property rights.

4. No unconstitutional interference with property rights is affected by requiring retail merchants to file notice of intention to sell the whole or a large part of their stocks, seven days before the sale, under penalty of the sale being voidable at the instance of creditors.

Same—replenishment of stock.

5. One who purchases a retail stock of goods from a merchant who has not complied with the statutory requirement as to notice of sale is not entitled to retain against creditors of the merchant articles placed in the stock by him after the purchase, if they merely replace the goods sold, and are purchased with the avails of such sales.

(Hamersley, J., dissents.)

(January 16, 1907.)

that the statutory presumption may be overthrown by evidence of good faith.

The provisions of the Georgia statute, the constitutionality of which was upheld in *Jacques & T. Co. v. Carstarphen Warehouse Co.* 131 Ga. 1, 62 S. E. 82, are substantially like those of the New York statute passed upon in *Wright v. Hart*, supra, and expressly declare that a sale made in violation of its terms "shall be conclusively presumed to be fraudulent." The court held that the statute neither deprives one of property without due process of law, nor abridges the privileges and immunities of citizens of the United States, nor denies equal protection of the laws; and that it is not class legislation. It was further held that the statute was not obnoxious to the rule that the legislature cannot, under the guise of prescribing a rule of evidence applicable to a given class of cases, deprive the courts of their exclusive power to decide when an essential fact has been proven, upon the ground that, notwithstanding the phraseology employed, the statute in reality prescribes a rule of substantive law and not a rule of evidence.

The Georgia court of appeals had previously, in *Taylor v. Folds*, 2 Ga. App. 453, 58 S. E. 633, expressed an opinion in favor of the constitutionality of the statute, without discussing the question further than to recognize the existence of a conflict of authority in other states.

The Michigan statute which is substantially like the Georgia statute and declares that a sale in violation of its terms "shall be void as against the creditors of the seller, etc." was upheld in *Spurr v. Travis*, 20 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Superior Court for New London County in plaintiff's favor in an action brought to recover possession of assets alleged to belong to a bankrupt. Affirmed.

The facts are stated in the opinion.

Mr. John J. Phelan for appellant.

Messrs. Jeremiah J. Desmond and Donald G. Perkins, for appellee:

Requiring notice of such an intended sale to be recorded before the sale is not unconstitutional.

Com. v. Alger, 7 Cush. 85; *State v. Main*, 69 Conn. 135, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; *Walp v. Moear*, 76 Conn. 520, 57 Atl. 277; *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312.

Hall, J., delivered the opinion of the court:

The plaintiff is the trustee of the estate of Philip E. Hendrick, who was adjudicated a bankrupt upon the petition of sundry creditors, dated September 19, 1904. On and for some years prior to August 31, 1904, said Hendrick conducted personally in his own name and in his building in Taftville, in

145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 A. & E. Ann. Cas. 250, against objections that it deprives one of property without due process of law, denies the equal protection of laws, and is class legislation because limited to merchants and not including farmers, manufacturers, etc., and because it does not relate to merchants who owe no debts. The court said that the Michigan statute was subject to neither of the objections—failure to exempt from the operation of its provisions persons acting in fiduciary or official capacity under judicial process, and the making it a criminal offense for both purchaser and seller to act in making a sale and purchase in disobedience or disregard of its provisions—which characterized the Utah statute declared unconstitutional in *Block v. Schwartz*, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 A. & E. Ann. Cas. 550.

The decision in the *Spurr Case* was followed without further discussion in *Muselman Grocer Co. v. Kidd, D. & P. Co.* 151 Mich. 478, 115 N. W. 409.

The Minnesota statute, in other respects like the Georgia and Michigan statutes, declares that a sale in violation of its terms "will be presumed to be fraudulent and void as against creditors of the seller." The statute was construed in *Thorpe v. Pennock Mercantile Co.* 99 Minn. 22, 108 N. W. 940, 9 A. & E. Ann. Cas. 229, merely to prescribe a rule of evidence by creating a rebuttable presumption, and, as so construed, its constitutionality was upheld. The court, however, stated that, even if the statute were to be construed as rendering a sale in viola-

this state, a retail general store and meat market, and at the same time, in a store hired by him on the opposite side of the street, carried on a separate and independent retail drug business under the name of the "Taftville Drug Company," which was managed by a licensed druggist employed by him. The value of the stock in the general store was about \$2,000, and of the stock, fixtures, and soda fountain in the drug store, about \$3,500. There was no evidence at the trial of the separate value of the stock, fixtures, and soda fountain. On August 31, 1904, said Hendrick, at a single transaction, and not in the regular course of business, and without any written bill of sale, and without having caused to be recorded the notice of his intention to make such sale required by chapter 72, p. 49, of the Public Acts of 1903, sold and delivered to the defendant said drug store and the whole of his stock, fixtures, and soda fountain

therein for the price of \$3,500, receiving therefor from the defendant \$50 in cash, a small indorsed check, one note for \$2,000 payable in five days, and one for \$1,400 payable in seven days, both being signed by the defendant as agent. It was understood between Hendrick and the defendant that payment of said notes would not be demanded before January 1, 1905. The defendant has never paid said notes, and it did not appear at the trial that payment thereof had ever been demanded. The defendant had been managing said drug business, as a clerk for Hendrick, for two months before such sale, with the expectation of eventually buying it. He had no property, had previously failed in business, and was owing debts on account thereof, and for that reason signed said notes as agent. After such purchase, the defendant continued to conduct said drug business, purchasing goods in small amounts from time to time from

tion of its terms absolutely void, the weight of authority would sustain it.

The importance of the distinction between a statute which makes a sale in violation of its terms absolutely void and one which merely creates a rebuttable presumption in such case is emphasized by the decision in *Sprintz v. Saxton*, 126 App. Div. 421, 110 N. Y. Supp. 585, upholding the constitutionality of the New York act after it had been amended by substitution of the phrase "will be presumed to be fraudulent and void" for the phrase "shall be fraudulent and void," in the statute at the time it was declared unconstitutional in *Wright v. Hart*, supra. Another ground of distinction was that the amended statute contains a new provision taking out of its operation sales by executors, administrators, receivers, or a public officer conducting a sale in his official capacity.

The constitutionality of the Pennsylvania statute, was upheld, after a full discussion, in *Wilson v. Edwards*, 32 Pa. Super. Ct. 295, notwithstanding it declares that a sale in violation of its terms "shall be deemed fraudulent and voidable," and was construed by the court to render a sale voidable, and not merely to prescribe a rule of evidence. In addition to the fundamental constitutional objections that the statute denied the equal protection of the laws, and that it was an unwarrantable infringement of liberty and the right to acquire and dispose of property, the court overruled the objection that its purpose was not sufficiently indicated in its title, which reads: "An Act Relative to the Sale in Bulk of the Whole, or a Large Part of a Stock of Merchandise and Fixtures, or Merchandise or Fixtures, not in the Ordinary Course of Business; Providing Certain Requirements Therefor, Imposing Certain Duties upon the Seller, and Making Their Violation a Misdemeanor."

This decision was followed in *Feingold v. Steinberg*, 33 Pa. Super. Ct. 39, 20 L.R.A. (N.S.).

It was held in *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392, that the facts shown were sufficient to rebut the legal presumption of fraud predicated on want of notice to creditors, required by the bulk sale statute of that state, which provides that a sale in violation of its terms "shall be presumed fraudulent as against the creditors of the vendor, and shall be conclusive evidence of fraud, unless it shall be made to appear that the sale was made in good faith and without any intent to defraud such creditors." The court did not consider the question of constitutionality of the statute, for the reason that it was not questioned on the argument, nor presented in the briefs, of counsel.

It will be observed, however, that the Illinois supreme court, in *Charles J. Off & Co. v. Morehead*, post, 167, holds the Illinois bulk sales law of May 13, 1905, unconstitutional, notwithstanding that the act in terms merely declares that a sale in violation of its terms "will be presumed to be fraudulent and void as against the creditors of the seller." The decision rests upon the broad ground that there is no legitimate basis for the classification upon which the statute rests, and the court does not undertake to distinguish the statute in question from those of other states which have been upheld, by reason of any difference in terms. This decision was followed without further discussion in *Pogue v. Rowe*, 236 Ill. 157, 86 N. E. 207.

The general questions of construction arising under the bulk sales law are treated in the subject note to *Everett Produce Co. v. Smith*, 2 L.R.A. (N.S.) 331; and the specific questions as to the applicability of the statute to a transfer in payment of a creditor, in a case note to *Compton v. Dietlein*, 12 L.R.A. (N.S.) 174; and the question of its applicability to a chattel mortgage, in the case note to *Hannah & Hogg v. Richter Brewing Co.* 12 L.R.A. (N.S.) 178.

the receipts of the business to keep up the stock, and drawing from the receipts about \$16 a week for his living expenses until the goods were replevined by the plaintiff in January, 1905. At the time of said sale, Hendrick was largely indebted and was being pressed by his creditors, but he did not believe that he was in fact insolvent. His general store was closed by attachment on the 16th of September, 1904. The property in the hands of the plaintiff is insufficient to pay the claims of Hendrick's creditors.

The trial court held that the sale to the defendant was not made to hinder or defraud creditors, nor in contemplation of insolvency, but that it was void under chapter 72, page 49, of the Public Acts of 1903, and § 4869 of the General Statutes of 1902, and rendered judgment for the plaintiff. In his reasons of appeal the defendant claims that the trial court erred in holding, upon the facts above stated, that the sale of the drug business was a sale by Hendrick of "the whole or a large part of his stock in trade," within the meaning of chapter 72, page 49, of the Public Acts of 1903, and was void under said act and § 4869 of the General Statutes of 1902, and in not holding that said act of 1903 was in conflict with the state and Federal Constitutions. In this court the plaintiff pleaded in abatement of the defendant's appeal that the finding of facts for the appeal was filed and notice thereof given to the defendant on July 26, 1906, and that the appeal was not filed until August 11, 1906, and not within ten days after such notice of the filing of the finding. To this plea the defendant demurred upon the ground that he was not required to file his appeal within ten days after July 26th, since chapter 24, page 264, of the Public Acts of 1905 provides that "all proceedings to make or complete the record on such appeal shall be suspended during the months of July and August."

The plea in abatement is insufficient. The appeal was filed in time. The filing of the finding in July and of the appeal in August were effective, notwithstanding the provisions that all proceedings should be suspended during those months. That provision was not intended to prevent either court or counsel from filing the necessary papers to make or complete the record on the appeal, during the months of July and August, to become operative upon the expiration of that period.

As the drug store was not conducted as a part of the business of the general store, but as a separate and independent business, carried on in another building, and under another name, the decision of the trial court that the sale was within the statute is clearly sustainable upon the ground that it was

a sale of Hendrick's whole stock in trade in an independent business.

Section 4868, as amended by chapter 72 of the Public Acts of 1903, is not invalid as conflicting with either the Federal or state Constitution. In 1901 an act entitled "An Act Concerning Sales of Personal Property" was passed, which provided, in effect, and as afterward stated in § 4868 of the General Statutes, that any sale by such dealer, at a single transaction, and not in the regular course of business, of the whole or a large part of his stock in trade, should be in writing, describing the property sold, and all the conditions of the sale, acknowledged before competent authority, and recorded within one day after the sale in the town clerk's office where the vendor has his place of business, and, as afterward stated in § 4869 of the General Statutes, that such sales made without these formalities should be void as against the creditors of the vendor at the time of the sale. Pub. Acts 1901, chap. 161, p. 1356. In 1903 the act was passed entitled: "An Act Concerning the Transferring of a Person's Business," which was in force at the time the sale in question was made, and which reads as follows: "Section 4868 of the General Statutes is hereby amended to read as follows: No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole or a large part of his stock in trade unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing describing in general terms the property to be so sold, assigned, and delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto." Pub. Acts 1903, chap. 72, p. 49. Said act neither repealed nor changed § 4869 of the General Statutes of 1902. In 1905, § 4868 of the General Statutes was further amended so that, instead of absolutely prohibiting such sales without such notice, as the language of that section did, it should only render them void as against the vendor's creditors. Pub. Acts 1905, chap. 211, p. 408. In *State v. Reynolds*, 77 Conn. 131-134, 58 Atl. 755, in sustaining, as a valid exercise of the police power of the state, § 1358 of the General Statutes of 1902, prohibiting any person from exposing for sale from any wagon or temporary stand any article of provisions within 1 mile from the fair ground of any incorporated society, we expressly approved of the language of the

courts of other jurisdictions describing the police power of the state as extending "beyond the protection of health, peace, morals, education, and good order," and as comprehending "all those general laws of internal regulation necessary to secure the peace, good order, the health, and comfort of society, and the regulation and protection of all property in the state," and as the "power to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state . . . and add to its wealth and prosperity,"—citing *State v. Harrington*, 68 Vt. 622–626, 34 L.R.A. 100, 35 Atl. 515, and *Barbier v. Connolly*, 113 U. S. 27–31, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357. In *Walp v. Mooar*, 76 Conn. 515–521, 57 Atl. 277, we said of § 4868, as it read before it was amended in 1903, that it was not unconstitutional because it applied only to retail dealers, nor as depriving persons of their property without due process of law; that the purpose of the act was to prevent fraud; that the legislature had the undoubted power to adopt reasonable measures for regulating the sale of merchandise in this state so as to prevent fraud; and that the act then in question was clearly within that power.

No citizen has an absolute right to sell his property either in such manner or at such time as he may choose. Every person holds his rights, however fundamental they may be, subject to the exercise within constitutional limits of that governmental power vested in the legislature of the state in which he resides, which is commonly called the "police power." *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13. While the exercise of such power by the legislature is only to be justified upon the ground that it is for the public good, that its purpose is the removal of an existing evil, that the provisions of the act bear a reasonable relation to the evil sought to be cured, and that they are such as are not usually oppressive upon individuals, and do not impose unnecessary restrictions upon lawful occupations, yet, when courts are required to pass upon the validity of such legislation, it is to be remembered that, in the exercise of such police power, "a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests" (*Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499); that every such law is not to be held void "which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree" (*Otis v. Parker*, 187 20 L.R.A. (N.S.)

U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 86, 43 L. ed. 909, 19 Sup. Ct. Rep. 609); that "every presumption and intentment is to be made in favor of its validity, and that, unless it appears beyond reasonable doubt to be 'a clear usurpation of power prohibited,' it must stand as a valid act." *State v. Reynolds*, supra; *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *State v. Main*, 69 Conn. 123, 135. 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; *State v. Feingold*, 77 Conn. 326–331, 59 Atl. 211. The manifest purpose of the act in question is to protect creditors of retail dealers against a class of sales which are often fraudulent, and opportunities for making which are readily afforded by the nature of the retail business and the manner in which it is usually conducted. *Walp v. Mooar*, supra. Enactments to prevent such fraudulent transfers are clearly within that class of legislation generally denominated "police regulations." In considering whether, in passing this particular act, the legislature has transcended the limits of its constitutional authority, we are to inquire whether the methods provided by the act for curing the existing evil are reasonably appropriate for that purpose, and whether they unreasonably infringe upon personal or property rights. Section 4808 as originally enacted provided no other notice to creditors than by the recording of the bill of sale within one day after the sale. In enacting the amendment of 1903 the legislature probably believed that a notice before the sale would be a much more effectual means of enabling creditors to protect their rights than a notice after the sale had been made.

It may be that this act approaches the verge of legislative power, but we cannot say that its requirements as to the manner and time of giving notice of the sale are so clearly unreasonable or so unnecessarily burdensome as to compel us to hold that any constitutional rights have been infringed. It cannot be said that such notice as creditors would receive from the recording seven days before the sale of a notice of his intention to sell by the vendor, would give them an unnecessarily long time to take steps to protect their interests. Although, by the language of the amendment of 1903 taken strictly, sales of the character there described, made without the required notice, are absolutely forbidden, it is apparent, and especially from the fact that § 4869 was left unchanged, that they were only intended to be voidable at the instance of creditors. It does not seem to us, either from a consideration of the requirements themselves of the act, or of the facts of the case before us, that the restrictions placed by the legislature up-

on sales of the kind in question are such as will cause such serious inconvenience to those affected by them as will amount to any unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice by paying his debts, even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction, and not in the regular course of business, that its provisions are aimed. It is, of course, possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale occasioned by the giving of such notice. But "a possible application to extreme cases" is not the test of the reasonableness of public rules and regulations. *Com. v. Plaisted*, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224. "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public." *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549-564, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624. Statutes imposing even more severe restrictions upon such sales than those of the act before us have been sustained in other jurisdictions in the cases cited in *Walp v. Mooar*, *supra*, of *John P. Squire & Co. v. Telier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; and *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

The fact that some of the goods replevined were placed in stock by the defendant after his attempted purchase from Hendrick does not entitle the defendant to retain them. It appears that he merely replaced goods sold with others purchased with the avails of such sales.

There is no error.

Baldwin, Prentice, and Shumway,
JJ., concur.

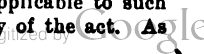
Hamersley, J., dissenting:

Chapter 72 of the Public Acts of 1903, whose validity is challenged in this action, is in form an amendment of chapter 161 of the Public Acts of 1901 (Rev. 1902, §§ 4868, 4869, 4870), but is in substance and legal effect a repeal of the act of 1901 and the en-

actment of a new statute of a radically different character.

The former act required a sale of his stock in trade by a retail dealer to be made in writing and recorded within one day after the time of sale, under penalty of an unrecorded sale being void as against existing creditors of the vendor. The regulation as to what sales shall be made in writing and recorded is plainly a legislative power. The act did not affect the property of the vendor, nor restrict his freedom of action in his selling that property; and the penalty imposed for its disobedience, in view of the actual or constructive fraud against creditors, possible to be more easily accomplished through such sale if not in writing and immediately recorded, was sufficiently appropriate to the legitimate purpose of the regulation to make its wisdom and justness a purely legislative, and not a judicial, question. We therefore held that the act was not unconstitutional. *Walp v. Mooar*, 76 Conn. 515, 67 Atl. 277.

The act of 1903, read in connection with its amendment by chapter 211 of the Public Acts of 1905, requires every retail dealer, before making a sale of his stock in trade, to come to an agreement with his vendee as to all the conditions of the sale; to state these conditions in writing, together with a description of the property to be sold and the parties to the sale; and to cause this writing, signed by him, to be recorded at least seven days previous to making such sale, under penalty, in case of disobedience, of the sale being void as against existing creditors.

Do these limitations upon the owner's right to sell his property necessarily involve a substantial impairment of the value of that property? If they do, then the act takes private property without compensation, and it is immaterial under what form of words or pretense the result is accomplished. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273. The validity of the act of 1903 turns upon the answer to this question. If the limitations upon sale involve no substantial impairment of the value of the owner's property, then the justification of the incidental annoyance to the owner may be regarded as a legislative, rather than a judicial, question; but, if the necessary effect of the act is destruction of private property without compensation, then the principles of the law applicable to such a case involve the invalidity of the act. 

to these principles there is little, if any, controversy. They are settled by our own decisions in accordance with the weight of authority in other jurisdictions. The protection of the citizen in the equal enjoyment of personal freedom and private property are secured by our Constitution in terms as broad as those which yeast the legislative power in the general assembly. The power to destroy or substantially impair these rights is not included in the grant of legislative power, and a law purporting to be the exercise of legislative power, whether of the power of taxation, or of trade regulation, or of protective legislation (often called police power), or of any other legislative power, is void if in effect it is a substantial impairment of those rights secured by the Constitution against the operation of every manifestation of legislative power. *State v. Conlon*, 65 Conn. 478, 489, 31 L.R.A. 55, 48 Am. St. Rep. 227, 33 Atl. 519; *State v. Travelers' Ins. Co.* 73 Conn. 255, 265, 57 L.R.A. 481, 47 Atl. 299; *McKeon v. New York, N. H. & H. R. Co.* 75 Conn. 343, 347, 61 L.R.A. 730, 53 Atl. 656; *State v. McMahon*, 76 Conn. 97, 102, 55 Atl. 591; *State v. Feingold*, 77 Conn. 326, 331, 59 Atl. 211.

In *State v. Travelers' Ins. Co.* supra, we say: "The legislative power in all its manifestations is limited. . . . If any exaction . . . in the form of taxation . . . is a seizure of the property of one for the benefit of another, or is an uncompensated confiscation of property, the law authorizing such exaction" violates the Constitution and is void.

In *McKeon v. New York, N. H. & H. R. Co.* supra, we say that a law authorizing acts which in effect constitute the taking of property without compensation is void, notwithstanding such acts are authorized in the exercise of the police power; that the phrase "police power" does not denote some transcendent form of legislative authority, but that the police powers of a state are simply the powers of government inherent in every sovereignty, and, if exercised by legislation which violates any right guaranteed by the state Constitution, they are to that extent invalid; and that "the legislation on which the defendant relies in the case at bar makes no direct provision for compensation for property taken. The Constitution does; and that is enough."

In *State v. McMahon*, supra, we say: Legislation is not exempt from constitutional guaranties because it relates to subjects commonly classed under the phrase "police power." The whole legislative power is committed to the general assembly subject to the constitutional restrictions, and no manifestation of that power is exempt from these limitations. A law which takes private

property without compensation is equally void, whether classed as an exercise of educational power in building a school house, or of police power in the destruction of property dangerous to health. "Clothing infected with disease may be destroyed without compensation to its owner, not because the law authorizing it is a police regulation and so exempt from constitutional limitation, but because no right of property is invaded by such destruction." No law can authorize the taking of property without compensation, either for private or public use, because such legislation is outside the field of legislation included in the grant of legislative power of any nature. But the rights of property thus protected do not include a right to the possession or use of anything which is either in itself, or a particular use, inherently dangerous to others. The power to protect its citizens from such dangers is included in the grant of legislative power, and, when anything which may be the subject of private ownership thus becomes dangerous, menacing the health, peace, or morals of the public, the legislature may authorize unlimited restrictions in its use, or even the destruction of the thing itself, without compensation, and the law may be within the constitutional limits of this power of protective legislation, because the thing destroyed, when thus dangerous to the public, ceases to that extent to be the subject of ownership, and its destruction is not the taking of property but the destruction of a thing which no man has a right to own. The loose phrase "police power" is sometimes limited to this particular exercise of the power of protective legislation in respect to things which, by reason of their danger to the public, have to that extent ceased to be the lawful subject of private ownership; but more frequently its use covers as well the power of trade regulations and all regulations appropriate to promote public quiet, comfort, and prosperity. Referring to such regulations, we say, in *State v. Reynolds*, 77 Conn. 131, 134, 58 Atl. 755: "Every citizen holds his rights subject to the exercise, within constitutional limits, of this power." Among the constitutional limits are those provisions which except from the grant of all legislative power the power to take property without compensation. The legislature has full power in promotion of general public interests to enact laws regulating the use of property which do not substantially affect the protected rights of property and person; it has the power to regulate the use of, and even to destroy, anything which may be the subject of ownership, and which has become a menacing danger to the public; each kind of regulation is an exer-

rise of that legislative power often called "police power," but the principles by which the two kinds of regulation must be governed are very different.

In the former case the controlling question relates to the wisdom and justice of the regulation, and this is a legislative question; in the latter, the question is, Has the protected right of property been lost by reason of the inherent danger to the public of the thing owned? and this is a judicial question. The distinction is vital. The efficacy of any limitation of legislative power in respect to property rights protected by the Constitution depends upon the conception and maintenance of this distinction. Such limitation must inevitably become a mockery if the courts hesitate to determine in each case as a purely judicial question whether or not the protected right of property exists. In determining this judicial question the courts ordinarily follow the legislative finding as to the dangerous nature of the property, but not when they are satisfied that there exists no reason for such a finding. For instance, when the legislature finds that the liquor distilled from wheat is a menacing danger to public peace and morals, which deprives the owner of any absolute right to sell such property, and thereupon prohibits its sale, the courts accept the finding even if there may be room for some difference of opinion. But, should the legislature find that wheat from which the dangerous liquor may be distilled is a menacing danger to public order, and thereupon prohibit its sale, it will hardly be contended that the strongest desire to maintain the validity of a legislative act could justify the court in accepting the finding and declaring the legislation valid. No more can it be seriously contended that the stock in trade of all retail dealers, whether used for sale in small quantities or in bulk, is in its nature such a menacing danger to the public that the owner has no right of property in such a dangerous use, so that a law destroying the stock in trade, or substantially impairing its value, does not appropriate property without compensation.

If, therefore, the restrictions of the act of 1903 do substantially impair the value of the property affected, there is no serious question as to its invalidity. Acts imposing somewhat similar restrictions, and apparently intended to accomplish a similar purpose, were in the same year (1903), through a strange coincidence, enacted by the legislatures of a large number of states. The courts of New York, Ohio, and Utah have held such legislation invalid. *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 20 L.R.A. (N.S.)

1 A. & E. Ann. Cas. 558; *Block v. Schwartz*, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22. 1 A. & E. Ann. Cas. 550. The courts of Massachusetts, Tennessee, and Washington have supported their validity. *John P. Squire & Co. v. Teller*, 185 Mass. 18, 102 Am. St. Rep. 322, 60 N. E. 312; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37.

In this class of cases the primary question is, Does the law in its necessary practical effect appropriate property not dangerous to the public either inherently or in its particular use? This question determined, the application of the settled principles defining the limitation of legislative power is comparatively simple. As was said in *State v. Feingold*, 77 Conn. 326, 333, 59 Atl. 211: "In drawing the line which separates the field of arbitrary interference with protected rights of property and freedom in personal action, from that of protective legislation in behalf of public safety, each case must fall on one or the other side in accordance with its particular circumstances." The act of 1903 prohibits all retail dealers from selling their property, which is palpably not dangerous to public safety either inherently or in its particular use, without complying with certain antecedent requirements. Applying the rule of common sense to the commonly known conditions of trade, it seems to me that the necessary practical effect of these requirements is a substantial impairment of the value of the property affected, and, for this reason (without reference to the question whether the act also violates that equality under the law in the enjoyment of civil rights which is guaranteed by our Constitution), I am unable to concur in the decision of the court.

Affirmed by Supreme Court of United States January 4, 1909, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174.

ILLINOIS SUPREME COURT.

CHARLES J. OFF & COMPANY, Appt.,
v.
DELLA I. MOREHEAD.
WILBUR GEHRES, Interpleader.

(235 Ill. 40, 85 N. E. 264.)

Bulk-sales law — constitutionality.

A statute requiring, under penalty of having the sale presumed fraudulent as to the

Note.—See case note to *Young v. Lemieux*, ante, 160.

creditors, one about to sell a stock of merchandise in gross or in a manner out of the due course of business to make an inventory and list of his creditors and notify them of the proposed sale, which is not required of persons selling other kinds of property under similar circumstances, unconstitutionally deprives him of liberty and property.

(June 18, 1908.)

APPEAL by plaintiff from a judgment of the Logan County Court dismissing an attachment to reach property for the satisfaction of a debt of defendant. Affirmed.

Statement by Vickers, J.:

This is an action in assumpsit and attachment brought by Charles J. Off & Company against Della I. Morehead. A writ of attachment was issued upon an affidavit alleging that the defendant had, within two years, fraudulently conveyed and disposed of her property so as to hinder and delay her creditors, contrary to the provisions of and act entitled "An Act to Prevent Sales of Merchandise in Fraud of Creditors," approved May 13, 1905, and in force July 1, 1905. This attachment writ was levied upon a stock of groceries which had formerly belonged to the defendant. To the declaration in assumpsit, which consisted of the common counts, a plea of the general issue was interposed. The affidavit for attachment was traversed and issue joined on the traverse. After the seizure of the stock of merchandise by virtue of a writ of attachment, Wilbur Gehres, by leave of court, interpleaded, and by his interplea averred that the said stock of merchandise attached and seized by virtue of the writ of attachment was at the time it was so attached and seized, and still was, the property of him, the said Wilbur Gehres, and not the property of the said Della I. Morehead. To the interplea Off filed a replication, denying that the property seized was the property of the interpleader, and averring the same to be the property of Della I. Morehead. This replication concluded to the country, and upon it issue was joined. A jury was waived by the parties as to the issues on the declaration in assumpsit and the issues on the affidavit in attachment, and these issues were tried by the court. A jury was impaneled to try the issue on the interplea. Upon the hearing of that issue the jury found a verdict in favor of the interpleader. The court found for the plaintiff in the action of assumpsit and assessed his damages at \$288.81. Upon the issue as to the attachment the finding of the court was for the defendant. A judgment having been rendered upon the verdict of the jury finding Wilbur Gehres to be the owner of the stock of merchandise, the 20 L.R.A. (N.S.)

plaintiff in the attachment suit and defendant in the interplea duly excepted, and has perfected his appeal direct to this court on the ground that the constitutionality of the act of May 13, 1905, known as the "bulk-sales law" (Laws 1905, p. 284), is involved.

The statute the constitutionality of which is involved in this case is as follows:

"Sec. 1. That a sale of any portion of a stock of merchandise, otherwise than in the ordinary course of trade or in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in gross, will be presumed to be fraudulent and void as against the creditors of the seller unless the seller and purchaser shall, at least five days before the sale, make a full and detailed inventory showing the quantity, and, so far as possible, with the exercise of reasonable diligence, the cost price, to the seller, of each article to be included in the sale; and unless such purchaser shall, at least five days before the sale, in good faith, make full and explicit inquiries of the seller as to the names and places of residences or places of business of each and all of the creditors of the seller and the amount owing each creditor; and unless the purchaser shall, at least five days before the sale, in good faith, notify or cause to be notified, personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge, or can, with the exercise of reasonable diligence, acquire knowledge, of said proposed sale and of the said cost price of the merchandise to be sold and of the price proposed to be paid therefor by the purchaser. The seller shall, at least five days before such sale, fully and truthfully answer in writing each and all said inquiries.

"Sec. 2. Except as especially provided in this act, nothing therein contained nor any act thereunder, shall change or affect the present rules of evidence or the present presumptions of law."

The court below held the above statute unconstitutional, and refused to allow the appellant to prove that the sale in question had been made without complying with the provisions of said act.

The facts in this case are not in dispute. Della I. Morehead borrowed \$500 from the First National Bank of Lincoln, Illinois, with which she bought a small stock of groceries and engaged in the retail grocery business. She became indebted to Off & Company, of Peoria, for merchandise, to the amount of \$288.81. Her business appears to have been unsuccessful. She sold her entire stock of goods to Wilbur Gehres. An invoice of the stock was taken, and it was found that the stock was worth, at cost prices, \$296. Gehres paid her for the stock

\$260. A horse and delivery wagon valued at \$100 were included in the sale, bringing the total sale price up to \$360. Gehres paid for the property by a check. Appellee applied the whole amount of the check on her note of \$500 to the bank. Appellee testifies that she found her business was unprofitable, and that she desired to apply the proceeds of the merchandise on her debts, as far as the same would go. Appellee had mortgaged her homestead for the \$500 which she borrowed of the bank.

There is no contention that the sale of the stock of merchandise was fraudulent in fact. Appellant's sole contention is that the sale was made in violation of the bulk-sales law, above set out, and for that reason it must be held fraudulent and void as to the creditors of appellee.

Messrs. Winslow Evans and George J. Jochem for appellant.

Mr. A. D. Cadwallader for appellee.

Vickers, J., delivered the opinion of the court:

The constitutionality of this statute is challenged on the ground that it is in conflict with §§ 1 and 2 of the Bill of Rights. These sections are as follows:

"Sec. 1. All men are by nature free and independent, and have certain inherent and inalienable rights. Among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

"Sec. 2. No person shall be deprived of life, liberty, or property, without due process of law."

The statute in question singles out a particular class of persons, and imposes burdens upon them from which all other classes are exempt. The persons thus affected are deprived of both liberty and property, in that they are not permitted to contract in respect to a particular kind of property subject to the same laws that are applicable to all other classes of property. The privilege of contracting is both a liberty and a property right, and a law which deprives a man or a class of the right to acquire and enjoy property upon the same terms and in the same manner permitted to the community at large is in violation of the constitutional rights of the persons affected by such law. Cooley, Const. Lim. 1st ed. 393; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395. "Due process of law" is synonymous with "law of the land," and it means a general public law, binding upon all members of the community under all circumstances, and not partial or private laws affecting the rights 20 L.R.A. (N.S.)

of private individuals or classes of individuals. *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People*, supra. The legislature undoubtedly has the constitutional power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only; but in such instances the class of persons upon whom the law is to operate must possess some common disability, attribute, or qualification, or must occupy some condition marking them as proper objects for the operation of special or class legislation. *Gillespie v. People*, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Harding v. People*, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *Ruhstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; *Starne v. People*, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61. The general principle running through all the cases is that a statute which arbitrarily selects a class of individuals and subjects them to peculiar rules or imposes upon them special obligations or burdens from which other persons are exempt is unconstitutional. In the language of Judge Cooley, in his work on Constitutional Limitations, 6th ed. 481-483: "Everyone has a right to demand that he be governed by general rules; and a special statute which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government."

Meadowcroft v. People, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303, was a prosecution under the act for the protection of bank depositors, which provided, among other things, that the "failure, suspension, or involuntary liquidation of the banker, broker, banking company, or incorporated bank within thirty days from and after the time of receiving such deposit, shall be prima facie evidence of an intent to defraud, on the part of such banker, broker, or officer of such banking company or incorporated bank." In that case the constitutionality of the statute was assailed on the ground that it was special legislation in that it established a rule of evidence applicable only to a particular class of persons. That contention was answered by this court, speaking by Mr. Justice Baker, by pointing out that the business of banking is not *juris privati*, but is, like that of an innkeeper or common carrier, affected with the public interest, and therefore subject to public regulation; and the law was sustained on the ground that there was manifest reason and necessity for protecting the community in their dealings with persons engaged in the

banking business that do not exist with respect to their transactions with those employed in "the ordinary agricultural, manufacturing, merchandising, and mining pursuits." The only persons affected by this statute are persons who own "stocks of merchandise," and persons who may purchase a portion of such stock of merchandise in some manner other than in the ordinary course of business, or the entire stock of merchandise in gross. The words "stock of merchandise," in this statute, are used in the common and ordinary acceptance of those terms, and mean the goods or chattels which a merchant holds for sale, and are equivalent to "stock in trade" as ordinarily used and understood among merchants and tradesmen. The title of this act indicates its purpose to be the prevention of sales of merchandise in fraud of creditors. It cannot be seriously contended that a creditor of a merchant occupies a position of such peculiar public concern that the passage of this act can be justified because of the inability of creditors of merchants to take care of themselves upon an equal footing with creditors of persons engaged in other lines of business. There is, furthermore, no reason pointed out, and none suggests itself to us, why sales of stocks of merchandise should be placed under the protection of a special statute imposing onerous restrictions and conditions upon both seller and buyer from which persons dealing in all other classes of property are exempt. This law has no application to a sale by a manufacturer of all his machinery, tools, finished articles, and raw material; or by a farmer of all his live stock, farm implements, crops grown or growing, and household goods; or by a hotel keeper of his entire business and all the property therein; or by a livery or transfer company of all its rolling stock, harness, and horses owned and used in the business; or by a publisher of all his presses and printing machinery and appliances; or by a mine owner of all the property owned and used in the mining business; or to a sale by a miller who may sell his business, mill machinery, and the grain and its products on hand. On behalf of these and all others, the law indulges the presumption of honesty and fair intentions in making sales, either in or out of the ordinary course of business, with or without an inventory, and in bulk or by parts and parcels. If sales made of the various classes of property above referred to are presumed to be fair and honest, it is difficult to see why a sale of a stock of merchandise under similar conditions should be presumed to be fraudulent and void. There is no such actual, substantial difference between the members of the class of individ-

uals upon whom this statute is intended to operate and the owners of other kinds of property as to warrant the legislature in passing an act applicable only to persons dealing in stocks of merchandise. The act in question is therefore special class legislation, which is prohibited by the Constitution of 1870.

Statutes bearing more or less similarity to the one now under consideration have been enacted in a number of other states. The validity of these statutes appears to have been questioned in the courts of last resort in eight states and one territory. These courts have reached widely different results. Thus, in *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312, *Walp v. Moar*, 76 Conn. 515, 57 Atl. 277, *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50, *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37, and *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 2 L.R.A. (N.S.) 334, 82 Pac. 490, 6 A. & E. Ann. Cas. 970, statutes of the same general character as the one here involved have been held constitutional; while in *Block v. Schwartz*, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 A. & E. Ann. Cas. 550, *McKinster v. Sager*, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854, *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 A. & E. Ann. Cas. 558, and *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263, the opposite conclusion was reached and the statutes declared unconstitutional. We do not regard the question involved here as one to be determined upon the weight of authority outside of this state. We have so often expressed our views in regard to the clause of our Constitution now under consideration that its interpretation is settled by the previous decisions of this court too firmly to be departed from out of regard for opposing views in other states, however highly we may esteem them. Without regard to the question of the weight to be given to the conflicting decisions of other courts upon the question now in hand, we think the reasoning of those courts which have held such statutes unconstitutional on the ground upon which we rest our judgment in this case are more in harmony with the views of this court as expressed in the numerous cases than are the reasons which are given by those other courts in which a different result has been reached.

Our conclusion is that the act in question is void in its entirety. It follows, therefore, that the court below committed no error in refusing the evidence offered to prove that

the sale in question was not made in accordance with its provisions.

The judgment of the County Court of Logan County will be affirmed.

NEBRASKA SUPREME COURT.

EX PARTE WILLIAM G. CLARKE.

WILLIAM G. CLARKE, Plff. in Err.,

v.

MARY E. LYON et al.

(—Neb. —, 118 N. W. 472.)

Divorce — custody of children — jurisdiction.

1. Where the court of a sister state has granted a divorce and awarded the temporary custody of the children to the mother, who becomes a resident of this state and dies here, leaving such children in the hands of relatives who are appointed guardians by the county court, the fact that the court ren-

Headnotes by CALKINS, C.

Case Note. — Effect of death of parent to whom custody of child was awarded upon rights of surviving parent.

In *Re Robinson*, 17 Abb. Pr. 399, note, it was held that, upon the death of the mother, to whom the custody of the children had been awarded in divorce proceedings, the father's rights over the children were restored; and he was entitled to their care and custody.

In *Schammel v. Schammel*, 105 Cal. 258, 38 Pac. 729, it was held that, where a decree of divorce awarded the custody of a minor child to the mother, and ordered the father to pay every month a certain sum of money to the mother, "or to the legal guardian of said minor" for the support and education of the minor, the part of the decree here quoted was beyond the power of the court and without any legal effect, since, upon the death of the mother, the father again became entitled to the custody of the child, and he was then obligated to furnish such support as the law, and not the decree, imposed upon him.

In *Re Blackburn*, 41 Mo. App. 622, it was held that a decree of divorce which awarded the custody of the child to the mother did not operate as a conclusive bar to the father's right to the custody of the child for all time; that it had that effect as between him and his divorced wife only while she lived; that upon her death his right to the custody of the child again became paramount, and that such right could not be defeated by her dying request that the child should remain in the keeping of its grandparents.

In *Re Neff*, 20 Wash. 652, 56 Pac. 383, it was held that a deceased wife could not, by testamentary disposition, deprive the 20 L.R.A. (N.S.)

dering such divorce retained jurisdiction for the purpose of making further orders does not deprive the courts of this state of jurisdiction to determine the merits of a controversy between the divorced father and such guardians for the custody of such children,—especially where the court rendering the divorce has expressly refused to itself determine the material question in issue.

Same — decree — effect.

2. Where a court granting a divorce without finding the father unfit temporarily awards the custody of minor children to the mother, such decree does not deprive the father of the natural right to the custody of such children against any person except the mother; and, upon her death, such right ceases to be affected by such award.

Guardian — appointment — effect.

3. The appointment of a guardian by a county court is not conclusive as against a parent's right to the custody of his children, unless it appears that he had notice of the proceeding, and that the question of his competency and suitability was adjudicated.

Parent — custody of children — fitness.

4. The unfitness which deprives a parent of the right to the custody of his children must be positive, and not comparative; and the mere fact that the children would be bet-

father of the custody of his children, although during her lifetime their custody had been awarded to her in a divorce suit.

In *McKinney v. Noble*, 38 Tex. 195, it was held that, under a statute which declared that "the parents or the survivors of them . . . have a natural right and duty to take care of the persons of their minor children," the mother, to whom the custody of her minor child had been given by a decree of divorce, could not by will deprive the father of the guardianship of the person of his child.

But in *Wilkinson v. Deming*, 80 Ill. 342, 22 Am. Rep. 192, it was held that a decree of divorce which gave to the mother the absolute custody of a child took away, *ipso facto*, from the father all control thereafter over the child until restored by the action of the proper court; and the court, on the application of the father after the death of the mother, refused to give him the custody of the child, the deceased mother having by will appointed a testamentary guardian of the child, who was not shown to be an unfit person, there being in existence at that time a statute giving to a mother, when sole, the power to make such a testamentary disposition of her child.

In *Re Steele*, 107 Mo. App. 567, 81 S. W. 1182, upon habeas corpus after the death of the father, the court refused to give a female child to its mother, it appearing that the father had procured a divorce from the mother on the ground of adultery; that the custody of the child had been awarded to the father, who took her to the home of his married sister, the respondent, to be cared for, protected, and educated, and that the mother had married her paramour and was living with him.

ter nurtured or cared for by a stranger is not sufficient to deprive the parent of his right to their custody.

Same — how determined.

5. While the unfitness which deprives a parent of his natural right to the custody of his children must be positive, and not comparative, the degree thereof must be considered in relation to the attending circumstances, such as the concern he has shown for them in the past, the suitability of his domestic surroundings to receive them, and the question of their general welfare.

(November 6, 1908.)

ERROR to the District Court for Lancaster County to review a judgment denying an application for a writ of habeas corpus against Mary E. Lyon and H. E. Wood to secure possession of certain children. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Carlos J. Ward and Halleck F. Rose, for plaintiff in error:

Upon the death of the parent in custody of children, the surviving parent has a right to present his claim to their custody, and the deceased parent has no right to appoint a testamentary guardian.

Nelson, Div. & Sep. §§ 975, 976, 985, pp. 934, 940, 954; Re Coons, 20 Ohio C. C. 47; State ex rel. Neider v. Reuff, 29 W. Va. 751, 6 Am. St. Rep. 676, 2 S. E. 801; 14 Cyc. Law & Proc. p. 809; Umlauf v. Umlauf, 128 Ill. 380, 21 N. E. 600; Church, Habeas Corpus, p. 728, § 451.

All applications to change the decree must be made to the court granting the order.

Nelson, Div. & Sep. § 980, p. 945; Bailey v. Schrader, 34 Ind. 260; Wakefield v. Ives, 35 Iowa, 238.

A court of one state should give full faith and credit to the decisions of the courts of another.

Church, Habeas Corpus, p. 729, § 451a.

Primarily the father has a right to the custody of his children.

Church, Habeas Corpus, p. 699; Harding v. Harding, 144 Ill. 603, 21 L.R.A. 310, 32 N. E. 206; Umlauf v. Umlauf, 128 Ill. 381, 21 N. E. 600.

Unless the father is affirmatively shown to be unfit to have the custody of his children, the custody should not be committed to another.

Farrar v. Farrar, 75 Iowa, 125, 39 N. W. 226; Hopkins v. Hopkins, 39 Wis. 167; Welch v. Welch, 33 Wis. 534; Eckhard v. Eckhard, 29 Neb. 457, 45 N. W. 466; Norval v. Zinsmaster, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373; 14 Cyc. Law & Proc. p. 806, § 2.

The discretion of the court is abused if the 20 L.R.A. (N.S.)

custody of children is awarded to a third person where one of the parents is not manifestly unqualified for the trust.

Nelson, Div. & Sep. § 976 p. 937; Farrar v. Farrar, supra; Norval v. Zinsmaster, 57 Neb. 161, 73 Am. St. Rep. 500, 77 N. W. 373.

A court is without jurisdiction when a minor resides in one state and the guardian in another.

Church, Habeas Corpus, p. 730.

Messrs. F. A. Boehmer and I. P. Hewitt, for defendants in error:

A decree of divorce granted for the fault of the husband, giving the custody absolutely to the mother, takes away, *ipso facto*, all control of the father over the child.

Wilkinson v. Deming, 80 Ill. 342, 22 Am. Rep. 192.

The statutory right in the surviving parent is not absolute, but the welfare of the children is the real and vital question to be determined in such cases; and, when the father is unfit or financially unable to support the children or properly maintain them, their custody should be awarded to other parties.

Schouler, Dom. Rel. 4th ed. § 248; Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993; State ex rel. Filbert v. Schroeder, 37 Neb. 671, 56 N. W. 307; Norval v. Zinsmaster, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373; Sturtevant v. State, 15 Neb. 464, 48 Am. Rep. 349, 19 N. W. 617; Eckhard v. Eckhard, 29 Neb. 459, 45 N. W. 466; Giles v. Giles, 30 Neb. 624, 46 N. W. 916; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; Re Thomsen, 1 Neb. (Unof.) 751, 95 N. W. 805.

A court, in habeas corpus proceedings, should not grant the custody of the children to the parent from whom, by his own fault, they were taken in the divorce proceeding.

Eckhard v. Eckhard, 29 Neb. 457, 45 N. W. 466; Norval v. Zinsmaster, supra.

Messrs. G. A. Adams and L. F. Mason also for defendants in error.

Calkins, C., filed the following opinion:

This was a petition for a writ of habeas corpus by William G. Clarke to obtain possession of his two minor children. The petitioner was married to Anna Carpenter Lyon in 1885 in the state of Illinois, where they lived together as husband and wife until the year 1899, when they separated. In 1901 the petitioner began a suit in the circuit court of Cook county, Illinois, against his wife, Anna, for a divorce on the ground of desertion. In this suit the wife filed an answer and cross bill, praying for a divorce from her husband on the ground of desertion on his part. A decree was entered

granting her a divorce upon such cross bill, and she was awarded, until the further order of the court, the custody of the two surviving children of said marriage, both boys, Holly L., born March 17, 1887, and Caryl C., born May 18, 1897.

It seems that the wife, Anna, was possessed of an estate in her own right sufficient for the support of herself and children; and, beyond the husband's releasing any marital claims to which he was entitled in her lands, no adjudication of property rights was made between the parties. The wife, with the two boys, removed to Lincoln, in this state, where she resided until her death, December 21, 1906. From the time of the divorce until her death she supported herself and the two boys without any assistance from their father. The petitioner, very soon after the rendition of the decree of divorce, married a second wife, Adelaide, with whom he lived until about six months before the commencement of this proceeding, and by whom he had a son, Myron, who was at the time of the taking of the evidence in this case about four years old. The respondent Lyon and the wife of the respondent Wood were half sisters of Anna Carpenter Clarke; and, while the latter left no will, she, upon her deathbed, expressed the wish that Mr. and Mrs. Wood should have the custody of the children. The respondent, Lyon, who, it is claimed, resided in Waukegan, Illinois, came to Lincoln about the time of the death of the mother, and together with Mr. and Mrs. Wood took charge of the children. On the 4th day of January, 1907, the petitioner obtained an order in the original divorce suit from the circuit court of Cook county, Illinois, awarding him the permanent custody and care of said children. Upon the intervention of certain relatives of the children to set aside this order, the court, on the 11th day of February, 1907, entered an order in said case vacating the order awarding the custody of the children to their mother, and granting the father leave to take any proper steps in any court of competent jurisdiction to obtain their custody, the court expressly declining to determine whether the petitioner was or was not a fit person to have the custody of said children as against the persons with whom they were then domiciled. Upon obtaining the order of January 4, 1907, the petitioner immediately notified the respondents by letter of the making thereof; and they, on January 7th, filed a petition in the county court of Lancaster county, and obtained an order appointing themselves guardians of the person and estate of the said children. No notice of the proceeding before the county judge was given the father.

20 L.R.A. (N.S.)

On February 20, 1907, the petitioner began this proceeding, his application setting forth his relationship to the children, the rendition of the decree of divorce, the subsequent modification thereof, and alleging that the said children were unlawfully restrained of their liberty. For answer to this application the respondents alleged their appointment as guardians, asserted their competency to properly discharge such trust, and charged that the petitioner "is not a suitable person to take care of and have the custody of said children, and that the welfare of said children would be better preserved if they were not placed in his care and custody." They added as special reasons for his unfitness that he was "possessed of a quarrelsome character and violent temper, and that he was addicted to the excessive use of intoxicating liquors."

There was a trial to the court upon the issues so tendered, and the writ was denied, from which finding and judgment of the court the petitioner appeals.

1. The petitioner contends that the court where the divorce suit was tried maintains jurisdiction of the parties for the purpose of changing the decree as to the custody of the children, and that they remain the wards of the court, so that, upon the death of the party to whom their custody was awarded, that court may grant custody to the surviving parent. This may be true where the parties interested remain within the jurisdiction of the court granting the divorce; but it is not applicable to the facts in this case. The mother lawfully brought the children to this state, and lawfully acquired a residence here. Upon her death the children remain within this jurisdiction, whose courts alone have power to enforce an order as to their custody; and, while such courts should give full faith and credit to the judgment of the circuit court of Cook county, we do not think they are required to enforce the order of January 4, 1907. This order was made after the death of the mother, and without any notice to the persons with whom the children were then domiciled. It is apparent that the court regarded the order as made without jurisdiction, and void; for when, on February 11th, its attention was called to the fact that the mother was dead and the children were not within its jurisdiction, it, acting as though the order of January 4th had never been made, proceeded to set aside the order awarding the custody of the children to the mother, and gave the father leave to take proper legal steps in any court of competent jurisdiction to obtain their custody and control, expressly declining to pass upon the question of his fitness for such custody. It is plain that the court did not regard the or-

der of January 4th as in force; and, if it were in force up to that time, it was modified by the order of February 11th.

2. The respondents contend that the award of the custody of the children to the mother gave her control of them not only during her life, but invested her with a power to dispose of them at her death. This contention cannot be maintained. There was no finding that the father was unfit to have the custody of these children; and the award of such custody to the mother until the further order of the court was only a finding that, as between the father and mother, the interests of the children would be best served by committing them to the care of the mother for the time being. Her death not only removes the reason for this award of custody, but renders its execution impossible, so that the right of the father to the custody of the children is no longer affected by such decree.

3. It is claimed on behalf of the respondents that the order appointing them guardians of the minor children was an adjudication of the father's right to the custody of their persons. Whatever may be the effect of this order so far as the estate of the minor children is concerned, it would not of itself give the right of custody of the persons of the children against a parent who had no notice and whose rights were not adjudicated. The question of his competence and suitability would remain to be adjudicated. *Re Thomsen*, 1 Neb. (Unof.) 751, 95 N. W. 805.

4. Upon the question of the fitness of the father, the finding of the district court was that the petitioner could not "provide for said children, or rear them in as proper and fitting a manner as can the respondents." The oldest boy, having been born in March, 1887, has attained his majority, and this controversy no longer concerns him. It is conceded that the respondents are so situated as to give excellent care to the boy Caryl, now ten years old, and no criticism is made of the manner in which he is being nurtured and educated, nor of the environment in which he is placed. In fact, it is tacitly admitted that his present surroundings are better than his father is able to offer; but it is earnestly insisted that the disqualification which deprives a parent of the custody of his child must be of a positive, and not of a comparative, character. Upon this question we can do no better than to quote from the opinion of *Irvine, C.*, in the case of *Norval v. Zinsmaster*, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373. He there says: "We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language 20 L.R.A. (N.S.)

applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed by revolution, if necessary. In *Sturtevant v. State*, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617, the child was only a few months old, and the custody was taken from the father because he was unable personally to discharge duties which the custody imposed. *Giles v. Giles*, 30 Neb. 624, 46 N. W. 916, was a controversy between father and mother, where the natural rights were equal. *State ex rel. Filbert v. Schroeder*, 37 Neb. 571, 56 N. W. 307, and *Schroeder v. State*, 41 Neb. 745, 60 N. W. 89, presented a case of affirmative unfitness of the father and of abandonment of the child."

5. The respondents insist that the petitioner is an unsuitable and unfit person to have the care of this child, and that the evidence, not only would have justified the district court in so finding, but that the same is of such a character as to sustain no other conclusion. It appears that at the time of the petitioner's marriage with his wife, Anna, he was a clergyman of the Presbyterian Church. He afterwards served for several years as pastor of the Campbell Park Presbyterian Church in Chicago, and from there went to the People's Institute, which at that time seems to have been the nucleus of a social settlement under the patronage of Bishop Fallows. This enterprise did not long sustain its benevolent character, and the petitioner in some way became the owner of the property in which it was carried on, and thereafter devoted the same to secular uses. The building contained a theater, a hotel, a dance hall, and several stores which were rented for various purposes, including a saloon and restaurant. The petitioner occupied rooms in the hotel part of this building, and his business consisted in managing the property. He still resided there at the time of the beginning of this proceeding; but about the 20th of March, 1907, he rented a house on Irving avenue, and installed his married sister, whom he brought from Louisiana for that purpose, as housekeeper. At this time he was separated from his wife, Adelaide, and there was pending a suit by her to obtain a divorce on the ground of

habitual drunkenness. On the whole, it may be conceded that the petitioner had a suitable residence and was of sufficient financial ability to undertake the support of his children. Upon the question of his intemperance, without citing the evidence at large, it fully sustains the charge that the petitioner became so addicted to the use of intoxicating liquors as to greatly shock and distress his friends who had known him while officiating as a clergyman; and, after making due allowance for the special aversion which such conduct in an ex-clergyman would inspire, we are constrained to say that it went so far that it would have compromised the character of one who had always been engaged in secular pursuits. The petitioner did not himself testify as a witness, but there is found in the record his answer to the bill of his wife, Adelaide, for a divorce on the ground of habitual drunkenness. In that answer, verified by him on the 29th day of October, 1906, he made the old plea that "he was tempted of the woman." He says that, before he associated with her, he was personally and professionally opposed on principle to the use of intoxicating liquors; that after coming under her influence he indulged in their moderate use; that he never drank to the extent of being unfit to attend to business; and that, when he drank on rare occasions more liquor "than was wise, it was almost invariably under the sting of her abuse." This answer, read in the light of the positive evidence of witnesses as to his drinking habits, though perhaps insufficient to establish the existence of habitual drunkenness in the strictest of all the varying shades of interpretation applied by the courts to that term, yet indicates a considerable deterioration in the moral force and character of the petitioner which to a degree unfits him for the care and nurture of his child. During the time the children were in the custody of the mother he does not appear to have contributed to their maintenance, nor to have given them any parental attention. He was compelled to surrender their custody, and, the mother being able to support them, the fact that he did not voluntarily assist her should not of itself be taken as evidence of a want of affection on his part; but there are many attentions which a loving father may and usually does render to children beyond his custody and control, and these appear to have been entirely lacking in this case, which indicates a slight degree of affection and a want of parental care for these children on the part of the petitioner. As we have already seen, the unfitness of the parent which deprives him of the absolute right to the custody of children must be positive and not comparative; but this does not mean 20 L.R.A. (N.S.)

that the degree of unfitness may not be considered in connection with all the other circumstances of the case. And, so considering the present situation of the child, the father's former indifference to him, his intemperate habits, and the unsettled state of his domestic affairs, we cannot say the district court erred in denying the writ prayed for.

As this conclusion is partially based upon the petitioner's intemperate habits and the disturbed state of his domestic atmosphere, both of which are susceptible of amendment and improvement, it is proper to say that the dismissal of the writ is not a bar to a future application of like character, should changed conditions justify a different conclusion.

We therefore recommend that the judgment of the district court be affirmed.

Fawcett and Root, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

NEW YORK COURT OF APPEALS.

HARRY B. DAVIS, Respt.,
v.

WILLIAM ROSENZWEIG REALTY OPERATING COMPANY, Impleaded, etc., Appt.

(192 N. Y. 128, 84 N. E. 943.)

Sale — rescission — lien for payment.

1. After rescission for fraud of an executory contract for purchase of land the vendee has no lien upon the land for the amount of his advance payment.

Equity — rescission — personal judgment.

2. One defrauded into a contract for the purchase of land may maintain a bill in equity for rescission of the contract, and secure full relief, including a decree for return of money paid on the contract.

(Gray, Hiscock, and Chase, JJ., dissents.)

(May 19, 1908.)

Case Note. — Right of vendee under executory contract to a lien on the land for the amount paid thereon where the contract fails or is rescinded.

Generally, in both this country and England, a vendee of land by executory contract is entitled to an equitable lien thereon for the amount paid on the purchase price, where the contract fails because of some act or conduct of the vendor or his inability to perform it. The exact nature of this lien is not clear. The doctrine has been quite

APPPEAL by the defendant corporation from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term, Part III., for New York County in plaintiff's favor in an action brought to rescind a contract and recover the amount which had been paid thereon. Modified.

The facts are stated in the opinion.

Mr. Benjamin N. Cardozo, with Mr. Herbert H. Maass, for appellant:

The vendee's election to rescind the contract was an abandonment of his lien.

Kerr, *Fraud & Mistake*, 3d ed. 338, 339; Bigelow, *Fr.* pp. 415, 416; Yeomans v. Bell, 151 N. Y. 230, 45 N. E. 552; Schiffer v. Dietz, 83 N. Y. 300; Moller v. Tuska, 87 N. Y. 166; Terry v. Munger, 121 N. Y. 161, 8 L.R.A.

generally applied without any discussion as to the nature of the lien, except, perhaps, the statement in general terms that it was an equitable lien, very similar to that of a vendor for unpaid purchase money.

In view of the distinction made in *DAVIS v. WILLIAM ROSENZWEIG REALTY OPERATING Co.* the nature of the lien becomes a matter of some importance. This distinction is emphasized by the decision of that court in *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937, decided at the same time as the *DAVIS CASE*. In the former case, the right of a vendee to a lien on failure of the vendor to convey because of defective title was recognized and applied where the action was to enforce the lien, and was in its nature an affirmance of the contract. And it is on this ground that the case is distinguished in the *DAVIS CASE*, wherein the vendee sought to rescind the contract for the fraud of the vendor, and also sought, as an incident to such relief, a lien on the subject-matter of the contract for the amount paid on the purchase price.

The dissenting opinion thereto, by Judge Gray, is based on the theory that such a lien is decreed independently of the contract, although that furnishes the reason for it, establishes the relation of the parties, and is the evidence of their agreement. He contends that the lien of both vendor and vendee is purely the creation of equity, and is, except as stated, entirely independent of the contract. Hence, he argues that there is no distinction in principle between the *DAVIS CASE* and the *Elterman Case*.

But see *Garrett v. Cohen*, 117 N. Y. Supp. 129, wherein this distinction was also recognized.

Without engaging in the controversy as to whether the lien of a vendor or vendee ordinarily arises out of and is dependent upon the contract, or whether entirely independent of it, it is suggested that the majority opinion on this question might apply in the ordinary case of the failure or inability of the vendor to comply with his contract, and yet not be applicable to the state of facts presented in the *DAVIS CASE*. In such a case, although there is no direct au-

216, 18 Am. St. Rep. 803, 24 N. E. 272; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Rose v. Watson*, 10 H. L. Cas. 672; *Occidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648; *Jennison v. Leonard*, 21 Wall. 302, 22 L. ed. 539; *Northrup v. Mead*, 121 App. Div. 389, 106 N. Y. Supp. 150; *Tompkins v. Hyatt*, 28 N. Y. 353; *Goelth v. White*, 35 Barb. 76; *Moyer v. Shoemaker*, 5 Barb. 319; *Wilson v. Breyfogle*, 11 C. C. A. 248, 24 U. S. App. 1, 63 Fed. 379; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825; *Walton v. Meeks*, 120 N. Y. 82, 23 N. E. 1115; *Northridge v. Moore*, 118 N. Y. 419, 23 N. E. 570; *Graves v. White*, 87 N. Y. 465; *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876; *Whitbread v. Watt*, L. R. 1 Ch.

thority for the proposition, yet it is suggested that no principle of equity jurisdiction or power would be violated if it was held that the act of the vendor in procuring, by fraudulent representations, money of the vendee to be applied upon a contract for the purchase of specific realty, created a right or interest in or over that specific property which equity could lay hold of, and by means of which relief by way of rescission could be made efficient.

The conclusion of the majority was based on the theory that a vendee's lien arose out of, and was incident to, the contract of purchase, and depended for its existence upon the vitality of the contract; and hence, when the contract fell by its rescission, all rights derived therefrom by either party fell with it.

The decision itself is opposed to the great weight of authority wherein the doctrine of a lien in favor of either vendor or vendee is recognized, and it also seems to be opposed to the majority of the cases that have considered the nature of a vendee's lien. If not opposed to the doctrine of the following cases, it, at least, makes an exception not recognized in any of them.

Thus, in *Pilcher v. Smith*, 2 Head, 208, in allowing a purchaser a lien for the purchase money paid on a contract with a married woman void because of her coverture, the court said that, the contract being void, it authorized a decree of rescission; and, as incident to the latter relief, it was clearly competent to declare a lien upon the land conveyed thereby to secure the repayment of the purchase money.

Sir Thomas Clarke, in *Burgess v. Wheate*, 1 W. Bl. 150, thus stated the rule as to both the vendor and the vendee: "Where conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representatives of the purchaser."

835; *McCreery v. Day*, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986; *New York v. New York Refrigerating Constr. Co.* 146 N. Y. 210, 40 N. E. 771; *Hurst v. Trow Printing & Bookbinding Co.* 2 Misc. 366, 22 N. Y. Supp. 371; *Bigler v. Morgan*, 77 N. Y. 318; *Nelson v. Plimpton Fireproof Elevating Co.* 55 N. Y. 480; *Morange v. Morris*, 3 Keyes, 50.

A vendee is not entitled to a lien in the absence of some special equity rendering the enforcement of such a lien essential for his protection.

Klim v. Sachs, 102 App. Div. 44, 92 N. Y. Supp. 107; *Occidental Realty Co. v. Palmer*, supra; *Krainin v. Coffey*, 119 App. Div.

And in *Occidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648 (affirmed in 192 N. Y. 588, 85 N. E. 1113, without opinion, on authority of *Elterman v. Hyman*, supra), the court said that, upon the execution of the contract, the vendor became a trustee of the land for the purchase of it, retaining a lien for the purchase price, and the vendee became the equitable owner of the land; and that, under such circumstances, the vendee's lien for moneys paid on account of the purchase was a natural and necessary corollary.

So, in sustaining the right of a vendee to a lien, in *Everett v. Mansfield*, 78 C. C. A. 188, 148 Fed. 374, 8 A. & E. Ann. Cas. 956, the court said that the right to a lien was based on the well-known, fundamental rule that in equity what is agreed to be done is regarded as done; therefore, from the time a contract is made for the purchase of real estate, the vendor is in a certain sense a trustee for the purchaser, and the purchaser in a certain sense is regarded as the real owner of the land, so that each, under the ordinary equitable rules, has a lien for his protection; adding that the whole practice in equity with reference to such contracts was clearly on the basis that the parties were under mutual equitable obligations to each other.

It will be noted that all of the foregoing theories as to the character of a vendee's lien are based either on the theory of an equity arising from payment under the circumstances, or on an implied or quasi contract created by partial or complete payment, or on an implied trust arising in the same manner. The text writers also present, in substance, similar theories as to the character of the lien. Thus, *Pomeroy* says that such a lien is the exact counterpart of the grantors, that it is a security for so much of the purchase price as the vendee has paid, and for the performance by the vendor of his contract. 3 Pom. Eq. Jur. 3d ed. § 1263.

Judge Story says that, on receipt of a portion of the purchase money, the vendor becomes a trustee for the vendee for the amount so paid, who has a lien upon the

517, 104 N. Y. Supp. 174; *Matthews v. Hoffmeister*, 107 N. Y. Supp. 1136; *Perry v. Board of Missions*, 102 N. Y. 99, 6 N. E. 116; *King v. Thompson*, 9 Pet. 204, 9 L. ed. 102; *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875, 2 Story, 608; Fed. Cas. 1,876; *Rosenberg v. Haggerty*, 189 N. Y. 481, 82 N. E. 503; *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961, 5 A. & E. Ann. Cas. 45; *Bispham*, Eq. § 353; *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Maroney v. Boyle*, 141 N. Y. 463, 38 Am. St. Rep. 821. 36 N. E. 511; *Eyler v. Crabbs*, 2 Md. 137, 66 Am. Dec. 711; *Stevens v. Hurt*, 17 Ind. 141; *Roper v. McCook*, 7 Ala. 319.

Rescission is not the proper remedy.

Bruner v. Meigs, 64 N. Y. 506; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20

land therefor. 2 Story, Eq. Jur. 13th ed. p. 551.

These different theories, however, are not inconsistent with *Elterman v. Hyman*, supra. Indeed, they are there recognized and stated. Thus, it is there said that, "as the vendor has a lien because he owned the land but conveyed prematurely, and the vendee ought not to keep it without paying for it, so, as it seems to me, the vendee has a lien because he has paid for the land pursuant to contract, and, as he cannot get the land, he has a right to get out what he put in on the faith of the land. The lien springs from the trust under which the vendor, as the legal owner, holds the land for the vendee, the equitable owner. Part payment creates partial ownership, and the vendee has an interest in the land itself to the extent of the payments made thereon. The contract and payment in full make him the equitable owner of all the land. The contract and payment in part make him the equitable owner *pro tanto*. . . . The right is correlative to that of the vendor conveying without payment. In either case the *res*, or the subject of the contract, is the land, and whatever is paid on the land without corresponding conveyance, or conveyed without corresponding payment, is a lien on the land by virtue of parting with money on the faith of the land, or with land on the faith of the promise to pay for it. Payment is not made on the credit of the vendor, but on the credit of the land, and the purchaser's money, in equity, is converted into land, or attached to it as a lien. The equitable ownership, when specific performance cannot be had, is converted into money by a judicial sale of the vendor's interest, which in effect is the foreclosure of an equitable mortgage."

The doctrine of *DAVIS v. WILLIAM ROSENZWEIG REALTY OPERATING CO.* is also in apparent conflict with the doctrine enunciated in *Whitbread v. Watt* [1902] 1 Ch. 835, cited in the *DAVIS CASE*, by Justice Gray in his dissenting opinion. In this case a contract for the sale of real estate was terminated by the purchaser exercising a power

L. ed. 501; *Buzard v. Houston*, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; *Bosley v. National Mach. Co.* 123 N. Y. 555, 25 N. E. 990; *Globe Mut. L. Ins. Co. v. Reals*, 79 N. Y. 202; *Allerton v. Belden*, 49 N. Y. 375; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. ed. 170; *Fowler v. Palmer*, 62 N. Y. 533; *Metropolitan Elev. R. Co. v. Manhattan Elev. R. Co.* 11 Daly, 373; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *United States v. Bitter Root Development Co.* 200 U. S. 472, 50 L. ed. 560, 26 Sup. Ct. Rep. 318.

Mr. John Frankenheimer, for respondent:

A purchaser of real estate is entitled to a lien for his deposit in every case in which

his right to recover his deposit has not been lost by his misconduct.

Occidental Realty Co. v. Palmer, 117 App. Div. 507, 102 N. Y. Supp. 648; *Stevenson v. Spratt*, 3 Jones & S. 503; 1 Dart, Vend. & P. ed. 1905, 112, 518; 2 Williams, Vend. & P. ed. 1906, '950; 2 Warvelle, Vend. & P. § 869; *Reeves, Real Prop. ed.* 1904, § 449; *Snell, Eq.* 115; *Fetter, Eq.* 236; *Thomson's Modern Eq.* 490; *Perry, Tr.* § 231; 29 Am. & Eng. Enc. Law, 2d ed. p. 730; 3 Pom. Eq. Jur. 3d ed. § 1263; *Wythes v. Lee*, 3 Drew, 396; *Whitbread v. Watt* [1902] 1 Ch. 835; *Mackreth v. Symmons*, 15 Ves. Jr. 329; *Burgess v. Wheate*, 1 W. Bl. 123.

The vendee's lien is not affected by the vendor's wilful fraud.

Masson v. Bovet, 1 Denio, 69, 43 Am. Dec.

of rescission reserved to him therein without any act or default by the vendor. The exact question passed upon in the *DAVIS CASE* was not discussed, although apparently raised by counsel. The question that seemed the most serious to the court, and which received much comment, was whether a rescission, by the vendee taking advantage of a clause in a contract authorizing a rescission, gave him the same right to a lien that he would have had he rescinded because of some act or default of the vendor. The court reached the conclusion that in either event the vendee had a lien upon the property for such part of the purchase price as he had paid. This conclusion was based upon the general nature of the vendee's lien. As to such a lien, *Vaughan Williams, L. J.*, said: "The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity." On the same point, *Stirling, L. J.*, said: "If we look at that which is really the foundation of the doctrine, namely, the desire to do justice as between vendor and purchaser, it appears to me that that reason applies no less forcibly in the present case than in the ordinary case in which the rescission of the contract takes place by reason of some default on the part of the vendor. In a case in which the vendor had rescinded under a power reserved to him, it would, I think, be absolute injustice if the purchaser were not allowed to have a lien for the purchase money which he had paid, and which was the security on his part for the performance by him of the contract. I think also the justice of the case requires that the purchaser should have a lien when the contract reserves to him a power to rescind."

The same may be said of *Rose v. Watson*, 10 Jur. N. S. 297, which sustained the right of a purchaser of land by executory contract to a lien, he having refused to carry out the contract on the ground that the vendor had failed to do certain things which he had agreed to do, and which were the in-

ducement to the contract. In reaching this conclusion the Lord Chancellor said: "When the owner of an estate contracts with the purchaser for the sale of it, or even for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract in this sense, *viz.*, that the ownership of the estate is transferred, subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance of the contract, executes it, and, to the extent of the purchase money so paid, does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate." The contention was made by the assignee of the vendor that the proceeding by the purchaser amounted to a rescission by him of the contract, and therefore he ought not to have the benefit of the lien created thereby. The court, however, denied this contention, but on the ground that the proceeding by the purchaser to enforce the lien was not a rescission of the contract. On this point the Lord Chancellor said: "It is quite a mistake, and a misapplication of the word to say that the purchaser has rejected or put an end to the contract. The purchaser would have been willing to perform the contract if the vendor had performed those things which in good faith he was bound to do; and it is impossible to say, with any truth or accuracy of expression, that the purchaser has repudiated the contract because the vendor has been unable to redeem his own promises which faithfully he had pledged, and in dependence upon which the purchaser entered into the contract. It only gives, in point of fact, an additional ground of complaint to the purchaser that he cannot obtain the estate he contracted for, and that, being unable to obtain it by reason of the failure of the vendor, the loss to him is attempted to be aggravated by depriving him of the only means of acquiring the repayment of his money,—the vendor having become bankrupt,—*viz.*, by following the interests which, in respect of the payment of that money, he had acquired in the estate."

651; *Neblett v. Macfarland*, 92 U. S. 101, 23 L. ed. 471; *Montefiori v. Montefiori*, 1 W. Bl. 364; *Whitbread v. Watt*, supra; 2 *Williams, Vend. & P.* 948; 29 *Am. & Eng. Enc. Law*, 2d ed. p. 730; *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 101; *Mycok v. Beatson*, L. R. 13 Ch. Div. 384.

The purchaser does not abandon his right to a lien by asking a court of equity to rescind the contract because of the vendor's misrepresentation.

Masson v. Bovet, supra; *Hammond v. Pennoek*, 61 N. Y. 153; *Cobb v. Hatfield*, 46 N. Y. 533; *Schiffer v. Dietz*, 83 N. Y. 300; *Moore v. Mutual Reserve Fund Life Assn.* 121 App. Div. 335, 106 N. Y. Supp. 255; *Goeth v. White*, 35 Barb. 76; *Colville v. Basly*, 2 Denio, 139; *Butler v. Prentiss*, 158

N. Y. 64, 52 N. E. 652; 2 *Warvelle, Vend. & P.* § 676; 29 *Am. & Eng. Enc. Law*, 2d ed. p. 736; *Dubois v. Hull*, 43 Barb. 32; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Code*, § 635, subd. 3; *Champion Card & Paper Co. v. Searing*, 47 Hun, 237; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825; *Berry v. Armistead*, 2 Keen, 221; *Edwards v. M'Leay*, 2 Swanst. 287; *Hart v. Swaine*, L. R. 7 Ch. Div. 42; *Jett v. Locke*, 5 J. J. Marsh, 591.

The action was properly brought in equity for a rescission of the contract.

24 *Am. & Eng. Enc. Law*, 2d ed. p. 615; *Becker v. Church*, 115 N. Y. 562, 22 N. E. 748; *McHenry v. Hazard*, 45 N. Y. 580; *Bosley v. National Mach. Co.* 123 N. Y. 550, 25 N. E. 990; *Bruyn v. McCreary*, 105 App.

In all reason and justice, therefore, and in all principle, it is impossible to find anything to countenance this attempt on the part of the assignees of the vendor, who stand in the shoes of the vendor, to deprive the purchaser of a lien on the estate.'

The foregoing cases, although using language that indicates that a purchaser's lien is an equitable right created in the property by the payment of money under a valid contract of purchase and not dependent upon the contract itself, but rather an incident to the giving of relief thereunder by way of reimbursement, do not, however, apply the doctrine to a similar state of facts as was presented in the *DAVIS CASE* which, as already stated, involved a rescission because of the fraud of the vendor.

In the following cases, however, although the question was not discussed, and the general rule was applied without noting the distinction made in the *DAVIS CASE*, the right of a vendee in an executory contract for the purchase of land to rescind it for the fraud of the vendor, and enforce a reimbursement of the money paid by him on the purchase price by a lien on the property and its foreclosure, was sustained: *Davis v. Heard*, 44 Miss. 50; *Cooper v. Merritt*, 30 Ark. 686; *Gayle v. Troutman*, 31 Ky. L. Rep. 718, 103 S. W. 342; *Elliott v. Boaz*, 9 Ala. 772 (vendee was held entitled to possession of the land purchased until reimbursement, and for a lien thereon for the amount paid).

The question was also presented in *Mycok v. Beatson*, L. R. 13 Ch. Div. 384, wherein a purchaser of an interest in a partnership attempted to rescind the partnership contract on the ground of fraud, and the claim was made that the act of rescission put an end to the contract *ab initio*, and that therefore no benefit, even by way of a lien, could be had under it. While the court did not comment on this contention, the right to a lien on the partnership property under these circumstances was sustained.

In *Hickson v. Lingold*, 47 Ala. 449, it was said that, where fraudulent representations had been made in the sale of real estate by executory contract to the injury of the vendee,

or the vendor was unable to make a good title, and in other cases not mentioned, the vendee might, without restoring the possession, file his bill within a reasonable time to rescind the sale, and enjoin the collection of the purchase money. The court said that in such cases a vendee was permitted to retain the possession as a security for the money paid, and to indemnify him for the necessary and permanent improvements made in good faith upon the premises. The facts in this case, however, are not within the scope of the note.

The right of a vendee to a lien upon real estate, the subject-matter of an executory contract of purchase, was also sustained in the following cases, where the rescission was not based on the fraud of the vendor, but on some other ground: *Jett v. Locke*, 5 J. J. Marsh, 591 (defect in title); *Bullitt v. Eastern Kentucky Land Co.* 99 Ky. 324, 36 S. W. 16 (defective title); *Lyttle v. Davidson*, 23 Ky. L. Rep. 2262, 67 S. W. 34 (oral contract void under statute of frauds); *Chisenberry v. Wylie* (Tenn. Ch. App.) 54 S. W. 49 (refusal of the vendor to convey according to his agreement, and also because of a defect in the title); *Cleveland v. Bergen Bldg. & Improv. Co.* (N. J. Ch.) 55 Atl. 117 (defect in title); *Torrance v. Bolton*, L. R. 14 Eq. 124.

On a bill filed by a vendee of an executory contract for the purchase of real estate for a specific performance, or as alternative relief to rescind, the doctrine was stated in *McWilliams v. Jenkins*, 72 Ala. 480, that, upon a rescission of such a contract, the court possessed the power, and it was also its duty, to secure the purchase price paid by the vendee by giving a lien, or creating a charge on the land for its repayment. The court added that this duty to protect the vendee by securing him in the reimbursement of purchase money advanced upon the faith of the contract, was well established in the system of equity procedure of that state, and *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225, was cited as authority. That case, however, was a bill by a vendee for specific performance. Such relief being denied, the court sustained the bill to give

Div. 302, 93 N. Y. Supp. 995; Story, Eq. Jur. 13th ed. §§ 694, 700, 700a, 701; Vail v. Reynolds, 118 N. Y. 297, 23 N. E. 301; Gould v. Cayuga County Nat. Bank, supra; Yeomans v. Bell, 151 N. Y. 230, 45 N. E. 552; Keefuss v. Weilmunster, 89 App. Div. 306, 85 N. Y. Supp. 913; Prince v. Jacobs, 80 App. Div. 243, 80 N. Y. Supp. 304; Pritz v. Jones, 117 App. Div. 643, 102 N. Y. Supp. 549; Murtha v. Curley, 90 N. Y. 372; Bell v. Merrifield, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55; Rogers v. New York & T. Land Co. 134 N. Y. 198, 32 N. E. 27; Chatfield v. Simonson, 92 N. Y. 209; Hemmingway v. Poucher, 98 N. Y. 281.

Vann, J., delivered the opinion of the court:

In the case of *Elterman v. Hyman*, 192

relief by way of compensation for improvements made, and reimbursement of the amount paid on the purchase price. This relief was given on the theory that whenever compensation is allowed, and specific performance denied, the land may be charged with the payment of the amount ascertained to be due to the vendee as against the vendor and his representatives.

In *Galbraith v. Reeves*, 82 Tex. 357, 18 S. W. 696, the vendee was allowed to cancel an executory contract for the purchase of real estate for defective title, and, as an incident to the rescission, was allowed to recover the amount paid on the purchase price, and was given a lien on the land to secure its repayment. This relief was also given on a bill by the vendor for specific performance.

A vendee's lien for the amount of the purchase price paid by him, if the vendee is entitled to rescind the contract, was said, in *Dart v. McQuilty*, 6 Ind. 391, to be subject in equity to execution.

On a bill by a vendee for specific performance for compensation and reimbursement as alternative relief, the doctrine was enunciated in *Griffith v. Depew*, 3 A. K. Marsh. 177, 13 Am. Dec. 141, that, on a rescission of a contract, the court will place the parties *in statu quo* as near as can equitably be done; that the vendor ought to refund the purchase money paid, with interest, and the vendee ought to restore the subject purchased with rents and payment for waste, receiving a credit for the valuable and lasting improvements he may make; and if, on such accounting, a sum be found due the vendee, the court said that a lien on the land purchased should be given him, and provision made for its foreclosure, should the vendor fail to pay the amount found due.

To the same effect on a bill to enjoin a judgment for breach of covenant and for specific performance is *Funk v. McKeoun*, 4 J. J. Marsh. 162.

A vendee's lien was enforced in *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785, in a proceeding by the vendor to recover possession of land sold by executory contract 20 L.R.A. (N.S.)

N. Y. 113, 84 N. E. 937, we held that a vendee of land under an executory contract for the purchase thereof has a lien on the land for the amount paid pursuant to the contract; that, when the vendee is without fault, and the vendor cannot give good title, the former may sue in equity for a foreclosure of his lien, and that the commencement of such an action is not a rescission of the contract, but an affirmation thereof to secure a right given thereby and by payment pursuant to its terms.

In that case no rescission was alleged or found. In this case, however, the plaintiff alleged that the vendor falsely represented to the vendee that "the bottom of said lots was not made ground, but natural ground;" that the vendee was deceived thereby and induced to sign the contract and pay the

where specific performance was refused because of defect in the title, and, for this reason, on the application of the vendee, the contract was canceled and rescinded. The question as to the right of the lien was not discussed, the principal question being whether the lien extended to improvements made by the vendee while in possession.

Scott v. Griggs, 49 Ala. 185, held that, where the parties to a contract for the sale of real estate agree upon its rescission, the law implies no trust in favor of the vendee by way of lien, as a security for the purchase money paid by the vendee to the vendor before the rescission. Such a case is distinguished from one where a vendor goes into a court of chancery, and asks the rescission of a sale of lands upon grounds which would entitle the court to take jurisdiction. In such a case it is said that the rescission will not be allowed without requiring the vendor to return the purchase money to the vendee. This rule, the court said, rested upon the principle that a party who asks equity shall do equity.

But see *Whitbread v. Watt*, supra.

The general doctrine as to the right of a vendee to a lien was sustained in the following cases, wherein the lien was allowed on refusal specifically to enforce the contract of purchase: *Clough v. Clough*, 3 B. Mon. 64 (sale by vendor to subsequent purchaser with notice); *Farmer v. Samuel*, 4 Litt. 187, 14 Am. Dec. 106; *Aday v. Echols*, supra (failure by vendee to clearly establish terms of oral contract); *Brown v. East*, 5 T. B. Mon. 405 (doctrine stated); *Swetsch v. Waskow*, 37 Ill. App. 155 (refusal to convey); *Stevenson v. Spratt*, 3 Jones & S. 496 (defective title); *Turner v. Marriott*, L. R. 3 Eq. 744 (defective title).

The doctrine that the purchaser of real estate under an executory contract was entitled to a lien thereon for the purchase price, where a specific performance of the contract on the part of the vendor was impossible because of defects in his title, was applied in *Westmacott v. Robins*, 4 De G. F. & J. 390. The relief in this case was given on a supplemental bill to a bill for specific

sum of \$5,000 thereon. The complaint then continues as follows: "That, upon learning that the said representations aforesaid were untrue, the plaintiff demanded of the defendants the return of the said sum of \$5,000 and a rescission of the agreement aforesaid, but the defendants refused and still refuse to pay the said sum or any part thereof, or to rescind said agreement." The relief demanded was "that the said agreement be rescinded by reason of the false and fraudulent representations aforesaid; that the defendants be adjudged to pay the sum of \$5,000, with interest from February 23, 1905, and that the plaintiff be adjudged to have a lien" upon the said premises and a foreclosure of the same. The findings follow, in substance, the allegations of the complaint. The relief awarded was a rescission

of the contract, the recovery of the \$5,000 with interest from the date of payment, the establishment of a lien for the amount paid, the foreclosure thereof, and that upon a sale of the premises the money be brought into court; that the plaintiff be paid his \$5,000 therefrom, and that he recover judgment for any deficiency. The complaint was dismissed without costs as to one of the defendants, who was held not to be a proper party. The appellate division unanimously affirmed upon the authority of *Occidental Realty Co. v. Palmer*, 117 App. Div. 507, 102 N. Y. Supp. 648. No question was raised by answer or during the trial as to the jurisdiction of the court, and neither party demanded a trial by jury. Both parties tried the case on the theory that, if the facts alleged in the complaint were established, the

performance, wherein the purchaser asked that, if compensation for a defective title could not be ascertained and made, and the contract of purchase specifically enforced by giving him the benefit of such compensation, he be given a decree for the amount paid by him on the purchase price, and that it be adjudged a lien on the land.

The foregoing cases sustained a vendee's lien on a bill for specific performance where such relief was denied, but the cases were retained to give relief by way of compensation and reimbursement. They are not in conflict with the *DAVIS CASE* as the contract was clearly recognized. This may also be said of the following cases, wherein a vendee's lien was established and enforced in actions substantially similar in form to *Elterman v. Hyman*, supra, being in the nature of an action to establish and foreclose a lien for the amount of purchase price paid: *Stults v. Brown*, 112 Ind. 376, 2 Am. St. Rep. 190, 14 N. E. 230; *Weiss v. Schweitzer*, 47 Misc. 297, 95 N. Y. Supp. 923 (defective title); *Thompkins v. Seely*, 29 Barb. 212 (defective title); *Craft v. Latourette*, 62 N. J. Eq. 206, 49 Atl. 711 (defective title); *Occidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648 (defect in title); *Selkir v. Klein*, 50 Misc. 194, 100 N. Y. Supp. 449 (defect in title); *Delano v. Saylor* (Ky.) 113 S. W. 888 (defect in title); *Urbach v. Pye*, 55 Misc. 465, 105 N. Y. Supp. 143 (deficiency in the amount of land purchased); *Stewart v. Wood*, 63 Mo. 252 (vendor sold to subsequent purchaser with knowledge); *Shirley v. Shirley*, 7 Blackf. 452 (vendor sold to subsequent purchaser with notice); *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258 (subsequent encumbrance); *Ungrich v. Shaff*, 119 App. Div. 843, 105 N. Y. Supp. 1013 (stated); *Clark v. Jacobs*, 56 How. Pr. 519 (doctrine stated); *Payne v. Atterbury*, 11arr. Ch. (Mich.) 414 (stated); *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249 (stated).

The doctrine was applied on a bill by a vendee to create and foreclose a lien for the amount paid by him in services on an ex-

ecutory contract to purchase, on the ground that the vendor made further performance impossible, in *Wickman v. Robinson*, 14 Wis. 494, 80 Am. Dec. 789. But the vendee, in his complaint, expressly stated that he had never consented to a rescission of the contract, and would not until his claim was paid.

The same result was reached in *Coleman v. Floyd*, 131 Ind. 330, 31 N. E. 75, where the doctrine was enunciated that a vendee who pays money to the vendor on a contract for the conveyance of land may, by action for that purpose, enforce a vendee's lien for the amount paid on the contract of purchase, where the vendor cannot, or will not, perform.

Where vendee is in default.

It is generally recognized, and where the question has been presented it has been held, that a vendee in default, if entitled to relief by repayment of any portion of the purchase price paid upon an executory contract of purchase, is not entitled to a lien to secure its repayment. *Dinn v. Grant*, 5 De G. & S. 451.

And in *Cornwall v. Henson* [1900] 2 Ch. 300, although damages were allowed a purchaser of land on executory contract on a bill by him for specific performance or for damages in lieu thereof, the court denied a lien. The reason for the denial does not appear. The vendee was, however, in default, and because of this default the vendor abandoned the contract.

In California the Civil Code (§ 350) provides that one who pays to the owner any part of the price of the real property under an agreement for the sale thereof has a special lien upon the property, independent of possession, for such part of the amount paid that he may be entitled to recover back in case of a failure of consideration. This provision was held in *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392, not to apply to a vendee who was in default at the time his vendor rescinded the contract because of such default. It was

plaintiff would be entitled to equitable relief of some kind.

The first question presented is whether the lien of a vendee for the amount paid on an executory contract for the purchase of land survives a rescission of the contract adjudged by a court of equity on the ground of fraud practised by the vendor by which the vendee was induced to enter into the contract. Under the facts found, the right of recovery at law for the sum paid is not questioned, but it is strenuously insisted that rescission destroys the contract, and remits the parties to their original rights. We held in the *Elterman* Case that the vendee's lien was created by the contract and payment thereunder, and that, upon default by the vendor without fault of the vendee, the latter could foreclose his lien. If we reasoned correctly in that case, there can be no lien without a contract. Payment on the contract pursuant to its requirements gives a lien by operation of law. The contract is the essential basis of the lien, for payment is simply an observance by the vendee of one of the express terms thereof. Rescission, therefore, destroys the contract *ab initio*, and leaves the parties in the same situation as if no contract had ever been made. Under these circumstances there can be no lien.

The second question is whether, even if the plaintiff was not entitled to a vendee's

lien, the action was properly brought in equity for a rescission of the contract on the ground of fraud. In *Becker v. Church*, 115 N. Y. 532, 565, 22 N. E. 748, we said through Judge Gray: "There cannot be any doubt as to the jurisdiction of courts of equity over actions to cancel and set aside instruments on the ground of fraud in their procurement. Such actions are in the nature of preventive remedies. The existence of the instruments may be a well-founded source of anticipated danger by the party whom they do, or whom they are designed, to affect. The reason for the maintenance of the action for their avoidance is to be found in the reasonable apprehension that the evidence of the fraud may not be always attainable; or that the defense of fraud may not always be available at law." The general rule governing the subject is well set forth in 24 *American & English Encyclopedia of Law*, 2d ed. p. 615, as follows: "Where the complainant in equity seeks to have a contract totally rescinded and declared void for fraud, the fact that he seeks, also, a recovery of money is not sufficient ground for the refusal of the court to entertain jurisdiction; for in an action at law the recovery of money is the principal object, while in the suit in equity the rescission of the contract is the principal matter of relief and the recovery of money is merely an incidental, although a necessary, conse-

also held that such a vendee had no lien at common law, as it was a rule in equity that such a lien did not exist in favor of one who was in default.

Where vendee not in possession.

The claim has been made that a vendee is entitled to a lien on the failure of an executory contract, for the purchase of real estate, only where some special equity exists in his favor, such as possession of the land, which is the subject-matter of the contract. This was the conclusion of the court in *Klim v. Sachs*, 102 App. Div. 44, 92 N. Y. Supp. 107, and *Krainin v. Coffey*, 119 App. Div. 516, 104 N. Y. Supp. 174.

These cases, however, were overruled in *Elterman v. Hyman*, supra, wherein it was held that neither possession nor any special equity other than the payment of a portion of the purchase price was essential to create such a lien.

And in *Bullitt v. Eastern Kentucky Land Co.*, 99 Ky. 324, 36 S. W. 16, the court said: "If the contract was rescinded and any part of the land embraced in the contract belonged to the vendors, we are of the opinion the vendee had a lien thereon to reimburse it for any sum which it had paid the vendors on the purchase money, notwithstanding the vendors failed to place it in possession of the land." 20 L.R.A. (N.S.)

Where contract is invalid.

The question is frequently presented as to the right of a vendee to a lien for the purchase money paid on an executory contract of purchase which is for some reason invalid and therefore unenforceable. The cases are in conflict on this question.

In *ejectment* by the vendor, *Rumfelt v. Clemens*, 46 Pa. 455, denied a vendee in possession under an executory contract, void because executed by a married woman and not acknowledged according to law, the right to retain possession of the land until reimbursed for the amount paid by him on the purchase price.

In *Wright v. Begley*, 31 Ky. L. Rep. 53, 101 S. W. 342, a purchaser of land by executory contract was denied a lien thereon for the purchase money paid, as the vendor was a married woman, and the contract of sale, if executed by her at all, was not according to statute, and she had received no part of the purchase price.

Although the general doctrine as to the right of a lien in favor of a vendee, where the contract fails without fault on his part, was recognized in *Bishop v. Martin*, 23 Ky. L. Rep. 1494, 65 S. W. 807, it was denied because the contract of purchase was a verbal one, and was therefore void under the statute of frauds, the purchaser not being in possession of the land. To the same ef-

quence; hence, the court, being properly in possession of the cause for the purpose of granting purely equitable relief, will proceed to do complete justice between the parties, although a part of the relief granted is purely legal in its nature. This principle is in full accordance with the broader principle of equity, that in all cases of fraud, if the party defrauded is entitled to any equitable relief as to the contract in which he has been defrauded, and if it is necessary for him to establish the fraud in order to obtain this relief, the court will grant him full and entire relief, notwithstanding that as to a part thereof he has a perfect remedy in an action for damages at law." As was said in *Vail v. Reynolds*, 118 N. Y. 297, 302, 23 N. E. 301: "A person who has been induced by fraudulent representations to become the purchaser of property has, upon discovery of the fraud, three remedies open to him, either of which he may elect. He may rescind the contract absolutely, and sue in an action at law to recover the consideration parted with upon the fraudulent contract. . . . He may bring an action in equity to rescind the contract, and in that action have full relief. *Allerton v. Allerton*, 50 N. Y. 670. Such an action is not founded upon a rescission, but is maintained for a rescission; and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender

of it on the trial. Lastly, he may retain what he has received, and bring an action at law to recover the damages sustained."

The plaintiff in this action adopted the second course suggested by bringing an action in equity to rescind, and when rescission was decreed he became entitled to full relief, which included as an incident to rescission the recovery of the amount paid on the execution of the contract. Rescission was the primary right demanded by the plaintiff in his complaint, and, as was well said by the appellant's counsel: "Whatever legal relief was claimed in this action was purely incidental and tributary to the equitable relief." When the contract fell, all rights derived therefrom by either party fell with it. The plaintiff had no right to a lien depending on the contract, and the defendant had no right to retain the amount paid on the contract. While the court had no power to render judgment establishing a lien, it had power to decree rescission and follow it by such further relief as was appropriate to rescission, even if it involved a judgment for money only. *Baily v. Hornthal*, 154 N. Y. 648, 660, 61 Am. St. Rep. 645, 49 N. E. 56. If rescission had not been decreed, there could have been no judgment for money, but that legal relief necessarily followed the equitable relief that was granted. The fact that the plaintiff demanded more than he was entitled to is not important, because,

fect is *Lyttle v. Davidson*, 23 Ky. L. Rep. 2262, 67 S. W. 34.

In *Blackburn v. Pennington*, 8 B. Mon. 217, where a conveyance of real estate by a married woman was invalid because defectively acknowledged, a subsequent purchaser was given a lien on the land purchased for the amount he paid on the purchase price in reliance upon representations made to him by her when sole to the effect that the title she had conveyed was valid.

But *North v. Bunn*, 122 N. C. 766, 29 S. E. 766, held that, although a contract by a married woman to convey would be no defense to an action to recover possession, yet that in such action the purchaser was entitled to have an equitable lien declared in her favor for the amount she had paid. The court said that it could not compel a married woman to execute a deed and acknowledge its execution as of her own free will, but it could declare the price paid to be an equitable lien in favor of the other party, so that, if the vendor kept the property, she must pay the amount of the lien. To same effect, see *Piecher v. Smith*, 2 Head, 206; also *Felkner v. Tighe*, 39 Ark. 357.

Where a married woman, in conjunction with her husband, sold land, received a portion of the purchase price, and put the purchaser in possession, but refused to convey, it was held in *Newman v. Moore*, 94 Ky. 147, 42 Am. St. Rep. 343, 21 S. W. 759, that 20 L.R.A. (N.S.)

the land should be subjected to the repayment of the sums paid by the purchaser.

Pierson v. Lum, 25 N. J. Eq. 390, also held that a purchaser of real estate by executory contract from a married woman was entitled to a lien thereon for that portion of the purchase price paid by him, although the contract was void, where she knew of the payments made on the purchase price, and it enhanced the value of her separate estate.

Sautelle v. Carlisle, 13 Lea, 391, applying the doctrine that purchase money received as part consideration upon a void sale of land would be treated as an equity attaching to the land, and subject to which a subsequent purchaser with notice took, held a vendee, under an oral contract void under the statute of frauds, entitled to a lien for the amount paid by him on the purchase price as against a subsequent purchaser, with notice, from the vendor, a married woman. The relief was given in a proceeding in equity to construe a will and to distribute an estate.

But in *McNew v. Toby*, 6 Humph. 27, the court said that money advanced on an invalid verbal contract for the purchase of land created no lien thereon to secure the repayment of the sum so advanced. The case, however, was disposed of on a question of jurisdiction.

when an answer has been interposed, the Code provides that "the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue." Code Civ. Proc. § 1207. I think that the trial court, according to the allegations of the complaint and the facts found, which are conclusive upon us, properly rendered judgment for a rescission of the contract and a return of the money paid thereon, but improperly for a lien and the foreclosure thereof, with judgment for deficiency.

The judgment appealed from should be modified by striking therefrom all provisions relating to a lien, the foreclosure thereof and judgment for deficiency, and, as thus modified, affirmed, without costs in this court to either party.

Cullen, Ch. J., Werner and Willard Bartlett, JJ., concur.

Gray, J., dissenting:

The plaintiff in this action seeks to have rescinded an agreement made with the defendant company, whereby he agreed to purchase certain real estate in the city of New York, upon the ground that the contract was induced by false and fraudulent representations of a material nature as to the character of the soil. As incidental relief, he demanded that the defendant pay to him the sum of \$5,000, which he had paid on account of the purchase price, together with his expenses and costs, and that he have a lien upon the premises for the same. He recovered a judgment for the relief prayed for, except as to the lien for his expenses and costs, and the judgment has been unanimously affirmed by the justices of the appellate division.

The only question of law for our consideration now is whether the vendee in an agreement for the purchase of real estate, which fails through no fault on his part, but by reason of the refusal, inability, or, as in this case, the fraud, of the vendor, is entitled to an equitable lien on the land for any sums advanced on account of the purchase money. The question of the right of the vendee to such a lien, where the vendor is unable to convey according to the contract, has been determined affirmatively in *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937. The present case does not, as I view it, differ in principle from that case, although it differs in the respect that this action is for a rescission. I do not need to discuss at any length the main question, which Judge Vann in the case referred to has so elaborately treated upon the authorities, as upon principle. What I shall briefly say is in support of the conclusion which 20 L.R.A. (N.S.)

he reached as to the general right to the lien, although I differ as to the basis for the doctrine. I am quite unable to agree with him in the views expressed in this case. As I view the question, the vendee's lien, like that of the vendor, is purely the creation of equity, and is quite independent of the contract, otherwise than as the contract is the cause for such an exercise of the power of a court of equity. Like a vendor's lien, it exists in equity upon the basis of certain necessary and natural presumptions, or of natural equities. The vendor is presumed not to intend to convey away his land without payment of the price agreed to be paid, and therefore the land, where the vendee has gone into possession, will be impressed with a lien to the extent that consideration remains unpaid. With a corresponding regard for the vendee, the court will presume that he made the partial payment on account of the price agreed to be paid, intending to rely, in the event of the failure of the contract through the fault of the vendor, and as security for a repayment, upon the land, in which he is deemed to have a beneficial interest through the partial performance of the contract. If the doctrine of a vendor's lien upon the land for the unpaid purchase money merits acceptance in the administration of justice by a court of equity, as I assume, we may accept it as within the province of equity to treat both parties with equal justice, and to give to each the same remedy. This doctrine, which is asserted in decisions by the English courts and by many text writers, finds its strongest support, in my opinion, in the view which is taken in equity of the relations of the parties to a contract for the sale and conveyance of land. In that view, the vendor becomes a trustee of the legal title for the vendee, where the vendee has paid, or is prepared to pay, the purchase price; and it is a logical application of the principle, where the vendee has paid a part of the price, and the contract comes to naught through the vendor's fault, to hold the latter as a trustee to the extent of the payment made. The vendee advances a part of the price of the land in the faith that the conveyance will ultimately be made to him upon the terms and in the manner agreed upon, and that no fraud has been practised by the vendor to vitiate the transaction. The vendor is chargeable with knowledge of this, and, in receiving a portion of the price of the land, should, and will, be presumed to hold the legal title in trust *pro tanto* for the vendee; that, in the event of the contract failing through his fault, repayment of the money advanced may be secured. If the theory is correct, it is immaterial whether the party agreeing to

sell is at the time seised of the premises; for, if he thereafter acquires them, the trust will then arise in the vendee's favor.

I think that it follows fairly from what is held as to the general doctrine that whether the transaction of purchase fall through by reason of the inability of the vendor to convey as agreed, or whether, as in this case, the contract be rescinded before completion by reason of the vendor's misrepresentation of a material fact, in either event, the vendee's right to a lien cannot be affected. That view has been taken by the English courts, as will appear from the opinions in *Mycock v. Beatson*, L. R. 13 Ch. Div. 384, *Rose v. Watson*, 10 H. L. Cas. 672, and *Whitbread v. Watt* [1902] 1 Ch. 835; and it seems to me, always granting the right in equity to decree a lien, that it is a proper view. And see 29 Am. & Eng. Enc. Law, 2d ed. p. 730. The objection is urged that, assuming the right of a vendee to a lien, it is abandoned where the contract is rescinded. The argument is that, "by the election to rescind for fraud, a vendee dissolves the contractual tie and renounces all the benefits resulting from the contract, at the same time that he disclaims its burdens." It is sought, by the argument, to make a distinction between an election to treat the contract as broken and an election to avoid it. This argument is based upon the premise that the vendee's lien is a deduction from the contract, and cannot stand without it. It is true that the contract establishes the relations of the parties and is the evidence of their agreements; but its rescission for the fraud of, or for a breach by, the vendor should not affect the right of the vendee to his equitable lien upon the land. Why should it, if its creation by equity is to secure to the vendee repayment of his advances? The contract, in such case, is not void, but voidable, at the option of the purchaser. If the option is exercised, how is the right to invoke the equitable power of the court to decree a lien lost? I think that the argument disregards the principle upon which, as I conceive it, equity creates the lien. The lien is decreed independently of the contract, which does not give it, but furnishes the reason for the decree. See *Whitbread v. Watt*, supra. The complainant, demanding relief in equity from his agreement, whether rescission is demanded because of an intentional, or of an innocent, misrepresentation, is relieved in either case, and the parties are restored to their original status. But, if the vendor in the contract has received a part of the purchase price of the land, is there any insuperable reason why he should not be held as a trustee in respect thereof for the vendee. 20 L.R.A. (N.S.)

and why should the power of the court be less, in such case, to decree a lien upon the land to secure the discharge of the trust duty? The procedure effects an equitable result, and it does not contravene any rule of law. Is it correct to assert that the plaintiff, in asking a court of equity to relieve him from the obligation of an agreement induced by the defendant's misrepresentations, necessarily abandons his equitable remedy of a lien upon the land to secure the repayment of the money advanced towards its purchase? I am disposed to think it is not. The court, having equitable jurisdiction of the parties, when determining the vendor to be in fault and that the parties shall be placed *in statu quo*, proceeds to do full justice between them by determining that the vendee shall have a lien upon the land to secure him against the loss of the moneys paid towards its purchase. In order to ascertain the real nature of this exercise of equitable power, it may be considered in relation to its basis and to the result of its operation. The basis is the promise of the vendor to convey the land, as and when agreed, and that meanwhile he is a trustee of the legal title for the vendee to the extent of the purchase moneys paid. The extent of its operation is to subject the land to the execution of a trust, either to convey, where there has been full performance by the purchaser, or to return him his moneys, where the contract has failed and ceases to be binding through no fault of the latter. It supplies a remedy where the law falls short of accomplishing full justice. If equity lays hold of a pretext, or adopts a fiction, in such a case it is no more than it does in many other cases, in order to enforce a natural right and to effect a just result.

For these reasons, I advise the affirmance of the judgment.

Hiscock and Chase, JJ., concur.

PENNSYLVANIA SUPREME COURT.

JOHN KUHBACK

v.

IRVING CUT GLASS COMPANY, Appt.

(220 Pa. 427, 69 Atl. 981.)

Mandamus — Irregularity — waiver.

1. Filing a return in pursuance of an agreement that papers served by the one

Case Note. — Right of stockholder to inspect books of corporation.

The above subject is considered, and cases bearing thereon are gathered, in a note to *Weihenmayer v. Bitner*, 45 L.R.A. 440. It

making a return shall be regarded as an alternative writ of mandamus waives all irregularity in the proceedings prior thereto.

Same — parties — representative of defendants.

2. The answer of the president of a corporation on behalf of himself and all other officers in a mandamus proceeding to compel the inspection of the corporate books subjects the other officers to the orders of the court, although they were not served with the papers in the proceeding.

Corporation — agreement — protection of officer.

3. That, in the absence of an agreement by a corporation that papers served in a mandamus proceeding shall be regarded as an alternative writ, its president would be sub-

ject to attachment, will not relieve it from the agreement.

Corporation — inspection of papers — mismanagement.

4. That a corporation, prior to a certain time, was paying dividends, and that it then ceased, and, three years afterwards, owed its directors large sums of money, and was otherwise in debt, are sufficient to entitle a stockholder to a writ of mandamus to compel the corporation to permit him to inspect its books and papers for the purpose of securing information upon which to base a proceeding against the directors for mismanagement.

Same — antagonistic interests — effect.

5. That a stockholder seeking to compel the corporation to permit him to examine its books to protect his interests is also a stock-

is intended to include herein only cases reported since that note. Cases where inspection was sought in a pending suit, primarily involving other rights, are also excluded.

As affected by the motive or purpose—at common law.

This subdivision deals simply with the general question whether the common-law right of a stockholder to inspect the books of his corporation is an absolute one, or depends upon a proper motive or purpose. The question as to what is a proper motive or purpose is discussed in a subsequent subdivision.

As applied in this country, the common-law right of a stockholder to inspect the books of his corporation is not an absolute one, but depends upon his motive in seeking the inspection.

This was, in substance, the language employed in *Varney v. Baker*, 104 Mass. 239, 80 N. E. 524, 10 A. & E. Ann. Cas. 989, wherein, in allowing a peremptory mandamus for this purpose, the court said that it was not necessary that there should be any particular dispute to entitle the stockholder to exercise this right, that nothing more was required than that, acting in good faith for the protection of the interests of the corporation and his own interests, he desired to ascertain the condition of the company's business.

And in *State ex rel. Weinberg v. Pacific Brewing & Malting Co.* 21 Wash. 451, 47 L.R.A. 208, 58 Pac. 584, the court said that a stockholder of a corporation had the right at reasonable times to inspect and examine the books and records of the corporation so long as his purpose was to inform himself as to the manner and fidelity with which the corporate affairs were being conducted and his examination was made in the interest of the corporation. "Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation, and, when it is charged to be otherwise, the burden should be on the officers refusing such request, or the corporation, to establish it."

20 L.R.A. (N.S.)

So, in *State ex rel. Watkins v. Donnell Mfg. Co.* 129 Mo. App. 206, 107 S. W. 1112, the court remarked that a stockholder's common-law right of inspection was broader than the statutory right, and was not limited thereby; that it was subject only to the limitations that the inspection should be for a proper purpose and at a proper or convenient time or place.

In sustaining the right of a stockholder to a mandamus to inspect the books of a national bank, the court, in *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4, 4 A. & E. Ann. Cas. 433, said that, in issuing a writ of mandamus, it would exercise a sound discretion, and would grant the writ under proper safeguards to protect the interests of all concerned; that it should not be granted for speculative purposes, or to gratify idle curiosity, or to aid blackmailing, but it would not be denied a stockholder who sought information for legitimate purposes.

So, in *Bruning v. Hoboken Printing & Pub. Co.* 67 N. J. L. 119, 50 Atl. 906, in denying an application for a mandamus because it did not show the purpose of the examination or that it was in good faith, the court said that the common-law right was not given to gratify curiosity, or for speculative purposes, but only when its exercise was sought in good faith and for a specific purpose.

A distinction between the right to inspect the books in general and the by-laws of a corporation was made in *Re Coats*, 75 App. Div. 567, 78 N. Y. Supp. 429, wherein the court said that an application to examine the by-laws rested upon a different footing than an application for an inspection of the books and papers in general; that the by-laws constituted a part of the contract between the stockholder and the corporation and were binding upon both, and added: "It must be a strong case, therefore, which would interpose to prevent a stockholder from an opportunity to examine the by-laws of the corporation and thus inform himself of the terms of the contract into which he has entered. He ought to be permitted to know the extent and terms of his obliga-

holder in a rival corporation is not sufficient to deprive him of the right to the relief sought.

Same — offer to purchase stock — effect.

6. A corporation cannot deprive its stockholder of the right to inspect its books for the protection of his interests by offering to purchase his stock at a price fixed by it.

Same — compromise offer.

7. A corporation cannot deprive its stockholder of the right to inspect its books by offering to furnish him abstracts of them or to permit an inspection by an expert to be selected by it and him.

(March 16, 1908.)

APPEAL by defendant from a judgment of the Court of Common Pleas for

tions and the tenure upon which he holds his property. It does not appear that the privilege to inspect the by-laws will be abused, or that any ulterior purpose prejudicial to the corporation will be served thereby."

A distinction was also made between the right of a director to inspect the books of the corporation, and the right of a stockholder so to do, in *People ex rel. McInnes v. Columbia Paper Bag Co.* 103 App. Div. 208, 92 N. Y. Supp. 1084, wherein, in holding that a director was entitled to a peremptory mandamus, permitting him to inspect the books of account, records, and papers of the company, the court said: "Whether the relator was entitled to the writ as a stockholder, we need not consider. He was a director, and, as such, as matter of law, he was entitled to the peremptory writ. . . . Sufficient facts appear in the petition and affidavits to justify the action of the court below in granting this writ. There are allegations that the president of the company and another director (there being but three directors) are wasting its assets. A director of a corporation is responsible to stockholders for the faithful execution of his trust. He is also authorized by law to maintain an action to recover back moneys or property wastefully disposed of by those in control and management of the corporation." One of the defenses to the application for mandamus was that the directors had endeavored to meet all the reasonable demands of the relator to have the books of the corporation examined and its condition disclosed. The court, however, said that relator, as a director, was entitled to make the examination for himself or with the aid of a competent and proper person employed by him and approved by the court.

— under statute.

The courts are not unanimous as to the nature of the right to inspect the books of a corporation, conferred upon stockholders by statute. In a few jurisdictions it is said that the right thus conferred is an absolute and arbitrary one, and that the court would, 20 L.R.A. (N.S.)

Wayne County granting a writ of mandamus to compel defendant to permit plaintiff to inspect its books. Affirmed.

The facts are stated in the opinion.

Messrs. H. Wilson and P. H. Hoff, for appellant:

Even the right to a copy of the stock list has limitations.

Com. v. Empire Pass. R. Co. 134 Pa. 237, 19 Atl. 629.

To entitle a stockholder to an inspection of the books, it is necessary that there should be some particular matter in dispute, between members, or the corporation and individuals in it.

R. v. Merchant Tailors' Co. 2 Barn. & Ad. 115.

It is well settled that minority stockhold-

by an appropriate remedy, aid in its exercise without reference to the motive of the stockholder in making the inspection.

Thus, in *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050, constitutional and statutory provisions requiring corporations doing business in the state to keep certain books in which must be recorded the transactions of the corporation, which must be open to the inspection of the directors, stockholders, etc., of the corporation, were construed to confer an arbitrary and absolute right upon the stockholders, irrespective of motive, to inspect its books. On this point the court said: "It is not necessary for the petition to aver or show the purposes or object of the inspection. Neither is it any defense to allege that the objects and purposes are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the Constitution and the statute cannot be defeated by stopping to inquire into motives. . . . The statute is founded upon the principle that the shareholders have a right to be fully informed as to the conditions of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. The shareholder is not required to show any reason or occasion for making the examination. Nor can he be met with the defense that his motives are improper."

It was also said in *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033, that the motive of a stockholder in seeking to enforce the right conferred upon him by a statute providing that the books and records of corporations shall at all reasonable times be open to the inspection of every stockholder was not a proper subject for judicial investigation; and that such a stockholder is entitled to the aid of the court where he shows that he is a stockholder, and that he has requested an inspection of the books of the corporation at a reasonable time and place, and that such request was denied.

In New York the later cases recognize a

ers cannot question, in judicial proceedings, the acts of directors or majority stockholders, unless such acts are *ultra vires*, illegal, or fraudulent.

26 Am. & Eng. Enc. Law, pp. 959, 960.

The inspection should not be allowed, since the relator is also a stockholder of a rival corporation.

Com. ex rel. Boas v. Coit, 15 W. N. C. 484.
Mr. Charles A. McCarty for appellee.

Mestrezat, J., delivered the opinion of the court:

This is a mandamus to compel the defendant company, a trading corporation, to permit the relator, a stockholder, to inspect its books and records. The objections of the defendant to the petition, the order of the

distinction between the right to inspect the general books of the corporation and the right to inspect stock or transfer books, declaring that the former is a common-law right, the enforcement of which is discretionary with the court, whereas the latter is a statutory right, the enforcement of which, in a case within the terms of the statute, is mandatory. People ex rel. Lorge v. Consolidated Nat. Bank, 105 App. Div. 409, 94 N. Y. Supp. 173 (appellate division, first department); People ex rel. Callanan v. Keeseville, A. C. & L. C. R. Co. 106 App. Div. 349, 94 N. Y. Supp. 555 (appellate division, third department); People ex rel. Althause v. Giroux Consol. Mines Co. 122 App. Div. 617, 107 N. Y. Supp. 188 (appellate division, first department); Althause v. Giroux, 56 Misc. 508, 107 N. Y. Supp. 191.

There is, however, a difference of opinion as to the consequences involved in the latter proposition. Thus, in the Callanan Case there was a mandamus proceeding to enforce the right of a stockholder to inspect the stock book, based upon § 29 of the stock corporation law, which provides with respect to domestic corporations that "the stock book of every such (stock) corporation shall be open daily during at least three business hours for the inspection of its stockholders and judgment creditors, who may make extracts therefrom." The court, after stating the distinction already referred to, said that "the motives of a stockholder in inspecting the stock book alone are immaterial." The apparent purpose of the relator in this case, however, was to ascertain who were stockholders entitled to vote upon a proposition to increase the corporate stock, and that purpose would in any event seem to have been a proper one.

So, in distinguishing between the right to inspect the general books of the corporation and its stock book, it was said, in Althause v. Giroux, 56 Misc. 509, 107 N. Y. Supp. 191, that the right to inspect the general books of the corporation was founded on a common-law basis, the granting or withholding of which rested in the sound discretion of the court, while the right to inspect the

court, and the form of the writ and its service were well taken, and would have to be sustained if they had not been waived. The act of June 8, 1893 (P. L. 345, 3 Purdon, 13th ed. 2424), prescribes the mode of procedure in mandamus proceedings. The petition should contain the jurisdictional facts, and upon its presentation the court should award an alternative writ. The writ, as in other cases, should be issued by the prothonotary in the usual form. In this case, however, the court, in making the order, inadvertently used the word "issued" instead of "awarded," and the prothonotary, instead of issuing the writ of mandamus, prepared a certified copy of the petition and order of court which the sheriff served upon the president of the company. This was

stock book was founded on the statute, and was absolute.

In the above case the court said that, where there was nothing in the record to show that the purpose for which an inspection was sought was illegitimate or ulterior, and the stockholder, in his written demand, in affidavit form, swore that his purpose was not inimical to the corporation, in the absence of more substantial evidence on the question, it would not be justified in ignoring the mandatory direction of the statute.

Other cases, however, have distinguished between the right and its enforcement. Thus, People ex rel. Althause v. Giroux Consol. Mines Co. 122 App. Div. 617, 107 N. Y. Supp. 188, denied an application for a mandamus, based on § 53 of the stock corporation law, as amended by Laws 1897, chap. 384, p. 314, § 3, which, in substance, requires every foreign stock corporation having an office for the transaction of business within the state to keep therein a stock book for the inspection of its stockholders and creditors, on the ground that it did not in terms authorize stockholders to make extracts from such book, and that therefore the award of a mandamus to a stockholder, allowing him to make extracts from the stock books, was not of course, but within the discretion of the court, and would therefore be denied where the purpose was an ulterior one. The court said: "There is no express provision of law authorizing the issuance of a writ of mandamus to enforce the provisions of § 53 of the stock corporation law, and, when application is made under that section, whether such writ will issue rests in the sound discretion of the court to which the application is made. Re Steinway, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103. When the court can see from the facts presented, or it can fairly be inferred therefrom, that the application is not made in good faith for the protection of the applicant's interest in the corporation, but for some ulterior or improper purpose, then the writ should be refused."

That the court, in the last case, did not intend to make any distinction in this respect between a case where the right to

wholly irregular, and not a compliance with the well-established practice in such cases. The prothonotary should have issued a writ in the alternative form commanding the respondent to do the things required in the order of the court.

The defendant company, however, waived all defects in the proceedings prior to the return. It agreed that the papers served on the defendant's president should be regarded as an alternative writ of mandamus, and filed a return thereto. By filing a return in pursuance of this agreement, the company waived all the irregularities in the proceedings. The papers were served only on the president of the company, but he made a return "for himself and the other respondents, officers of said corporation." The

plaintiff took chances in failing to name the officers, as contemplated by § 7 of the act of 1893. The papers were served only upon George H. Reichenbacher, and, of course, he is the only one who could be compelled to make a return to the writ. He, however, as president of the company, has answered for all the officers of the corporation, and they are therefore in court and subject to its orders. It has been argued that defendant's agreement that the papers should be considered as an alternative writ of mandamus should not be enforced, because the president of the corporation would otherwise have been subject to an attachment. But this is not sufficient to relieve it from the agreement, because, if an attachment had been awarded, it could have been superseded

make extracts from the stock book is based on § 29 of the stock corporation law applicable to domestic corporations, which expressly gives such right, and a case based on § 53, under which the right to make extracts must be inferred from the right to inspect, is apparent from the fact that the same court applied the same doctrine in *People ex rel. Hunter v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369, to an application based on § 29, for a writ of mandamus compelling a corporation to permit the relator to make an undisturbed inspection of the stock book, it being specifically held in this case that it was error for the special term to refuse to inquire into the motive of the relator in making the application upon the theory that the right to inspect is absolute without reference to the relator's motive. The court, after stating that there is no express provision of law authorizing a mandamus to enforce the provisions of § 29, and that the granting of mandamus is always in the judicial discretion of the court, said: "Where facts are stated which justify an inference that the application is not made in good faith for the protection or purposes of the applicant, but for the benefit of undisclosed persons for undisclosed purposes, the court has power to, and should, before granting the application, require the applicant to frankly state whether or not he is acting at the instigation of others who are undisclosed, and the purpose for which the application is made." It is to be observed that Houghton, J., who wrote the opinion in the Callanan Case, dissented from the decisions on this point in the last two cases, he having in the meantime been transferred from the first to the third department. In his dissenting opinion in the Hunter Case he says that the rule ought to be as stated in the majority opinion, but the legislature had made it different; and that the remedy was with it rather than with the courts.

It will be observed that the language employed in the last two cases carries an implication, at least, that the right to inquire into the motive of the stockholder is confined to cases where the remedy by manda-

mus is invoked. In *Henry v. Babcock & W. Co.* 125 App. Div. 538, 109 N. Y. Supp. 853 (appellate division, first department), however, McLaughlin, J., expressed the opinion that the stockholder's motive in demanding an inspection of the stock book and the right to make extracts therefrom is a relevant inquiry, even in an action for the statutory penalty for refusing to permit the inspection; but held that in any event the inspection in this case was properly denied for the reason that there was no demand to inspect, apart from the demand to be allowed to make copies (a point subsequently considered in this note). Scott, J., concurred on the last ground; Patterson, P. J., in the result; and Laughlin and Houghton, JJ., dissented.

In the *Lorge Case* the court, while holding that a stockholder was entitled to a peremptory writ of mandamus to enforce his right to make extracts from the stock book of a national bank, and stating the distinction already referred to between the right to inspect the general books of the corporation and the right to inspect the stock book, nevertheless said: "Doubtless the court has power to withhold an inspection [of the stock book] for an illegitimate purpose, and may regulate the time when the inspection shall be made. But, where it is sought for a legitimate purpose, and the application is made during business hours, the right to such inspection is mandatory." (The question considered in this case, whether the right to inspect carries with it the right to make extracts when that right is not expressly granted, is subsequently treated in this note.)

The appellate term, in *Althause v. Giroux*, 58 Misc. 508, also seems to have been of the opinion that the motive of the stockholder in demanding permission to make extracts from the stock book is subject to investigation in an action to recover the statutory penalty; and criticizes the statement in the Callanan Case that the motives of the stockholder in inspecting the stock book alone are immaterial. The decision, however, was in favor of the plaintiff, the court saying that there was nothing to impugn his motives to

by an appeal, and that would have prevented the enforcement of the attachment against the president until the appeal was disposed of. We notice the irregularities in the proceedings so that our silence may not be construed to mean a tacit approval of the defective pleadings.

The case was heard below on the petition, the return, and a demurrer to the return. The court awarded an alternative writ requiring the defendant to give the relator, with his clerk or clerks, access to all the books, records, and papers of the company, or such of them as he may require in order to secure information regarding the matter set forth in the petition. The petitioner purchased at public auction on June 2, 1906, eight shares of the stock of the corporation,

owned by the estate of Peter Crockenberg, one of the eight original stockholders; and subsequently the company issued to Kuhbach a stock certificate. He requested the company to give him information as to its condition, the volume of business done, the amount of profits, and the financial standing of the company. The information was refused. He also made a request of the officers for permission to examine the books, records, and papers of the company, including pay roll, sales book, debits, and credits of the company. This request was likewise refused. The relator then filed this petition, setting forth certain facts alleged to show reckless mismanagement of the corporation by its officers, and praying for a mandamus on the officers of the company to compel them to

the extent of showing illegitimacy of purpose.

The doctrine that the right to inspect, given by statute, is not an arbitrary one, also finds support in other New York cases included herein under heading "What purposes are proper."

Peremptory mandamus to enforce the right of a stockholder to examine the books of the corporation was also granted in *People ex rel. Fennelly v. Amalgamated Copper Co.* 184 N. Y. 573, 578, 77 N. E. 1193, 1194, affirming 110 App. Div. 892, 96 N. Y. Supp. 1141, no opinion being filed in either court.

In other jurisdictions it has been held that the right conferred by statute applies only where the purpose of the inspection is a proper one, and will therefore be enforced only after an inquiry by the court into the merits of the application.

Thus, in *State ex rel. O'Hara v. National Biscuit Co.* 69 N. J. L. 198, 54 Atl. 241, § 33 of the Code, concerning corporations, (Rev. 1896 as amended by P. L. 1898, p. 409), which provides that "every corporation shall keep at its principal and registered office in this state the transfer books in which the transfer of stock shall be registered, and the stock books, which shall contain the name and address of the stockholders, the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the examination of every stockholder," was held not to broaden the common-law right of a stockholder with respect to the inspection of the books of the corporation so as to make such right absolute rather than discretionary with the court, or to extend the right to all cases without reference to whether the purpose is with respect to the stockholder's interest as a stockholder, or germane to his status as such.

In *State ex rel. Watkins v. North American Land & Timber Co.* 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172, it was said that the law was settled in that state that the books of a corporation were not open to the inspection of persons without an interest therein, or to the unreasonable inspection of 20 L.R.A. (N.S.)

persons who were interested. (See also "What purposes are proper," *infra*.)

In some jurisdictions the doctrine is limited to the extent that the corporation or custodian of the books, the inspection of which is sought, may, as a matter of defense to an application to enforce the right to inspect, show that the applicant is actuated by an improper motive.

Such is the doctrine of *Clawson v. Clayton*, 33 Utah, 266, 93 Pac. 729, wherein a statute providing in substance that the books of every domestic corporation shall at all reasonable hours be subject to examination by bona fide stockholders was held to give to such stockholders an absolute right to inspect the books of the corporation at reasonable times. It was, however, recognized that, if the only motive for an inspection was to inflict an injury upon the corporation, or upon anyone, an inspection for such purpose would be an abuse of the right, and would not be permitted; but the court added that these things were matters of defense, and not matters that the stockholders must negative in the first instance; neither were these things presumed from the fact that the stockholder selected some agent to make the inspection or examination in his behalf.

Although no statutory provision exists in Wyoming, permitting stockholders to examine the books of the corporation, it was held in *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984, that a by-law of the corporation which entitled stockholders to an examination of the books of the corporation during business hours so enlarged and broadened the common-law right that an application by a stockholder for mandamus to enforce the right was sufficient, although the purpose of the examination was not expressly alleged. The court said that, under this by-law, if the object of the examination sought was mere idle curiosity, or an illegitimate purpose, that would be a matter of defense.

Affirming this doctrine, *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326, held that an application, based on the statute, for mandamus by a stockholder against the custodian of the books of a corporation, to enforce the

permit him to inspect the books and papers of the company, and thereby acquire certain specific information to enable the relator, if necessary, to file a bill in equity to restrain the mismanagement which exists in the company. The petitioner avers that the company gave him a statement showing the alleged standing of the company on January 1, 1907; that, if the statement is correct and shows the actual condition of the affairs existing in the company, it discloses reckless mismanagement of the company's business to such an extent that steps should be taken to correct the apparent mismanagement which exists in the company; that, if the statement is false, he is entitled to know what the real condition of affairs is in the company in which he has his money invested.

The petitioner then states in detail some items in the statement furnished him with he alleges sustain the allegation of mismanagement. In addition to what is disclosed by the items in the statement referred to, he alleges, what has not been denied by the return, that the company was very prosperous and paying large dividends up till July 25, 1904, and that since that time it has not declared a dividend, but is in debt as shown by its statement. The petitioner further avers that, if the company is permitted to conduct its business in the manner shown by the statement furnished him on January 1, 1907, it will soon become insolvent, and perhaps necessitate a dissolution of the corporation. It is further averred that the pe-

right to inspect them, was good on demurrer, although the purpose of the inspection was not disclosed in the application. That the burden was on the company to show that the motive was an improper one.

See, to same effect, *State ex rel. Weinberg v. Pacific Brewing & Malting Co.* 21 Wash. 451, 47 L.R.A. 208, 58 Pac. 584.

And in *Meysenburg v. People*, 88 Ill. App. 328, following the doctrine of *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, it was said that, unless it appeared that the examination of books and records was for some improper or unlawful purpose, the right was absolute. That, where it was claimed in a mandamus proceeding that the motive was improper or unlawful, it rested upon the defendant to plead and prove the facts upon which such claim was based. The allegations in the answer not being sufficient to show such a purpose, a demurrer thereto was sustained.

But *People ex rel. Hunter v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369, said that, while it was sufficient in the first instance to show the existence of a clear legal right to the relief demanded, if, however, in answer to the application, facts were presented to the court from which the inference could fairly be drawn that the application was not made in good faith for the protection of the applicant or of the corporation, but was for some ulterior or improper purpose, the burden was cast upon the party making the application affirmatively to show that he was acting in good faith, for a legitimate purpose, and his own or the corporation's protection.

What purposes are proper.

—interest germane to right as stockholder.

If the purpose of the inspection is germane to the interests of a stockholder as such, and reasonable grounds for the inspection are presented, the right will be enforced. The following cases are of value as illustrating what a proper purpose is within this rule:

In *Hodgens v. United Copper Co.* (N. J. L.) 20 L.R.A. (N.S.)

67 Atl. 756, an alternative writ of mandamus was awarded a stockholder of a domestic corporation to compel it to bring its books, etc., within the state for examination, etc., it appearing that the financial reports of the company, made at the stockholders' meetings, had been very general, and no details given, and the allegations of the petition and the proofs to sustain the same were of such a character as to render it doubtful if certain dividends paid by the company had not been paid from its capital and in depletion of the corporate assets.

In *Garcin v. Trenton Rubber Mfg. Co.* (N. J. L.) 60 Atl. 1098, a mandamus was also awarded a stockholder to enable him to inspect such books of the corporation as might be necessary to enable him to ascertain the value of his stock so that he could intelligently offer it for sale, it appearing that no dividend had ever been declared on the stock, and no statement showing the financial condition of the company had ever been made.

The desire to ascertain the value of the stock of the company, and whether its business was being conducted according to law, was also held to be a proper purpose, in *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4, 4 A. & E. Ann. Cas. 433.

So, the desire of a stockholder to ascertain the condition and the value of the stock, and whether there had been mismanagement of the corporation, and, if so, what effect it had had upon the assets or the business of the corporation, in order to file a bill in equity for the appointment of a receiver, or take other proper proceedings for the benefit of the corporation, and of his interest therein, was also held, in *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 A. & E. Ann. Cas. 989, to be a proper purpose for inspection, although the trial court was unable to find as a fact that there was any mismanagement of the company, or incapacity on the part of its officers. It did, however, find that the petitioner honestly believed that the company was being mismanaged, and that the desire to make the inspection was in good faith.

tioner has been denied all information by the officers of the company as to the business of the company, and that such information is necessary in order to enable the petitioner, as he proposes doing, to file a bill in equity against the company and its officers for the purpose of restraining them from the further commission of the acts complained of. The return does not deny certain facts alleged in the petition, which we think are material and sufficient to warrant the court in granting the relief which the relator seeks. It does deny, however, the allegations of mismanagement of the business of the corporation, or that its business has been conducted in a way and manner injurious to the stockholders. It alleges that the relator, in making a demand for

the inspection of the books, is not acting in good faith, for the reason that he is a director in a competing glass company, and desires the information that it may be used to the advantage of that company.

It is averred in the petition, and not denied by the return, that the business of the company was very prosperous prior to July 25, 1904, when Peter Crockenberg died. He was the owner of the five shares sold at auction and purchased by the relator. During the four years prior to the death of Crockenberg the earnings of the company amounted to 320 per cent on its capital stock. Since his death, and while the relator has owned the stock, a period of about three years, no dividends have been paid or declared by the corporation. The statement of

In *Neubert v. Armstrong Water Co.* 211 Pa. 582, 61 Atl. 123, mandamus was awarded a stockholder to enable him to examine the books of his corporation on his showing that its business was under the control and management of three persons who had acquired a majority of its stock; that they had failed to keep proper accounts and make annual statements of the financial condition of the corporation to the stockholders; that other illegal acts had been committed to prevent the stockholders from knowing the value of their stock. The purpose of the examination was to enable the relators to obtain information necessary to enable them to file a bill in equity to restrain such persons from the further commission of the acts complained of, for an accounting of the moneys expended by them, and for other purposes stated. The petition also averred that the three persons who were in control of the corporation had resorted to various devices to compel the petitioners to sell to them their stock at a price below its actual value, and one of the purposes of the examination was to ascertain the value of the stock.

State ex rel. Watkins v. Donnell Mfg. Co. 129 Mo. App. 206, 107 S. W. 1112, also held that, where the purpose of the inspection was to ascertain whether the financial condition of the company was such that a receiver should be appointed and its affairs wound up, a mandamus should be awarded.

In *State ex rel. Johnson v. St. Louis Transit Co.* 124 Mo. App. 111, 100 S. W. 1126, mandamus was allowed where the purpose was to ascertain the financial condition of the company, and the facts as to certain contracts and dispositions of assets alleged to be inimical to the interests of the stockholders.

State ex rel. Watkins v. North American Land & Timber Co. 108 La. 621, 87 Am. St. Rep. 309, 31 So. 172, held a stockholder entitled to mandamus to inspect such books of a foreign corporation as were within the state, where it was shown in his behalf that he was the owner of a large amount of the capital stock of the company; and that, by reason of a cabal between the stockholders and the directors in the country of the dom-

icile of the corporation, he was deprived of all voice, management, and control in the direction of its affairs; and that, in order that he might be informed of its present condition and past transactions, and might so exercise his rights as to prevent mismanagement, correct abuses, extravagance, and waste, and protect himself from irreparable loss and injury, it was necessary that he should be allowed to inspect all the books, accounts, papers, and correspondence of the company.

That the inspection of the books of a foreign corporation kept in Missouri, for the purpose of ascertaining its financial condition, and the value of its stock, was a proper purpose, sufficient to entitle a shareholder to mandamus, was held in *State ex rel. English v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780. This conclusion was based upon the common-law right of inspection, the statutory provision being inapplicable. The motive for the inspection being a sufficient and proper one, the court held that the fact that the relator was an officer in a rival company did not of itself present a sufficient ground for denying him the right of inspection, although the right was so restricted that certain secrets of the company would not be thereby disclosed.

The fact that the stockholder seeking to inspect the books of the company is on unfriendly relations with its officers, and is a competitor of the company, or an officer in a competing company, is not sufficient to raise the presumption that the purpose of the inspection is an improper one. *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326.

In *Re O'Neill*, 47 Misc. 495, 95 N. Y. Supp. 964, a mandamus was awarded a stockholder, permitting him to examine the books, papers, and vouchers of the corporation where the petitioner had been a member of the board since its formation, and no report had been made by it of its affairs since its existence, a period of about three years, and it did not appear to be doing any business, although the answer of the president, who induced the petitioner to buy stock therein, alleged that he had given petitioner information as to the loss of a considerable

January 1, 1907, shows, among other things, \$3,780 due the incorporators for wages, and \$1,244.40 loaned by them to the corporation and secured by notes, making a total of \$5,024.40 due the incorporators, who are also directors of the company. The statement further shows a bank note for \$2,000, bills payable amounting to \$2,199, and more than \$800 due as commissions and expense of salesmen. There is also, as appears by the statement, a mortgage on the buildings for \$6,300. The petitioner further avers that, from his knowledge of the company's business, he believes that the capital stock should now be worth many times its original par value, and that a dividend of at least 10 per cent should be declared by the company if its business had been properly, in-

telligently, and economically transacted. We think the averments in the petition, taken in connection with the statement of January 1, 1907, were sufficient to warrant the court in awarding the mandamus. The petition does not have to aver facts sufficient to sustain a bill filed for an accounting. The stockholders of a corporation are the owners of its franchise and its assets, and they have a right to be informed of the financial condition of the company. When, therefore, a stockholder furnishes sufficient data to warrant the conclusion that there is mismanagement and that the affairs of the company are not conducted in a proper manner and in the interests of the stockholders, he has a right to demand of the officers of the company permission to examine

amount in a transaction of which the petitioner knew the particulars, and had answered all his reasonable inquiries as to the affairs of the corporation. He also alleged that, while the petitioner was at one time his intimate friend, he was now hostile to him. The court, however, said that the answer did not advance any valid reasons, under the circumstances, why the mandamus should not be awarded as prayed for, especially as there was no satisfactory proof that any injury would result to the corporation therefrom of such a nature as to render the inspection improper, or that the petitioner had any illegal end in view in making the application.

That a stockholder is a member of a company engaged in a competing business is no ground for refusing his right to inspect, although the only purpose of the inspection is to ascertain if the business of the company is being properly conducted. *Hodder v. George Hogg Co. (Pa.)* 72 Atl. 553.

In *People ex rel. Ludwig v. Ludwig & Co.* 126 App. Div. 696, 111 N. Y. Supp. 94, the fact that a corporation was expending a considerable amount of its funds in erecting a factory on land owned by a relative of the president, under an alleged arrangement that, by paying a large amount in excess of the actual cost of construction, the property should be conveyed to the corporation, was held sufficient to entitle a large stockholder to a mandamus to enforce an inspection of the books, although he was engaged in a rival business, and had been indiscreet in causing to be sent to persons having business relations with the corporation trade journal copies containing the moving papers in the proceeding, wherein was alleged the mismanagement of the affairs of the corporation. The right of inspection was so limited, however, that the relator would not, by such inspection, be able to ascertain the names of the customers of the corporation.

Re *Hastings*, 128 App. Div. 516, 112 N. Y. Supp. 800, held that the executor of a deceased owner, who was also her sole legatee, was entitled to a mandamus requiring the officers of the corporation to permit him to examine and take extracts of the records and papers, where it appeared that the pres-

ident and owner of the other one half of the stock was drawing a large salary, and, since the death of the executor's decedent, had promoted his son so as greatly to increase his salary; also, that the stock had recently been increased by proceedings which, with reference to giving notice to those interested in the decedent's estate, savored of bad faith. The court said that the fact that the executor demanded and was persistent in his demand, that he be elected to the position held by his decedent in his lifetime, and that he receive the salary formerly paid to her, and the further fact that he threatened investigation if his demand was refused, was not sufficient to infer bad faith on his part in seeking the inspection, it not appearing that he was engaged or interested in any rival or competing business, or that he had any interest adverse to his interest in the corporation.

But in *Re Kennedy*, 75 App. Div. 188, 77 N. Y. Supp. 714, the right to examine and copy the books of a corporation was denied to the executors of a stockholder thereof, where it appeared that they were officers of a hostile corporation, and were attempting to build up a new and rival business instituted by their decedent in his lifetime; and where it also appeared that the declared object of the examination, viz., to enable the county treasurer to ascertain the value of the stock of the corporation so that the value of the taxable transfers under decedent's will could be fixed, was a mere pretense, inasmuch as, under the tax law, the treasurer could subpoena the officers of the corporation and obtain from them all necessary information. The court said that it was apparent from the papers that the real object of the petitioners was to obtain information that would aid them in crippling the business of the corporation, for the benefit of its business rival.

And in *Re Coats*, 73 App. Div. 178, 76 N. Y. Supp. 730, mandamus was denied where affidavits in opposition to a petition by a stockholder for mandamus to enable him to inspect the books of the company established that the petitioner was not the real party in interest, but was a mere dummy for others who were seeking to obtain

the books, records, and accounts of the corporation so that he may protect his interests; and if the demand is refused, and he makes application to the court to enforce it, a mandamus should be awarded. The facts averred in the relator's petition were sufficient to justify the court in granting the alternative writ, and subsequently in awarding the peremptory writ.

That the relator is a stockholder in a competing company is of itself not sufficient to deprive him of the relief he seeks in this proceeding against the defendant company. This has been distinctly ruled in *Cobb v. Lagarde*, 129 Ala. 488, 495, 30 So. 326, 328. It is there said: "The defendant set up in his answer that the petitioner's purpose in wanting to inspect the book was an improper

one. This was defensive matter, and the burden was on the defendant to show it, and we are not prepared to say that he has done so. The fact of the petitioner being a stockholder in a rival concern, and that he may thereby gain some advantage by an inspection of the books of the defendant company, does not necessarily show an improper purpose in making demand for inspection, and will not deprive him as a stockholder of his right of investigation into the management of the affairs of said company." In the case at bar there is simply an averment, on belief, that the relator desires the information to use it for the advantage of a competing company. It is not alleged in the return that the averment can be supported by proof. The offer of the defendant

control of the company to destroy it, and that he was closely connected with such third persons in the scheme, where the effect of the inspection would be to assist in carrying out the scheme.

So, in *Bevier v. United States Wood Preserving Co.* (N. J. L.) 69 Atl. 1008, mandamus was denied where an examination of the testimony given in support of the application to secure the inspection of the books of the corporation led the court to believe that the purpose of the examination was not in good faith, but was for the purpose of aiding a competitor; and the information furnished by the company and the position assumed by it indicated a willingness to give such information as was proper to accomplish the avowed object of the stockholder.

In *Re Pierson*, 44 App. Div. 215, 60 N. Y. Supp. 671, it was held that a peremptory writ of mandamus was properly denied a stockholder in a gas company who sought thereby to compel the company to permit him to examine its books to ascertain if it was selling gas at a loss, it appearing that the company had paid no dividend for a period of about fifteen months, and that it was selling gas at a greatly reduced rate, which, however, the company alleged to be necessary because of a reduction of rates by competing companies. The court said that there was no showing made of any proper or laudable motive for the inspection, which would justify granting to the petitioner a peremptory writ of mandamus, and added that, if it had been made to appear that the object sought by the examination would promote the interests of the stockholders or of the company, or that the value of the securities held by the petitioner would be enhanced or protected thereby, there might be a basis for the issuance of the writ.

Colwell v. Colwell Lead Co. 76 App. Div. 615, 78 N. Y. Supp. 607, reversed an order of the supreme court awarding a mandamus to a stockholder, permitting him to inspect the books of the corporation, on the ground that no sufficient reason was shown for the inspection, where the purpose was to ascertain whether or not the company had been

properly conducted during the past year, and a full and complete answer was made to the application.

In *People ex rel. Mackey v. American Union L. Ins. Co.* 31 Misc. 617, 64 N. Y. Supp. 916, where a stockholder of an insurance company had made charges of mismanagement against the company to the effect that contributions by the stockholders to make good an impairment of the capital stock of the company had been subsequently withdrawn, which charges had been decided adversely to him in an action brought by him against the company and its officers in relation thereto, it was held that such stockholder was not entitled to a mandamus to compel the company to permit him to examine its books and make copies of them where he based the right on the charges of mismanagement and wrongdoing adjudicated against him in the prior action.

Where the object of a corporation as set forth in its charter was "to unite in a social and political organization the young men of Philadelphia to foster and promote a love for and a knowledge of the principles of the Republican party, to educate the young men to a loftier appreciation of their relations to the national, state, and municipal governments, to encourage them to an active participation in the nomination and election of honest and capable public officers by and through the Republican party." *McClintock v. Young Republicans*, 210 Pa. 115, 68 L.R.A. 459, 105 Am. St. Rep. 784, 59 Atl. 691, held the following to be proper purposes to entitle a member of such association to a mandamus, permitting him to inspect a list of members, and make a copy thereof at a time and place convenient for the purpose: "(a) To institute measures and advocate policies which may tend to promote the objects for which the corporation was organized; (b) to prevent the affairs and property of the corporation from being used to further the private political ambitions of any member or group of members; and (c) to oppose the election or re-election of incompetent officials, and to aid in the election of officers who will be faithful to the best interests of the members, and who will administer

company to buy the relator's stock at a price fixed by it is no answer to his demand for an inspection of the books and papers of the corporation. He is not required to sell his stock to the defendant company or its officers at any price, and especially at a price to be named by them. In fact, it would be difficult for him to know what would be a fair and reasonable price for his stock until he gets the very information he demands in this proceeding. Nor is it an answer to the relator's application that the company will furnish him extracts or copies from its books, or that the company will agree to have them inspected by an expert selected by it and the relator. These propositions on the part of the company entirely overlook the rights of a stockholder in a trading

corporation. As we have suggested, the stockholders are the owners of the company's assets, and for the protection of their interests they have a right to be informed of the management of its business. If, therefore, there is apparent mismanagement or misconduct by the officers of the corporation, a stockholder has a right to make an investigation for himself and ascertain the true condition of the company's affairs. Of course, this right to examine the books, records, and papers of the company must be exercised in good faith, and at a proper time and place, so as not to interfere with the business of the company. But, subject to this limitation, the officers of the company must permit the stockholder to investigate the company's affairs, and, if they fail to do so

the affairs of the corporation and control its property in accordance with the purposes for which the corporation was organized."

—to subserve private interest.

A stockholder is not entitled to inspect the books of his corporation in order to ascertain whether a certain person against whom he has a claim by virtue of legal proceedings in a different state owns or has recently transferred shares of stock in the company. *State ex rel. O'Hara v. National Biscuit Co.* 60 N. J. L. 198, 54 Atl. 241.

A mandamus will not be granted to compel a corporation to exhibit its books and papers to a stockholder where his purpose is to ascertain whether facts exist which would authorize an application to the attorney general to dissolve the corporation or to appoint a receiver, and also to enable him to require the officers of the corporation to make good any deficit caused by their misconduct. *People ex rel. McElwee v. Produce Exch. Trust Co.* 53 App. Div. 93, 65 N. Y. Supp. 926.

In *Re Taylor*, 117 App. Div. 348, 101 N. Y. Supp. 1039, a mandamus was denied a stockholder of a bank to compel it to exhibit its books for inspection to aid him in a suit against the directors thereof for damages because of the publication by them of a false report as to the financial condition of the bank whereby he was induced to purchase stock therein to his loss. The court said that mandamus to compel an inspection would issue in behalf of a stockholder only in proper aid of his stock interest. That, wherever information concerning the management, conduct, and control of the corporation was necessary for the protection of such stock interest, its revelation would be compelled; but that, where the information was sought, not for the benefit of the owner's stock interest, but to assist him in matters personal to himself and wholly apart from such interest, the writ would not be granted.

In *Schondelmeyer v. Columbia Fire Proofing Co.* 219 Pa. 610, 69 Atl. 49, where it did not appear by the pleadings that the relator, a stockholder, was in any way aggrieved by the action of the company, or 20 L.R.A. (N.S.)

that his rights as a stockholder were infringed by the refusal to permit him to examine the books of the company; and it did appear that his sole purpose in seeking to inspect the books was to ascertain the value of his stock, to use such knowledge in an action by him against the president of the company for deceit in misrepresenting to him the value of the stock at the time he purchased it,—the court said that his motive in making the inspection was not a proper one, and mandamus was accordingly denied.

But in *Woodworth v. Old Second Nat. Bank* (Mich.) 117 N. W. 893, although the court found that the real purpose of a stockholder in examining the books of his bank was to enable him to obtain evidence as to the condition of the bank, and the value of its stock, to aid him in preparing for the trial of an action of deceit against certain directors of the bank for false representations as to its financial condition, by reason of which he was induced to purchase stock therein, yet it was held that, tested by the common-law right of inspection, the purpose of the inspection was a proper and legitimate one.

In *State ex rel. de Julvecourt v. Pan American Co.* 5 Penn. (Del.) 391, 61 Atl. 398, where a by-law of the company gave a stockholder the right to examine its books, a peremptory writ of mandamus was awarded a stockholder on a petition against the corporation and its president, allowing him to inspect and copy such books, papers, and records of the corporation as might be necessary to enable him to ascertain the value of the stock of the company; whether the company in fact owned or controlled certain valuable properties it claimed to own; whether the stock issued had ever been paid for; and also the truth or falsity of certain representations alleged to have been made to the relator by the president of the corporation to induce him to transfer certain of his property to the corporation in exchange for a block of its capital stock.

In *Henry v. Babcock & W. Co.* 125 App. Div. 538, 109 N. Y. Supp. 853, the court said that a person, by purchasing 1 share of stock out of an authorized issue of 150,000 shares, did not thereby acquire the right

on a reasonable and proper demand, the court will, on proper application, enforce the demand by mandamus. It is settled that at common law a stockholder of a trading corporation has a right to examine the books and papers of the company at a reasonable time and place, and for a proper purpose. In *Com. ex rel. Sellers v. Phenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184, it is held that a stockholder in a trading corporation, who is denied access to corporate records and information as to corporate affairs, may, in certain cases, have a mandamus to compel the production of such books and papers as are essential to him for some proper and definite purpose, such as an accurate ascertainment and legal assertion of his rights as a stockholder. In that case

Justice Trunkey, speaking for the court, said (page 116 of 105 Pa.): "Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers and to take minutes from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." When the same case was before this court again (113 Pa. 563, 572, 6 Atl. 75, 79), it was said: "Under the circumstances mentioned, and for the purposes stated, we are of opinion that, according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of

to inspect the stock book, given him by statute, for purposes purely personal, and not connected in any way with the corporation, or to protect the applicant's interest therein. And, if the motive of such person was questioned, it was his duty to disclose his motive so that the person having the books in charge might refuse to produce them if the purpose would work an injury to the corporation, or was purely personal to the applicant and not connected with any interest which he had in the corporation, and that, upon a refusal to disclose the motive, it was fair to infer that it was not a proper one; and a denial of the right to inspect, under such circumstances, would not render the corporation or the custodian of the books liable to the penalty prescribed by statute.

So, where a small number of shares of stock of an important financial corporation has been acquired for the express purpose of making an application for a list of stockholders, to be used for the benefit of third persons, whose names are not disclosed, and for purposes not disclosed, mandamus will not be granted. *People ex rel. Hunter v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369.

A second demand by a stockholder to be allowed to make a complete transcript of the stock book of a foreign corporation, on the eve of decisions in prior actions between the same parties, which involved the same right and depended upon a question of construction, together with his admission that his only purpose in seeking the transcript was to facilitate him in circularizing to effect the sale of stock of other companies in which he was interested, was held, in *Althouse v. Giroux*, 56 Misc. 511, 107 N. Y. Supp. 193, sufficient to show that the plaintiff was not actuated by an honest purpose in making the demand; and his right to recover a penalty for the refusal of the demand was therefore denied.

And in *People ex rel. Althouse v. Giroux Consol. Mines Co.* 122 App. Div. 617, 107 N. Y. Supp. 188, where the object in making extracts from the stock book of a corporation was to obtain a list of the stockholders and 20 L.R.A. (N.S.)

their addresses, to be used for circularizing purposes for the sale of stock in other companies in which the applying stockholder was interested, and to take up the question of negotiating loans to such stockholders upon their stock as collateral security, mandamus to compel inspection was denied, the court holding the purpose was improper.

But in *Lawshe v. Royal Baking Powder Co.* 54 Misc. 220, 104 N. Y. Supp. 361, a stockholder of record, who acquired stock in a foreign corporation in order to procure an inspection of the stock book, to obtain information as to the various holders of common stock in order to communicate with them for the purpose of buying stock from, or selling stock to, them, was held to present a proper purpose for examination under § 53; and that, upon the refusal of his application to inspect, he could maintain an action for the penalty provided by statute for such refusal.

Effect of limiting by-law or statute.

U. S. Rev. Stat. § 5241, U. S. Comp. Stat. 1901, p. 3517, which provides that no association shall be subject to any visitatorial powers, other than such as are authorized by this title, or vested in the courts of justice, does not interfere with, or cut off, the common-law right of a shareholder in a corporation to inspect the books of the corporation. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4, 4 A. & E. Ann. Cas. 433.

Neither is a stockholder's common-law right of inspection affected by a statute conferring upon him a limited right. *State ex rel. Watkins v. Donnell Mfg. Co.* 129 Mo. App. 206, 107 S. W. 1112.

In *Hodgens v. United Copper Co.* (N. J. L.) 67 Atl. 756, one ground for resisting the mandamus sought was a by-law to the effect that no stockholder should have any right to inspect any account or book or document of the corporation, except as conferred by statute, or authorized by resolution of the board of directors, or by a resolution of the stockholders. But the court said that this by-law did not change the statutory power of the court to order the

the company. Such a right is, of course, not to be exercised to gratify curiosity, or for speculative purposes, but in good faith and for a specific, honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as a stockholder. . . . A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers [the relator] was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable personal inspection of them, and, with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he proposed to bring."

books to be brought into the state, and, when within the state, to be examined by the stockholders; that the statutory authority to order the books to be brought within the state would be a futile power if, when the books are within the state, such a provision or by-law could nullify the order of the court for the stockholders to inspect and examine the books. It was also said that such a by-law, if construed to give the right to a corporation thus to defeat the right of a stockholder to inspect the books of the company, would be oppressive and unreasonable.

A by-law authorizing the directors, in their discretion, to deny stockholders an inspection of the books, and making the action of the directors final, is unreasonable and void. *State ex rel. Lindsay v. Jessup & M. Paper Co.* (Del.) 72 Atl. 1057.

Who entitled to enforce.

A stockholder in a corporation, in order to secure the aid of the court by its writ of mandamus to enforce the right to inspect the stock book of the corporation given to stockholders by § 29 of the stock corporation law, must first have his name entered in the stock book of the corporation as an owner of some of its capital stock. *Re Reiss*, 30 Misc. 234, 62 N. Y. Supp. 145.

Butterfly-Terrible Gold Min. Co. v. Brind, 41 Colo. 29, 91 Pac. 1101, also holds that the holder of shares of stock in a corporation is not entitled to exercise the right to inspect the books of the corporation, given him by statute, until he has had the transfer of stock to him entered upon the books of the company as therein provided.

A stockholder who applies for a mandamus to enforce his right to inspect the books of the corporation loses his right to relief where he disposes of his stock while his appeal from an order denying him the writ is pending. *State ex rel. Fears v. New Orleans Maritime & Merchants' Exchange*, 112 La. 868, 36 So. 760.

Assistance of attorney, stenographer, or accountant.

Where a stockholder is entitled to inspect the books and records of the corporation, if 20 L.R.A. (N.S.)

In *Huyler v. Cragin Cattle Co.* 40 N. J. Eq. 392, 398, 2 Atl. 274, 278, it was said by Chancellor Runyon, delivering the opinion: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times. . . . Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stock-

holders. It will better enable him to exercise this right to have the assistance of an attorney, accountant, or stenographer, he is entitled to such assistance, subject, of course, to the limitation that in the exercise of the right the ordinary affairs of the company will not be unduly interfered with. *State ex rel. Johnson v. St. Louis Transit Co.* 124 Mo. App. 111, 100 S. W. 1126; *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 A. & E. Ann. Cas. 989.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033, also holds that the right given by statute to a stockholder to inspect the books of the corporation is an incident to the ownership of stock, and may be exercised at any reasonable time so long as the relation of stockholder exists. That the right to take copies and records, either in person or by agent, follows as an incident the right to inspect. "It rests, as does the entire right to examination rest, upon the broad ground that the business of the corporation is not the business of the officers exclusively, but is the business of the stockholders."

And *Clawson v. Clayton*, 33 Utah, 266, 93 Pac. 729, holds that the right given by statute to bona fide stockholders to inspect the books of the corporation is not a personal right in the sense that the examination must be personally conducted, but that the right thus conferred may be exercised by an agent or attorney of the stockholder.

In considering this question, in *People ex rel. Lorge v. Consolidated Nat. Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173, it was held that the right of inspection, given by both §§ 29 and 53 of the stock corporation law, carried with it the right to make such extracts from the books as would enable the shareholder to retain the information disclosed by the inspection.

To the same effect are *Fay v. Coughlin-Sandford Switch Co.* 47 Misc. 687, 94 N. Y. Supp. 628, and *Althaus v. Giroux*, 56 Misc. 509, 107 N. Y. Supp. 191.

To what corporations applicable.

A state court has jurisdiction to issue a mandamus to compel a national bank to

holders." In the case in hand the petitioner avers that the information he seeks is necessary to enable him, as he purposes doing, to file a bill in equity against the company and its officers to restrain them from mismanaging the business of the company. The truth of this averment is apparent, and, unless the petitioner secures the information, it is very doubtful whether he can maintain a bill against the defendant company and its officers. He has been denied all information as to the business of the corporation, and his only remedy is the one he invokes in this proceeding. It may be that, when he examines the books and papers of the corporation, he will be satisfied that the

company's affairs have been properly conducted by the officers, but, under the facts disclosed in his petition, that is no reason for denying him an opportunity for examining the books and papers of the company so that he may satisfy himself of the condition of its affairs in order to protect his investment in the company. So far as the record discloses, the relator has presented sufficient facts in his petition to warrant his allegation of mismanagement, and he has, therefore, the right to examine the books and papers of the company. The mandamus was properly awarded.

The assignments of error are overruled, and the judgment is affirmed.

submit its books to an examination by a stockholder for a proper purpose. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130. 26 Sup. Ct. Rep. 4, 4 A. & E. Ann. Cas. 433.

Shareholders of a national bank in process of liquidation are entitled to the aid of state courts to enforce the right to inspect its books and records. *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

The constitutional right of stockholders to inspect applies to a benevolent or charitable corporation. *Garvin v. Pacific Coast Marine Firemen's Union*, 2 Cal. App. 638, 84 Pac. 270.

The right of a stockholder to inspect the books of a corporation applies as well to a stockholder of a fire insurance company as to any other corporation. *Re Coats*, 73 App. Div. 178, 76 N. Y. Supp. 730.

In *People ex rel. Venner v. New York L. Ins. Co.* 111 App. Div. 183, 97 N. Y. Supp. 465, a distinction was made between a policy holder's right to inspect the books of a life insurance company which issued his policy, and the right of stockholders to inspect the books of a corporation; and it was held that a mutual life insurance company did not come within the provisions of § 29 of the stock corporation law requiring corporations to keep a book containing a list of its stockholders open to the inspection of such stockholders. The court said that no such duty rested upon a mutual life insurance company, and that therefore such section did not apply.

In *Nettles v. McConnell*, 151 Ala. 538, 43 So. 838, it was held that a foreign corporation doing business within the state, and having books and papers connected with its operations in the custody of its officers and agents of the state, would be treated, as to such books, papers, and persons, as a domestic corporation; and that therefore § 1274, Code 1896, providing for the inspection of the books of all private corporations by stockholders, would apply.

Remedy.

The doctrine was stated in *Hub Constr. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574, that mandamus was the proper remedy to enforce the right of corporate stockholders and creditors, given by 20 L.R.A. (N.S.)

statute, to inspect the books and records of the corporation. The case, however, involved mandamus by a creditor.

Maeder v. Buffalo Bill's Wild West Co. 132 Fed. 280, held that the usual remedy of a stockholder to enforce his right to inspect the books of the corporation, and to compel the books of a foreign corporation to be brought within the state for that purpose, was by mandamus. The court said that he could receive no aid for such a purpose by a bill in equity; and that, if the purpose in compelling the books of a foreign corporation to be brought within the state was for evidential purposes in the proceeding in equity in which the motion to that effect was made, before he could entitle himself to an order to produce the books he must, where his bill of complaint had been demurred to, show a right to maintain his bill. In this case the demurrer to the bill was sustained because of a want of equity in, and it was therefore held that any remedy the stockholder had to compel the inspection of the books of the corporation was by mandamus, and not by a bill in equity.

So, in *Trimble v. American Sugar Ref. Co.* 61 N. J. Eq. 340, 48 Atl. 912, the court sustained a demurrer to a bill in equity, by a stockholder to restrain his corporation from engaging in a course of business alleged to be *ultra vires* and unlawful; also to compel a dividend out of surplus money alleged to be concealed by the corporation, and for a discovery as to certain alleged unlawful contracts by the corporation, and also as to its present financial condition, property, investments, etc. One ground of the demurrer was that the discovery prayed for could be had by proceedings to inspect the books and papers of the corporation. While the demurrer was sustained generally for want of equity in the bill, the court, as to this particular ground of demurrer, said that the complainant's remedy was by mandamus in a court of law to compel defendant to permit an inspection of the books by the complainant, aided, if necessary, by a petition under the statute to this court, or any other court, to compel the defendant to bring the books into this state for inspection.

Fuller v. Alexander, Hollander & Co. 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646, also held that a stockholder of a domestic

tic corporation, whose books and papers were kept out of the state, was not entitled to an order of a court of chancery in a proceeding instituted for that purpose, requiring the corporation to produce all its books, papers, etc., at a stated time and place, within the state, in order that such stockholder might make an examination and copies thereof. The basis of the decision was that the sole remedy of a stockholder, wrongfully refused inspection of the books and papers of his corporation, was by mandamus; and that, while the court of chancery in a suit pending before it, over which it had jurisdiction, might, upon proper cause shown, summarily order all the books of a domestic corporation to be forthwith brought within the state and kept therein at such place and for such time as might be designated in the order, yet this right given by statute did not authorize the court of chancery to assume jurisdiction in a proceeding, the sole purpose of which was to enforce the right of a stockholder to inspect the books of the corporation.

Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234, in holding that it was the duty of a domestic corporation which had its principal office and place of business in another state to keep the records and books of account at its principal office in the state of Illinois, so that the same might be open to the inspection of the stockholders, also held that mandamus was the proper remedy to secure this right to the stockholders.

But *State ex rel. Watkins v. North American Land & Timber Co.* 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172, holds that, where certain books of a foreign corporation were not kept within the state, the court had no jurisdiction by mandamus to compel the corporation to submit such books to the inspection of a stockholder, although by the laws of the state the company was required to keep the books, or copies thereof, within the state.

Mitchell v. Northern Security Oil & Transp. Co. 44 Misc. 514, 90 N. Y. Supp. 60, affirmed in 91 N. Y. Supp. 1104, also holds that the courts of New York have no jurisdiction by mandamus to compel a foreign corporation to submit its books to a stockholder for inspection where the books are not kept within the state.

A Federal circuit court will not take jurisdiction of an application for a mandamus by a stockholder to compel an inspection of the books of the bank where the pleadings fail to show that the matter in dispute exceeds \$2,000. *People ex rel. Lorge v. Consolidated Nat. Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033, construing Rev. Stat. 6741, which provides that "mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station;" together with § 6744, which reads 20 L.R.A. (N.S.)

that it "must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law,"—held that mandamus was not, but injunction was, the proper remedy to be pursued by a stockholder to enforce the right to inspect the books of his corporation, given him by § 3254.

In *Brewster v. F. G. Brewster Co.* 127 App. Div. 729, 111 N. Y. Supp. 1026, where an administrator sought to determine whether there was any agreement between his decedent and a third person as to the equal control of the corporation, and whether an issue of stock, putting control of the corporation in the defendants, was authorized, the court said that the better practice would be to examine the officers, and thus ascertain what books or accounts might be necessary to examine to obtain the knowledge sought, and then obtain an order for such books as were shown to be material. It appearing that the defendants had offered the inspection of books of this character prior to the application for the mandamus, the application was denied.

The doctrine was enunciated in *Bourdette v. Seward*, 52 La. Ann. 1333, 27 So. 724, that the legal right of a stockholder of a corporation to examine the corporate books was a right which gave him a cause of action at law for damages against the corporate officers should they refuse to allow the inspection. The case involved the question of the measure of damages.

The foregoing doctrine was reaffirmed in the same case when again before the court in 107 La. 258, 31 So. 630.

Demand and refusal.

Latimer v. Herzog Teleseme Co. 75 App. Div. 522, 78 N. Y. Supp. 314, holds that a stockholder is not entitled to a peremptory mandamus to examine books, etc., of the company where the petition and affidavit for mandamus merely allege that the petitioner has no knowledge of the condition and the affairs of the corporation, or the names of its stockholders, and that it is necessary to examine the books of account and the stock books and list of stockholders to ascertain the names and residence of the other stockholders of the company so that the petitioner may confer with them as to the management by the present officers of the affairs, where no demand was made upon the corporation for this information prior to the application for mandamus.

While the right of a stockholder to inspect the books, records, and papers of a corporation was recognized in *Mathews v. McClaughry*, 83 Ill. App. 224, the petition for mandamus was dismissed because it was directed against an officer of the corporation, and the petition did not show that such officer had ever refused the right to inspect, or had interposed any obstruction thereto.

It is not necessary to show that a demand for the inspection was made during business hours, or that it was made at the place of business of the corporation, or that the per-

son making the demand was the agent of the applicant, or had any legal right to represent her in the transaction. *State ex rel. Weinberg v. Pacific Brewing & Malting Co.* 21 Wash. 451, 47 L.R.A. 208, 58 Pac. 584.

A *prima facie* case is made entitling a stockholder to the penalty provided by § 53 of the stock corporation law, on showing that he made a demand to be allowed to inspect the stock book, upon a person who claimed and appeared to be in charge of the office of the corporation, and who stated that the books of the corporation were kept there, but refused to allow the plaintiff to inspect them. *Pelletreau v. Greene Consol. Gold Min. Co.* 49 Misc. 233, 97 N. Y. Supp. 391.

McClintock v. Young Republicans, 210 Pa. 115, 68 L.R.A. 459, 105 Am. St. Rep. 784, 59 Atl. 691, held it to be a sufficient demand and refusal where a member of an incorporated association demanded a list of the members of the association and was refused the information by the board of directors and the corresponding secretary, whose duty required him to keep a list of the membership, and who had the list in his possession at the time of the demand.

Bay State Gas Co. v. State, 4 Penn. (Del.) 238, 56 Atl. 1114, in construing § 29 of the general corporation law of Delaware, 1901, which, in substance, provides that the original or duplicate stock ledger, containing the names and addresses of stockholders, and the number of shares held by them respectively, shall at all times during the usual hours for business be open to the examination of every stockholder at its principal office or place of business, held that it was sufficient to entitle the shareholder of a domestic corporation to a mandamus to enforce the right of inspection given him by this statute, if his petition for mandamus showed that he was a stockholder, and that he had made a proper demand on the corporation at its principal office or place of business to inspect the books, and there had been either an express refusal or such conduct on the part of the corporation as was equivalent to a refusal. In this case the stockholder had commenced to examine the stock ledger of the defendant corporation at its office in the state of New York; before the examination was completed he was told that the office at New York had been closed, and the transfer books sent to Philadelphia; at Philadelphia he was informed that the stock book had been turned over to the president of the corporation, who was in Wilmington, Delaware; he then applied at the principal office of the company in Wilmington for the purpose of inspecting the stock book, on six different days, and on each day found the office closed; he thereupon made a demand in writing upon the president for the privilege of inspecting the stock book, but received no answer thereto. The court said that this conduct on the part of the corporation and its officers was equivalent to a refusal of the right to inspect.

Kirkman v. Carlstadt Chemical Co. 36 20 L.R.A. (N.S.)

Misc. 822, 74 N. Y. Supp. 865, held that the penalty provided by § 29 for the refusal to permit a stockholder to examine the stock book of the corporation attached only to an unlawful neglect or refusal. It was therefore held that no penalty was incurred, where, upon a stockholder requesting to examine the stock book, he was informed by the treasurer of the company that the book was not at the office, but was at his house, and it was mutually agreed that he would call again the next day. The treasurer promised that he would have the book there the next day, which he did, but the stockholder did not call, and, instead, sued for the penalty.

So, in *Lozier v. Saratoga Gas, Electric Light, & P. Co.* 59 App. Div. 390, 69 N. Y. Supp. 247, where the agent of a stockholder was told, in response to his demand to examine the stock book, that it was not at that office, but was at the office of the president of the corporation, only a short distance away, where he was at liberty to examine it, no penalty was held to have been incurred within the meaning of § 29, since this conduct did not amount to either a refusal or a neglect to exhibit the book.

An officer of a foreign corporation is not liable to the penalty imposed by § 53 of the stock corporation law for a refusal to allow a stockholder to inspect the stock book of the corporation, unless it is shown to have been in his possession at the time demand was made upon him to inspect it. *Gould v. Olympic Min. Co.* 49 Misc. 612, 96 N. Y. Supp. 455.

And in *Billingham v. E. P. Gleason Mfg. Co.* 43 Misc. 681, 88 N. Y. Supp. 398, the secretary of a corporation was held not liable to a stockholder for the penalty provided in § 29 for a refusal to allow a stockholder to inspect the stock book of the corporation, where it appeared that no such book was kept by the corporation. The court said that the secretary could not be said to have neglected or refused to exhibit a book that was not in existence at the time the demand for the inspection was made upon him.

But a stockholder in a foreign corporation, who makes a demand upon the corporation to examine the stock book, is entitled to the penalty provided by § 531 of the stock corporation law, where it appeared that no stock book complying with the requirements of this statute was kept at the office of the corporation within the state, and where it also appeared that the stockholder was refused the right to take extracts from an incomplete stock book kept by the corporation. *Fay v. Coughlin-Sandford Switch Co.* 47 Misc. 687, 94 N. Y. Supp. 628.

A stockholder who on one day applied to the secretary of a foreign corporation for permission to inspect the stock book, and was refused, and on the following day made a similar demand with the same result, and on the next day made a demand upon the president, which at the time was refused, but was subsequently complied with, was held, in *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586,

to have, in substance, made but one demand and met with but one refusal; he was therefore held entitled to but one penalty under § 53 of the stock corporation law.

To the same effect, under § 29 of the stock corporation law, applied to domestic corporations, is *Walcott v. Little*, 46 Misc. 96, 91 N. Y. Supp. 411.

But it was held in *Gould v. Olympic Min.* (Co. supra, under § 53 of the stock corporation law referring to foreign corporations, that an action for a penalty against a corporation is not a bar to a subsequent action to recover a penalty for a refusal occurring after the commencement of the first action.

Matters of procedure.

In *McClintock v. Young Republicans*, supra, it was held that the corporation by its directors, and the corresponding secretary, were the only parties necessary to be named in an alternative writ of mandamus in behalf of a stockholder to secure the inspection of a list of members, they being the only parties named in the alternative writ who, in the language of the 7th section of the statute referring to such writs, had "the power and whose duty it is to do the act required."

Where eight separate and independent corporations had a common secretary, who was the custodian of the books of each of the corporations, it was held in *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099, to be a misjoinder of parties respondent where a stockholder, having stock in each of such corporations, filed a single petition for a mandamus to compel respondent, as secretary of each company, to allow him the privilege of access to the books and papers of the different corporations.

PENNSYLVANIA SUPREME COURT.

AGNES Y. HOLBERT

v.

CITY OF PHILADELPHIA, Appt.

(221 Pa. 266, 70 Atl. 746.)

Municipal corporation — ice on walk — liability.

1. A municipal corporation which maintains, without drainage, a sidewalk along a street crossing a railroad below grade in such a manner that, by reason of its grade and formation, ice accumulates and remains on it in freezing weather so as to be unsafe for pedestrians using it, without any attempt to remove the ice, will be liable for injuries to a pedestrian who falls thereon, if the jury finds that the conditions existing at the time of the accident are due to the city's negligence.

Trial — negligence — jury.

2. Whether or not a pedestrian injured by a fall on a sidewalk was exercising proper care in passing along the walk, and whether

he fell from any want of care on his part, are questions for the jury.

Sidewalk — ice — notice.

3. The mere presence of ice on a sidewalk is not sufficient to admonish a pedestrian that, by the exercise of proper care, he cannot pass over it in safety.

Same — assumption of risk.

4. Mere knowledge of the icy condition of a sidewalk leading under a railroad track which is kept open and maintained for travel by the municipality will not preclude one from using the walk without assuming the risk of its dangerous condition.

(May 11, 1908.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Charles W. Boger, Joseph W. Catharine, and J. Howard Gendell, for appellant:

Plaintiff knew of the defect in the highway and voluntarily undertook to test it, and therefore cannot recover against the municipality for injuries sustained in consequence of such defect.

Dehnhardt v. Philadelphia, 15 W. N. C. 214; *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Dwyer v. Port Allegheny*, 216 Pa. 22, 64 Atl. 854; *Durkin v. Troy*, 61 Barb. 437; *Smith v. New Castle*, 178 Pa. 298, 35

Case Note. — Liability of municipality for injuries caused by freezing of water accumulated on walk by reason of artificial conditions.

The cases upon this question decided prior to 1903 are collated in a subject note to *Brown v. White*, 58 L.R.A. 321. Only two later cases have been found.

In *Walsh v. New York*, 109 App. Div. 541, 96 N. Y. Supp. 540, it was held that, where there had been no snow storm, and the streets were not icy or slippery, the city was liable to a pedestrian who, on a crosswalk, slipped and fell on ice about 4 inches thick, which had formed from water escaping from a hydrant maintained by the city, and which hydrant had been continuously leaking during the preceding summer and fall.

In *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250, it appeared that a pedestrian fell and injured himself upon a sheet of ice extending across the sidewalk in an oval shape 6 feet wide, 5 inches thick in the center, and tapering to thin edges, formed from water collected upon the roof of an adjoining building and cast upon the walk by an overhanging and projecting conductor; that the ice had formed and remained upon the walk for two or three days prior to the injury; that it was hidden by a slight covering of snow, and

Atl. 973; *Hill v. Tionesta Twp.* 146 Pa. 11, 23 Atl. 204; *Winner v. Oakland Twp.* 158 Pa. 405, 27 Atl. 1110, 1111; *Fleming v. Lock Haven*, 15 W. N. C. 216; *Evans v. Philadelphia*, 205 Pa. 193, 97 Am. St. Rep. 732, 54 Atl. 775; *Haven v. Pittsburgh & A. Bridge Co.* 151 Pa. 620, 25 Atl. 311; *Forks Twp. v. King*, 84 Pa. 230; *Wharton, Neg.* 440; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580.

Mr. Lewis Lawrence Smith, for appellee:

The municipal corporation was bound to observe the defective condition of the walk.

Campbell v. York, 172 Pa. 205, 33 Atl. 879; *McLaughlin v. Corry*, 77 Pa. 109, 18 Am. Rep. 432; *Fritsch v. Allegheny*, 91 Pa. 226; *Kibele v. Philadelphia*, 105 Pa. 41; *Wyman v. Philadelphia*, 175 Pa. 117, 34 Atl. 621; *Philadelphia v. Smith*, 23 W. N. C. 242; *Koch v. Williamsport*, 195 Pa. 488, 46 Atl. 67; *McCabe v. Philadelphia*, 217 Pa. 140, 66 Atl. 247; *Bucher v. Sunbury*, 216 Pa. 89, 64 Atl. 906; *Garland v. Wilkes-Barre*, 212 Pa. 151, 61 Atl. 820.

The plaintiff was not guilty of contributory negligence from the fact that she used that route with knowledge of the icy condition.

Brown v. White, 206 Pa. 106, 55 Atl. 848; *Mellor v. Bridgeport*, 191 Pa. 562, 43 Atl. 365; *Steck v. Allegheny*, 213 Pa. 573, 62 Atl. 1115; *Evans v. Philadelphia*, 205 Pa. 193, 97 Am. St. Rep. 732, 54 Atl. 775; *Manross v. Oil City*, 178 Pa. 276, 35 Atl. 959; *Bucher v. Sunbury*, *supra*; *Chilton v. Carbondale*, 160 Pa. 463, 28 Atl. 833.

Mestrezat, J., delivered the opinion of the court:

About 2 o'clock on Sunday afternoon, January 25, 1903, Agnes Y. Holbert, the plaintiff, and her sister, Mrs. Stevens, left

that the projecting conductor had been in use for four months. It was held that the accumulation of ice in the manner shown constituted a nuisance which the city was bound to prevent or abate, and, negligently failing to perform this duty, it was liable for the natural consequences; that the fact that the walk was originally constructed in a reasonably safe condition for travel did not relieve the city of its duty to exercise a continuing oversight to keep it free from obstructions; that the failure of the officers of the city to have knowledge of the existence of the ice in time to have removed it before the injury was a neglect of duty, if the ice existed for such a length of time that they ought to have known of it; that, if the city's civil engineer, while acting as city commissioner, directed the property owner so to arrange the water conductor as to cast the collected water upon the sidewalk, and that condition continued through four months prior to the injury, then the city was charge-

20 L.R.A. (N.S.)

the former's home on East Walnut lane, Germantown, within the limits of the city of Philadelphia, to go to Indiana avenue. Their direct route was south along Magnolia avenue to Chelton avenue, where they were to board a street car to reach their destination. Magnolia avenue is 50 feet wide, and its general course is north and south. Both the cartway and the sidewalks are paved with brick. The Germantown branch of the Philadelphia & Reading Railroad crosses it at a right angle. Only the eastern footway or sidewalk is continued under the bridge, and forms with the bridge and its abutments a tunnel about 30 feet long, 10 feet wide, and 7 feet high on the north end, and 10 feet high on the south end. From a point some distance north of the tunnel or bridge Magnolia avenue descends rapidly to the south side of the bridge; the grade in the tunnel being 3 feet in a distance of 30 feet. The sidewalk under the bridge is paved with brick, but without curb. While there were intakes in the avenue on the north side of the bridge through which water from the street could pass, yet the water which fell on the east sidewalk, and water dropping from the bridge, naturally ran through the tunnel to the south side of the bridge. The bridge prevented the sun from falling upon the sidewalk beneath it. When the plaintiff arrived at the north side of the bridge, she discovered some ice at the mouth of and also in the tunnel. She proceeded along the sidewalk, and when she was about halfway through the tunnel, she slipped on the ice, fell, and broke her left arm in two places. Her description of the attempt to pass under the bridge and of the accident is as follows: "I went on, and I came by picking my way carefully, and I stopped and looked where I was going, and I saw a bare spot

able with the knowledge that, in case of rain or melting snow, followed by freezing weather, ice would be formed on the walk in such a manner as to render its ordinary use dangerous.

As to the liability of a municipal corporation for injuries from smooth, level ice or snow accumulated from natural causes on a sidewalk not otherwise defective, see case note to *Evans v. Concordia*, 7 L.R.A. (N.S.) 933.

As to liability of a municipal corporation for injuries from rough or uneven ice or snow accumulated from natural causes on a street or sidewalk not otherwise defective, see case note to *Bull v. Spokane*, 13 L.R.A. (N.S.) 1105.

As to the liability of an abutting property owner for injuries caused by ice formed from water artificially turned across the sidewalk, see case note to *Hynes v. Brewer*, 9 L.R.A. (N.S.) 598, which supplements on this point the note in 58 L.R.A. 321.

at my right. I thought, here is a place of safety, I will get on that place, so I could see my way on through the place in safety at that place. Just as I was stepping from the ice that I was standing on, onto this place of safety, my feet went out from under me, and I fell, and I broke my left arm in two places,—at the wrist and at the elbow.” The plaintiff claimed, and her testimony tended to show, that the walk under the bridge, except a few small places, was covered with ice from 1 to 2 inches thick, and that part of the ice was very rough. The bridge was built in 1895, and there was ample evidence in the case to warrant the jury in finding that, during the winter seasons since its construction, ice invariably accumulated on the sidewalk beneath it. It was in evidence that the winter of 1902–03 was “a very hard winter,—a hard, miserable winter. . . . It [the sidewalk] was icy all that month [January, 1903].” This action was brought by the plaintiff to recover damages for the injuries she sustained in falling on the sidewalk under the bridge. It is averred in the statement of claim “that, by reason of the overhead bridge of the railroad across the said Magnolia avenue, ice and snow accumulate under said bridge unless the pavement is kept clean; that it was the duty of said defendant to keep said sidewalk clean and free from ice. . . . But, notwithstanding its duty in the premises, the said defendant did not keep the said sidewalk in good order and repair and free from such obstructions, but allowed the said ice and snow to accumulate there and remain there for a long space of time, and, by reason of its said neglect, the plaintiff was injured.” The defendant offered no evidence, and the case was submitted to the jury upon the plaintiff’s testimony. The verdict was for the plaintiff, and from the judgment entered thereon this appeal was taken by the city.

A municipality is not liable for injuries resulting from the general slipperiness of its streets or its sidewalks occasioned by a recent precipitation and freezing of rain or snow. During the night rain or snow may fall and freeze so that streets and sidewalks are slippery and in a dangerous condition, but it manifestly would be unreasonable to hold the city liable for injury to a pedestrian the following morning, caused by his falling on the sidewalk. Therefore persons who undertake to pass over the sidewalks of a city, made unsafe or dangerous by the freezing of recent falls of rain or snow, know their condition and assume the risk; and, if they fall by reason of the smoothness of the ice, the law imposes no liability upon the city. While, however, the city is not responsible for the general slippery condi-

tion of its sidewalks caused by the recent falling or freezing of rain or snow, yet the rule does not extend so far as to protect the city from liability for injuries caused to a person by slipping on ice, in a street or sidewalk, where it has accumulated by reason of a defect in the street or walk, or by reason of the neglect to construct and maintain suitable drains to carry off the water. *Decker v. Scranton City*, 151 Pa. 241, 31 Am. St. Rep. 757, 25 Atl. 36; *Manross v. Oil City*, 178 Pa. 276, 35 Atl. 959. It is the duty of a municipality to keep its streets, including its sidewalks, in a reasonably safe condition, so that pedestrians using the sidewalks and exercising care may do so with safety. A sidewalk may be made defective or dangerous by the accumulation of ice or snow, as well as in other ways and by other means. The municipality, however, is not responsible unless the defective condition of the walk is attributable to its negligence. That is the general rule, and one which applies as well where the sidewalk is defective by reason of the slippery condition of the ice thereon as well as by reason of excavations or other obstructions in the walk. The liability for injuries resulting from the accumulation of ice on a pavement is not confined to cases where the accumulation has resulted in hills or ridges. That is not the only test of liability in such cases, as this court distinctly ruled in *Manross v. Oil City*, supra. There the court sustained the ruling of the trial judge in denying the point submitted by the defendant city that it was “not liable for an injury caused by reason of the slippery condition of the ice and snow upon its walks, unless such injury is caused by the accumulation of ice and snow into hills and ridges so as to render passage dangerous.” The trial judge refused the point, and in doing so said: “A city may be liable for an accident caused by the slippery condition of its streets caused by the negligence of its officials, even where the ice and snow do not form into hills and ridges.” The accumulation of ridges and hills in ice may cause a pavement to be dangerous and convict the city of negligence, but the city is equally responsible if the sidewalk is made dangerous to public travel by reason of any accumulation of ice and snow caused by the negligence of the city. In other words, if an injury results to a pedestrian by reason of a defective sidewalk, the municipality is liable if the defect, whatever it may be, was occasioned by the municipality’s negligence. These principles are settled by numerous authorities in many jurisdictions.

Recurring now to the case in hand, we think the evidence was sufficient to warrant the jury in finding that the plaintiff’s inju-

ries were caused by the negligence of the city. They were not caused by the general slipperiness or smoothness of the sidewalk resulting from the precipitation and freezing of recent falls of snow or rain. If they were, of course she could have no claim against the city. They were caused by the condition of the sidewalk beneath the bridge, made unsafe and dangerous to travel by the accumulation of ice, which could, and should, have been prevented by the city. The conditions of the place were peculiar. The sidewalk was not the ordinary and usual open and exposed pavement. On the contrary, it was correctly described as a tunnel. Owing to the grade of the street, water falling on the east sidewalk flowed into the tunnel. The water that accumulated on the bridge also fell in and passed through it. The direct rays of the sun never penetrated it. These conditions necessarily caused ice to accumulate beneath the bridge in the winter, and naturally it was liable to remain during the winter months. The water from the walk and that dripping from the bridge formed into ice on the sidewalk in the tunnel. That ice was not reached by the sun and was unaffected by it. The sun melted the ice on the walk above the bridge, but the water would flow to the bridge, only to be frozen as it passed upon and over the ice under the bridge. The inlets at either side of the 50-foot avenue gave no sufficient relief to this condition of affairs. The city made no adequate provision for preventing the water falling on the walk, and that dripping from the bridge, from flowing into and through the tunnel, or for the removal of the ice which, in winter, was produced by this water. The consequence was, as disclosed by the evidence, that since the construction of the bridge the sidewalk beneath it has been, by reason of ice, unsafe each winter for persons who had occasion to use the street. This danger resulted, therefore, from causes under the control of the city, and not from natural causes, such as the recent precipitation and freezing of rain or snow upon ordinary sidewalks. The duty of the city to make this sidewalk reasonably safe for public travel is as imperative as to keep the streets and other sidewalks of the city in a safe condition. As long as this tunnel is kept open and maintained as a public highway by the city, the duty to keep it reasonably safe is imperative, and cannot be evaded or neglected with impunity. From what has been said it will be observed that it was not a question whether the plaintiff's injuries resulted from a ridge or hill of ice on the pavement beneath the bridge, but whether the icy condition of the 20 L.R.A. (N.S.)

pavement made it dangerous and unsafe for pedestrians using the sidewalk, and that such condition was attributable to the negligence of the city. One of the witnesses testified: "It [condition of the pavement] was from the water falling down the hill, not having a proper drainage off of it, the drippings of the railroad over on the pavement dripping down, and the water falling down and freezing on the pavement, by not having the proper drainage from the top to get it away from there." In fact all the evidence in the case bearing on the subject tended to show that this was the cause of the conditions prevailing under the bridge at the time of the accident. And, as we have said, the evidence was ample to show that this unsafe condition of the tunnel had existed in the winter months since the construction of the bridge. It was therefore clearly a case for the jury to determine whether the conditions existing there at the time the plaintiff received her injuries were caused by the negligence of the city. This is a street that is frequented by a great many people in winter as well as in summer. It is one of the public thoroughfares of the city, which should be kept in a safe condition for travel at all times.

Whether the plaintiff exercised proper care in passing along the sidewalk, and whether she fell from any want of care on her part, were for the jury. It has been argued that as she approached the bridge she saw ice on the pavement, both in and outside the tunnel, and that therefore it was negligence for her to attempt to pass through the tunnel. That position, however, is wholly untenable. There was nothing there to admonish her that by the exercise of care she could not pass with safety through the tunnel. She had done so on a previous occasion when the same or similar conditions existed. The danger was not immediate or imminent. The sidewalk was in constant use by the people of that vicinity. Of course, other persons had fallen on the ice there, but many others had passed over it with safety. In fact, just as the plaintiff was entering the tunnel, another person came out of it, and passed her. There were spots or places in the pavement where there was no ice, which the plaintiff attempted to use to avoid the ice. Under the circumstances, therefore, it was not negligence, to be declared by the court, for the plaintiff to use the sidewalk. As said in the recent case of *Steck v. Allegheny*, 213 Pa. 573, 576, 62 Atl. 1115, 1116; "When the testimony shows a defect of such character that the street can be used with safety by the exercise of reasonable care, notwithstanding its defective condition, it

is not for the court, but for the jury, to determine whether the injured party performed the duty required of him under the circumstances." Nor was the plaintiff to be driven from the street or prevented the use of the sidewalk by the fact that she, like many others in that community, knew of the icy condition of the walk. As we said in *Altoona v. Lotz*, 114 Pa. 238, 246, 60 Am. Rep. 346, 7 Atl. 240, 242. "It is not the law that a resident in a city must remain continuously on his property when the city grossly neglects the repair of its streets, under pain that, if he ventures on the streets or walks and suffers injury resulting from the city's default, he can recover nothing. Nor is the resident bound, under like pain, to abstain from going to church in the evening, or other places, when he may be moved to go by a sense of duty or love of pleasure. On his part it is enough if he takes the ordinary care which ought to be exercised by a prudent man under the circumstances."* This street and sidewalk, as we have seen, was in constant use by the public, and, while some persons were injured by falling upon the accumulation of ice, the number was small as compared with those who used the walk in safety. The sidewalk under the bridge was kept open and maintained as a place for a travel by pedestrians, and hence there was an invitation by the city for the public to use it. It was not error for the court to decline to say to the jury that the plaintiff was negligent in using the sidewalk under the circumstances. There could be no question, under the evidence, that the defendant knew of the unsafe condition of the walk. Since the construction of the bridge, eight years previous, it has been dangerous in the winter months, caused by the accumulation of ice resulting from the peculiar conditions existing at the place. These conditions, as well as the danger resulting therefrom, were obviously and necessarily known to the defendant. The danger had existed for years in the winter season, and hence it is manifest that the city must have had knowledge of it. Two of the witnesses testified specifically as to the existence of ice on the sidewalk at that place during the month of January of the year 1903. What everybody else sees the city must see.

The only error assigned is the refusal of the court below to give binding instructions to the jury to find for the defendant, and, for the reasons stated, the assignment is overruled, and the judgment is affirmed.

Petition for rehearing overruled.
20 L.R.A. (N.S.)

ARKANSAS SUPREME COURT.

J. H. DOUGLAS, Appt.,
v.
JAMES W. CAMPBELL et al.

(— Ark. —, 116 S. W. 211.)

Action — prematurity — school district.

1. One who, because of the unlawful suspension of his child from a public school, becomes liable for board and tuition in another district, cannot maintain an action for damages against those responsible for the suspension, as soon as he has arranged for accommodation in such district and before he has paid his money.

Damages — suspension from school.

2. One whose son is unlawfully suspended from a public school for a period of only twenty days cannot hold those responsible for the suspension liable for the cost of his tuition in another district for a whole term.

Mandamus — suspension from school.

3. In the absence of direct pecuniary injury, the remedy of a parent whose child is wrongfully suspended from a school is mandamus to secure his restoration, and not an action for damages.

School — suspension — drunkenness.

4. A pupil may be suspended from a public school for being drunk and disorderly in violation of the ordinances of the municipality, although his misconduct was not on the school grounds, where the statute authorizes suspension for gross immorality.

(February 8, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Randolph County dismissing the complaint in an action brought to recover damages alleged to have been caused by the unlawful expulsion of plaintiff's son from school. Affirmed.

Statement by Wood, J.:

The complaint, omitting caption, is as follows: "Said J. H. Douglas, for cause of action against said defendants James W. Campbell, J. C. Miller, Wesley Pressley, C. E. Pringle, E. Dalton, A. Z. Schnabaum, and Ben A. Brown, states that he is a citizen and resident taxpayer of the Pocahontas school district (special), which comprises and embraces the incorporated town of Pocahontas, Arkansas, both of which are corporations organized and existing under the laws of the state of Arkansas, and as such is legally entitled to all the benefits of the free public schools taught within the limits of said school district. That the defendant James W. Campbell is the teacher in the

Note. — As to power of school authorities over pupils while outside of school grounds, see case note to *Kinzer v. Toms*, 3 L.R.A. (N.S.) 406.

public school of said school district of Pocahontas, and is now engaged in teaching a term of free public school commencing January 1, 1907, and ending May 1, 1907, under contract with the directors of said district. That the defendants J. C. Miller, Wesley Pressley, C. E. Pringle, and E. Dalton are duly elected and qualified directors of said school district. That Ben A. Brown and A. Z. Schnabaum are also directors, duly qualified and acting, who are also made defendants herein. Plaintiff states that he is the lawful father of a son, Charley Douglas, a minor under the age of twenty-one years, and who is entitled to attend and receive instructions in the free public schools of said district, and has been in attendance until the beginning of the present term. Plaintiff states that, on or about the ——— day of December, 1906, being one of the holidays, the above-named defendant and Ben A. Brown and A. Z. Schnabaum held a director's meeting in said town of Pocahontas, at which time the defendant James W. Campbell was, at his own instance, also present. Plaintiff states that at said meeting above defendants pretended to act within the scope of their authority as directors, being moved and instigated by the defendant Campbell, expelled and suspended plaintiff's son, Charley Douglas, from said school, and from further attendance upon said school for the term of twenty days from the beginning of the present term then and there by notifying him in writing, he being also present, that he should not be allowed to attend said school, nor be allowed to be on the school grounds, or to associate with the pupils of the said school at said school or on the grounds thereof, stating as a reason for the said act that the said Charley was drunk and disorderly on the streets of said town during one of the holidays, viz., on Christmas Day, 1906, which, if true, was a violation of the ordinance of said town,—all of which is untrue, and which the said Campbell and the other defendants knew to be untrue; and that the action of the said defendants, maliciously prompted and instigated by the said Campbell, was but the carrying out of a conspiracy formed by and among said defendants to deprive plaintiff and his son of the benefits of said school, and to prevent his further attendance for said twenty days; and that the act of expulsion and suspension for said time was malicious as to all defendants, was a gross and flagrant abuse of their power and authority as directors aforesaid, and the effect of which was to deprive plaintiff of his legal, vested, and constitutional rights to have his said son attend and receive instructions, at and in the free public school of said town. But

20 L.R.A. (N.S.)

plaintiff states that, if it is true that his son was drunk and disorderly as charged, that it was in no violation of rules of said school, did not occur at or in the school or about the school grounds, and that the alleged offense was not such as to deprive plaintiff legally of his rights and his said son of his rights to further attend the school; that, by reason of said unlawful act of defendants, plaintiff has been compelled to place his said son in another school beyond the limit of said school district, and beyond the home of plaintiff, and to engage and become liable for the board of his son at a cost of \$75 for the term ending the last of May, 1907, and tuition in the sum of \$20, for washing and laundrying, \$20, the purchase of new and different books necessary in the sum of \$10, in the aggregate \$125, to the damage of plaintiff in the sum of \$125. For further cause of damage he states that the said act complained of was malicious and without cause; that the said charge was but a pretense for the justification of said act; that the same was maliciously instigated by the defendant Campbell, and so entered into by the other defendants, and that, by reason thereof, plaintiff has been deprived of the company and companionship of his only child, and further states that the effect of the act complained of here was to bring, and has brought, shame and humiliation to plaintiff, and caused plaintiff great mental anguish and suffering on account thereof, whereby he is entitled to and has sustained damages in the further sum of \$2,000. Wherefore, plaintiff prays judgment against said defendant in the sum of \$2,125 damages, for cost, and for all proper relief."

The appellees filed a demurrer containing these grounds, to wit: (1) That the plaintiff has no legal capacity to sue for the alleged wrongful acts. (2) That there is a defect of parties plaintiff. (3) That the complaint does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and entered judgment dismissing the complaint, from which this appeal was taken.

Messrs. Beloate & Lomax for appellant.

Mr. T. W. Campbell, for appellees:

The father cannot recover damages for the illegal suspension of his child from the public school.

1 Jaggard, Torts, p. 461; Tiffany, Persons & Dom. Rel. p. 267; Boyd v. Blaisdell, 15 Ind. 73; Donahoe v. Richards, 38 Me. 376; Spear v. Cummings, 23 Pick. 224, 34 Am. Dec. 53; Stephenson v. Hall, 14 Barb. 222; Sherman v. Charlestown, 8 Cush. 161.

Facts and circumstances of the case must be recited in the complaint, sufficient to show

malicious or arbitrary action on the part of the board.

Cochran v. Patillo, 16 Tex. Civ. App. 458, 41 S. W. 537.

Wood, J., delivered the opinion of the court:

1. The demurrer was well taken. The complaint does not show a cause of action. The complaint does not show any damage to appellant by reason of the suspension of his son from school for twenty days. He does not allege that he has been compelled to pay out any money on account of the suspension. He alleges that he has been compelled to engage and become liable for certain sums, which he names, for the term ending the last of May, 1907. This alleged term commenced nine days before the suit was brought, and ended nearly four months later. So his allegation is in effect that he "will become liable;" not that he has already expended the money. Therefore the suit would be premature even if appellant "would be compelled," as he alleges, to pay the various sums mentioned. But the complaint shows that appellant was only suspended and expelled from the school for twenty days. Appellant, therefore, was not compelled to send his son to another school out of the district. He does not show that his son appeared at the expiration of the twenty days asking for readmission, and that his request was refused. Hence appellant fails to show that he had suffered any financial injury by reason of the temporary expulsion or suspension. He fails to allege facts showing that after the twenty days he was compelled to send his son to another school, or that during the twenty days he was compelled to expend any amount for the education of his son.

2. The parent, unless he has sustained some direct pecuniary injury thereby, has no right to sue for damages for the unlawful expulsion or suspension of his child from school. His remedy therefor is by mandamus to compel the school authorities to allow his child to attend school. *Boyd v. Blaisdell*, 15 Ind. 73; *Donahoe v. Richards*, 38 Me. 376; *Spear v. Cummings*, 23 Pick. 224, 34 Am. Dec. 53; *Stephenson v. Hall*, 14 Barb. 222; 21 Am. & Eng. Enc. Law, p. 772; *Tiffany, Persons & Dom. Rel.* 267; *Sherman v. Charlestown*, 8 Cush. 161. And see note to 41 L.R.A. 605. Unless he alleges facts showing an unlawful expulsion, and personal pecuniary injury already incurred by him by reason thereof, he does not state a cause of action. *Sorrels v. Matthews*, 129 Ga. 319, 13 L.R.A. (N.S.) 357, 58 S. E. 819, 12 A. & E. Ann. Cas. 404.

3. But appellant does not state facts sufficient to show an unlawful suspension. Being drunk and disorderly in violation of the 20 L.R.A. (N.S.)

ordinance of the town as charged was sufficient cause for the punishment inflicted. Section 7637, Kirby's Dig., expressly authorizes the directors of any school district, "at the instance of the teacher, to suspend from the school any pupil for gross immorality, refractory conduct, or insubordination." Wholesome discipline is absolutely essential to the success of any school. Large discretion is allowed the teacher and the board within the statute in determining what course of conduct on the part of the pupils is necessary for the good of the whole school. That is the prime consideration. Any conduct on the part of a pupil that tends to demoralize other pupils, and to interfere with the proper and successful management of the school,—i. e., to impair the discipline,—which the teacher and the board shall consider necessary for the best interest of the school, may subject the offending one to the punishment prescribed by the above statute. "Refractory conduct, or insubordination," and gross immorality, are incompatible with that good government in a school which is absolutely essential to its success. Hence these are expressly mentioned in the statute as conduct justifying the somewhat severe punishment of suspension. It will be presumed that the teacher and the board have the best interests of the school at heart, and that they have acted in good faith in exercising the authority with which the law has clothed them. The burden is upon him who calls in question their conduct to show that they have not been actuated by proper motives. But, if the teacher and board should, through malice, arbitrarily, and without reason, suspend a pupil from school, the pupil would have his remedy as we have before mentioned, and the parent also would have his remedy if he has sustained any pecuniary injury by reason of such illegal suspension.

The law on this and kindred subjects is exhaustively reviewed and stated in *Board of Education v. Purse*, 101 Ga. 422, 41 L.R.A. 593, 65 Am. St. Rep. 312, 28 S. E. 896, and in note to that case reported in 41 L.R.A. 593. See, also, 21 Am. & Eng. Enc. Law, pp. 771 et seq., note; 25 Am. & Eng. Enc. Law, 2d ed. p. 25, note 6.

Affirmed.

CALIFORNIA SUPREME COURT.

RE ESTATE OF JAMES MOFFITT, Deceased.

(153 Cal. 359, 95 Pac. 653.)

Inheritance tax — community property.

1. The wife, upon the death of the husband, takes his half of the community prop-

erty as heir, within the meaning of a statute taxing all property which shall pass by the intestate laws from one who shall die seised or possessed of the same.

On Petition for Rehearing.

Same—vested rights.

2. A constitutional provision directing the legislature to define the rights of the wife in relation to property held in common with her husband does not give her a vested right in the property which cannot be subjected to an inheritance tax when the husband's share passes to her upon his death, where the property referred to is community property in which she has only an expectancy during the husband's life.

(April 20, 1908.)

A PPEAL by the widow and executors of James Moffitt, deceased, from a decree of the Superior Court of Alameda County directing the payment of an inheritance tax upon community property held by the decedent. Affirmed.

The facts are stated in the opinion.

Messrs. Warren Olney and Olney & Olney for appellants.

Messrs. Snook & Church for respondent.

Henshaw, J., delivered the opinion of the court:

This is an appeal by the widow and the executors of the will of the deceased from an order and decree made by the superior court of Alameda county in probate, directing the executors to pay to the county treasurer of Alameda county the sum of \$26,684.50 as the inheritance tax upon the interest of the widow in the community property of herself and her deceased husband.

Case Note.—Liability of community property to succession tax.

Aside from *RE MOFFITT* and its companion cases, *Re Sims*, 153 Cal. 365, 95 Pac. 655, and *People v. Lebus* (Cal.) 96 Pac. 1118,—which depend upon the *MOFFITT CASE* for their reason and decision,—only one case has been found which passes upon the question whether community property is liable to a succession tax; and this one comes to a different conclusion from the *MOFFITT CASE*.

This case is *Marshall's Succession*, 118 I.A. 212, 42 So. 778, where it appeared that a person died intestate leaving a widow and children, and no property other than that held in community. In an effort to collect an inheritance tax, it was held that the surviving spouse did not acquire, in usufruct, the estate of the deceased spouse by inheritance, and hence the right of usufruct in such case is not subject to the tax imposed on inheritances. The court, in giving the reason for its decision, said: "It is 20 L.R.A. (N.S.)

The inheritance-tax law of this state, approved March 20, 1905 (Stat. 1905, chap. 314, p. 341), prescribes that "all property which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same . . . shall be and is subject to a tax hereinafter provided for." The single question presented by this appeal is whether the surviving wife's share of the community property is subject to this inheritance tax.

It is conceded that the determination of the trial court that such property is liable for the payment of this tax finds support in the cases of *Re Burdick*, 112 Cal. 387, 44 Pac. 734; *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228, and *Sharp v. Loupe*, 120 Cal. 89, 52 Pac. 134, 586. But it is earnestly contended that this court should overrule these cases to the extent of holding that, as to the community property, the widow has such an ownership or estate or title as enables her to take upon the death of the husband, not as his heir, and not by succession, but by a certain right of survivorship; that, in effect, the wife, during the existence of the marriage status, has always enjoyed an ownership in one half of the community property; and that by the death of the husband her ownership of this moiety is simply released from the power of disposition over it with which the law during his lifetime and during the existence of the marriage status has clothed him. Reference is made to the language of the Civil Code (§ 682), which declares that ownership of property by several persons is either (1) of joint interest; (2) of partnership interest; (3) of interests in common; (4) community interest of husband and wife. We are referred, also, to expressions in some

true that the right of usufruct which is vested in the surviving spouse is defeasible at the will of the deceased, but it is, nevertheless, a right conferred by the law, which enters into and forms part of the marriage contract, and of which the survivor can be deprived by no one save the deceased spouse; and it seems to us hardly correct to say that the surviving spouse necessarily takes the usufruct by inheritance from the deceased, because the latter has not made a testamentary disposition to the contrary. At all events, it is a matter within the control of the lawmakers, and they have thought proper to say that the surviving spouse shall 'hold' the usufruct (except where the deceased spouse has, by will, exercised the right of disposing of it), and shall take from the deceased spouse 'by inheritance' only in default of descendants, ascendants, or collateral relatives."

As to the liability of community property for debts, see note to *Oregon Improv. Co. v. Sagmeister*, 19 L.R.A. 233.

of the earlier decisions of this court, such as the language of *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125, where it is said: "The husband and wife during coverture are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death." All of these Code sections, all of these cases, and all of these arguments were most ably urged upon the attention of the court in the first two cases above cited, and the conclusion then reached was there expressed in the following language: "Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *Godey v. Godey*, 39 Cal. 157. In that case it is said that, while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy, . . . it is at the same time . . . so vested in her that [the] husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it.'" After painstaking investigation and review, and after the fullest deliberation, this court, in *Re Burdick*, determined and held, as it declared in *Speckels v. Speckels*, that upon the death of the husband the wife takes one half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. A reading of the opinions of this court in those cases will establish how thoroughly the questions were entered into, and what a complete disposition was made of them.

It is next urged that, as laws imposing inheritance taxes are subject to strict construction; and that, as it could not have been in the legislative mind that by this act there was imposed a tax upon the widow's share of the community property,—therefore a construction should be sought which will avoid this harsh result. But a familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it. Thus the legislature is presumed to have enacted it with full knowledge that this court in bank, not once, but repeatedly, had declared that the wife did

take her share of the community property upon the death of her husband by succession as his heir. The next and necessary presumption that follows is that the legislature enacted the inheritance-tax law in the light of these decisions and to the end that the widow's share of the community property should bear this tax quite as much as would the portion of the husband's separate estate which might come to her by will or by the laws of succession. In other words, since the legislature knew that the latest expression from this court upon the subject was an unequivocal declaration that the widow did take her share of the community property as heir of the husband, if it had designed that the widow's share should not be subject to this tax, it would have made provision that it should be excepted from the operation of the law. If, however, the truth be as counsel urge, that it never entered the minds of the men constituting the legislative body that they were imposing this tax upon the community interest of the wife, it can only be said that for their ignorance they, and not the courts, are responsible, and for their omission they, and not the courts, must find the remedy.

The order and decree appealed from are affirmed.

We concur: *Beatty, Ch. J.; Shaw, J.; Angellotti, J.; Sloss, J.; Lorigan, J.*

A petition for rehearing having been filed, the following *Per Curiam* response was handed down May 29, 1908:

Upon petition for rehearing it is urged that the decision in this case fails to dispose of the Federal question, which appellant presented in argument. To the decision rendered the following is therefore added and made a part thereof:

Appellant further shows that the community property here under consideration was acquired under the Constitution of 1849, and the laws referable thereto. That Constitution, after defining the separate property of the wife, declared (article 11, § 14): "Laws shall be passed more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband." Upon these facts appellant argues that the Constitution of 1849, together with the laws passed in conformity with its direction, "conferred upon the wife an equal interest with her husband in the common property;" and it is said that, while the Constitution of 1879 is silent upon the matter of the community property, nevertheless, neither that Constitution, nor any new laws passed under it,

can deprive the wife of her interest in the community property, guaranteed and secured to her by the Constitution of 1849; and the question is asked: "Shall this court do what the legislature cannot do and take from her a vested right?" Appellant's counsel answer this question to their own satisfaction by invoking the aid of article 1, § 10, and Amendment 14, § 1, of the Constitution of the United States.

It cannot be doubted, indeed it is conceded, that the Constitution of 1849, in speaking of property "held in common with her husband," does not refer to tenancies in common, as known to the common law, but does mean property of the character now universally designated "community property." Thus, the declaration of the Constitution of 1849, above quoted, amounts to no more than a mandate to the legislature to define and prescribe the rights of the wife in the property of the community. The Spanish-Mexican civil law was, of course, the law in force in California at the time of its cession by Mexico to the United States; and it was the design of the Constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new state (most of whom were at that time former citizens of Spain or Mexico) the rights to the community property which they had enjoyed under the Mexican rule. But, even under the Spanish-Mexican civil law, the wife had no vested estate in the community property. She had rights which may be loosely described as "vested," in the sense that the person to whom the rights belonged was not doubtful or uncertain, but positive and known. In this sense only were her rights vested, but those rights never amounted to an estate. She became vested with an estate only (under certain contingencies) upon the dissolution of the marriage, or upon the death of the husband, otherwise, as sums up Ballinger, after review of the system, "her interest seems to be a mere expectancy during coverture, similar to that under the French system." Ballinger, *Community Property*, p. 29. And, says the supreme court of Louisiana (*Boyer's Succession*, 36 La. Ann. 506): "The wife has, during the marriage, no vested proprietary interest in any property composing the community, but only an inchoate right which entitles her to the hope or expectation that, if she survives her husband, she can receive or own one half of the property that may be left after payment of the community debts." And, again, says Platt (*Property Rights of Married Women*; see *Fallbrook Irrig. Dist. v. Abila*, 106 Cal. 362, 39 Pac. 794): "The 20 L.R.A. (N.S.)

wife has no voice in the management of these affairs; nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by law as the sole owner." But, passing from the enunciations of these writers, learned in the law on the subject, we may come directly to the declarations and adjudications of our own court under the Constitution of 1849 and the laws passed in accordance with its mandate, and we find Chief Justice Field, whose study of this Spanish-Mexican system was as profound as his mastery over it was complete, declaring "the interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor." *Van Maren v. Johnson*, 15 Cal. 308. Soon thereafter Mr. Justice Cope, speaking for the court in *Packard v. Arellanes*, 17 Cal. 525, says: "So long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity. This was held in *Van Maren v. Johnson*, before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor. The same doctrine prevails in Louisiana, and appears to be an established principle of the civil and Spanish law." And, again, Mr. Justice Thornton, speaking for the court in *Greiner v. Greiner*, 58 Cal. 119, says: "The interest of the wife during the same period [coverture] was a mere expectancy, like the interest which an heir may possess in the property of his ancestor."

It is thus apparent that the construction put upon the Constitution of 1849, and the laws passed thereunder, is identical with that declared in *Re Burdick*, 112 Cal. 387, 44 Pac. 764, and *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228. The Constitution of 1879 does not, as did the Constitution of 1849, command the legislature to pass laws defining the wife's rights in the community property because, as for thirty years those laws had been upon the statute books, and as the rights under those laws had been from a very early date judicially determined and settled, no need existed in the new Constitution to call for legislative action upon the matter. For these reasons it is impossible to perceive where or how the inheritance law under consideration does violence to any provision of the Constitutions of California of 1849 or 1879, or to any provision of the Constitution of the United States.

Rehearing denied.

CALIFORNIA SUPREME COURT.
(In banc.)

GRACIOSA OIL COMPANY, Resp.,
v.
SANTA BARBARA COUNTY, Appt.

(— Cal. —, 99 Pac. 483.)

Tax — oil lease.

The rights of the holder of an oil lease may be taxed separately from those of the owner of the fee, under a statute providing that the term "real estate" shall include all mines and minerals in and under land, and all rights and privileges appertaining thereto.

(January 8, 1909.)

APPPEAL by defendant from a judgment of the Superior Court for Santa Barbara County in plaintiff's favor in an action brought to recover taxes alleged to have been illegally exacted. Reversed.

The facts are stated in the opinion.

Mr. R. B. Canfield, with **Mr. W. S. Day**, for appellant:

The lease creates a species of property which is subject to taxation.

People v. Smith, 123 Cal. 70, 55 Pac. 765; *San Francisco v. McGinn*, 67 Cal. 110, 7 Pac. 187; *Smith v. Morse*, 2 Cal. 524; *State v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 Cal. 645; *People v. Frisbie*, 31 Cal. 146; *People v. Cohen*, 31 Cal. 210; *People v. Black Diamond Coal Min. Co.* 37 Cal. 54; *People v. Donnelly*, 58 Cal. 144; *Los Angeles v. Los Angeles City Waterworks Co.* 49 Cal. 638; *Bakersfield & F. Oil Co. v. Kern County*, 144 Cal. 148, 77 Pac. 892; *Stockton Gas & Electric Co. v. San Joaquin County*, 148 Cal. 313, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 A. & E. Ann. Cas. 511; *Re Major*, 134 Ill. 19, 24 N. E. 973; *Consolidated Coal Co. v. Baker*, 135 Ill. 545, 12 L.R.A. 247, 36 N. E. 651; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Jones v. Wood*, 1 Ohio N. P. 155; *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 6 L.R.A. (N.S.) 628, 53 S. E. 928; *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *Jeffers v. Easton, E. & Co.* 113 Cal. 345, 45 Pac. 680; *New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Washb. Easements & Servitudes*, 2d ed. p. 813.

Note. — See case note to *Wolfe County v. Beckett*, 17 L.R.A. (N.S.) 688, on the general question whether the interest of one other than the owner of the soil in mineral *in situ* is an independent subject of taxation; and note to *Hancock County v. Imperial Naval Stores Co.* 17 L.R.A. (N.S.) 693 on the analogous question whether the interest of one other than the owner of the soil in growing trees or timber or their products is a separate subject of taxation. 20 L.R.A. (N.S.)

Mr. U. S. Webb, Attorney General, also for appellant.

Mr. H. C. Booth, for respondent:

Oil and gas, until separated from the realty, must be treated as a part of the realty underneath the surface of which they lie.

Columbian Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. 234; *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59; *Brown v. Spilman*, 155 U. S. 605, 39 L. ed. 304, 15 Sup. Ct. Rep. 245; *Acheson v. Stevenson*, 146 Pa. 223, 23 Atl. 331, 396; *Williamson v. Jones*, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436.

The oil lease did not convey a separate taxable interest in the minerals beneath the surface.

Thornton, Oil & Gas, § 58; *Knott v. Peden*, 84 Cal. 299, 24 Pac. 160; *United States Coal, Iron & Mfg. Co. v. Randolph County Ct.* 38 W. Va. 201, 18 S. E. 566; *State v. South Penn Oil Co.* 42 W. Va. 80, 24 S. E. 688; *Jones v. Wood*, 1 Ohio N. P. 155; *Moore's Appeal*, 4 Pa. Dist. 703; *Scranton v. Gilbert*, 16 W. N. C. 28; *Sanford's Appeal*, 75 Conn. 590, 54 Atl. 739.

Shaw, J., delivered the opinion of the court:

• This is an action to recover taxes assessed against plaintiff by defendant and paid under protest, claiming that the assessment is void.

For the year 1904 plaintiff was assessed for taxes as the owner of property described on the assessment roll as "Mining rights and privileges under lease made by L. Harris et al., to Graciosa Oil Co., dated December 15, 1900, and recorded in [referring to the record], in and to the following described lands [describing about 7000 acres of land situated in Santa Barbara county]." The property rights thus described were assessed at the value of \$14,950, and on this assessment the taxes in question were levied and paid. For the same year the same land was assessed to the lessors Harris et al., who were the owners of the fee, at the value of \$66,150. In this assessment the land was described by sections and subdivisions, precisely as in the assessment to plaintiff, without mention of any deduction from the valuation thereof or of any exception arising out of any qualification, limitation, or burden upon the fee, by reason of the separate ownership of the mining rights and privileges referred to in the assessment to plaintiff. It was found by the court, however, "that the mining rights and privileges assessed to plaintiff was not included, and no part of them was included, for assessment in or with any of the property as assessed

to" Harris et al., and that "the said assessment of said mining rights and privileges was not included in and did not include the assessment of any property assessed" to said Harris et al. We understand this finding to mean that there was no double assessment or double taxation upon the same property or interest therein, and we assume therefrom that the valuation of the entire estate and property in the land, as made by the assessor, including the plaintiff's rights and privileges, would exactly equal the aggregate amount of all the assessments involved. The court below, in its conclusions of law, held the assessment to plaintiff void solely on the ground that the mining rights and privileges granted by the lease were not taxable or assessable separately from the land upon which they were operated, and that the lease did not create a separate taxable interest in the land, or justify a separate assessment of the right granted, although the value of said right was not included in the valuation of the land in the assessment to the landowners. The question presented and argued is whether or not, under the provisions of the Constitution and of the Political Code providing for taxation, an assessment of the mining rights and privileges of plaintiff under the lease referred to can be made against the plaintiff, separately from, and in addition to, the assessment to the owners of the fee covering the land itself, but not including said rights and privileges, or, in other words, whether or not the respective rights of the plaintiff and of Harris et al., under the contract, are separately assessable to each.

The contract of lease was dated December 15, 1900. The parties of the first part, named as lessors, were Lawrence Harris, Eleanor Kate Harris, and Harry H. Harris, the owners of the land. By this contract the landowners granted to the plaintiff, party of the second part, "the sole and exclusive right to enter upon the premises (described) for the purpose, and to mine or bore wells, or to do whatever things may be necessary and proper for the development and extraction upon said premises of petroleum, and other hydrocarbon substances, by whatever name known and natural gas (asphaltum included)," together with the privilege of conveying over said land any of said substances produced therefrom, the right to use the water of the streams thereon so far as needed in said business, and of placing and maintaining on the premises "all structures and appliances necessary and useful for the objects of the lease; . . . to have and to hold the said premises and privileges with the appurtenances for the said purposes unto the said party of the second part, its successors or assigns, from and after the date 20 L.R.A. (N.S.)

hereof . . . for and during the whole period of twenty years, unless otherwise terminated by the party of the second part [plaintiff?], for failure to comply with the terms of this lease;" provided that, if any wells on the premises were then producing oil, such wells might be retained by the plaintiff and deepened and operated thereafter so long as they continued to produce. It further provided that the lessee should begin development work within six months from the date of the lease, and prosecute the same continuously in good faith to success or abandonment; but that it should have the right, at its option, to abandon the lease at any time that it deemed it unprofitable to hold or operate; and that the lease should thereupon become void. And, further, that, "in the event that oil is found, the lessee agrees to deliver or pay as rent or royalty to the said lessor . . . the one-tenth part or share of so much of all the crude oil of petroleum, naphtha or maltha which may be produced and saved by the lessor from said wells and operations on said premises," not including that required by the plaintiff for fuel in the mining operations.

The contention of the respondent is that there can be but one assessment of these lands, that the assessment to the Harrises covers and includes all other interests, and that, after having made that assessment, excluding the value of plaintiff's rights, it is not lawful to separately assess to the plaintiff the value of its property rights under the oil lease. It is no doubt the general rule, regarding land held under an ordinary lease for years giving the right to hold the land for usufructuary purposes only, that, in the absence of contrary statutory provisions, there is to be but one assessment of the entire estate in the land, and that this assessment should include the value of both the estate for years and of the remainder or reversion. 27 Am. & Eng. Enc. Law, p. 678; Chicago & A. R. Co. v. People, 153 Ill. 409, 29 L.R.A. 69, 38 N. E. 1075; State ex rel. Glenn v. Mississippi River Bridge Co. 109 Mo. 253, 19 S. W. 421. Section 3887 of the Political Code recognized this rule, and provided that "the mortgagor or lessor of real estate is liable for the taxes thereon." This section was repealed in 1880, but, so far as we are advised, the practice of making but one assessment of such land and covering therein the entire value of all interests and estates has been uniformly followed in this state, since its repeal as well as before. With respect to ordinary leases for usufructuary purposes, there are good reasons for this practice. Except when held for speculative purposes, the value of land usually depends on the value of the use and occupa-

tion, and consists of a sum equivalent to a principal which, at the rate of interest usual upon safe investments, will bring a net annual income equal to that which the land will produce. The lessor or landowner annually receives a sum as rent which he deems the equivalent of this annual income, or of the value of the use of the land to him, and therefore he enjoys the entire beneficial interest in the premises, including the value of the leasehold as well as of the fee. There are exceptional cases, due to the sudden rise in rental values, where this is not the case. But general rules in regard to taxation must be made to fit the usual conditions and not the exceptional ones, and statutes are to be construed with this fact in view. Since 1880 there has been no express statutory provision on the subject; but we think that, as to such leasehold estates, the owner of the fee may fairly be deemed to be the owner of the whole estate for purposes of taxation.

There are material differences between such estates for years and the right and privilege to bore for and extract oil held by the plaintiff under its oil lease. See *Thornton, Oil & Gas*, §§ 47, 48. The plaintiff, it is true, does not own an absolute present title to the oil strata in place. Such an absolute estate in an underlying stratum may be created and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land. For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. *Jones, Real Prop.* § 537; *State v. Moore*, 12 Cal. 70. But the contract in question vests no present title in a stratum in place. It leaves the title to the oil in the landowner until it is brought to the surface. The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real at common law. *Civil Code*, § 801, subd. 5; section 802, subd. 6; *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 6 L.R.A. (N.S.) 628, 53 S. E. 928-937, and cases there cited; *Thornton, Oil Leases*, § 51. The royalty is frequently fixed before the discovery of oil, usually at a time when the existence of oil in profitable quantities is a matter of conjecture, and without regard to the adjustment between the parties of the burden of taxation upon the respective interests. The value represented by the royalty is ordinarily very small as compared to that of the right of the lessee. After

the discovery of oil in such leased ground, the value of the lessor's real interest and right is much less than it would be if he had the whole estate, including all the oil thus discovered. There is no real parallel between such a case and that of a lessor under an ordinary lease for occupation and use. It is well known that such leasehold estates or interests in oil strata, after a discovery of oil, often command large prices in the market, out of all proportion to the value of the interest of the landowner receiving only the royalty and enjoying the use only for other purposes. The right of the lessee under this contract is more than that of the ordinary lessee. It is of a different character and for a different purpose. He has no right at all to the usufruct of the soil. His right extends to the extraction of a certain part of the substance of the land itself, to its permanent separation and removal and its conversion to his own use. The whole object of the contract is to effect, if not technically a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof to another. It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land. There is no statute forbidding it. On the contrary, we think the statute at least permits it, if it does not require it. If it is permitted, the respondent cannot complain. The suit is based on the provisions of § 3804 of the Political Code, which give a right of recovery only when the assessment is absolutely void. Mere irregularities in procedure which do not invalidate the assessment do not absolve the taxpayer from his obligation to pay the taxes nor give him any right to recover taxes already paid.

The Political Code declares that all property must be assessed to the owner thereof. § 3628. It must be conceded that the rights and privileges of the plaintiff under this lease are private property, and are taxable in some form. *Const. art. 13, § 1*. The property rights thus vested in plaintiff belong to it, and not to its lessor. It cannot with good reason be contended that the value of the lessor's estate, including the value of the right to the royalty in the oil produced, embraces, covers, or represents the value of the plaintiff's rights and privileges in the land, as in the case of the lessor in an ordinary lease. It would seem to follow necessarily that the mining rights and privileges

of the plaintiff should be separately assessed to it as the owner. The Code recognizes such rights and privileges as a species of property in real estate, and makes sufficient provision for the effective enforcement of payment of taxes thereon. Section 3617 provides as follows: "The term 'real estate' includes: (1) The possession of, claim to, ownership of, or right to the possession of land. (2) All mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations, growing or being on the lands of the United States, and all rights and privileges appertaining thereto." The strata of oil or oil-bearing sand constitute, as we have seen, a part of the land which may be the subject of separate ownership. There may be a separate "claim to" this part of the land, as well as a separate "claim to" a portion of the surface. A "claim to" take this stratum from its place and then convert it to one's own use may well be termed a claim to land, although not accompanied by actual physical possession of the subterranean deposit. The lease also gives plaintiff the right to possession of the surface of the ground, so far as may be necessary to enable it to bore for and extract oil and as an incident to the main purpose of the contract. The plaintiff's rights may therefore in these aspects be classed as real estate within the first clause of § 3617. The oil strata also constitute "minerals in and under the land," and the rights and privileges of plaintiff under the lease are clearly "rights and privileges appertaining" to such minerals, and consequently are real estate within the meaning of the second subdivision aforesaid. With respect to enforcing payment of the taxes, § 3820 provides that "the taxes on all assessments of possession of, claim to, or right to the possession of land, shall be immediately due and payable upon assessment, and shall be collected by the assessor as provided in this chapter." Section 3821 declares that in the cases provided for in § 3820 the assessor shall at the time of making the assessment, or at any time before the first Monday of August following, collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed; or, if no personal property can be found, then the assessor may collect the taxes by seizure and sale of the right to the possession of, claim to, or right to the possession of, the land. By § 3822 the provisions of §§ 3791 to 3796, inclusive, are made applicable to such seizure and sale. These sections provide for a sale at public auction with immediate delivery of possession to the purchaser. The interests of plaintiff, therefore, come with-

in the precise terms of § 3820, and, if no personal property can be found belonging to the owner, the assessor could forthwith proceed to sell the rights of the plaintiff in the land and in the oil strata and give immediate possession thereof to the purchaser. Such being the reasonable construction of the statute, it is to be presumed that it was intended to have that effect by the legislature. In *Bakersfield & F. Oil Co. v. Kern County*, 144 Cal. 154, 77 Pac. 892, it was held that taxes on a mining claim were collectible immediately under these sections. There is a statement in the opinion in that case that payment of taxes could not be enforced by a sale of the mining claim. But, in the view of the facts there involved and stated, this evidently means no more than that such sale could not be made as there threatened; that is, without previous search for personal property and a seizure and sale thereof if found.

It may be urged that the second clause of § 3617, above quoted, refers only to mines, minerals, quarries, and timber "growing or being on lands of the United States," and to rights and privileges in such lands only, and has no application at all to lands held in private ownership. We can perceive no necessity for so narrow a construction. It is a matter of common knowledge, and a thing recognized by legislative enactments, that such mining rights and privileges may exist on lands belonging to the state of California. Stat. 1897, chap. 270, p. 438, § 3; Stat. 1880, chap. 117, p. 130; Stat. 1873-4, chap. 531, p. 766. The lands of the state are not taxable. If the rights and privileges of the miner upon such lands are not taxable to the person in possession, they would entirely escape taxation. There is no doubt that the section does include such private possessory interests and rights in lands of the United States, and authorizes the assessment thereof as private property; but it may also reasonably be held to include mines, minerals, and quarries in and under state lands and lands held in private ownership, and rights and privileges appertaining thereto, and to authorize the separate assessment of such property, when held separately from the ownership of the other parts of the land, the first part of the clause referring to absolute titles to such minerals, and the latter part to mining rights and privileges, such as those of the plaintiff in this case. In view of the manifest propriety and justice of such separate assessments, a broader construction should be adopted.

The court below erred in holding that the mining rights and privileges of the plaintiff under the lease could not be lawfully taxed to plaintiff separately from the interest or

estate assessed to the landowners. Upon the findings made, judgment should have been given for the defendant.

The judgment is reversed.

We concur: Beatty, Ch. J.; Angelotti, J.; Sloss, J.; Lorigan, J.; Henshaw, J.; Melvin, J.

COLORADO SUPREME COURT.

COLORADO SPRINGS & INTERURBAN
RAILWAY COMPANY, Appt.,
v.

MARY C. NICHOLS.

(41 Colo. 272, 92 Pac. 691.)

Evidence — Injury — married woman — services.

1. Upon the question of damages to be awarded a married woman for negligent injury to her person, witnesses may state

Case Note. — Right of married woman to recover for loss of time, services, wages, or impaired capacity to labor.

It may be stated as a general rule that, notwithstanding the married women's acts, a married woman who receives personal injuries cannot, in an action for damages, recover for loss of time, services, or wages, or impaired capacity to labor, when used in connection with the performance of her household duties, since her services belong to the husband, for the impairment or loss of which he alone can recover. *Denver & R. G. R. Co. v. Young*, 30 Colo. 349, 70 Pac. 688; *Tuttle v. Chicago, R. I. & P. R. Co.* 42 Iowa, 518; *Thomas v. Brooklyn*, 58 Iowa, 438, 10 N. W. 849; *Nichols v. Dubuque & D. R. Co.* 68 Iowa, 732, 28 N. W. 44; *Hall v. Manson*, 90 Iowa, 585, 58 N. W. 881; *Denton v. Ordway*, 108 Iowa, 487, 79 N. W. 271; *Elenz v. Conrad*, 115 Iowa, 183, 88 N. W. 337; *Wyandotte v. Agan*, 37 Kan. 528, 15 Pac. 529; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Holton v. Hicks*, 9 Kan. App. 179, 58 Pac. 998; *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675; *Wallis v. Westport*, 82 Mo. App. 522; *Kroner v. St. Louis Transit Co.* 107 Mo. App. 41, 80 S. W. 915; *Newell v. St. Louis Transit Co.* 108 Mo. App. 530, 84 S. W. 105; *Central City v. Engle*, 65 Neb. 885, 91 N. W. 849; *Filer v. New York C. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327. Also recognized in *Uransky v. Dry Dock, E. B. & B. R. Co.* 118 N. Y. 304, 16 Am. St. Rep. 759, 23 N. E. 451; *Becker v. Albany R. Co.* 35 App. Div. 46, 51 N. Y. Supp. 395; *Austin v. Bartlett*, 67 App. Div. 312, 73 N. Y. Supp. 156, reversed on other points in 178 N. Y. 310, 70 N. E. 855; *Mellwitz v. Manhattan R. Co.* 43 N. Y. S. R. 354, 17 N. 20 L.R.A. (N.S.)

that before her injury she performed certain household duties, and what she was able or not able to do after the injury, for the purpose of showing the extent of the injury.

Trial — instruction — issues.

2. It is not error to refuse to instruct the jury, in an action by a married woman to recover for negligent injuries to her person, that she cannot recover for inability to perform her household duties, where no claim for such damages is made in the complaint.

Damages — married woman — personal injury.

3. A married woman may recover from one who negligently injures her, damages for impairment of her ability to labor, independently of her husband's right to recover for her loss of time.

Same — physical condition — aggravation.

4. A carrier by whose negligence a pregnant woman who is its passenger is thrown violently to the floor and injured, so that she suffers a miscarriage, cannot escape liability to her in damages for her injuries

Y. Supp. 112; *Walter v. Kensinger*, 13 Pa. Co. Ct. 222; *Richmond R. & Electric Co. v. Bowles*, 92 Va. 738, 24 S. E. 388; *Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319; *Norfolk R. & Light Co. v. Williar*, 104 Va. 679, 52 S. E. 380.

To the same effect is *Carr v. Easton*, 7 Pa. Co. Ct. 403, although the court took occasion to say: "There are exceptions to this rule; but the present case does not fall within any of them unless the plaintiff's inability to dress herself be treated as an exception, her injury to that extent resulting in her own personal loss." The court in this case seemingly also recognized the equity of permitting a married woman herself to recover for her impaired capacity to labor, for it said further: "The act of 1887 does certainly give to a wife the right to her own earnings, and this right, under certain circumstances, is superior to her husband's claim to her services. The loss by the wife of her earning power might carry with it the loss of the fruits of this right, a loss personal to herself and one which might, in a supposable contingency, prove a very serious one. Take the case at bar. Suppose the husband of plaintiff should obtain a verdict for the loss of her services, and should then, with the money in his pocket, desert her, leaving her penniless. With her earning power unimpaired, she might be self-supporting; with her earning power destroyed, if without friends, she would become a charge upon the public. Why should she not be indemnified against such a fate. Perhaps the answer is that the supposed contingency might never happen, and that the event of its happening is too uncertain to be made the basis of compensation in damages."

Upon the same principle, it was held in *Frohs v. Dubuque*, 109 Iowa, 219, 80 N. W.

because they would not have occurred had she not been pregnant.

Pleadings — variance — disease — description.

5. That physicians describe plaintiff's disease as neurasthenia, in an action to recover damages for personal injuries, does not require an instruction that, under the pleadings, no damages can be recovered for it if found to exist, where the pleadings state that she suffers severe bodily and mental pain, is unable to eat solid food, and is confined to bed and unable to move about.

(November 4, 1907.)

A PPEAL by defendant from a judgment of the District Court for El Paso County in plaintiff's favor in an action brought

341, that a married woman, in an action for personal injuries, cannot recover the amount paid by her for domestic service during her disability.

In *Bading v. Milwaukee Electric R. & Light Co.* 105 Wis. 480, 81 N. W. 861, it was held that an instruction to the jury to the effect that a married woman was entitled to recover "for her loss of strength and general ability to pursue her regular avocation," although inaccurate, was not prejudicially erroneous, when taken in connection with the fact that the jury had twice been given specific directions that she could not recover for loss of time.

And in some jurisdictions, even though the wife did work outside her household duties, as long as such work was done to aid the husband in support of the family, and not for her own separate benefit, it has been held that, in an action for damages for personal injuries received, she cannot recover for impaired capacity to labor, loss of time, or services.

Thus, in *Plummer v. Milan*, 70 Mo. App. 598, a married woman who was injured was not permitted to recover for her inability to perform the ordinary avocations of life, since such services belong to her husband; nor was she permitted to recover for her inability to continue to take in sewing, where this was done to aid and serve her husband in support of the family.

To the same effect holds *Dawson v. Troy*, 40 Hun, 322, 2 N. Y. Supp. 137, where, although it appeared that the plaintiff was working in a mill for wages, it did not appear that it was upon her sole and separate account, the court saying that the fact that she collected her wages was quite consistent with her collecting them for her husband.

A similar case is *Bloom v. Manhattan Elev. R. Co.* 43 N. Y. S. R. 378, 17 N. Y. Supp. 812, where the woman was working in a cigar factory.

In *Thuringer v. New York C. & H. R. R. Co.* 71 Hun, 526, 24 N. Y. Supp. 1087, a married woman was not permitted to recover for loss of time, although it appeared that

to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. David P. Strickler, McAllister & Gandy, and Dines, Whitted, & Dines for appellant.

Messrs. W. J. Chinn and R. P. Ady for appellee.

Steele, Ch. J., delivered the opinion of the court:

The appellee, while a passenger on one of the appellant's cars, was, as shown by the testimony, thrown from her seat to the floor, and sustained serious injuries, for which she claims damages. The record clearly discloses the negligence of the appellant, and

her husband had not been living with her for twelve years, and she had worked out and earned money by cleaning and washing.

It was held in *Blaehinska v. Howard Mission & Home*, 130 N. Y. 497, 15 L.R.A. 215, 29 N. E. 755, that damages recoverable by a married woman for personal injuries cannot include anything for loss of earnings where she was working for her husband under a contract for wages, as such contract is not enforceable, and the damages for the loss of such services belong to the husband.

Where, however, a married woman is engaged in an independent business of her own, whether such business consumes all her time, or is merely done in addition to her household duties, the same rule does not apply, since the married women's acts have placed her in regard to such business on the same footing as a *feme sole*; and therefore, in an action for damages, she may recover for impaired capacity to pursue such business, or loss of time, labor, or services whatever it may be called. So hold *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *Fleming v. Shenandoah*, 67 Iowa, 505, 56 Am. Rep. 354, 25 N. W. 752; *Dickens v. Des Moines*, 74 Iowa, 216, 37 N. W. 165; *Bailey v. Centerville*, 108 Iowa, 20, 78 N. W. 831; *Wyandotte v. Agan*, 37 Kan. 528, 15 Pac. 529; *Jordan v. Middlesex R. Co.* 138 Mass. 425; *Boyle v. Saginaw*, 124 Mich. 348, 82 N. W. 1057; *Gilson v. Cadillac*, 134 Mich. 189, 95 N. W. 1084; *Smith v. Chicago & A. R. Co.* 119 Mo. 246, 23 S. W. 784; *Perrigo v. St. Louis*, 185 Mo. 274, 84 S. W. 30; *Hendricks v. St. Louis Transit Co.* 124 Mo. App. 157, 101 S. W. 675; *Brooks v. Schwerin*, 54 N. Y. 343; *Moran v. New York City R. Co.* 94 N. Y. Supp. 302; *Fife v. Oshkosh*, 80 Wis. 540, 62 N. W. 541; *Texas & P. R. Co. v. Humble*, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526.

To the same effect is *Healey v. P. Ballantine & Sons*, 66 N. J. L. 339, 49 Atl. 511, where the court said: "A personal injury which disqualifies a married woman from carrying on the business in which she is engaged manifestly vests in her the right

the jury awarded damages in the sum of \$5,000. From a judgment in the foregoing amount, the defendant appealed.

It is urged that the court erred in receiving testimony concerning plaintiff's ability to perform her usual household work, and in refusing to instruct the jury that she could not recover damages on account of any impairment of her ability to perform such work, and in authorizing the jury to award her damages therefor. The complaint does not allege any amount as damages sustained for the impairment of plaintiff's ability to perform household duties, nor was the jury instructed upon the subject. No claim was made by the plaintiff that she had been damaged in any specific amount because of the impairment of her ability to perform her

household duties. The complaint alleges a permanent disability caused by her injuries received through the negligence of the defendant, and, as showing her condition, the court permitted plaintiff to prove that before her injuries she had uniformly performed certain household duties. Counsel offered the following instruction, which was refused: "The jury are instructed that, if you find the issues joined herein for the plaintiff, nevertheless she is not entitled to recover any damages from the defendant by reason of any impairment, if any, of her ability to perform her usual and ordinary household duties by reason of the injuries complained of, if any." The case *Denver & R. G. R. Co. v. Young*, 30 Colo. 349, 70 Pac. 688, is relied upon as supporting counsel's

to recover damages sustained by her in respect to her separate business. The impairment of her capacity to perform labor may be considered as an element of the damages, since the husband's right to recover for loss of services does not preclude her right to recover for the loss of her capacity to earn for herself. The distinction is between the effort to award the wife damages for the loss of service to her husband in his household in the discharge of her domestic duties, and the loss of ability to make earnings outside of the household duties and irrespective of the husband, especially where the married woman is engaged in transacting any business on her own account."

In *Schmelzer v. Chester Traction Co.* 118 Pa. 29, 66 Atl. 1005, it was held that a deserted wife may sue separately and in her own name to recover damages for the loss of her earning power in the future, sustained through injuries to her person.

In *Normile v. Wheeling Traction Co.* 57 W. Va. 132, 68 L.R.A. 901, 49 S. E. 1030, it was said that, if a married woman is interfered with in her business transactions, and, for that reason, unable to earn what she otherwise would have earned, the damage is personal to her; and such damage can be recovered by her in an action alone, or jointly with her husband.

In *Reading v. Pennsylvania R. Co.* 52 N. J. L. 264, 19 Atl. 321, it was held that the marriage of a woman after the receiving of personal injuries cannot affect her right to recover damages for the loss of her capacity to earn money; the court saying that the fact that she, by her marriage, has acquired the right to be supported by her husband, cannot affect the principle in question, though it may affect in a material degree the value of the thing lost.

There is a class of cases, however, among which is *COLORADO SPRINGS & I. R. Co. v. NICHOLS*, which consider a married woman's capacity to labor, even though she is not engaged in an independent business, as something belonging to herself, and as separate and distinct from her services, wages, time, or capacity to do something the result of

which belongs to her husband. These cases naturally hold that when a married woman is injured, and her capacity to labor is impaired, she, from that very impairment to labor, suffers an injury peculiar to herself, for which she herself may recover damages. These cases, it will be noted, are not necessarily opposed to those cases above set out wherein it is held that a married woman cannot recover for loss of time, services, wages, or impaired capacity to labor, as connected with the performance of her household duties, although it must be admitted that it is practically impossible to determine from some of these latter cases, whether the courts by which they were decided would ever concede that an impaired capacity to labor as such might be an injury to the wife as well as to the husband.

In some of these cases the inability to labor is classed with pain and suffering; among these is *Powell v. Augusta & S. R. Co.* 77 Ga. 200, 3 S. E. 759, a case sufficiently set out and reviewed in the *NICHOLS CASE*. To the same effect holds *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49.

In *Atlanta Street R. Co. v. Jacobs*, 88 Ga. 647, 15 S. E. 825, where a married woman was thrown from a street car, resulting in her injury and incapacity to do labor, it was said: "It seems to us that the loss or material impairment of any power or faculty is matter for compensation irrespective of any fruits, pecuniary or otherwise, which the exercise of the power or faculty might produce; and irrespective, also, of any conscious pain or suffering which the loss or impairment might occasion. Every person is entitled to retain and enjoy each and every power of body and mind with which he or she has been endowed, and no one, without being answerable in damages, can wrongfully deprive another by a physical injury of any such power or faculty, or materially impair the same. That such deprivation or impairment can be classed with pain and suffering was ruled by this court in *Powell v. Augusta & S. R. Co. supra*, and inasmuch as enforced idle-

contention that the court committed vital error in refusing to instruct the jury as requested. In the case mentioned the jury was instructed that plaintiff was entitled to such reasonable amount as would compensate her for her inability to perform manual labor; and, in fixing the amount of her recovery, there should be taken into consideration her loss of time resulting from her incapacity to labor. The plaintiff in

ness or diminished efficiency in offices of labor is calculated to give rise to mental distress, it is not error to describe the thing by its effects and call it pain and suffering. But it need not be so called necessarily; and consequently it was not misleading for the court to treat of it separately as a subject-matter for compensation in damages, although the plaintiff was a married woman."

In *Cullar v. Missouri*, K. & T. R. Co. 84 Mo. App. 340, in considering the damages recoverable by a married woman for personal injuries, the court said: "The husband is allowed to recover for the loss of the wife's services, and she cannot include in her damage any loss of time wherein she might have rendered him service. But that will not prevent her from recovering for all those things which injure her, apart from a mere loss of service and society to which the husband is entitled. Physical disability is a personal loss apart from being a deprivation of a money-earning power."

This was also recognized in *Perrigo v. St. Louis*, 185 Mo. 274, 84 S. W. 30.

In *Chicago & M. Electric R. Co. v. Krempel*, 103 Ill. App. 1, it was said that the loss of a married woman's ability to work is a personal injury to her, which may affect her in many ways peculiar to herself.

In *Minick v. Troy*, 19 Hun, 253, affirmed in 83 N. Y. 514, although a married woman was precluded from recovering for loss of services such as belonged to her husband, yet she was permitted to recover for loss of such services as she had "sustained herself and towards herself."

And see *Carr v. Easton*, 7 Pa. Co. Ct. 403, *supra*.

In *South Covington & C. Street R. Co. v. Bolt*, 22 Ky. L. Rep. 906, 59 S. W. 26, a married woman was permitted to recover for permanent impairment of her ability to earn wages by services performed for others than her husband, although it did not appear in the case that she had an independent business; the court taking occasion to say that the same criterion of recovery exists as to her as to a man or a single woman.

A similar case, holding to the same effect, is *Louisville & N. R. Co. v. Dick*, 25 Ky. L. Rep. 1831, 78 S. W. 914.

In *Harmon v. Old Colony R. Co.* 165 Mass. 100, 30 L.R.A. 658, 52 Am. St. Rep. 499, 42 N. E. 505, it was held that the impairment of the capacity of a married woman to perform labor can be considered as an element of the damages recoverable in an action

that case, as in this, was a married woman living with her husband. The court held that, as she was required to perform the ordinary household duties for her husband, and was entitled to no compensation from him for such services, the jury was not authorized to allow her damages which would compensate her for her inability to perform household duties, and in fixing the amount of her damages to take into consideration

by her for a personal injury, where the statutes entitle her to make contracts on her own account, and give her the right to her own earnings.

To the same effect hold *Millmore v. Boston Elev. R. Co.* 198 Mass. 370, 84 N. E. 468, and *Hamilton v. Great Falls Street R. Co.* 17 Mont. 351, 42 Pac. 860, 43 Pac. 713.

In *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545, it was held that loss of ability to labor is an element of general damage, to be considered by the jury in an action brought by a husband and wife to recover for a tortious injury to the wife. The court said: "But it is urged by the appellant that damages for loss of ability to labor on the part of the wife, caused by an injury of the kind in question here, can only be recovered by the husband in a separate action brought for that purpose. We cannot assent to this contention. The rule contended for was the rule at common law, and is doubtless the rule now in those states in which the legal identity of the wife is submerged into that of the husband, and where the time and services of the wife are not, to an extent, her own, but the property of the husband. Under our statutes, the time and earnings of both husband and wife are community property, not owned exclusively by the husband, but the common property of both. In the case at bar both husband and wife are necessary parties. The judgment should run to both. The damages, after recovery thereof, become the community property of both."

Cases closely related to the above are those where evidence in regard to the impaired capacity to labor has been admitted, not for the purpose of laying claim to damages for loss of time, or services from her household duties, but for the purpose of showing the extent of her injury. The following cases are of this nature: *Healy v. Visalla & T. R. Co.* 101 Cal. 585, 36 Pac. 125; *Joliet v. Conway*, 119 Ill. 489, 10 N. E. 223; *George v. Haverhill*, 110 Mass. 506; *Young v. Detroit*, G. H. & M. R. Co. 56 Mich. 430, 23 N. W. 67; *Dotton v. Albion*, 57 Mich. 575, 24 N. W. 786; *L. W. Pomerene Co. v. White*, 70 Neb. 171, 97 N. W. 232, 98 N. W. 1040; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653.

Cases in which the husband was the complaining party, although possibly indirectly deciding what the wife might recover or be prevented from recovering, have been expressly excluded from this note.

her loss of time resulting from her incapacity to labor. Here the plaintiff does not seek damages for her loss of time and inability to perform her household duties, nor from any other impairment of her ability to earn money; and the court expressly charged the jury that she was not to be awarded damages for her inability to earn money or for any loss sustained by such impairment. The court, in the case cited, does not hold that a married woman may not recover damages if she be permanently injured, and that her inability to labor may not be an element of such damage, but does hold that she may not recover for loss of time from her household duties, for such loss is an element of damage which the husband alone may recover. It was entirely proper, we think, for the court to permit the witnesses to state that, before the plaintiff was injured, she performed certain work, including her household duties, and to state what work, if any, she could perform after her injury, not for the purpose of laying claim to damages for loss of time from her household duties, for which she cannot recover, but for the purpose of showing the extent of her injury. That the plaintiff did not seek damages for her inability to perform her household duties as such, and made no claim therefor in the pleadings or in the evidence, is clearly shown by instruction No. 10, wherein the jury was instructed that, "in arriving at the amount of such damages, you should take into consideration the nature and extent of the injuries, if any, sustained by plaintiff, and the physical and mental pain and suffering, if any, she has suffered on account of such injuries. You should also consider whether the plaintiff's injuries are merely temporary or likely to continue for a future period, or to be permanent; and, if you find from the evidence that such injuries, or any of them, are likely to continue for a future period, or to be permanent, then you should also consider any future physical or mental pain or personal inconvenience she is likely to suffer on account of such injuries, as well as those you may find from the evidence she has already suffered." The question whether she could or could not recover compensation for the loss of time from her household duties not being an issue raised by the pleadings or evidence, it was not error to decline to instruct the jury as requested. Moreover, the instruction offered does not correctly state the law. A married woman is entitled to recover damages for the impairment of her ability to labor, independently of the husband's right to recover for the loss of her time. Chief Justice Bleckley, in the case *Powell v. Augusta & S. R.* 20 L.R.A. (N.S.)

Co. 77 Ga. 200, 3 S. E. 759, expressly so holds, and states in the course of his opinion: "It may be thought that the loss of ability to labor is not pain, but this is a mistake. There is no greater blessing of life than the ability to labor, even though the proceeds may belong to another. It is better for happiness, as well as for virtue, to work for nothing than to be idle. A physical injury that destroys the power of a human being to labor is one of the most serious injuries that it is possible to inflict. True, it is not to be measured by pecuniary earnings where the suit is [brought] by a married woman, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him; but the wife herself has such an interest in her working capacity as that she can recover something for its destruction, and what she is to be allowed ought to be more or less according to the length of time during which her privation is likely to continue. Such privation may well be classed with pain and suffering, especially where it involves the breaking up of established habits. To man or woman accustomed to work enforced idleness is torture." The first proposition stated by counsel is, we think, without merit.

The second proposition advanced by the appellant is that "the court erred in allowing evidence of plaintiff's alleged miscarriage, and later in refusing defendant's requests for instructions thereon, and in instructing that damages might be recovered therefor." The plaintiff was permitted to testify, over objection, that at the time she was injured she was pregnant, and that shortly thereafter she suffered a miscarriage. The defendant requested instructions, in substance, that if plaintiff was pregnant and sustained injuries which she would not have sustained but for her pregnancy, and which were the direct consequences of pregnancy, that such injuries were remote and not proximate, and that plaintiff was not entitled to recover; and that, even if the defendant was guilty of negligence, and the plaintiff was injured through such negligence, if such injuries were not of such character as might reasonably have been foreseen or expected as the natural result of the act complained of, the plaintiff cannot recover. In support of the instructions offered, and as sustaining their position that the testimony should not have been received, counsel cite *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89. At a time when the custom of women was upon her, the plaintiff in that action was compelled to leave a burning car of the defendant on a winter's night, and with but slight apparel. By reason of the exposure,

the custom spoken of was suppressed, and she suffered a long period of sickness. The court held that, although she was compelled to leave the car in a half-clad condition and expose herself to the severity of the weather, as the direct result of the company's negligence, still that her subsequent illness was not the result of the exposure, but the result of her exposure in her then condition; and, further, that "the increased risk arising from conditions affecting their fitness to journey, certainly where they are unknown to the carrier, must rest upon their own shoulders;" and the plaintiff's right to recover was denied. The case cited is not controlling in this case. In that case it was not a direct injury which caused the plaintiff's sickness, and her illness was caused, not by exposure alone, but by exposure in her then condition. In this case the plaintiff was thrown violently upon the floor of defendant's car, and as a direct result thereof she suffered a miscarriage. The case of *Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403, is more nearly in point. In that case Mr. Justice Gabbert, in holding the city liable to the plaintiff for damages directly resulting from an injury sustained through the negligence of the city in maintaining a defective sidewalk, held not erroneous an instruction directing the jury that, if the plaintiff had a latent disease which would not have been made manifest, or caused her trouble except for the injury sustained by the fall, or that such condition was aggravated by the alleged injury, it might consider such injury in estimating damages. In the course of the opinion the justice said: "The sidewalks of the city are for the use of those with organic predisposition to disease as well as for the healthy and robust; and any injuries which the former may sustain by reason of defects in such sidewalks, which result in aggravating an already diseased condition, are results for which the city must respond, if otherwise liable." And, as sustaining this position, he cites *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, which is a case very like the *Barker Case*, and similar to the one now under consideration. The court held that a pregnant woman, a passenger on a railway train, who was carelessly directed by a brakeman to leave the train 3 miles short of her destination, and who was compelled, being a stranger there, to walk until she reached her destination, and who, by reason of this exertion, suffered a miscarriage and sickness, was held entitled to recover damages from the company for the injury. So that, except in so far as the *Barker Case* announces the doctrine that a corporation is liable in damages for the proximate results

of injuries occasioned by its negligence, it is modified by the later decision in the case *Denver v. Hyatt*, and that case is controlling in this. It was therefore not error to refuse to instruct the jury that, if the plaintiff sustained injuries which she would not have sustained had she not been in a state of pregnancy, such injuries are the remote, and not the proximate, result of the defendant's negligence, nor error to refuse to instruct the jury, under the facts of this case and the law applicable thereto, that, if such injuries were not of such a character as might reasonably have been foreseen or expected as the natural result of the act complained of, defendant was not liable.

We regard the assignments mentioned in subdivisions 3 and 4 of appellant's brief as being without merit, and shall not discuss them.

It is next contended that the court erred in not instructing the jury that, "under the pleadings, the plaintiff is not entitled to recover damages by reason of her state of neurasthenia, if you find that she is so afflicted;" and the appellant says that no mention is made in the complaint that the plaintiff was afflicted with neurasthenia. The plaintiff alleges in her complaint, "that, as a result of the injury so caused, and because thereof, plaintiff has ever since undergone great and severe bodily and mental pain and suffering, and has received great and permanent bodily injury; that ever since being thrown as aforesaid, and because thereof, plaintiff has been unable to eat any solid food, and is compelled to subsist upon liquid nourishment; and ever since being thrown, as aforesaid, and because thereof, plaintiff has been and still is confined to her bed, and cannot move about, and is unable to do any work of any kind whatsoever." Physicians testified, without objection, that plaintiff was afflicted with what is known as "traumatic neurasthenia." By this they mean that the nervous system, as the result of a wound or injury, had become weakened, and that there is a lack of power in the nerve centers to perform their functions properly. No testimony is set out in the brief from which it appears that the plaintiff was permitted to recover for injuries other than those alleged in the complaint, and we shall assume that her condition of suffering severe bodily and mental pain, of being unable to eat any solid food, of being confined to her bed, of being unable to move about, and of being unable to do any work of any kind whatsoever, as alleged in the complaint, was established by the evidence; and that the term "neurasthenia," as used by the physicians, is the technical name of the disease from which she was suffering.

Finally, the verdict in the sum of \$5,000

is declared to be excessive. The record does not disclose that the verdict is so manifestly disproportionate to the injury as to make it apparent that the jury was influenced by prejudice, misapprehension, or by some corrupt or improper consideration, and we cannot therefore disturb it.

Finding no error in the record, the judgment is affirmed.

Goddard and Bailey, JJ., concur.

IOWA SUPREME COURT.

WILLIAM STONE

v.

ELIZA STONE et al., Appts.

(— Iowa, —, 119 N. W. 712.)

Deed — exception — life estate.

An exception in a deed conveying real estate, of "a certain lot of timber" growing on a portion of the land granted, for the benefit of a stranger to the instrument, is an exception of the timber rather than of the land itself, for the benefit of the person named personally, and terminates with his death, the fee then being in the grantee in the deed.

(February 20, 1909.)

Case Note. — Effect of provision in deed for benefit of stranger thereto.

In Sheppard's Touch. 80, it is stated as one of the essentials of a good reservation that it must be made to one of the grantors, and not to a stranger to the deed. This rule is said in Tiffany, Real property, § 383, to be presumably due to the feudal origin and purpose of a reservation, as formerly understood. And, in view of the fact that a reservation is technically a regrant, the locality of the rule is apparent.

This rule seems to be regarded by the courts as axiomatic; and in the following cases it has been held that an estate cannot be treated in a stranger to a deed by a reservation therein: Jackson v. Snodgrass, 140 Ala. 365, 37 So. 246; Brace v. Van Eps (S. D.) 109 N. W. 147; Karmuller v. Krotz, 18 Iowa, 352; White v. Marion (Iowa) 117 N. W. 254; Hill v. Lord, 48 Me. 83; Herbert v. Pue, 72 Md. 307, 20 Atl. 182; Murphy v. Lee, 144 Mass. 371, 11 N. E. 550; Haverhill Sav. Bank v. Griffin, 184 Mass. 419, 68 N. E. 839; Logan v. Caldwell, 23 Mo. 372; Borst v. Empie, 5 N. Y. 33; Craig v. Wells, 11 N. Y. 315; Hornbeck v. Westbrook, 9 Johns. 73; Hornbeck v. Sleight, 12 Johns. 190; Parsons v. Miller, 15 Wend. 561; Maynard v. Maynard, 4 Edw. Ch. 711; Ives v. VanAuken, 34 Barb. 566; Eysaman v. Eysaman, 24 Hun, 430; Stevens v. Adams, 1 Thomp. & C. 587; Edwards v. 20 L.R.A. (N.S.)

A PPEAL by defendants from a judgment of the District Court for Scott County establishing and quieting title to certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. W. M. Chamberlin and Walter H. Petersen, for appellants:

The grant was of the fee, and not of the right merely to remove the timber.

Gould v. Howe, 131 Ill. 490, 23 N. E. 602.

Mr. J. A. Hanley for appellee.

Deemer, J., delivered the opinion of the court:

Both plaintiff and defendants claim title under a deed made by Henry Stone, Sr., and his wife, Betsey, to Ruth Stone, on or about April 9, 1870, the material parts of which read as follows: "Witnesseth: That whereas the said Henry Stone, Sr., is desirous to make provision for his daughter-in-law, the aforesaid Ruth Stone, and for her children hereinafter to be named, against future contingencies and hers and their support; and whereas the aforesaid Henry Stone, Sr., is desirous that his said daughter-in-law and her children should enjoy the proceeds, rents, issues, and income of the real estate hereinafter more particularly described for the full term of her natural life, free from the control, liabilities, or interferences of any husband that she may hereafter have: Now, therefore, this indenture, witnesseth: That

Brusha, 18 Okla. 234, 90 Pac. 727; Young's Petition, 11 R. I. 636; Re Palin, 28 R. I. 12, 65 Atl. 282; Strasson v. Montgomery, 32 Wis. 52.

And it has likewise been said that an exception cannot so operate. Craig v. Wells and Parsons v. Miller, supra; Redding v. Vogt, 140 N. C. 562, 53 S. E. 337, 6 A. & E. Ann. Cas. 312.

Although a reservation or exception in a conveyance will not confer title upon a stranger to the instrument, under certain circumstances it may operate as an admission in his favor, or as an estoppel against the grantor. Butler v. Gosling, 130 Cal. 422, 60 Pac. 596.

A reservation will be considered as made to the grantor when valuable rights are secured to him, although others may be benefited by it. Wall v. Wall, 126 N. C. 405, 35 S. E. 811.

Although the fact that a reservation is inoperative to create an estate or interest in one not a party to the instrument will render it void as such, it has, nevertheless, been held that, when so intended, it may operate as an exception to the grant. See Martin v. Cook, 102 Mich. 267, 60 N. W. 679; Burchard v. Walther, 58 Neb. 530, 78 N. W. 1061; Bridger v. Pierson, 45 N. Y. 601; Bartlett v. Barrows 22 R. I. 642, 49 Atl. 31; Redding v. Vogt, supra.

the said Henry Stone, Sr., in consideration of the sum of one dollar to him in hand paid by the said second party, the receipt whereof is hereby acknowledged, has bargained and sold, and does by these presents grant, bargain, sell, convey, and confirm unto the said second party, the following described real estate lying and being situated in the county of Scott, and state of Iowa, to wit: The west half ($\frac{1}{2}$) of the northwest quarter of section No. five (5), township No. seventy-eight (78) north, of range five (5) East, of the 5th P. M., excepting a certain lot of timber growing and standing in the southwest corner of the aforescribed quarter section, the land upon which said timber is situated more fully described as follows, to wit: Commencing at the southwest corner of said premises, running thence north to a certain creek known as the 'Condid Creek;' thence in an easterly direction following the meanderings of said creek to the first bridge across said creek, known as the Old Slough Road Bridge; thence in a southerly direction on and along said Slough Road to the south line of said premises; thence west to the place of beginning, supposed to contain fifteen (15) acres. Said timber reserve is made for the express use, benefit, and behoof of Henry Stone, Jr., son of Henry Stone, Sr., also the east half ($\frac{1}{2}$) of the west ($\frac{1}{2}$) of the southwest quarter of section No. five (5), in township No. seventy-eight (78) North, of range five (5) east, of the 5th P. M., containing forty acres (40), more or less. The intention being to convey hereby absolute title in fee simple to said real estate, to have and to hold the premises herein described in trust for the uses and purposes hereinafter specified. First. To use for the maintenance of herself and for the maintenance, education, and support of her minor children the aforescribed trust for the full term of her natural life, she to pay from the proceeds, products, and use of said trust all taxes that may hereafter be justly assessed against said premises. Second. To leave the premises at her death in as good condition as reasonable use thereof will permit to her two sons named William Stone and Henry Stone. Third. The said Henry Stone, Sr., and Betsey Stone, his wife, hereby declare that upon the decease of the aforesaid Ruth Stone, the aforesaid trust shall cease and determine, and the foregoing described premises shall belong in fee simple to William Stone and Henry Stone, sons of the said Ruth Stone, upon the express condition that the aforesaid William Stone and Henry Stone pay or cause to be paid to their three sisters the following sums, to wit: To their sister Harriet the sum of one hundred dollars (\$100). to their sister Mary the sum

of one hundred dollars (\$100), to their sister Ida the sum of one hundred dollars (\$100), said sums to be paid at the time of their taking possession of said premises; and the said party of the second part doth hereby signify her acceptance of this trust, and doth hereby covenant and agree to and with the said parties of the first part faithfully to discharge and execute the same to the true intent and meaning of these presents. In witness whereof, we have hereunto set our hands and seals, this 10th day of May, A. D. 1870."

Thereafter, and in the year 1901, Harriet Dickinson and her husband, and Mary Shannor and her husband, Ida Waterbury and her husband, and H. H. Stone and his wife conveyed their respective interests in the lands described in the initial deed quoted to plaintiff, William Stone. The three main grantors in these several deeds are brother and sisters of the plaintiff. Henry Stone, Sr., the grantor in the first deed quoted, was the father of Henry Stone, Jr., and the grandfather of plaintiff. Plaintiff's mother, Ruth Stone, was the widow of Miron Stone, who was a son of Henry Stone, Sr. Ruth Stone died in the year 1901, and Henry Stone, who was the husband of the defendant Eliza Stone and the father of the other defendants, died prior to the time of the death of Ruth. Ruth Stone held a like estate in the property in controversy, and, with plaintiff, has been in the possession of the property since the time of the making the original deed in May, 1870. Plaintiff has paid each of his three sisters the \$100 provided for them in the deed hitherto set out, and has received the deeds mentioned, and he, plaintiff, has also purchased an undivided one half of his brother Henry's (or H. H. S.'s) interest. Unquestionably, then, plaintiff owns the fee title in said premises, unless it be found that defendants have some interest in virtue of the exception or reservation clause of the original deed, which reads in this wise: "Excepting a certain lot of timber growing and standing in the southwest corner of the aforescribed quarter section; the land upon which said timber is situated, more fully described as follows, to wit: Commencing at the southwest corner of said premises, running thence north to a certain creek known as 'Condid Creek;' thence in an easterly direction, following the meanderings of said creek to the first bridge across said creek, known as the Old Slough Road Bridge; thence in a southerly direction on and along said Slough Road to the south line of said premises; thence west to the place of beginning, supposed to contain 15 acres. Said timber reserve is made for the express use and benefit and behoof of Henry Stone, Jr., son of Henry Stone Sr." Upon

this defendants base their claim to 120 acres of the land.

The argument is that the original deed conveyed a fee to Henry Stone, Jr., and that the clause in the deed referring to Henry Stone, Jr., creates an exception, and conveys the lands therein mentioned to Henry Stone, Jr. To properly solve this question, we must have in mind the distinction between reservations, exceptions, and grants. The nature of a grant is pretty well understood. But a grant may be of any kind of an estate which is the subject of transfer. A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant. And an exception is a clause in a deed which withdraws from its operation some part of the thing granted which would otherwise have passed to the grantee under the general description. *Blackman v. Striker*, 142 N. Y. 555, 37 N. E. 484; *Biles v. Tacoma*, O. & G. H. R. Co. 5 Wash. 509, 32 Pac. 211; *Eisley v. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 128, 36 N. W. 659; *Herbert v. Pue*, 72 Md. 307, 20 Atl. 182. Sometimes the terms are used indiscriminately, and what is described in the conveyance as an exception is oftentimes held to be a reservation. *Wellman v. Churchill*, 92 Me. 193, 42 Atl. 352. A reservation is never of a part of the estate itself, but is something taken back out of that already granted, as rent, or the right to cut timber, or to do something in relation to the estate, while an exception is of some part of the estate not granted at all. *Youngerman v. Polk County*, 110 Iowa. 731, 81 N. W. 166. A reservation is always in favor of the grantor, and, if it does not contain words of inheritance, it exists only for the life of the grantor. *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352. A reservation must be in favor of the grantor or party executing the conveyance, and not to a stranger. *Karmuller v. Krotz*, 18 Iowa. 352.

With these rules in mind, we now go to the deed which lies at the basis of this controversy, and are forced to conclude from an examination thereof that there was an exception rather than a reservation in the deed, and that this exception was of a certain lot of timber rather than the land itself, and that such reservation was for the benefit of Henry Stone, Jr., personally, and terminated with his death. This exception was not of an estate in the land or any part thereof; but, if it were, it is of a life estate only which terminated with the death of Henry Stone. There can be no doubt that the entire estate in the lands described was conveyed in trust to the grantees named, but that a certain amount of timber was excepted from the grant. This exception

was for the personal benefit of Henry Stone, Jr., and would terminate by his death. Henry Stone, Jr., has conveyed all his right, title, and interest in and to the property to the plaintiff, and we do not think that defendants have any interest therein. If any they have, it is upon the theory that something remained in the grantor, Henry Stone, Sr., after his conveyance in April of the year 1870 which passed by descent to his heirs. As already observed, we do not think that anything remained in him, but that the title passed by the deed save and except the timber growing upon a certain part of the premises which was excepted from the grant, and the use thereof given to Henry Stone, Jr., who has since conveyed all his right, title, and interest to plaintiff herein.

The trial court correctly established plaintiff's title, and quieted it against all of the defendants; and its decree must be, and it is, affirmed.

IOWA SUPREME COURT.

W. E. RATLIFF, Appt.,

v.

J. O. ELWELL et al.

(— Iowa, —, 119 N. W. 740.)

Homestead — pension — exemption — prior debt.

A homestead purchased with pension money belonging to a man, and, by his direction, conveyed to his wife, is not subject to execution upon a judgment against her, although it is based on a claim antedating the acquisition of the homestead, if the purchase was made without the intention of making her the real owner of the property.

(February 18, 1909.)

APPEAL by plaintiff from a decree of the District Court for Union County dismissing the petition in an action brought to subject defendant's homestead to the payment of a judgment recovered by plaintiff against defendants after the acquisition of such homestead but on an indebtedness antedating the acquisition thereof. Affirmed.

Statement by McClain, J.:

Action to subject the homestead of defendants, who are husband and wife, the property having been acquired with the husband's pension money, and, at his request,

Note.—See case note to *Bremseth v. Olson*, 13 L.R.A. (N.S.) 170, as to right of husband, as against creditors, to claim homestead as exempt where title is vested in the wife.

conveyed to the wife, to the payment of a judgment recovered by plaintiff against defendants after the acquisition of such homestead, but on an indebtedness antedating such acquisition. After a trial on the merits the court dismissed plaintiff's petition, and he appeals.

Messrs. Robbins & Wilkie, for appellant:

Property purchased with pension money belonging to the husband, but, at his direction, conveyed to his wife, and subsequently occupied by them as a homestead, is not exempt from execution sale for a debt of the wife, contracted prior to its acquisition.

Whinery v. McLeod, 127 Iowa, 11, 109 Am. St. Rep. 364, 102 N. W. 132; *Marquardt v. Mason*, 87 Iowa, 136, 54 N. W. 72.

Mr. N. W. Rowell for appellees.

McClain, J., delivered the opinion of the court:

As plaintiff's judgment was on an indebtedness against both husband and wife antedating the acquisition of the homestead, the property would not be exempt to the wife from sale, under the judgment as against her, although purchased with her husband's pension money, if she was in fact the owner. *Whinery v. McLeod*, 127 Iowa, 11, 109 Am. St. Rep. 364, 102 N. W. 132. But it was alleged in the answer that the husband was vested with and held the equitable title, although the legal title was in the wife; that the whole consideration paid for the property was paid by the husband with his pension money, and that after the payment of the consideration, and without any intent to relinquish, release, or part with his equity in said property, he, on his own motion, and without any previous arrangement with his wife or procurement on her part, directed the legal title to be placed in her by means of conveyance from the person to whom the purchase money had been paid. This allegation was supported by the testimony of both husband and wife, and there was no evidence to the contrary, nor were any facts shown casting discredit on such testimony. That one who pays the entire consideration for the purchase of property, and, for his own purposes, causes title to be placed in another, to whom he owes no duty to make conveyance, and without the intention of thus making the grantee the real owner, remains the equitable owner of the property under a resulting trust, seems to be well established. *Malley v. Malley*, 121 Iowa, 237, 96 N. W. 751; *Seeberger v. Campbell*, 88 Iowa, 63, 55 N. W. 20; *Hagan v. Povers*, 103 Iowa, 593, 72 N. W. 771; *Culp v. Price*, 107 Iowa, 133, 77 N. W. 848. The case before us differs, therefore, from that of *Whin-*

ery v. McLeod, supra, in the retention of equitable title by the husband paying pension money for its purchase. As the real title was not in the wife, the homestead cannot be subjected to the payment of plaintiff's judgment as against her; and, as the husband acquired his title solely by the payment of pension money, he holds such title exempt from judgment, even for antecedent debts. See Code, § 4010.

The decree of the trial court is therefore affirmed.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY EX REL. T. G. ALBRITTON, Revenue Agent, Appt.,

v.

W. W. RUBEL et al., Commissioners of Sinking Fund of Lebanon Waterworks Company.

(— Ky. —, 112 S. W. 1128.)

Tax—municipal sinking fund.

Money and interest-bearing securities in a sinking fund accumulated by a municipal corporation under legislative authority to retire bonds issued to secure a waterworks system, the income from which has never exceeded the expense of maintenance, are held for a public purpose, and are not subject to taxation.

(O'Rear, Ch. J., and Nunn and Carroll, JJ., dissent.)

(October 22, 1908.)

A PPEAL by relator from a judgment of the Circuit Court for Marion County reversing a judgment of the County Court in his favor in a proceeding to assess securities in defendants' sinking fund. Affirmed.

The facts are stated in the opinion.

Mr. W. W. Spalding for appellant.

Mr. H. S. McElroy, for appellees:

The fund in question is public property used for public purposes, and is exempt from county and state taxes.

2 Dill. Mun. Corp. 4th ed. §§ 773, 774; *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624; *Owensboro v. Com.* 105 Ky. 344, 44 L.R.A. 202, 49 S. W. 320; *Frankfort v. Com.* 29 Ky. L. Rep. 699, 94 S. W. 650; *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597.

Mr. J. P. Thompson also for appellees.

Note.—**COM. EX REL. ALBRITTON v. RUBEL** presents a phase of the question as to what municipal property is taxable, which is apparently new to the courts, as an extensive search has disclosed no other authorities in point.

Lassing, J., delivered the opinion of the court:

This suit was instituted in the Marion circuit court by T. G. Albritton, revenue agent, for the purpose of assessing certain dividend-paying stocks, bonds, and cash held by the sinking fund commissioners of Lebanon, Kentucky. In 1884 a charter was granted by the state legislature to J. M. Cardwell and others as incorporators of the Lebanon Waterworks Company. The capital stock of this company was fixed at \$100,000. The company was organized under this charter to supply the town of Lebanon with water. In 1886 the charter of the Lebanon Waterworks Company was amended so as to authorize the city of Lebanon to purchase its stock up to an amount not exceeding 750 shares of a par value of \$100 each, and, for the purpose of making this purchase, the city was authorized to issue its bonds, which were to mature at a stated time. The act further provided that, for the purpose of paying the bonds which the city should thus issue, a sinking fund should be created, and that the city should annually pay into said fund a sum sufficient to liquidate the bonds at maturity. For the purpose of managing this fund a commission of three was appointed. It appears from the record that \$55,000 of the stock of the water company were at that time delivered to the city and a like amount of city bonds were issued to the water company, and by it sold upon the market. At the time of the institution of this suit there had been paid into the sinking fund each year a sum approximating \$1,600, and the aggregate amount then in the hands of the commissioners was about \$26,000. The case was submitted to the county court upon the pleadings, there being no disagreement as to the amount of funds on hand. The county judge decided that the property of the sinking fund was liable for state and county taxes, and directed it to be assessed accordingly. An appeal was taken from this judgment to the circuit court, where, in due course of time, a judgment was rendered, in which it was held that all of the property in the hands of the sinking fund commissioners was, under § 170 of the Constitution, exempt from taxation. The petition of the revenue agent was accordingly dismissed, and, from that judgment, this appeal is prosecuted.

For the state, it is urged that the city holds these stocks and bonds and this cash in a private or proprietary capacity, and not in its governmental or public capacity, and that, therefore, it is subject to taxation; whereas, the sinking fund commissioners contend that it is held for a purely governmental or public purpose, and is exempt from taxation. The debt which this sinking

fund was created to liquidate was originally incurred by the city by legislative authority in the erection and installation of a waterworks system for the city. The same act which authorized the city to incur this indebtedness required that a fund be created for the purpose of liquidating this indebtedness at its maturity. The city owns all of the stock of the waterworks company, and the waterworks company, in addition to supplying the city with water, is held and operated for the purpose of extinguishing fires, sprinkling streets, flushing gutters and sewers, thereby ministering, not only to the comforts and necessities of the citizens of said town, but promoting and subserving the public health and conveniences of the city. The sinking fund was created for the sole purpose of liquidating the bonded debt incurred by the city in the purchase of the waterworks. It appears that the income from the sale of water has never been equal to, or at least exceeded, the expense of maintaining the plant.

The city is an arm or branch of the state government, and in the administration of its public affairs it acts as an agent of the state, and no property held by it for a purely public or governmental purpose is subject to taxation any more than the public property of the state itself is subject to taxation. In the case of *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624, Judge Robertson, speaking for the court, held that a courthouse, prison, and such property as was necessary or useful to the administration of municipal affairs, and devoted to such uses, were exempt from taxation; but, when such property was used by the city in its private capacity, such as market houses, fire engines, etc., it was subject to taxation. Since the date of this decision the trend of legislative enactment, and judicial interpretation as well, has been to extend and enlarge the exemption from taxation of the different classes of property held by cities in their governmental capacity, and contributing to the health, comfort, and convenience of its citizens; and the rule announced by Judge Robertson has been materially modified and extended. In the more recent case of *Owensboro v. Com.* 105 Ky. 344, 44 L.R.A. 202, 49 S. W. 320, it was held that property used by a city in connection with its fire department, and even public parks, was exempt from taxation. In the case of *Frankfort v. Com.* 29 Ky. L. Rep. 609, 94 S. W. 648, it was held that "the legislature authorizes municipalities to levy and collect taxes for the purpose of building and maintaining waterworks and lighting plants. They are acquired for public purposes and maintained for public purposes. They are paid for with money that

arises from the levy and collection of taxes, which can only be levied and collected for public purposes. Water is essential to the comfort, health, and safety of the citizens of the municipalities. . . . Therefore the legislature has recognized waterworks and lighting plants as public necessities. The right of municipalities to tax their inhabitants for the purpose of raising money to build and maintain these plants is not even questioned, and this court has repeatedly recognized that it can be done." In the case of *Covington v. Highlands*, 23 Ky. L. Rep. 323, 110 S. W. 338, the principle announced in the case of *Frankfort v. Com. supra*, is recognized and approved. The waterworks being acquired and maintained for a public purpose, paid for with money raised by pledging the city's credit, under special legislative authority, granted only upon condition that there should be created by the city a sinking fund for the purpose of redeeming the bonds at their maturity, it could hardly be said that this fund, which the city was required to create to redeem its bonds, should be subject to taxation. The debt was created for a governmental purpose, and must be paid off and satisfied by taxation. It is too great a burden to be borne by the municipality in any one year, and hence the legislature wisely provided that the burden of its payment should be distributed over a number of years. This annual tax, when collected and set aside for the purpose of redeeming these bonds, is no more subject to taxation than would a balance in the hands of the city treasurer be subject to taxation if there remained a balance at the end of the fiscal year. It is not held by the city for the purpose of making any profit out of it, but only for the purpose designated in the act of the legislature which authorized and directed its creation. But it is urged for the commonwealth that it is invested in interest-bearing stocks and bonds, and therefore the city derives a profit from its use. This is true, but the profit derived from its investment in such stocks and bonds is added to the principal fund from time to time, and this will continue to be done until the amount on hand in the sinking fund is sufficient to satisfy and pay off the bonds. When this period has been reached, the citizens of the municipality will then be relieved of any further burden on this account, and this tax, which has been collected through a number of years, will then be applied to the purpose for which it was collected.

Considered in its true light, the sinking fund in the hands of the commissioners is but so much taxes collected by the city for the purpose of liquidating an indebtedness created for a purely public purpose, and 20 L.R.A. (N.S.)

hence it is not subject to taxation, and, the circuit judge having so held, the judgment is affirmed.

O'Rear, Ch. J., and Nunn and Carroll, JJ., dissent.

KENTUCKY COURT OF APPEALS.

CITIZENS' FIRE INSURANCE COMPANY et al., Appts.,
v.
LOCHRIDGE & RIDGEWAY.

(— Ky. —, 116 S. W. 303.)

Insurance — party wall — recovery.

The owner of a building supported by a party wall which is injured by the burning of the adjoining building may recover, under the insurance policy on his building, diminution in its value because of the injuries to the party wall, which may include the full value of the wall.

(February 9, 1909.)

APPEAL by defendants from a judgment of the Circuit Court for Graves County in plaintiffs' favor in an action brought to recover the amount alleged to be due under a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Stanfield Brothers for appellants.

Mr. W. J. Webb, for appellees:

Complainant is entitled to full damages for the loss of the party wall.

Spaulding v. Grundy, 31 Ky. L. Rep. 951, 13 L.R.A. (N.S.) 149, 104 S. W. 293; *Sanders v. Martin*, 2 Lea. 213, 31 Am. Rep. 598; *Willford v. Gerard*, 22 Ky. L. Rep. 203, 56 S. W. 416; *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570.

Case Note. — Insurance; liability of insurer for value of party wall.

But one other case has been found upon the question presented in *CITIZENS' F. INS. Co. v. LOCHRIDGE* as to the right of an owner to recover under a fire insurance policy for loss or injuries to a party wall.

The case of *Montelone v. Royal Ins. Co.* 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472, presents the same question where a defendant insurance company endeavored to escape liability for the whole value of the party wall on the ground that the adjoining owner was liable for half the cost of rebuilding the wall. The court held that the defendant company was liable for a constructive total loss, and that the plaintiff should be reimbursed for the whole value of the wall. The court, however, recognized the defendant's right by subrogation to recover of the adjoining owner for the half of the wall, and reserved that right to the company.

O'Rear, J., delivered the opinion of the court:

Appellees were insured by appellants, a number of fire insurance companies, against loss or damage by fire to their four-story business house in Mayfield. Appellees and Mrs. Bollinger owned adjoining lots. When they bought them, there were buildings on each which joined, and were separated by a common party wall. The wall stood one half on each lot. The buildings were each two-story brick houses. Appellees' house having become damaged or partially destroyed, they began the erection of another and larger house,—the subject of the insurance involved in this suit. They attempted to contract with Mrs. Bollinger as to building the party wall between them two stories higher than it was, but the parties failed to agree. Appellees went ahead and rebuilt their house, using the old party wall as it stood, but extended the party wall so as to accommodate their four-story building. They paid all the cost of building the addition to the party wall. Mrs. Bollinger refused to pay them any part of it. Appellees insured their building with appellants as stated. Mrs. Bollinger's house caught afire one night, and was destroyed. The heat sprung, and otherwise impaired, the stability of the partition wall. Appellees declared upon it as a damage to their property under the policies of insurance. The trial resulted in a verdict, finding that the wall was damaged by the fire, and fixed the amount of the loss occasioned thereby to appellees on their building. We will not stop to discuss whether the damage to the wall was as great as the jury found. There is ample evidence in the record to sustain their verdict. And there is enough, too, to have sustained a verdict for a much less sum. It all depends on which of the testimony the jury believed, and that was their affair solely. So we assume that the wall was damaged to the extent found in the jury's verdict; that is, that the damage to appellees' building was in the sum found by the jury.

The court gave the jury these instructions:

"The court instructs the jury that, if they believe from the evidence that the fire which occurred in the Bollinger building on February 15, 1908, damaged by fire the building of plaintiffs, you will find for the plaintiffs the damage, if any was sustained by them, to the said building, not exceeding the sum claimed, \$4,335. And in estimating such damage you will estimate the difference in value, if anything, between said building just before the fire occurred and the same building immediately thereafter that you may believe was approximately caused by the fire; such difference, if any, in value, to 20 L.R.A. (N.S.)

be determined by the reasonable cost of repairing or restoring any damage or injury caused solely by the fire.

"The court instructs the jury that the west wall of the plaintiffs' building is a party wall, and one half of same belongs to plaintiffs to the second story, and all the balance belonged to the plaintiffs, but plaintiffs had the use of all the said wall, and the jury are instructed in this case, in estimating the plaintiffs' damages, to consider the difference in value of this wall to their building as the same exists as the result of the fire afterwards."

This court this day, in an opinion handed down in *Bright v. Bacon*, 116 S. W. 268, had occasion to consider the law applicable to party walls. It is not deemed necessary here to restate the reasoning advanced, or the authorities cited, in that opinion. It is enough to reiterate that each party to the party-wall agreement, in a situation such as this record discloses Mrs. Bollinger and appellees to have been in, was legally entitled to use the whole of the party wall as a means of support of their respective buildings; that each owned the fee to the center of the wall, and an easement in the rest of it; that either had a right to build the wall higher so as to increase the height of his building, but at his own cost; and, if the other subsequently came to also use the extension, the matter of compensation was regulated by the opinion of this court in *Spaulding v. Grundy*, 31 Ky. L. Rep. 951, 13 L.R.A. (N.S.) 149, 104 S. W. 293. This is substantially the criterion of appellees' title in the wall given to the jury by the instructions last quoted above. Appellants contend that this gives to the appellees the full value of the party wall in case it is destroyed, and to the other party the full value, also in case her building was similarly insured. So be it. The thing insured was not the wall, nor any particular interest in it. It was appellees' house as a house. A tenant may have an insurable interest in a house, while his landlord also has an insurable interest in it. If each is insured, and the house is destroyed by fire, is not the tenant damaged the value of his unexpired term, and is not the landlord damaged the value of the building, although but one building was destroyed?

Mrs. Bollinger, even if she had insurance upon her building, which was paid to her, could not be compelled to rebuild or repair the party wall. If it was so damaged by the fire that it had to be torn down and a new wall built so as to support appellees' building, then appellees alone had to bear that whole expense. If they do so rebuild it, and if Mrs. Bollinger subsequently elects to rebuild her house so as to tie onto or build into the party wall, she might have to repay

appellees one half of the cost, or one half of its then value, but that fact detracts nothing from appellees' present loss. Their building is not a whole building without that wall, and its damage is the diminution in its value by reason of the damage to the wall. That sum which it would require to restore the building in substantially as good condition as it was just before the fire represents the damage done to it by the fire.

We think the instructions fairly submitted to the jury the elements of appellees' loss, and the verdict must be affirmed.

MARYLAND COURT OF APPEALS.

STEWART & COMPANY, Appt.,

v.

JOHN W. HARMAN.

(108 Md. 446, 70 Atl. 333.)

Negligence — evidence — subsequent repairs.

1. Evidence that, after the breaking of a pane of glass causing an injury, new beading or strips to hold the pane in place were placed in the sash, is not admissible to prove negligence on the part of the owner in the maintenance of the window.

Appeal — condoned error.

2. The admission of incompetent evidence is not reversible error if the objecting party elicited on cross-examination evidence to the same effect.

Same — defective window — injury.

3. In the absence of any rule or custom for independent inspection by the owner of a building of the windows in it, he is not liable for injury to an employee whose duty is to open and close the windows, by the breaking of a glass caused by some defect in the setting, which arose after the original construction of the building.

Same — *res ipsa loquitur*.

4. Actionable negligence on the part of the owner of a building in maintaining a

Note. — The distinction, noted by the court in the foregoing case, between invoking the doctrine of *res ipsa loquitur* to justify an inference of negligence as the responsible human cause of an accident the physical cause of which is known, and invoking that doctrine for the purpose of justifying an inference as to the physical cause as well as negligence, is commented upon at page 355 of the case note to Fitzgerald v. Southern R. Co. 6 L.R.A. (N.S.) 337, dealing with the general question as to the applicability of the rule of *res ipsa loquitur* as between master and servant. The position of the court that the rule *res ipsa loquitur* cannot be invoked for the purpose of establishing the physical cause of the accident seems to be well founded in principle and authority.
20 L.R.A. (N.S.)

window the glass of which broke and injured an employee whose duty was to open and close the window, is not shown by the mere happening of the accident, where there is nothing to show the efficient cause of the accident.

(June 25, 1908.)

APPEAL by defendant from a judgment of the Baltimore City Court in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. W. L. Marbury and Jesse Shingluff, for appellant:

The doctrine of *res ipsa loquitur* is inapplicable.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320; Brownfield v. Chicago, R. I. & P. R. Co. 107 Iowa, 254, 77 N. W. 1038; Chicago Teleph. Co. v. Schulz, 121 Ill. App. 573; Sappenfield v. Main Street & Agri. Park R. Co. 91 Cal. 48, 27 Pac. 590; Higgins v. Fanning, 195 Pa. 599, 46 Atl. 102; Moore Lime Co. v. Johnston, 103 Va. 84, 48 S. E. 557; Crawford v. United R. & Electric Co. 101 Md. 402, 70 L.R.A. 489, 61 Atl. 287; Maryland Teleph. & Teleg. Co. v. Cloman, 97 Md. 620, 55 Atl. 681; Gans Salvage Co. v. Byrnes, 102 Md. 230, 1 L.R.A. (N.S.) 272, 62 Atl. 155; Fink v. Slade, 66 App. Div. 105, 72 N. Y. Supp. 821; Zahniser v. Pennsylvania Torpedo Co. 190 Pa. 353, 42 Atl. 707; Van Orden v. Acken, 28 App. Div. 160, 50 N. Y. Supp. 843; Hencke v. Ellis, 110 Wis. 538, 86 N. W. 171; Allen v. Kingston Coal Co. 212 Pa. 54, 61 Atl. 572; Benedict v. Potts, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560, 53 Atl. 665.

Evidence which refers to conditions existing or events transpiring after the happening of the event is not admissible.

Ziehm v. United Electric Light & P. Co. 104 Md. 48, 64 Atl. 61; Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591; Baltimore & Y. Turnp. Road v. Crowther, 63 Md. 558; Wood v. Heiges, 83 Md. 271, 34 Atl. 872; Morse v. Minneapolis & St. L. R. Co. 30 Minn. 465, 16 N. W. 358.

Mr. Thomas C. Weeks for appellee.

Worthington, J., delivered the opinion of the court:

This is a suit by an employee against his

employer to recover damages for an injury which the former sustained while engaged in the performance of his duties. The defendant is a mercantile corporation carrying on business in the building of the northeast corner of Howard and Lexington streets, in Baltimore city. Plaintiff was at the time of the accident complained of employed by the defendant to make himself generally useful on the fourth floor of its place of business. Some of his duties were to clean furniture, to help carry out furniture, and, more to the point so far as this suit is concerned, to open in the morning and to close in the evening the windows of that floor. The plaintiff testified that he had performed this duty every day during the five or six months of his employment there. These windows were large, their dimensions being 6 by 8 feet, each containing a single pane of heavy plate glass from about $\frac{3}{8}$ to $\frac{1}{2}$ an inch in thickness. The windows were opened and closed by means of fixed pivots, one at the top and one at the bottom of the window frame. There was also attached to the bottom of each window frame a device for controlling the window and holding it open or shut, or at any angle desired. It is not deemed necessary for the purposes of this case to minutely describe this device, as there is no contention that it was not in good condition. On the afternoon of June 4, 1906, the plaintiff had just closed one of these windows, when in an instant a great many fragments of broken glass from the pane in that window fell upon the backs of his hands, cutting and injuring him severely.

The manner in which the accident happened is briefly described by the plaintiff as follows:

Q. Will you describe to the jury how you closed that window?

A. It works on a pivot in the middle, and you had to push. The window closed very readily. I had the window closed, and my left hand was resting on the sill, and I was in the act of pulling down the blinds with the right hand and, like a flash, I should judge about 1,000 pieces came out and struck me here [indicating the backs of his hands].

Q. Did the glass fall outward or inward?

A. Some fell outward and some fell inward.

This was all the evidence offered by the plaintiff as to the manner in which the accident happened, and, as he was, at the time of the accident, hidden from view by some furniture in the room, no one but himself saw how it happened, though another employee of the defendant, a Mr. Gregg, a floorwalker, who had charge of the room,

testified that he could see the top of the window at the time it was closed; that the window closed rapidly, with a bang, and then he heard a terrible smash of glass. He said he examined the window immediately after the accident, and found the window glass broken out with the exception of some large pieces adhering to the beading around the edge. He also testified that, as far as he could see, the strips or beads which held the glass in the window sash were in perfect condition.

The defendant proved very satisfactorily that the window in question had been properly constructed, and the plaintiff does not on his part seriously contend that the window was not so constructed in the first place, but does contend that it was not maintained in a reasonably safe condition, and that, therefore, for its alleged failure so to maintain this window the defendant is chargeable with negligence. In what respect it was not maintained in a safe condition was not shown, and no evidence, except the fact of the breaking of the window under the circumstances above narrated, was adduced to prove any defect therein, unless the testimony of Mrs. Harman, plaintiff's wife, to the effect that, a few days after the accident, she was standing on the street and saw Mr. Kauffman, the glazier, putting new strips around the window, and the testimony of two other witnesses to the effect that, when they examined the window some time after the accident, they found the strips had been changed since the original construction, might be so considered. The evidence of Mrs. Harman as to what occurred several days after the accident does not prove or fairly tend to prove any defect in the window at the time the accident happened. These strips or beads to which she referred were used to secure the glass in the sash after it had been set in the rabbet, and were fastened to the sash from the outside. Possibly the old strips were broken or injured in removing the fragments of glass that adhered to the sides of the sash after the accident happened. Possibly they were broken while being removed, preparatory to putting in a new glass. When the question at issue is the liability of defendant for the alleged faulty construction or improper maintenance of an appliance, evidence of events transpiring after the happening of the accident is usually inadmissible. *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591; *Ziehm v. United Electric Light & P. Co.* 104 Md. 48, 64 Atl. 61. We think, therefore, that, as this evidence was objected to, it should have been excluded, but, as the defendant upon cross-examination elicited evidence to the same effect, the ruling of

the trial court in this regard furnishes no reversible error. *Leffler v. Allard*, 18 Md. 545. In the view that we take of the case, however, we do not consider this evidence important.

The defendant showed that the windows in the building had been in the first instance properly constructed by a competent builder; that such construction was a safe one; that the glass was good plate glass of glazing quality; and that the beading used to hold the glass in the sash was of the usual size and sufficient to make a good construction. Mr. Grim, a carpenter employed by the defendant, testified that he boarded up the opening the afternoon after the glass was broken out, and that the beads that held the glass in the window were in proper condition; no part of them being moved out of the way. Mr. Gregg, floorwalker for defendant, testified that he went to the window immediately after the accident, and found the window glass broken out, with the exception of some large pieces adhering to the beading around the edge, and that, as far as he could see, the beading seemed to be in perfect condition. He did not see where any of it was gone. Mr. Kaufman, the glazier who put the glass in the sash when the building was originally constructed eight or nine years before, testified that he put a new glass in the window after the accident, and that, when he went there for that purpose, he found the beads and everything all right, except that the glass was gone. This witness also testified that the beading originally put on the window to hold in the glass was $\frac{5}{8}$ of an inch, and that when he went there to put in the new glass he found the beading to be $\frac{3}{4}$ of an inch. The witness Morrow also testified that the beading which held the glass in place was $\frac{5}{8}$ by $\frac{3}{4}$. On cross-examination this witness stated that the beading at the time of the trial was larger than that originally used for the purpose of securing the glass. When the larger beading was put on the window did not appear, except from the testimony of Mrs. Harman, as above stated. The only evidence in the case therefore, to show that the window was in any respect defective on the day that the accident happened is the inference to be drawn from the testimony that beading slightly different from that used in the original construction was put in the window after the accident. This inference is rebutted by the direct testimony of two witnesses who examined the window immediately after the accident happened, and who stated that the beading was then in good condition.

But, assuming that there was sufficient evidence of a defective beading at the time of the accident to justify submitting that 20 L.R.A. (N.S.)

question to the jury, what evidence is there that such defective beading caused, or in any way contributed to, the accident and injury? How was the beading defective? How did such defect, if any, contribute to the accident? Even if we assume that some defect in the beading did in some unexplained manner contribute to the accident, still where is the evidence legally sufficient to show that defendant did not use due and reasonable care to maintain the window in a safe condition? In order to recover in this case, it is incumbent on the plaintiff to show, not only how the accident happened, but also that the defendant was remiss in respect to some matter which caused the accident. *Buswell, Personal Injuries*, 111a. The master's liability, if any liability attaches at all, depends altogether upon a breach by him of some imposed duty. Now, the law imposes upon the master the duty toward his servant of exercising due and reasonable care to provide and maintain proper and safe materials and appliances with which the servant may perform his work; but a master is not an insurer of his servant's safety. *Wood v. Heiges*, 83 Md. 269, 34 Atl. 872. When the servant engages to perform certain services for compensation, it is implied as part of the contract that, as between himself and his employer, he assumes all the risks incident to the service. In the absence of any rule or custom of the employer to inspect and test appliances with which his employees perform their respective services, and in the absence of any rule of law requiring him to do so, the employees themselves are expected to exercise circumspection for their own safety. As stated in *Buswell on Personal Injuries*, § 204: "The principle is that, where the servant has as good an opportunity as the master to ascertain and avoid the danger himself, he will have no recourse against the master in case he is injured thereby, and he accepts the employment upon this implied condition." Upon this principle, the case of *McGorty v. Southern New England Teleph. Co.* 69 Conn. 635, 61 Am. St. Rep. 62, 38 Atl. 359, was decided. In that case the plaintiff, who was employed as a lineman by defendant, climbed an old pole for the purpose of removing the wires and cross-arms therefrom, and while thus engaged the pole fell, by reason of its being rotten at the base, and the plaintiff, falling with it, received serious injuries. It was not shown that there was any rule or practice of the defendant to inspect and secure poles before linemen were sent to work upon them; and the court, in disposing of the case, said: "Whether it is incumbent upon the master or the servant to perform such a duty is usually a question of fact depending upon the terms of the contract of

employment; the servant's knowledge of the hazards of the work in which he is engaged; his ability and opportunity to discover the dangers to which he is exposed, and to avoid them; and upon other circumstances." And it was determined, under the circumstances of that case, "that each lineman should look out for his own safety in climbing poles," and that the master was not guilty of negligence for failure to provide a system of independent inspection. The same principle was also applied in the case of *Piper v. Cambria Iron Co.* 78 Md. 249, 27 Atl. 939, where this court said: "While employers should be held to a strict performance of duty towards employees, yet the latter must be required to exercise some prudence, and to use the necessary means supplied to them to enable them to do their work in a safe and expeditious manner."

In the present case there is no pretense that the defendant had established any rule or custom of independent inspection of the windows in the building; and, as the window in question was of simple design, and the plaintiff had ample opportunity to examine its condition from day to day for several months before the accident happened, no system of independent inspection would seem to have been necessary. The plaintiff was a man about fifty years of age, and there was nothing to show that he was not possessed of ordinary intelligence and capacity. It was therefore incumbent upon him to observe the condition of the windows from time to time for his own protection as well as that of the defendant. In fact, Mr. Gregg, the floorwalker, testified that it was the plaintiff's duty to report to him if any of the windows on that floor were out of order, and, while the plaintiff denied this when examined in rebuttal, yet we think that, under the circumstances of this case, this duty was imposed upon him by the very nature and character of his employment. As stated by Mr. Justice Field in *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, "If . . . [the servant] failed to exercise that prudence, care, and caution which prudent men under similar circumstances would ordinarily exercise, and . . . thereby contributed approximately to the injury, he was not entitled to recover." In *Toledo, W. & W. R. Co. v. Eddy*, 72 Ill. 138, where an employee was injured by a fall from a ladder of which he had been for some time in constant use, the fall having been caused by reason of some defect in the ladder, it was held that it was the duty of the employee himself to see and to know that the ladder was in repair, and, if not, to report the fact to the proper person for repair; that it was neg-

ligence on his part not to do so; and that the company was not liable.

Thus far we have proceeded upon the assumption that the plaintiff had proven, or given evidence tending to prove, some defect in the window, which caused or which directly contributed to the accident and injury complained of, while in fact no such evidence has been offered. The plaintiff contends, however, that the mere fact of the falling of the glass is itself evidence of such defect, and also of the defendant's negligence in not maintaining the window in good repair,—in other words, that the doctrine of *res ipsa loquitur* is applicable to this case; and in this contention he is sustained by the ruling of the trial court in granting his first prayer. But, before this doctrine can be applied, the efficient cause of the accident must be shown by the testimony. Evidence of some defect, by reason of which the accident happened, must be adduced. Ordinarily it is necessary to show how the accident happened, and then to prove negligence on the part of the defendant in respect to some matter which caused the accident; and the mere fact that an accident happened which caused the injury is not of itself generally sufficient to authorize an inference of negligence. *Buswell, Personal Injuries*, 111a. Until it is known what occasioned an injury, it cannot be said that the defendant was guilty of some negligence that produced the injury. *Benedick v. Potts*, 88 Md. 56, 41 L.R.A. 478, 40 Atl. 1067. To mulct a defendant in damages without proving what caused the accident is to punish it, not for any wrong it has done, or for any duty which it has omitted, but because we cannot prove what we wish to find out. *South Baltimore Car Works v. Schaefer*, 96 Md. 105, 94 Am. St. Rep. 560, 53 Atl. 665.

To test the soundness of plaintiff's contention, let us suppose that the whole pane had fallen out, unbroken, and had struck and injured the plaintiff on the first day of his employment. The reasonable inference is that such an accident could only have happened from some defect in the window, and the mere fact of its falling whole and entire from the sash would be evidence of such defect, and, in the absence of satisfactory explanation by the defendant, it would speak against him as to the exercise of due care on his part. In such a case the rule would be applicable, because it could be fairly and reasonably inferred from the circumstances themselves that negligence on the part of the defendant in properly constructing or in properly maintaining the window caused the accident. But in this case the glass was broken into "a thousand pieces," to use the expression of the plaintiff, before it fell, and such breaking may have been

caused by its being struck with a piece of furniture, in moving it, during the day, or by the force of the wind, or, as seems most likely, by its being shut with too great violence by the plaintiff himself. If it occurred under any of these circumstances the defendant would not be liable, because the plaintiff was in charge of the window and had opened and shut it daily for five or six months in absolute safety, and, if there were defects in the window and he failed to discover them, or if he broke the window by shutting it too violently, in either event his own negligence was the cause of the injury, and he could not recover. It has been held in a number of cases that the sudden breaking of machinery is not of itself sufficient to warrant the court in sending the case to the jury. *South Baltimore Car Works v. Schaefer*, supra. As was said by this court in the case of *Benedick v. Potts*, 88 Md. 54, 41 L.R.A. 478, 40 Atl. 1068: "The negligence alleged and the injury sued for must bear the relation of cause and effect. The concurrence of both and the nexus between them must exist to constitute a cause of action." The negligence alleged and chiefly relied on in this case is that "the defendant failed to maintain said window in such condition that it could be safely used;" and the only evidence of any such defect is the inference to be derived from the testimony that, after the accident happened, new beading was used to hold the window in place; but there is no evidence whatever that any defect, if any existed, caused the accident complained of, or that there was any connection between such alleged defect and the injury. In *Schaefer's Case*, supra, this court, quoting from *Stringham v. Hilton* (*Stringham v. Stewart*) 111 N. Y. 197, 1 L.R.A. 483, 18 N. E. 873, said: "The same machine was continued in use for several years. When used with ordinary care, there was no reason to suppose that harm or mischief could result." "This fact" said the court "brings the case directly within the rule that when an appliance or machine not obviously dangerous has been in daily use for a long time, and has uniformly proved adequate and safe, its use may be continued without imputation of negligence." We think this language is applicable to this case. The doctrine of *res ipsa loquitur* does not apply, at least, not against the defendant.

It follows from what we have said that there was error in granting the plaintiff's first prayer, and, as we do not think the plaintiff is entitled to recover, the judgment appealed from will be reversed without a new trial.

Judgment reversed, with costs.
20 L.R.A. (N.S.)

MICHIGAN SUPREME COURT.

CLEMENTS GERHARD, by Next Friend,
v.
FORD MOTOR COMPANY, Plff. in Err.

(— Mich. —, 119 N. W. 904.)

Evidence — conclusion.

1. A question on cross-examination of plaintiff, in an action to recover damages for injuries caused by being struck by an automobile, "And this accident happened simply because you were in a real hurry, . . . and you jumped down off the wagon, didn't you?"—is incompetent as calling for a mere conclusion.

Highway — lookout for automobiles — negligence.

2. A pedestrian is not bound, as matter of law, when lawfully using the public highways, to be continuously looking or listening to ascertain if auto cars are approaching, under penalty that, upon his failure to do so, if he is injured his own negligence must be conclusively presumed.

Trial — jury — highway — pedestrian — automobile.

3. The question of the negligence of a delivery boy who is struck and injured by an automobile is for the jury, where the evidence tends to show that, before leaving his wagon, he looked but did not see the automobile, and that, after he reached the ground and secured the packages he was to deliver, he walked a few steps beside the wagon, waiting for it to pass so that he could go behind it to reach the house where the packages belonged, when he was struck by the automobile coming rapidly up behind him.

(March 3, 1909.)

Case Note.—Duty of pedestrian in street to watch for automobiles.

The earlier cases upon this subject will be found in the notes to *Christy v. Elliott*, 1 L.R.A. (N.S.) 215, and *Hennessey v. Taylor*, 3 L.R.A. (N.S.) 345.

It is generally held that a pedestrian and the operator of an automobile have reciprocal rights and duties when using a street car highway, and that neither must so exercise those rights as to injure the other. *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 A. & E. Ann. Cas. 396; *Apperson v. Lazro* (Ind. App.) 87 N. E. 97; *Brewster v. Barker*, 113 N. Y. Supp. 1026; *Seaman v. Mott*, 127 App. Div. 18, 110 N. Y. Supp. 1040; *Hannigan v. Wright*, 5 Penn. (Del.) 537, 63 Atl. 234; *Simeone v. Lindsay* (Del.) 65 Atl. 778.

It not being the duty of a pedestrian when crossing a street or walking in a highway constantly to be on the lookout for the approach of automobiles, it is for the jury to determine how far a failure to observe the amount and kind of travel is indicative of such want of care as will bar a recovery

ERROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Fred L. Vandever, for plaintiff in error:

Plaintiff was negligent in not seeing the approaching automobile.

Payne v. Chicago & A. R. Co. 136 Mo. 562, 38 S. W. 308; *Artz v. Chicago, R. I. & P. R. Co.* 34 Iowa, 153; *Weltner v. Bishop*, 171 Mo. 110, 65 L.R.A. 584, 71 S. W. 167; *Nugent v. Kauffman Mill. Co.* 131 Mo. 252, 33 S. W. 428; *Metropolitan Street R. Co. v. Agnew*, 65 Kan. 478, 70 Pac. 345; *Cleveland,*

C. C. & I. R. Co. v. Elliott, 28 Ohio St. 340; *Young v. Chicago, R. I. & P. R. Co.* 57 Kan. 144, 45 Pac. 583.

Messrs. Pelton & McGee and George A. Safford, with **Messrs. Lillis & Hymers**, for defendant in error:

The question, "And this accident happened simply because you were in a real hurry to get the deliveries made, and you jumped down off the wagon, didn't you?" was properly excluded as calling for a conclusion.

5 Enc. Ev. pp. 651, 662; *Kelley v. Detroit, L. & N. R. Co.* 80 Mich. 237, 20 Am. St. Rep. 514, 45 N. W. 90; *Ireland v. Cincinnati, W. & M. R. Co.* 79 Mich. 163, 44 N. W. 426; *Harris v. Clinton Twp.* 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425.

A person in a public street has a right to

by one injured by an automobile. *Hennessey v. Taylor*, supra; *Arseneau v. Sweet*; *Apperson v. Lazro*; *Belleveau v. S. C. Lowe Supply Co. and Lampe v. Jacobsen, Tiffany & Co. v. Drummond*,—*infra*.

So, in the following cases it is held to be for the jury to determine whether due care was exercised.

Where one stepped into a street to board a street car at a usual stopping place without looking for, seeing, or hearing an approaching automobile, which did not give any warning, as he might reasonably assume that others would use due care with reference to his position; and he was not, therefore, required absolutely to keep the lookout for approaching automobiles. *Arseneau v. Sweet* (Minn.) 119 N. W. 46.

Where one crossing diagonally at the point of intersection of two busy city streets, after taking a few steps, was struck by a slowly moving automobile which he testified he did not see before leaving the sidewalk, there being conflicting testimony as to whether any warning of the approach of the automobile was given. *Lampe v. Jacobsen*, 46 Wash. 533, 90 Pac. 654.

Where, before starting diagonally to cross a street intersection where the street car track was torn up, one looked both ways without seeing an approaching automobile, but it did not clearly appear how frequently he afterwards looked in the direction from which the automobile approached. *Tiffany & Co. v. Drummond*, 168 Fed. 47.

Where a woman alighted from a street car without looking for approaching vehicles, and was struck by an automobile running upon the wrong side of the street. *New York Transp. Co. v. Garside*, 85 C. C. A. 285, 157 Fed. 521, affirming 146 Fed. 588.

The failure to look in either direction before alighting, at the conductor's direction, from the front end of a street car, at its usual stopping place in a busy city street, is not such contributory negligence as will prevent a recovery for injuries sustained by being struck, immediately upon reaching the ground, by an automobile run-

ning 6 miles an hour in the same direction as the car. *Brewster v. Barker*, supra.

As one, apparently a child, who has safely crossed in an easterly direction beyond the middle of a street, may assume that an automobile will avoid him, he is not guilty of contributory negligence where, as he looks back, he is struck by the lamp upon an automobile moving slowly in a southerly direction; but such question is properly left to the jury. *Benoit v. Miller* (R. I.) 67 Atl. 87.

An infirm person with defective eyesight, who was struck by a rapidly driven automobile coming from the rear while he was walking in the traveled portion of a highway, was not guilty of contributory negligence, where the course of the automobile was not changed or its speed slackened, although he was visible for from $\frac{1}{8}$ to $\frac{1}{2}$ mile, until its sudden approach so startled him as to cause him to jump to one side, just as the automobile swerved and struck him; whether he exercised due care being a question for the jury. *Apperson v. Lazro* (Ind. App.) 87 N. E. 97.

The question of due care is for the jury where one walking with two companions, on a dark night, along a country road, with street-car tracks at the side, was struck by an automobile with lamps lighted, coming from the rear; and it is error to exclude evidence that they frequently looked in that direction, and, just before the accident, one of the party looked back and said: "There are two cars coming;" and, looking again, also said: "let's hurry up, we can catch the second car at Reed's corner," as it cannot be held, as a matter of law, that the plaintiff could not rely on his companions, and whether he was justified in so doing was a question for the jury; and, if so justified, what was said was competent as tending to show, in connection with the other facts in the case, the circumstances under which he acted, and with reference to which his conduct must be judged. *Belleveau v. S. C. Lowe Supply Co.* 200 Mass. 237, 86 N. E. 301.

It is for the jury to determine the contributory negligence of, as well as what

rely upon the exercise of reasonable care on the part of drivers of vehicles to avoid causing injury, and a failure to anticipate the omission of such care does not render him negligent.

Caesar v. Fifth Ave. Coach Co. 45 Misc. 331, 90 N. Y. Supp. 359; *Hayward v. North Jersey Street R. Co.* 74 N. J. L. 678, 8 L.R.A. (N.S.) 1062, 65 Atl. 737; *Kathmeyer v. Mehl* (N. J. L.) 60 Atl. 40; *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 A. & E. Ann. Cas. 396; *Spina v. New York Transp. Co.* 96 N. Y. Supp. 270; *Buscher v. New York Transp. Co.* 106 App. Div. 493, 94 N. Y. Supp. 798.

degree of care should be observed by, one walking backwards while greasing a street-car track at a curve upon the south side of a street, who was struck by an automobile running at a high rate of speed without sounding any warning, which approached from the rear on the north side of the street, and, instead of continuing around the corner upon the right-hand side of the street, turned to the left so as to strike him. *King v. Green*, 7 Cal. App. 473, 94 Pac. 777. The court, in substance, said that, as the plaintiff's occupation required his presence in that part of the street devoted to the use of vehicles, he was not the same as an ordinary pedestrian, not because he was bound to exercise any less care, but because the care to be exercised must be determined from a different standpoint.

A verdict for the plaintiff will not be disturbed where it appears that at the time of the accident he was standing on the edge of a pavement with one foot on the curb in the act of stepping upon the roadway when he was struck by an automobile which was driven upon the curb, either through reckless management or inexperience of the driver. *May v. Allison*, 30 Pa. Super. Ct. 50.

In two Delaware nisi prius cases the jury was instructed, in substance, that, while it is the duty of one crossing a city street to make reasonable use of all his senses to observe impending danger, and a failure so to do is negligence, yet such reasonable use means such as an ordinary prudent and careful person would use under like circumstances; and, if a pedestrian saw an automobile before it struck him, or might have seen it in time to have avoided injury by the reasonable use of his senses, there can be no recovery; but, if the accident, by the exercise of reasonable care, could not have been avoided by the pedestrian, he would not be guilty of such negligence as will defeat a right to recover. *Hannigan v. Wright and Simeone v. Lindsay*, *supra*.

It is for the jury to determine whether it was contributory negligence for a boy of twelve years, in throwing up a ball, to run into the street to catch it, where he was struck by an automobile running at full

Moore, J., delivered the opinion of the court:

The plaintiff was injured on September 10, 1906, at about 5:30 P. M. He was two or three months over the age of fourteen. The accident occurred on Piquette avenue, which runs at right angles to Woodward avenue. Plaintiff was employed as a "jumper" on a delivery wagon, and in the performance of his duties it was necessary for him to follow the instructions of his driver and deliver packages to the proper addresses. The first street east of Woodward avenue, and parallel thereto is John R., and next east of John R. is Brush street. The delivery

speed, which gave no warning, and, as it approached the boy, "twitched" and hit him. *Turner v. Hall*, 74 N. J. L. 214, 64 Atl. 1060.

But it was held contributory negligence for a boy of twelve years to run suddenly into the street, in the middle of a block, to pick up a ball that had rolled therein, where he was knocked down and killed by an automobile operated in a careful manner. *Jordan v. American Sight-Seeing Coach Co.* 129 App. Div. 313, 113 N. Y. Supp. 786.

Freedom from contributory negligence is not shown where an aged man attempted to cross a crowded city street without observing the approach of an automobile, looking only at the people in front of him; it not appearing that he tried to avoid the various vehicles filling the street. *Wilkins v. New York Transp. Co.* 52 Misc. 167, 101 N. Y. Supp. 650.

So, due care is not shown by a pedestrian who, in crossing a street, apparently walked into a slowly moving automobile, notwithstanding its horn was sounded and bystanders shouted a warning, there being no evidence or inference that the driver of the automobile did not exercise due care, or that he omitted to do anything in his power to prevent a collision after he saw one was inevitable. *Seaman v. Mott*, 127 App. Div. 18, 110 N. Y. Supp. 1040.

It was contributory negligence for one to leap from a slowly moving trolley car in the nighttime, when its momentum was such as to carry him forward so that he could not look back and see an approaching automobile with lights burning brightly, which struck him the moment he attempted to cross a much-traveled highway, although before jumping from the car he looked up and down for approaching vehicles. *Starr v. Schenk*, 25 Montg. Co. Rep. 18.

One who observes an automobile 130 feet away before starting to cross a street, and does not look again in its direction, and is struck by it, is guilty of contributory negligence. *McCormick v. Hesser* (N. J. L.) 71 Atl. 55.

As to the duty of a pedestrian to avoid passing teams, see the case note to *Borg v. Spokane Toilet Supply Co.* 19 L.R.A. (N.S.) 160.

wagon approached Piquette avenue from the south on John R. street. Upon reaching Piquette avenue, the driver turned his horse to the right on Piquette avenue, and drove east toward Brush street. An automobile controlled by one of the employees of the defendant came to Piquette avenue from Woodward avenue coming from the south. When Piquette avenue was reached, the driver turned his automobile to the right, going in an easterly direction. When the wagon was a few feet from Brush street, the automobile attempted to pass on the north side of it, and struck the boy, who was badly injured. The case was tried before a jury who rendered a verdict for plaintiff. A motion was made for a few trial for the following reasons: (1) That said verdict was against the clear weight of the evidence offered and received at the trial of the said cause. (2) That the evidence establishes that the plaintiff was guilty of negligence, and that a verdict of no cause of action for the defendant should have been directed. (3) Because of the refusal of the court to peremptorily give those instructions of the defendant which would have ended the case, and not permitted the same to have gone to the jury for its consideration and deliberations. The court overruled the motion, giving his reasons therefor in writing. The case is brought here by writ of error.

There are eleven assignments of error grouped by counsel under three subdivisions. The first of these as stated by counsel is as follows: "The following question was asked plaintiff: 'And this accident happened simply because you were in a real hurry to get the deliveries made, and you jumped down off the wagon, didn't you?' Counsel feels as though it should have been permitted a good deal of latitude in the cross-examination of the plaintiff, especially in view of the testimony that had preceded this question." The question should be taken in connection with what preceded and what followed it.

The record shows as follows:

Q. Now, as a matter of fact, Clements, you were in a good deal of a hurry that night to make this delivery up on Brush because it was getting late, wasn't it?

A. Yes, sir.

Q. It was getting late, about half past 5, wasn't it?

A. Yes, sir.

Q. And the quicker you got your deliveries made the quicker you got home?

A. Yes, sir.

Q. And this accident happened simply because you were in a real hurry to get the deliveries made, and you jumped down off the wagon, didn't you? (Objected to as incompetent and immaterial.) The Court: 20 L.R.A. (N.S.),

I think I will exclude that. Exception to defendant.

Q. You were in such a hurry to get these deliveries made that you jumped down off of the wagon without stopping to look if an automobile was coming, did you not?

A. I looked before I got down off of the wagon, first looked at the side of the wagon and did not see it, and was struck just after I got down out of the wagon. I was taken over to the north curb of the north side of Piquette avenue; that is, after being picked up after the automobile had struck me. I was on that side of the street, and it was the closest to carry me.

It is apparent the question called for the conclusion of the witness. It is equally apparent that counsel was not prevented from cross-examining fully the plaintiff in relation to the occurrence.

The next subdivision relates to whether a verdict should have been directed in favor of defendant. In support of his contention, counsel cite Moore's Treatise on Facts, §161, *Payne v. Chicago & A. R. Co.* 136 Mo. 562, 38 S. W. 308, and other authorities. The law applicable to the case is not in dispute. The troublesome question is one of fact. The plaintiff claims that, before getting off the wagon to deliver his package, he looked toward Woodward avenue and saw no automobile, that the horse was then walking; that plaintiff jumped off the wagon with one bundle under his arm, alighting about 1½ feet from the wagon and a few feet in advance of the front wheels; that he then took two small packages from the bottom of the wagon just back of the dash, then began walking at the side of the wagon, to let the horse pass so he could go around back of it; that he had taken about 5 or 6 steps, when the automobile struck him in the back and left side; that he was knocked to the pavement, pushed and dragged across Brush street for a distance of about 66 feet, and dropped free of the auto; that after plaintiff became free of the machine it ran about 100 feet before stopping. It is also his claim that no warning was given of the approach of the automobile, and that, when he looked, it was either so near the south curb that his point of view was cut off by the wagon, or else that it was still in Woodward avenue approaching him at a great rate of speed, as was indicated by the distance the machine traveled after he was struck. It is also the claim of plaintiff that the driver had a clear space of 30 feet between the wagon and the north curb in which to pass, and that it was gross negligence to strike him with the machine when he was walking by the side of the wagon within 1½ feet of it, with his back toward the oncom-

ing machine. There was testimony tending to support these various claims of the plaintiff. In an action for injuries a street-car conductor who was struck by an automobile as he stepped from the forward end of his car to pass to rear of same, the evidence disclosed that the car which was bound south had come to a full stop before plaintiff alighted; that at that time the automobile was 15 to 18 feet distant, proceeding in a southerly direction at the rate of from 3 to 5 miles an hour, parallel and about 3 feet away from the track on which the car was standing, with a clear space of from 12 to 15 feet between the track and the curb of the westerly sidewalk; that the operator of the automobile had a clear view ahead of him; and that the plaintiff, as he stepped from the car, looked in the direction in which the car was to proceed; and it was held that questions of negligence and contributory negligence on the part of the plaintiff were for the jury. In this case the court said that the plaintiff had a right to rely upon the exercise of reasonable care on the part of the drivers of vehicles to avoid causing injuries to persons in the street, and that his failure to anticipate the omission of such care did not render him negligent. *Caesar v. Fifth Ave. Coach Co.* 45 Misc. 331, 90 N. Y. Supp. 359. It has been held that one running an automobile is bound to take notice of a person standing in the roadway conversing with a friend sitting in a carriage, and to use care not to injure him. *Kathmeyer v. Mehl* (N. J. L.) 60 Atl. 40. There is no imperative rule of law requiring a pedestrian, when lawfully using the public ways, to be continuously looking or listening to ascertain if auto cars are approaching, under the penalty that, upon the failure so to do, if he is injured, his own negligence must be conclusively presumed. *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 A. & E. Ann. Cas. 396. In this case the plaintiff testified she looked to see if there was any danger, but did not observe the defendant's automobile, nor hear any sign of its approach sounded. A witness called by her, who stood by her side before she attempted to cross the street, had observed the defendant's machine at some distance; but it was not shown that she communicated such information to the plaintiff. Upon such evidence, the court said that no such balancing of probabilities by plaintiff, with a willingness to take the risk of safely getting over before the defendant came up, was shown as to convict her of contributory negligence as a matter of law; and that, even if she had seen the defendant's machine approaching, and decided it was sufficiently distant to enable her safely to pass, she 20 L.R.A.(N.S.)

might have been found by the jury to have exercised due care, though the accident proved her judgment erroneous. See also *Spina v. New York Transp. Co.* (Sup.) 96 N. Y. Supp. 270; *Büschler v. New York Transp. Co.* 106 App. Div. 493, 94 N. Y. Supp. 798. The testimony of the driver shows that for some time before he overtook the delivery wagon he saw it, that he knew what it was. "I recognized the rig as a delivery wagon, but do not know as I ever saw that particular wagon on the street, but have seen that type of wagons before. I was thoroughly familiar with the kind of a wagon it was, and knew it was a wagon that was used in delivering packages, and I knew from observation about the streets of Detroit the character of the business that the people in charge of the wagon was doing. . . . I did not know whether one delivered the parcels and another drove the horse, but I did know that someone in charge of the wagon was in the habit of getting off of the wagon and running into houses to deliver parcels."

In view of the testimony, it was not a question of law to be determined by the judge in a directed verdict, but was a question of fact to be submitted to the jury under proper instructions. The other assignments of error do not call for discussion.

Judgment is affirmed.

NEW HAMPSHIRE SUPREME COURT.

MARY E. CUNNINGHAM

v.

C. R. PEASE HOUSE FURNISHING COMPANY.

(74 N. H. 435, 69 Atl. 120.)

Sale — dangerous substance — injury to user — liability.

1. A merchant selling stove blacking which explodes in use under such circumstances as to render him liable to the purchaser for injuries thereby caused is liable also to a member of the purchaser's family so injured, although he did not have him in mind when the blacking was sold, if he knew that the blacking was to be used on a stove, and that other members of the family were likely to use it.

Note.—As to liability of dealer for personal injuries from articles not obviously dangerous, see case note to *Clement v. Rommeck*, 13 L.R.A.(N.S.) 382.

As to liability of vendor for injuries to one not in privity with him, see case note to *Tomlinson v. Armour & Co.* 19 L.R.A.(N.S.) 923.

Same — negligence.

2. To entitle a purchaser of stove polish to hold the seller liable for its explosion because of his negligently selling it as safe for use, the purchaser must show that the seller's negligence was the sole cause of the injury.

Same — negligent or false statement.

3. One selling stove polish which explodes to the injury of the purchaser, when the latter attempts to use it, is liable for such injury if he knew that his statement, made to induce its purchase, that it was safe for the intended use, was false, or if he negligently made the statement believing it to be true, when the ordinary man having no more knowledge of the danger than he had would not have done so.

(February 4, 1908.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Hillsborough County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a nonsuit. Sustained.

Defendant sold to plaintiff's mother a can of 6-5-4 Self Shining Stove Lustre. The mother, having been attracted by an advertisement of the polish, went to defendant's store, where it was for sale, and was told that it could be put on a warm stove, the warmer the better. An attempt to use it on a warm stove resulted in an explosion to the injury of the plaintiff.

The action was in case declaring on the common-law count for negligence and upon certain sections of the statutes. A demurrer was sustained to the latter count, and a nonsuit ordered upon the former.

Further facts appear in the opinion.

Messrs. Doyle & Lucier, for plaintiff:

The defendant did not know that the article in question was safe to use in the manner in which he said it might be safely used, and in the manner in which he must have known it would be used by the plaintiff or someone else; and is liable for the injury caused by reason of such recommendation and sale.

Langridge v. Levy, 2 Mees. & W. 519; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; Wellington v. Downer Kerosene Oil Co. 104 Mass. 64; Farrant v. Barnes, 11 C. B. N. S. 553; Hourigan v. Nowell, 110 Mass. 470.

Messrs. Burnham, Brown, Jones, & Warren, for defendant:

The defendant did not sell the polish to the plaintiff or for her use, and there can be no privity of contract between them, and no liability that sounds in breach of contract either by way of implied warranty or otherwise.

20 L.R.A. (N.S.)

Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. 71 N. H. 532, 60 L.R.A. 116, 53 Atl. 807; West v. Emanuel, 198 Pa. 180, 53 L.R.A. 329, 47 Atl. 965; Gould v. Slater Woolen Co. 147 Mass 315, 17 N. E. 531; Slattery v. Colgate, 25 R. I. 220, 55 Atl. 639; Edwards v. Lamb, 69 N. H. 599, 50 L.R.A. 160, 45 Atl. 480.

A maker or vendor is not liable at the suit of an injured third party, unless he actually knows or should know he is putting out an imminently dangerous article.

1 Thomp. Neg. §§ 820-829; 7 Thomp. Neg. §§ 820-831; Benjamin, Sales, 5th ed. p. 456; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; Standard Oil Co. v. Parrish, 76 C. C. A. 405, 145 Fed. 829; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 2 L.R.A. (N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 A. & E. Ann. Cas. 124; Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. supra; Weiser v. Holzman, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797; O'Neill v. James, 138 Mich 567, 68 L.R.A. 342, 110 Am. St. Rep. 321; 101 N. W. 828, 5 A. & E. Ann. Cas. 177; Berger v. Standard Oil Co. 31 Ky. L. Rep. 613, 11 L.R.A. (N.S.) 238, 103 S. W. 245; 59 Cent. L. J. 324.

Young, J., delivered the opinion of the court:

The defendants' position is like that of one who "puts destructive . . . materials in situations where they are likely to produce mischief." Ricker v. Freeman, 50 N. H. 420, 432, 9 Am. Rep. 267. Such a person must respond in damages to those who are injured because of his acts, if he either knew or ought to have known that the materials were dangerous, and that the persons injured might come in contact with them. Hobbs v. G. W. Blanchard & Sons Co. 74 N. H. 116, 124 Am. St. Rep. 944, 65 Atl. 382; Scott v. Shepherd, 3 Wils. 403, s. c. 2 W. Bl. 892; Cooley, Torts, 78.

Although the defendant probably did not have the plaintiff in mind when it sold the blacking to her mother, it knew the mother bought it to use on her stove, and that other members of the family were likely to use it. Consequently the plaintiff can recover if her mother could have recovered had she been injured instead of the plaintiff. The defendant will not be prejudiced by the assumption that the plaintiff cannot recover if her mother could not, and by the omission to consider whether the situation might not be such that recovery might be had against both the mother and the defendant. Ricker v. Freeman, supra. The case, therefore, is con-

sidered as though it were an action by the mother. The declaration does not sound in either assumption or deceit. Whether she could maintain an action for a breach of warranty need not be considered; and whether she could recover for deceit will be considered only so far as is necessary to distinguish between facts constituting an intentional injury and those constituting a negligent one.

The common law imposes upon the seller the duty to refrain from falsely representing material facts for the purpose of misleading the buyer. The seller may praise the good qualities of his wares as much as he pleases, and is not bound to disclose their defects to the buyer, even if he knows of them, and is aware that the buyer believes he is purchasing sound goods. But if, for the purpose of inducing the prospective buyer to change his position, the seller sees fit to make any representation, either express or implied, in respect to facts which are material to the subject-matter of the sale, he must tell the truth. *Shackett v. Bickford*, 74 N. H. 57, 7 L.R.A.(N.S.) 646, 124 Am. St. Rep. 933, 65 Atl. 252; *Spעד v. Tomlinson*, 73 N. H. 46, 61, 68 L.R.A. 432, 59 Atl. 376; *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Rowell v. Chase*, 61 N. H. 135; *Springfield v. Drake*, 58 N. H. 19; *Pettigrew v. Chellis*, 41 N. H. 95; *Hanson v. Edgerly*, 29 N. H. 343; *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401.

The defendant admits its liability for an intentionally false statement of fact, but contends that it is not liable for a false statement honestly believed to be true, though negligently made. Although there are authorities which sustain that position (*Derry v. Peek*, L. R. 14 App. Cas. 337; *Angus v. Cliford* [1891] 2 Ch. 449, 470), it is not the view which obtains in this jurisdiction. In this state a person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he sustains in an action of deceit, when the maker of the statement knew it to be false, and in an action of negligence when he ought to have known it to be so. *Shackett v. Bickford*, supra; *Hewett v. Woman's Hospital Aid Assn.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807; *Edwards v. Lamb*, 69 N. H. 599, 50 L.R.A. 160, 45 Atl. 480; *Judge Jeremiah Smith* in 14 Harvard Law Rev. 184.

If, therefore, the defendant's false representation that it was safe to use the blacking on a hot stove was the cause of the plaintiff's injury, the facts that it thought 20 L.R.A.(N.S.)

the statement was true and had no intent to deceive do not necessarily bar her right to a recovery. Proof of those facts would merely require her to prove facts not essential to her case, if the representation was deceitfully made. If the representation was deceitful, she could recover by showing that its fault contributed to cause her injury; but, if it was merely negligent, she must show that it was the sole cause of her injury. 14 Harvard Law Rev. 188. The reason for this is that the law makes it the duty of everyone to use ordinary care to avoid being injured by another's negligence; but it imposes on no one the duty to use such care to avoid being injured by another's intentionally wrongful act. In actions for negligence contributory negligence is a defense; in actions for intentional injuries, it is not.

There is a difference, also, between intentional and negligent wrongs as to the facts necessary to establish the defendant's fault. If an injury is intentionally inflicted, proof that the defendant did the act establishes his fault; but, where negligence is charged, proof of the act must be supplemented by proof that the average man would not have done it. So in this case, if the defendant, for the purpose of inducing the plaintiff to buy the blacking, told her it could be safely used on a hot stove, and if neither knew nor cared whether its statement was true or false, it would be liable. *Shackett v. Bickford* and *Spעד v. Tomlinson*, supra. But, if it had no thought of deceiving her, it would not be enough to show that it made the representation. She must then go further and show, that the ordinary man would not have made it. 14 Harvard Law Rev. 188. The test, therefore, to determine whether the defendant was in fault for making the representation, is to inquire whether the ordinary man, having no more knowledge of the situation and its dangers than the defendant is shown to have had, would have told the plaintiff it was safe to use the blacking on a hot stove.

It cannot be said as a matter of law that the ordinary man would have made such a representation, unless it is common knowledge that the average man who engages in trade is accustomed to tell his patrons, not what he believes to be the truth in respect to his goods, but what he thinks will induce them to buy. It can be found from the evidence that the defendant thought the plaintiff was looking for a blacking to be applied to a stove in which there was a fire, and that it represented the blacking sold to the plaintiff as safe to use in that way, for the pur-

pose of inducing her to purchase it, when it either knew that the representation was false, or did not know it to be true. It is not common knowledge that the ordinary man is accustomed to make such representations to induce customers to buy his goods; and it cannot be said as a matter of law that an ordinary man selling a new blacking would affirm that he knew it would do all, and more than all, its makers claimed for it, when, in fact, he knew nothing of its qualities, and had done nothing to inform himself as to the soundness of the makers' claims.

The plaintiff was entitled to go to the jury on the common-law count. The demurrer to the statutory count was properly sustained, for it is not alleged that the defendant sold the blacking as an illuminating oil (Pub. Stat. 1901, chap. 126, § 26), or that it sold naphtha under an assumed name (Pub. Stat. 1901, chap. 126, § 28).

Exception sustained

Peaslee, J., did not sit. The others concurred

NEW MEXICO SUPREME COURT.

TERRITORY OF NEW MEXICO, Appt.,

v.

CHARLES R. JONES.

(— N. M. —, 99 Pac. 338.)

Gaming — slot machines.

1. Slot machines, where the chances are unequal, with the chances in favor of the machine, are *ejusdem generis* with "gambling games" specifically mentioned in § 1, chap. 64, p. 25, Laws 1907, and are illegal. Same — "banking games."

2. Slot machines of the kind described in the stipulation filed in this case are "banking games," and come within the inhibition of § 1, chap. 64, p. 25, Laws 1907.

(September 3, 1908.)

Headnotes by MILLS, Ch. J.

Case Note.—Operation of slot machine as gambling.

Although, on account of the difference in the statutes involved, the question is variously presented in the following decisions, the generally prevailing opinion seems to be that the operation of slot machines will be considered as gambling, or as coming within the inhibitions of statutes against lotteries or gambling, where the return to the player is dependent upon an element of chance, and this even though he is assured of his money's worth of some commodity, and hence cannot lose.
20 L.R.A. (N.S.)

APPEAL by the Territory from a judgment of the District Court for Guadalupe County sustaining a demurrer to an information charging defendant with having unlawfully operated certain gambling games. Reversed.

Statement by MILLS, Ch. J.:

On April 6, A. D. 1908, an information was filed in the district court of the sixth judicial district, sitting within and for the county of Guadalupe, charging Charles R. Jones and William H. Gleason with having unlawfully run and operated (1) a banking game of chance, to wit, a slot machine; (2) with having unlawfully run and operated a banking game of chance, to wit, roulette; and (3) with having unlawfully run and operated a certain banking game, to wit, a slot machine. The defendant Gleason was not found, but Charles R. Jones was taken into custody. On April 6, 1908, the territory dismissed the second count of the information, being the count which charged the defendants with having unlawfully run and operated the banking game of chance known as roulette. The defendant filed a demurrer to the information, but later entered a plea of not guilty. The demurrer was afterwards sustained by the court, and the information dismissed, to which action of the court the territory excepted, and prayed an appeal to the supreme court. On the 6th day of July, 1908, a stipulation was entered into between the several attorneys in the case, which omitting the caption and formal parts, reads as follows, to wit: "Stipulation of Facts: It is hereby stipulated and agreed by the undersigned that the following facts shall be and constitute the basis upon which the supreme court may act in determining its action upon the appeal in the above-entitled cause, upon the appeal to the territory from the order of the district court in sustaining defendants' demurrer to the informations filed herein: That, on the date mentioned in said information, the defendant Charles R. Jones, being the owner and proprietor of a saloon in Santa Rosa, Guadalupe county, New Mexico, did run and operate the follow-

In general.

In *Jeffries v. State*, 61 Ark. 308, 32 S. W. 1080, one who employed another to "look after" a slot machine which stood in the saloon of a third party, to keep it from being broken, into which machine persons would slide a nickel, and, if the machine opened, would get all in the box, and, if the machine did not open, the person putting in lost his nickel, was held properly convicted of "keeping and exhibiting a gaming machine."

In *Kolshorn v. State*, 97 Ga. 343, 23 S. E. 829, it was held that, where it appeared from the evidence that the accused kept and maintained a machine so contrived that, if

ing device or apparatus, which was kept and exhibited and owned by him at his saloon in said town, and which is the slot machine mentioned in the information filed by the district attorney herein, and to which defendant filed the demurrer above mentioned, namely: A case, box, or frame about 5 feet in height and about 4 feet wide; that on the inside thereof is certain machinery so constructed as to make it work automatically when in running order; that there are a number of slots of different colors on the top of the machine, and, if the player puts a nickel into the slot of any color, and pushes down a crank, it starts a circular disk to revolving, containing colors corresponding to the colors on the slots, and, if the color shown by the indicator over the disk at

which the disk stops revolving is the same color as the slot in which the coin is deposited, a certain valve will open and pay out to the player from 1 to 40 times the amount played by the player, according to the color played by him. If the indicator does not stop at the color played, the player loses the amount played. That there is a common fund placed in the machine by the defendant and constantly kept there, against which the players can play, to which the players' losings are added and from which his winnings are taken. In other words, if the nickel is placed in the green slot, and the disk stops at the point so the indicator points at the green color on the disk, it pays 5 times the original nickel played, and the yellow pays 10, the white 20, and the blue

one dropped a nickel in a slot therein, it might fall into certain compartments, and nothing would come out, or might fall into some other compartments, from which three nickels would drop out; and that the object and purpose of the accused in keeping and maintaining the machine were to win money in this manner,—he was guilty of unlawfully keeping and carrying on a certain scheme and device for the hazarding of money.

In *Conners v. Springfield*, 130 Ill. App. 240, the words "or other instrument or device commonly used for the purpose of gaming," as used in an ordinance imposing a penalty upon the keeping of any gambling house or rooms, was held to include slot machines.

In *Lyman v. Kurtz*, 166 N. Y. 274, 59 N. E. 903, the maintenance of a nickel slot machine, the mechanism of which was such that when a 5-cent piece was dropped into one of the several slots representing several colors, a disk was made to revolve on which were painted corresponding colors, and, when it ceased to revolve, the color upon its face opposite a finger determined whether the player had won or lost, the sum won being delivered by a mechanical device to the player in a cup, was held to violate a condition of a bond that an applicant for a liquor tax certificate should not permit any gambling to be done in the place where the traffic in liquors was to be carried on.

In *Lyman v. Brucker*, 26 Misc. 594, 56 N. Y. Supp. 767, a saloon keeper maintaining in his saloon a nickel slot machine and permitting it to be used by those who visited his premises, the player of which stood chances of losing his nickel or of having delivered to him by the machine a number of nickels, was held to have violated the conditions of his bond by suffering or permitting gambling to be done in his place of business.

In *Heelman v. State*, 6 Ohio N. P. 258, it was held that evidence of the placing of a nickel in a slot, whereupon defendant remarked that everybody who put a nickel in the slot was entitled to a cigar or a drink, was insufficient to show that de-

fendant was guilty of suffering a game to be played for gain by means of a gambling machine.

In *Christopher v. State*, 41 Tex. Crim. Rep. 235, 53 S. W. 852, it was held that, although a machine was an automaton, not only receiving the bets but deciding them, and paying the money to itself or to the winner, it was, nevertheless, a gaming device and within the operation of a statute which, after enumerating a number of games, the exhibition of which for the purpose of gaming was prohibited, went on to provide: "It being intended by the foregoing article to include every species of gaming device known by the name of 'table' or 'bank,' of every kind whatever, this provision shall be construed to include any and all games which in common language are said to be played, dealt, kept, or exhibited," although slot machines had not been invented when the statute was passed; the statutes relating to gaming being evidently framed to cover not only every gambling device then known, but all others that might be invented or become known. (Compare *Ex parte Williams*, *infra*.)

In *Meeks v. State* (Tex. Crim. App.) 74 S. W. 910, it was held that evidence that defendant kept in his saloon a slot machine, which, when operated upon the insertion of a nickel or a metal check, would display poker hands, such hands winning, in proportion to their value, various numbers of cigars; that, in paying the winnings, the machine did not work automatically, but retained what was played into it, and defendant in person paid the player; that it was generally the custom to pay in trade checks unless cigars were demanded; that there was printed on a card attached to the machine the statement, "Every 5 cents played gets one 5-cent cigar," but that if the party lost, defendant did not pay anything unless he demanded it; and it was not the general rule of players to ask for and receive anything unless they won; that the machine would win in such a rising scale that, while it would play about even, it would lose altogether about four times out of five; that the machine was kept as

40, when any of the same are similarly played. If, on the other hand, the indicator shows on some color which the player has not played, his money so placed by him goes into the common fund, and becomes the property of the defendant, and is lost to the player. Whether or not the player wins or loses is wholly a matter of chance. The machine above described is a game of hazard or chance, in which small sums of money are ventured for the chance of obtaining a larger sum of money. The machine above described is what is known as a percentage game; that is, the chances are unequal in favor of the owner. The above machine and device is not in any way operated with cards or dice. This stipulation is only for the purpose of this appeal, and shall

not be used on any trial or hearing on the merits, and shall be settled and used as a bill of exceptions. It is agreed by the plaintiff that the defendant does not waive his right to move for the dismissal of the appeal herein, or any objection he may desire to make to the trial of the case by the supreme court."

Mr. James M. Hervey, Attorney General, for appellant:

A slot machine is a gambling apparatus or device in which the chances are unequal in favor of the exhibitor and against the player, and is a banking game within the inhibition of U. S. Laws 1907, chap. 64, p. 25, § 1.

People v. Carroll, 80 Cal. 157, 22 Pac.

a trade leader for the purpose of attracting crowds into defendant's place of business and increasing his sales,—was sufficient to sustain a conviction for exhibiting a gaming table and bank, commonly called a "slot machine," for the purpose of gaming.

The decision in *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210, is sufficiently set forth in the case reported.

In *Fielding v. Turner* [1903] 1 K. B. 867, it was held that a shopkeeper having in his shop an automatic machine, the player of which, by pulling down and letting go a spring, discharged his penny so that it might go into one of seven compartments, four of which retained the penny in the machine, two of which returned it to the player, and one of which discharged a ticket entitling him to receive from the shopkeeper twopenny worth of articles sold in the shop, was properly convicted under the gaming house act of 1854, § 4, for having opened, kept, and used his shop for the purpose of unlawful gaming being carried on therein. And it was held that, while continuous practice with the same machine might enable the person to acquire knowledge as to the strength of the particular spring, and thereby enable him to be more skilful in making the penny fall into the center compartment than in the case of a person who had not the same practice, the use of the machine did not constitute a game of skill in the proper sense of the word.

In *Thompson v. Mason*, 68 J. P. 270, it was held that the occupier of a shop, who kept a machine similar to that described in *Fielding v. Turner*, supra, except that it contained five compartments instead of seven, only two of which retained the money, was properly convicted of permitting the shop to be used for the purpose of unlawful gaming, although there was evidence that dexterity in the play could be acquired to some extent by continuous practice with the machine or with machines of similar construction.

20 L.R.A. (N.S.)

Under anti-lottery provisions.

In *Loiseau v. State*, 114 Ala. 34, 62 Am. St. Rep. 84, 22 So. 138, evidence that one had in his cigar store a slot machine, which, when a nickel was dropped and a lever pressed, displayed card hands; that three certain parties went into said store, and each of them dropped five nickels into the slot, agreeing among themselves that the one after whose play the machine would indicate the highest card hand should have all the cigars which the said nickels purchased; that the defendant furnished from his stock of cigars a nickel cigar for each nickel which was put into the machine by said three parties; and that, when it was determined which one had made the highest score, the defendant delivered to such party cigars to the amount of and equal in value to the amount of the nickels put into the machine,—was held to support a conviction for setting up or carrying on a lottery; the court saying: "Calling it by name a slot machine instead of a lottery machine does not vary its character; nor does the fact that parties agreed that the winner should receive the value of the money in cigars, instead of the money itself, exert any influence in determining the character of the winning chance to have been by lot."

In *State v. Vasquez*, 49 Fla. 126, 38 So. 830, it was held that a machine from which one who put in a check, costing 5 cents, stood a chance of getting, in addition to a cheap cigar and a tune from a musical instrument, two or more, up to forty, additional checks that were good for 5 cents each in trade at the place in which the machine was placed, was a gambling apparatus which was not protected by a statute licensing "lung testers, striking machines, weighing machines, chewing-gum stands, or automatic penny in the slot machines, or any other device of a similar nature," especially where the state Constitution expressly prohibits lotteries.

In *New Orleans v. Collins*, 52 La. Ann. 973, 27 So. 532, it is held that the use of a slot machine where an element of

129; *Stearnes v. State*, 21 Tex. 693; *Webb v. State*, 17 Tex. App. 206; *Crow v. State*, 6 Tex. 335; *Randolph v. State*, 9 Tex. 521; *Bell v. State*, 32 Tex. Crim. Rep. 187, 22 S. W. 687; *Faucett v. State*, 46 Tex. Crim. Rep. 114, 79 S. W. 548; *Mims v. State*, 88 Ga. 458, 14 S. E. 712; *Brown v. State*, 40 Ga. 692; *Com. v. Wyatt*, 6 Rand. (Va.) 694; *Christopher v. State*, 41 Tex. Crim. Rep. 239, 53 S. W. 852; *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210; *Portis v. State*, 27 Ark. 360; *Trimble v. State*, 27 Ark. 355; *Euper v. State*, 35 Ark. 629; *State v. Rosenblatt*, 185 Mo. 114, 83 S. W. 975; *Eubanks v. State*, 5 Mo. 451; *State v. Gitt Lee*, 6 Or. 426; *Re Lee Tong*, 9 Sawy. 333, 18 Fed. 253; *Meeks v. State* (Tex. Crim. App.) 74 S. W. 910.

Mr. J. E. Wharton for appellee.

chance determines whether the prizes are to be given brings such operation under the definition of a lottery, whether the prizes given are stock in trade of licensed establishments or not.

As affected by nature of winnings.

In *Ex parte Williams* (Cal. App.) 87 Pac. 565, a statute making it a misdemeanor to conduct various enumerated games, "or any banking or percentage game, played with cards or dice, or any device for money, checks, credit, or other representative of value," was held not to render unlawful the keeping of a slot machine operated by dropping a nickel and pressing a lever, causing the machine to display various card hands, and where, if the proper combination of cards was shown, the party putting the nickel in the slot was entitled to from one to forty cigars according to the value of the hand shown, for anything better than jacks, other combinations not winning anything. Although the machine as thus operated was a banking game, it was held that the legislature did not intend to include cigars within the words "or other representative of value," especially where, at the time the statute was enacted, such a machine had not been invented. (Compare *Christopher v. State*, supra.)

In *State v. Woodman*, 26 Mont. 348, 67 Pac. 1118, a statute imposing a penalty upon the operation of any nickel-in-the-slot machine or other similar machine "for money, checks, credits, or any representative of value, or for any property or claim whatever," was construed as prohibiting the operation of a machine displaying poker hands, the player of which gets one or more cigars for a pair of kings or better, but who, upon a hand of less value, gets nothing. It was contended that the expression "any property or thing whatever," following the particular words, "money, checks, credits," etc., should be held to include only things *ejusdem generis* with those specifically named, and therefore that

Mills, Ch. J., delivered the opinion of the court:

As this court stated in the case of *Territory v. Lotspeich*, 94 Pac. 1025, some doubt may exist as to whether the right of the territory to appeal on quashed indictments includes informations; but, as no question was raised by the appellee on this point, and as the decision of this case is of great interest to a large number of citizens of this territory, we will proceed to consider the appeal on its merits.

The sole question involved in this case is whether or not the running and operating of a slot machine, such as is described in the stipulation of facts set out above, comes within the inhibition of § 1, chap. 64, p. 25, Sess. Laws 1907, which act is entitled: "An Act to Prohibit Gambling in the Terri-

nickel-in-the-slot machines for the distribution of cigars or other merchandise do not fall within the prohibition. In ruling adversely to this contention, the court held that the rule invoked is but a rule of construction to be used in ascertaining the legislative intent, and not for the purpose of controlling the words of the statute, or of confining its operation to narrower limits than the legislature intended, and therefore is not applicable where, as in the case under consideration, the expression must signify something beyond the specific articles enumerated, or else must be rejected entirely as having no import whatever.

Where player is not subjected to loss.

In *Meyer v. State*, 112 Ga. 20, 51 L.R.A. 496, 81 Am. St. Rep. 17, 37 S. E. 96, a dealer in cigars and chewing gum having in his store a machine which, when operated by placing a nickel in the slot and pulling a handle down, would exhibit a number of cards constituting a poker hand, the person depositing the nickel being entitled to a cigar or a package of gum, each valued at 5 cents, and, in addition thereto, to a prize according to the hand displayed, was held to be guilty of violating § 407 of the Penal Code, which declares that "no person, by himself or another, shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money, or valuable thing."

In *Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep. 293, 39 Atl. 1021 it was held that a slot machine displaying poker hands, the player being in any event entitled to a 5-cent cigar, and to additional cigars if the machine showed "three of a kind" or better, was a gambling device within the meaning of a statute prohibiting "every lottery, policy, policy lottery, policy shop, scheme or other device of chance of whatever name or description." The court said: "In the case before us it is idle to assume, or concede, that the person putting his 5

tory of New Mexico." Section 1 of this act, as shown by the engrossed copy on file in the office of the secretary of New Mexico, reads as follows, to wit: "Section 1. It shall hereafter be unlawful to run or operate any banking games of chance, such as faro, monte, pass-faro, pass-monte, twenty-one, roulette, chuck-a-luck, hazard, fan tan, poker, stud poker, red and black, high and low, craps, or any other banking games or games of chance played with dice or cards by whatsoever name known, in the territory of New Mexico." In the bill on file in the office of the secretary the word "craps" is interlined in ink, but no question has been raised as to its being the act which passed the legislature, and which was duly signed by the proper officials and became the law of the territory. It is unnecessary for us to

go into a history of the legislation in regard to gambling in this territory, as the same is set out quite fully in the exhaustive briefs filed by counsel in this case. Suffice to say that certain gambling games were permitted by law to be run in the year 1887, upon the paying of a license upon each gaming table and apparatus used in gambling, and, with certain slight changes, usually in the amount of the annual license to be paid, this remained the law up to the sitting of the legislature in the year 1907. In the year 1897 a license was first specifically laid upon slot machines by name, but the license so imposed was not as great as that laid upon gaming tables and other apparatus used in gaming by the law of 1887, and its amendments.

Section 1, chap. 64, p. 25, Laws 1907, which we are now considering, makes it un-

cents into the machine may be doing so merely as a means or mode of buying a 5-cent cigar. It is idle to deny that the impelling motive is the hope of getting other cigars for nothing. If the machine did not afford that chance it would not be used. True, the cigar dealer sets up the machine to increase his trade, and is recompensed by that increase for any losses, so that in the end he loses nothing; but he does so by arousing and stimulating the gambling propensity, the very propensity the legislature evidently seeks to repress. The element of chance is the soul of the transaction. The operator hopes by chance to get something for nothing. The dealer hopes chance will save him from giving something for nothing. Each is pecuniarily interested adverse to the other in a result to be determined solely by chance. To use the language of the street, 'it is a gamble' which will win, and we have no doubt the transaction is 'gambling' in the statutory sense of the word."

In *Cullinan v. Hosmer*, 100 App. Div. 148, 91 N. Y. Supp. 607, the operation of a slot machine into which any person dropping 5 cents became entitled by its operations to at least one 5-cent cigar, and possibly to three, was held to violate the condition of an undertaking of an applicant for a liquor-tax certificate that he would not "suffer or permit any gambling to be done in the place designated," there being absent any element of chance and resulting loss so far as the operator of the machine was concerned; but in *Re Cullinan*, 114 App. Div. 654, 99 N. Y. Supp. 1097, the same court announced that, upon more mature consideration of the question, and in view of a decision of the court of appeals subsequently coming to its attention, it had arrived at a different conclusion. It was there held that the maintenance in a saloon of a slot machine known as the Yale Wonder Clock, which, upon being operated, dis-

charged disks entitling the player to 5, 10, 15, or 25 cents in trade, was a violation of a provision of the liquor-tax law prohibiting gambling in a saloon. The court said: "The chief element of gambling is the chance or uncertainty of the hazard. The chance may be in winning at all, or in the amount to be won or lost. In using the present machine we may assume that the player cannot lose. By far the greater majority of the checks called in trade for the precise sum deposited in the slot. If every ticket represented 5 cents, the machine would not be patronized. The bait or inducement is that the player may get one of the checks for a sum in excess of the nickel he ventures; and that is the vice of the scheme. If he wins more than he pays, the proprietor must lose on that discharge of the ticket. To constitute gambling it is not important who may be the loser."

In *Lytle v. State* (Tex. Crim. App.) 100 S. W. 1160, it was held that one who, on various occasions, deposited a nickel in a contrivance known as a Yale Wonder Clock, which discharged checks entitling the player to 5, 10, 15 or 25 cents worth of merchandise, working automatically and requiring no personal supervision, was properly convicted of unlawfully betting at a gaming table and bank.

In *Ogilvie v. Benigno* (1906) 7 F. 82 (as digested in 2 *Butterworths' Ten Yrs. Dig.* 14), it was held that an automatic machine which involved the manipulation by the players of a cup for the purpose of intercepting a ball, which ball was propelled by a spring so as to fall within reach of the cup as it bounded from various points in its downward course, was an implement for playing a game at hazard, although a certain amount of success in working the machine could be acquired by practice, and though a player, even if unsuccessful, received an article of some value in return for his penny.

lawful to run and operate (1) any banking games of chance such as faro, etc., or (2) any other banking games, or (3) games of chance played with dice or cards by whatever name known. An examination of the stipulation shows that the defendant did run and operate a slot machine in his saloon in the town of Santa Rosa; that there was a fund placed in the machine by the defendant, and constantly kept there, against which the players played, and to which his losings were added and his winnings taken; that the machine is what is known as a percentage game, and that the chances are unequal in favor of the owner of the machine. It is a well-settled rule of law that, where general words of prohibition follow an enumeration of particular games or devices which are prohibited, such general words must be construed *ejusdem generis* with the games or devices which are specifically named. 20 Cyc. Law & Proc. p. 880. Is, then, a slot machine, such as is described above, of the same general kind or species as the particular games prohibited in this territory? No member of this court, perhaps fortunately, has had sufficient personal experience to pass upon the question as to whether or not a slot machine such as is involved in this case is within the same class as the games prohibited by § 1 of the act we are considering; but an examination of the authorities cited by counsel in their briefs convinces us that some of the courts, which have passed upon statutes prohibiting gambling, gave the subject of gaming and gambling devices deep and careful study, and evidently often burned the midnight oil pursuing their investigations and watching the votaries of the Goddess of Fortune as they tempted Fate by the turning of a card, the throwing of dice, or guessing the number and color on which the lively roulette ball would finally come to a stop. In one of the earlier cases decided in this country the court used apt words in classifying games of chance. It says: "This court is not advised that there is, or can exist, but two kinds or classes of games of chance. The first is where the chances are equal, all other things being equal. The second is where, all other things being equal, the chances are nevertheless unequal; that is, in favor of one side. The standard games enumerated, so far as they are understood by this court, are of the second class, and in all three of them the chances are in favor of the exhibitor of the game or table. Now, the playing charged in the information is at a game which, by the evidence, is proved to be a game wherein the chances are unequal, and in favor of the exhibitor of the table. It must therefore belong to the same class, and be of the like kind of gaming, to which 20 L.R.A. (N.S.)

the enumerated games belong. The advantages or chances in favor of the player or exhibitor of the table are not the same in each case, but in each case the chances are in his favor, and this is the distinctive character which marks them as games 'of the same or like kind;' and, when of the same or like kind, as classed above, it matters not by what denomination they are distinguished, or whether they are played with cards or dice, or in any other manner whatsoever. All such games, when played or exhibited *lucris causa*, are prohibited by the act under consideration, and subject to the penalties prescribed; but, if exhibited and played, not for the purpose of gain, they may or may not be offenses against the general law prohibiting gaming at cards, etc., according to circumstances." Com. v. Wyatt, 6 Rand. (Va.) 694. Bearing this definition in mind, we are clearly of the opinion that a slot machine such as that described in the stipulation in this case comes within the inhibition of our statute, in that it is a game of chance similar to those specifically named in the act, and that it is also a banking game. A fund was placed in the machine, and constantly kept there by its owner, against which the players bet and to which their losings were added and their winnings taken. The machine was also a percentage game, with the chances unequal in favor of the owner. This machine seems to us to contain all of the elements of the gambling games prohibited by the statute.

The contention of the attorneys for the defense is that there can be no unlawful gambling game run in this territory, unless there is a man in charge of the game who pays the bets, takes in the winnings, etc. We do not, however, regard the presence of the operator of the gambling device as essential. Slot machines are mechanical gamblers, and, being impassive and having no sensations of any sort, they are more likely to win than gambling games which are run by gamblers, who have all of the human passions and feelings. Playing against a slot machine is a struggle between a man and a machine,—a man with nerves and emotions, a machine with no nerves and no emotions. As was well said in *Christopher v. State*, 41 Tex. Crim. Rep. 239, 53 S. W. 852, in speaking of slot machines, "as to whether this is one of the gaming devices inhibited by statutes depends both on its construction and use. We gather from the statement of facts that, although the machine was an automaton, it was very skillfully constructed for the purpose of gaming. It not only received the bets, but decided them, and paid the money to itself or to the winner, without the intervention, for the time being, of the keeper or

exhibitor, but we also gather that this machine was put in place and arranged and set in motion, and that, when it was out of order, it was rearranged and repaired so it could operate. It was so skillfully constructed to serve its purpose that, according to the testimony, 'the chances were against the outsiders as four in favor of the machine to one against it.' It also occurs that the machine did not keep the money it won, but that the profits were divided between appellant and his copartner. We think this device comes fully within the meaning of the definition given by Judge Roberts in the case of *Stearnes v. State*, 21 Tex. 693." In this case slot machines of the kind described in it were declared to be gaming devices within the meaning of the laws of the state of Texas, although that law was passed previous to the invention of slot machines. In the case of *Meeks v. State* (Tex. Crim. App.) 74 S. W. 910, the Texas courts again held that a slot machine, constructed somewhat differently from that described in the case of *Christopher v. State*, supra, was within the inhibition of the statute.

The last case which we deem it necessary to cite in this opinion is that of *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210, which was decided as late as the year 1904, and, as this case is in our opinion decisive of the case at bar, we will quote from it at some length. The indictment in that case charged that the defendant, Gaughan, "did knowingly and unlawfully exhibit a certain gaming table commonly called a slot machine, being a table and machine of like kind to A. B. C. and E. O. tables, and faro bank, wheel of fortune, and keno tables, which machine is played by dropping coins into the slot as indicated by the machine, the coins used being a nickel, a dime, and a quarter, or twenty-five-cent piece, and the games played on said machine are games in which the chances are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor, the said Frank Gaughan, of the said gaming table, the said slot machine." In its opinion in deciding this case, the learned court says: "We think the slot machine is essentially a banking game. When the player wins, if it happens that he does win, the money is paid from the machine, the bank fund or deposits of the previous and less fortunate players. It is played by the machine or exhibitor on the one side, and any and all players who choose to play on the other side, and the chances to win are unequal, with the greater number of chances in favor of the machine or exhibitors. . . . If the use of slot machines, as they are used, is in fact a game, and, being a game, is of such character as may properly and legally be said to be a game of like kind with 20 L.R.A. (N.S.)

the prohibited games named, within the true intent and meaning of the statute creating and defining the offense, then the power and duty of the courts to punish the keeper or exhibitor of such machines is precisely the same as though the name 'slot machine' was written on the statute. . . . What, then, is meant by table of 'like kind' as used in this section? Is it absolutely necessary that there shall be a real table, or are the games named intended to point out certain forms of gambling and include all games of that particular form and character? I am clearly of opinion that the legislature intended to forbid certain kinds of gaming, amongn which are faro banks and keno tables, and all other games like them. . . . Our legislature has not deemed it necessary to prohibit all forms of gaming, . . . but no game of unequal chances can be played anywhere lawfully. The legislature has, in effect, said that people may indulge in certain games of amusement, or even bet on them to a limited extent, but that no person shall cheat his companion in the game by insisting on playing a game wherein the chances for winning are all on his side. . . . The games prohibited by this chapter—and indeed all unlawful gaming—may be divided into two classes. To the first class belong the games wherein the chances are equal; to the second class belong the games wherein the chances are unequal, and all other things being equal, the unequal chances being in favor of the keeper or exhibitor of the game. The games falling under the second class are enumerated in the statutes as 'A. B. C., E. O., and keno tables and faro banks and tables of like kind.' If the words 'slot machines' were inserted in the statutes and their use prohibited, very soon they would be supplanted by other machines bearing a different name, different in form and construction. . . . In order, then, to ascertain what games not named in § 1 of this chapter were intended to be prohibited, we must determine in what respect the games not named must be like the games named,—to bring them within the terms and meaning of the statute. Of what must the likeness consist? The four games named are all games of unequal chances, and the unequal chances are in favor of the keeper or exhibitor of the games. The skill of the player or his luck cannot affect the general result of the game. From the very nature and character of these games the keeper or exhibitor will win oftener than the player. This I understand to be the distinctive character of these four games, and that all other games possessing this distinctive feature are games of like kind, with them, within the meaning of this statute."

In the West Virginia case the court held that the slot machine in question in that

cause was *ejusdem generis* with the games mentioned in their statute, to wit, A. B. C., E. O., faro bank, and keno, and, furthermore, that it was within the mischief which the legislature intended to reach. We do not think that our statute is substantially different from that of West Virginia. It is true that they use words of "like kind," while our statute reads "such as," but we think that, as used, these words have substantially the same meaning, and we accordingly hold that slot machines of the kind described in the stipulation before us are *ejusdem generis* with the games mentioned in § 1, chap. 64, p. 25, Laws 1907; and we also hold that the running of slot machines of a kind substantially like the one in question in this case comes under the inhibition of our statute, which forbids the running of "any other banking games."

For the reasons given above, the judgment of the lower court is reversed, and the cause is remanded to the District Court of Guadalupe County, for further proceedings in accordance with this opinion, and it is so ordered.

McFie, Pope, Abbott, and Parker, JJ., concur. Mann, J., having tried this case below, took no part in this decision.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RE AUGUSTINE L. MCCREA.

(88 C. C. A. 282, 161 Fed. 246.)

Bankruptcy — discharge — refusal.

1. A bankrupt cannot be denied his discharge for wilfully refusing to obey an order to produce his books, if they were lost or destroyed by fire.

Same — absence of books.

2. Failure of one employed as a mine superintendent to keep books of his personal financial affairs shows no fraudulent intent which will deprive him of the privilege of discharge in bankruptcy.

Same — omission of assets — interest in estate.

3. A bankrupt cannot be said to have fraudulently or knowingly made a false oath, which will deprive him of the right to discharge, in not including in his schedule an interest in his deceased father's estate, where it is not obvious what interest belonged to him, or that it was transferable, while he claims to have transferred it, even though the transfer was so informal as not to have been effective.

Same — corporate stock.

4. A bankrupt cannot be deprived of his discharge for failure to include in his 20 L.R.A. (N.S.)

schedule stock in a corporation which he had pledged as collateral for a debt, the property of the corporation itself having been disposed of by foreclosure of a mortgage.

Appeal — costs.

5. A creditor upon whose objection a bankrupt is denied his discharge for failure to disclose assets will not be required to pay the costs of appeal, although the decision is reversed, where the bankrupt refused to furnish information necessary to a proper disposition of the case.

(April 14, 1908.)

Case Note. — Omission of bankrupt to keep books as ground for refusing discharge.

Section 14(b) of the original bankrupt act (Act July 1, 1898), chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3427, provided as a ground upon which a discharge may be refused, that the bankrupt should have, "with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep, books of account or records from which his true condition might be ascertained." The construction placed by the courts upon this provision having been such as to render it practically unavailable, it was amended by the act of February 5, 1903, 32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1026, so that such provision now reads, "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." The present note is limited to the question, under what circumstances a total failure to keep any books of account whatsoever will be taken as indicative of an intent to conceal the bankrupt's financial condition, and does not assume to include decisions as to the inferences to be drawn from the mode of bookkeeping employed, or the failure to keep a record of certain transactions.

The mere neglect to keep books and accounts showing the bankrupt's financial condition is not a ground for refusal to discharge. *Re Spear*, 103 Fed. 779; *Re Blacklock*, 118 Fed. 679.

Omission to keep books of account is not available as a ground for refusing to grant a discharge, where the proof shows that the bankrupt, who was employed in superintending a farm and commissary store for his brother with the understanding that he should have his living out of it, has not, since the passage of the act of bankruptcy, nor within more than three years before its passage, been engaged in business on his own account that required or made it appropriate for him to keep books. *Sellers v. Bell*, 36 C. C. A. 502, 94 Fed. 801.

In *Re Lowenstein*, 106 Fed. 51, it was held by the referee that where the evidence showed that the bankrupt's business since

APPEAL by petitioner from an order of the District Court of the United States for the Northern District of New York denying a discharge in bankruptcy. Reversed.

The facts are stated in the opinion.

Argued before Lacombe, Cox, and Noyes, Circuit Judges.

Mr. John R. Keeler for appellant.

Mr. George B. Draper for appellee.

Noyes, Circuit Judge, delivered the opinion of the court:

Augustine L. McCrea, having been adjudicated a bankrupt, applied in due season for his discharge. A creditor objected upon the following grounds: (1) That the bankrupt had committed an offense punishable by imprisonment under the bankruptcy law in knowingly and fraudulently making a false oath; (2) that he had fraudulently destroyed, concealed, and failed to keep records or books of account; (3) that he had failed to obey a lawful order of the referee for the production of books and papers. The district court referred the matter to a special master, who reported that the creditor had failed to sustain his objections, and that the bankrupt was entitled to his dis-

charge. The court, however, declined to confirm this report, sustained the creditor's objections, and denied the discharge. The bankrupt was entitled to his discharge as a matter of right, unless debarred upon one of the statutory grounds specified by the creditor. We will consider these grounds in their inverse order.

It is charged that the bankrupt disobeyed an order of the referee requiring him to produce certain books and papers. He produced some papers, and explained that others were lost or had been destroyed in a fire. He was not proceeded against for contempt, and the special master, who was also the referee issuing the order, was apparently satisfied that his explanation was correct, and found that he did not disobey the order. Upon an examination of the record, we reach no different conclusion. While the attitude of the bankrupt upon his examination was the opposite of that of a frank witness, a finding that he intentionally violated the referee's order would be unwarranted.

The next objection to the discharge was that the bankrupt fraudulently concealed and failed to keep books of account showing his financial condition. There was no evi-

the passage of the bankruptcy act had been that of a merchant tailor doing a very small business carried on by himself with the assistance of a boy, and tended to show that he omitted to keep regular books of account in order to avoid the trouble of keeping them, it did not establish a fraudulent intent to conceal his true financial condition, which would bar a discharge.

In *Re Corn*, 106 Fed. 143, it was held that a discharge would not be refused on the ground that the bankrupt failed to keep books of account, where the business (the nature of which is not stated) in which he was engaged for some time prior to the filing of his petition in bankruptcy was such that ordinarily books of account would probably not be kept.

Failure to keep books was held to be no ground for refusing a discharge, where it appeared that the bankrupts had been out of business for over two years, and therefore had no occasion to keep any books. *Re Prager*, 134 Fed. 1006.

In *Re Keefer*, 135 Fed. 885, it was held that a discharge would not be refused, on the ground of failure to keep books of account, to a school-teacher who also acted as agent for a small estate consisting of a farm, where the evidence did not indicate a failure to keep books of account with intent to conceal his financial condition with the object of defrauding his creditors.

Upon the other hand, in *Re Berkowitz*, 4 Am. Bankr. Rep. 37, it was held that a discharge would be refused to a bankrupt on the ground of failure to keep proper books of account, where a part of his business was the selling of bicycles on a deferred

system of payments, although his business was a small one and the amounts involved were comparatively small.

In *Bragassa v. St. Louis Cycle*, 46 C. C. A. 154, 107 Fed. 77 (affirming 103 Fed. 936), a discharge was refused to a bankrupt who, after having failed in business, deposited such money as came into his hands in two different banks, in his wife's name, where it was mingled with money deposited by her, without keeping any record showing what funds he had and what disposition was made of them, where he testified that he did this to keep anybody "from jumping on it," it being presumable that he failed to make any record of his receipts and disbursements for a similar purpose.

In *Re Bemis*, 104 Fed. 672, a discharge was refused to a bankrupt who, having transferred his property and business, that of an eye specialist, to his wife, claiming thereafter to have been employed by her at a salary, failed to keep any regular books from which his state of affairs could be learned, although he kept a bank account in his own name from which he checked out money for the benefit of the property which had been transferred to the wife.

In *Re Alvord*, 135 Fed. 236, a discharge was refused to a bankrupt, the nature of whose business is not stated further than that he had been connected with certain corporations, and with one of them in the capacity of manager, upon the ground that, though a man of considerable business experience, he had failed to keep any books whatever from which his financial condition might be learned.

dence that the bankrupt concealed any books for it did not appear that he kept any. He was the superintendent of a mine. His personal business did not require the keeping of books. His failure to keep them indicated no fraudulent intent.

The real question in the case, then, is raised by the first objection,—whether the bankrupt was guilty of an offense under the bankruptcy law. The offense charged was that of making a false oath with respect to his property. The objecting creditor claimed that he knowingly and fraudulently withheld from his schedule of assets two items: (1) His interest in his father's estate; (2) his stock in the Standard Pyrites Company. The father of the bankrupt died in 1898, leaving a will in which he left his property in trust during the lives of the trustees. After providing for certain payments from the income to the testator's wife and daughter, the will directed the division of the remaining income among his children, including the bankrupt. Upon the death of either the wife or daughter during the existence of the trust the remainder income is increased. The will further provides that, upon the termination of the trust, the principal estate shall be divided among the children then living and the issue of deceased children. There was no evidence concerning the value of the estate or the income thereof, except that the bankrupt's wife had received in the aggregate \$172 therefrom. The real estate described in the will was situated in New York. The inquiry, then, is whether this interest of the bankrupt was property which passed to the trustee in bankruptcy and which should have been included in the schedule of assets, if not previously conveyed away.

With respect to the principal estate, there is ground for two contentions: (1) It may be urged that the right of the bankrupt to take was wholly dependent upon the contingency that he outlive the surviving trustee,—that it cannot be determined until the death of the trustee who the remaindermen will be. Such an interest in many jurisdictions would be held to be a mere contingent remainder, and not "property," the title of which vested in the bankrupt within the meaning of the bankruptcy law. See *Re Twaddell* (D. C.) 110 Fed. 147; *Re Wetmore* 47 C. C. A. 477, 108 Fed. 520. (2) It may be contended that a devise of this character constitutes a vested and alienable remainder subject to be defeated by the contingency that the bankrupt may not outlive the trustees. The New York decisions are controlling with respect to the title to said real estate, and, although by no means uniform, seem to support the second contention. See 20 L.R.A. (N.S.)

Re Hoadley (D. C.) 101 Fed. 233. Moreover, in applying these decisions, we are met by the further inquiry whether the provisions of the will constituted a gift or a direction to divide. It is unnecessary for us to decide these questions. For the purposes of this case it is sufficient to point out their involved character.

The bankrupt's interest in the income is of a less uncertain nature. This interest seems to be vested and alienable. If not conveyed away, it undoubtedly should have been included in the bankrupt's schedule. The bankrupt, however, claims that, some years before the bankruptcy proceedings, and before the creation of the debt due the objecting creditor, he conveyed all his interest in his father's estate to his wife in consideration of love and affection. He failed to produce the conveyance, and his testimony was insufficient to establish the due execution and delivery of a legal conveyance. But, if certain interests in the estate of the bankrupt's father should have been included in the schedule of assets, it does not necessarily follow that the bankrupt knowingly and fraudulently made a false oath when he verified the schedule which did not mention them. It was not obvious what interests belonged to the bankrupt or that they were transferable. Moreover, as we have pointed out, the bankrupt claims that he did not own those interests. Informality in the conveyance and its delivery might have rendered it illegal, and still not affect the bankrupt's good faith. That but very little income had ever been received did not affect the character of the interests as property, but did have a bearing upon the bankrupt's fraudulent intent. Taking into consideration all the testimony and all the circumstances, we cannot say that the creditor has clearly shown that the bankrupt fraudulently and knowingly made a false oath in not referring in his schedule to his interest in his father's estate.

The following language quoted with approval by the circuit court of appeals of the third circuit in *Woods v. Little*, 67 C. C. A. 160, 134 Fed. 232, seems applicable here:

"Without discussing in detail the particular facts and circumstances of this case, we are of opinion the failure of the bankrupt to return in his schedules the interest complained of is not necessarily attributable to a fraudulent purpose. Indeed, the question of whether he had such an interest as passed under the bankrupt law was not easy of solution. The question of his right to discharge is a close one, but, on the whole, we incline to the opinion a discharge should be granted."

And as said in *Re Wetmore* (D. C.) 99

Fed. 703: "The burden is upon the exceptant to prove the allegation of fraud to the satisfaction of the court; and this burden she has not sustained. The best that can be said about the testimony is that the existence of a fraudulent intent to conceal may be in doubt. But, considering the technical nature of the arguments in support of the propositions that the interest of the bankrupt under his father's will was a vested interest, and that he now derives his title to the fund from that instrument and not from the will of his mother, the bankrupt can hardly be charged with fraudulent concealment of his interest because he may not have understood its true legal paternity. Merely to omit property from his schedule of assets would rarely be enough to prove a fraudulent intent on the part of the bankrupt."

The further contention of the objecting creditor that the bankrupt made a false oath by verifying his schedule without including his shares in the standard Pyrites Company requires little consideration. While it appears that this stock stands in the name of the bankrupt, it also appears that it is pledged as collateral, and that the property of the corporation has been disposed of upon the foreclosure of a chattel mortgage. There is nothing to show that this stock—and much more the bankrupt's equity in it—is of the slightest value. A bankrupt is not guilty of making a false oath when he omits from his sworn schedule securities which are absolutely worthless. The language of Judge Coxe in *Re Eaton* (D. C.) 110 Fed. 733, applies: "There is nothing to show the value of the stock . . . when the schedules were filed. It may have become utterly worthless at that time. It had been transferred to a trustee who was authorized to sell it to satisfy unpaid assessments. A receiver had been appointed of all the bankrupt's property, including the stock. . . . In these circumstances a perfectly honest man might have thought that the stock was of no value, and have forgotten to mention it in his schedules."

See also *Re Pearce*, 21 Vt. 611, Fed. Cas. No. 10,873.

We conclude, therefore, that the report of the special master who heard the witnesses and found that the creditor had failed to sustain his objections should have been confirmed by the court, and that the bankrupt should have received his discharge.

Only the matter of costs remains to be considered. As already stated, the bankrupt was not a frank witness. If discharges were granted only as rewards to bankrupts who freely furnish information to their creditors, 20 L.R.A. (N.S.)

this bankrupt would be pre-eminently not entitled to one. Undoubtedly this attitude brought upon him the action of the district court; and, while we think the bankrupt entitled of right to his discharge and consequently set aside the action of the district court, we are not inclined to require the objecting creditor to pay the costs of this appeal.

The order of the District Court is reversed, without costs.

NEW YORK COURT OF APPEALS.

ANNA HENRY, Respt.,

v.

HAMMOND HERRINGTON, Appt.

(193 N. Y. 218, 86 N. E. 29.)

Election of remedy — sale — suit for price — rescission.

One who has sold and transferred personal property to another, and received a portion of the price, has no right to sue him and others to whom he has transferred the property, for conspiracy to defraud her of her property, alleging the sale and transfer in the complaint; and such attempted action will not, therefore, on the theory of election of remedies, bar her right to sue her vendee for the unpaid purchase money.

(October 23, 1908.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a trial term for Rensselaer County in plaintiff's favor in an action brought to recover the purchase price of certain property alleged to have been sold and delivered. Affirmed.

The facts are stated in the opinion.

Mr. John T. Norton, for appellant:

In bringing the action for conspiracy the plaintiff elected one of two inconsistent remedies, and was precluded, by such election, from maintaining the action for the purchase price.

Westfall v. Peacock, 63 Barb. 209; *Morris v. Rexford*, 18 N. Y. 552; *Conrow v. Little*, 115 N. Y. 387, 5 L.R.A. 693, 22 N. E. 340; *Terry v. Munger*, 121 N. Y. 161, 8 L.R.A. 216, 18 Am. St. Rep. 803, 24 N. E. 272; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; *Roome v. Jennings*, 2 Misc. 257, 21 N. Y. Supp. 938; *Re Garver*, 176 N. Y. 386, 68 N. E. 667; *Crossman v. Universal Rubber*

Note.—The effect of choosing, by mistake, a remedy not legally available, is treated in a case note to *Clark v. Heath*, 8 L.R.A. (N.S.) 144.

Co. 127 N. Y. 34, 13 L.R.A. 91, 27 N. E. 400; *Drexel v. Hollander*, 112 App. Div. 25, 98 N. Y. Supp. 104.

Mr. John B. Holmes, with Messrs. Holmes, Bryan, & Holmes, for respondent:

The former action did not amount to an election of remedies which would estop the action for the purchase price.

Kinney v. Kiernan, 49 N. Y. 169; *Bowery Sav. Bank v. Belt*, 66 Hun, 60, 20 N. Y. Supp. 746; *Marsh v. Masterton*, 101 N. Y. 406, 5 N. E. 59; *Sullivan v. Ross*, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309; *Stowell v. Chamberlain*, 60 N. Y. 272; *Morris v. Rexford*, 18 N. Y. 552.

The demand of possession of property by the plaintiff, after having requested defendant to pay, which he refused, was not an election to rescind the sale.

1 Nichols, Pl. & Pr. 44; *Haas v. Selig*, 27 Misc. 504, 58 N. Y. Supp. 328; *Baumann v. Jefferson*, 4 Misc. 150, 23 N. Y. Supp. 685; 15 Cyc. Law & Proc. p. 260; *Carlisle v. Kinney*, 66 Barb. 363; *Cragin v. O'Connell*, 50 App. Div. 339, 63 N. Y. Supp. 1071, affirmed in 169 N. Y. 573, 61 N. E. 1128; *Cornwall v. Haight*, 8 Barb. 327; *Palmer v. Hand*, 13 Johns. 434, 7 Am. Dec. 392; *Van-Brocklen v. Smeallie*, 140 N. Y. 75, 35 N. E. 415.

Gray, J., delivered the opinion of the court:

This action was brought to recover the balance of the purchase money due to the plaintiff from the defendant upon a sale of personal property. The fact of the sale was put in issue by the answer; but the plaintiff recovered a verdict for the amount claimed by her, and the judgment upon the verdict has been unanimously affirmed by the appellate division. This is sufficient to dispose of the controverted facts of the case; but the appellant insists that a serious question of law survives the disposition made below, which has been erroneously determined. That was whether a previous action, brought by the plaintiff against this defendant and other persons, did not bar her from maintaining the present action, upon the ground that there had been an election by her between inconsistent remedies for obtaining relief, to which she must be held. The answer does not plead this defense, as it should have done to make it available (*Roberge v. Winne*, 144 N. Y. 709, 39 N. E. 631); but it may be that by the course taken by the parties upon the trial, that objection was waived. I think that it was, and, so assuming, it is quite clear that the plaintiff had not been precluded from maintaining this action upon the ground stated. The facts are established for us by the ver-

dict and judgment below, and they show that the property sold by the plaintiff consisted of certain furniture, fixtures, etc., contained in a hotel which she and her husband were conducting. He was the lessee of the hotel, and had transferred to her the personal property mentioned in payment of an indebtedness, and also subject to a chattel mortgage given by him to the defendant to secure a loan of \$500. Some time thereafter she made a sale of these chattels to the defendant for the sum of \$1,700, and executed a bill of sale thereof. One hundred dollars of the price were paid down. The balance, less the amount due upon the chattel mortgage, was to be paid some two weeks later, and the property sold was, by the direction of the defendant, to be left in the hotel. An explanation of the transaction is furnished in the evidence that the defendant expected to sell the property to Dennin, the lessor of the hotel, or to Ormsby, whom Dennin intended to secure as a tenant. Subsequently the plaintiff and her husband were dispossessed, and Ormsby went into possession of the hotel and its contents, having purchased the latter from the defendant. The defendant failed to pay his indebtedness to the plaintiff upon the bill of sale at the time when it matured, and he refused to admit any liability, referring her to Dennin and Ormsby. Believing, or acting upon the advice, that there had been a plan or conspiracy between Dennin, Ormsby, and the defendant to cause her husband to be dispossessed of the hotel, and herself to be cheated out of the property sold to the defendant, and after making futile efforts to get it back, she commenced an action against the three, and demanded damages against them, upon allegations that they had agreed together and had conspired to defraud her of the possession and ownership of her property. Her complaint, however, set forth the sale to this defendant by the bill of sale, his failure to pay, and that she had "never yet received either the property, . . . or any money, or a return of the bill of sale." When the action came on for trial, it was dismissed upon the pleadings. Thereafter she brought the present action.

If the plaintiff had two remedies open to her adoption in order to right herself, which were not consistent with each other, and she made an election of one in bringing her former action, she must be held to it, and will be deemed to have been concluded thereby from prosecuting the other remedy. This doctrine of the election of inconsistent remedies consists in holding a party, where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, to the one taken. *Morris v. Rexford*, 18 N.

Y. 552; *Mills v. Parkhurst*, 126 N. Y. 89, 13 L.R.A. 472, 26 N. E. 1041. If it appeared that the plaintiff had a right, either to disaffirm the sale of the chattels, or to treat the sale as absolute and to sue for their price, then, undoubtedly, by commencing an action upon the former theory, she would have concluded herself from ever proceeding upon the other theory. But, as the facts are established, she had no such choice, with respect to the transaction of sale, and that was manifest in her complaint in the former action. Her pleading showed that the title to the property had been transferred to this defendant under a bill of sale, and the action was properly dismissed and refused trial; for there could have been no conspiracy between the parties defendant to deprive the plaintiff of property, which she expressly alleged had been legally transferred by her to another. The proof is that the transaction of sale was complete by the execution of the bill of sale and the part payment of the price, and that the delivery of the subject of the sale was made in accordance with the direction of the vendee. The plaintiff had but the one course open to adoption against the defendant, and that was to compel him to pay what he still owed her. It is not the mere fact of having previously brought some action against a defendant to obtain relief upon such a transaction which would determine the application of the doctrine of election. It would be the fact that a plaintiff, with two courses open to him, had, by his previous action, declared his election or decision to affirm or to disaffirm the transaction, as the case might be. The right to make an election must actually exist; and, if it shall appear that it did not, then it is quite immaterial, in its bearing upon a subsequent action, that some previous action, looking to a remedy for the plaintiff's loss, had been brought. *Morris v. Rexford*, supra; *Terry v. Munger*, 121 N. Y. 161, 8 L.R.A. 216, 18 Am. St. Rep. 803, 24 N. E. 272. The plaintiff's previous action was fruitless, because she had no right to maintain it, upon her own showing; but that did not preclude her from subsequently bringing an action in which she asserted a right which she possessed. *Kinney v. Kiernan*, 49 N. Y. 164, 169. She had made no election, for there was no choice of remedies against the defendant, and in suing him with others, as for a conspiracy, she mistook or misconceived her remedy, and was dismissed; but she did not forfeit her legal right to bring this action to recover from the defendant what he owed her. Any step or action taken by her, which was fruitless because proceeding upon a misconception of the rights which the law gave her, left her 20 L.R.A. (N.S.)

unaffected as to any legal remedy which she did possess.

No other question requires consideration, and I advise the affirmance of the judgment.

Cullen, Ch. J., and Edward T. Bartlett, Haight, Werner, Willard Bartlett, and Hiscock, JJ., concur.

NEW YORK COURT OF APPEALS.

LOUIS LEVIN et al., Resp'ts.,
v.

JAMES S. DIETZ, Appt.

(194 N. Y. 376, 87 N. E. 454.)

Contract — unilateral — acceptance.

1. The mere physical acceptance and attempted enforcement by one party of a contract unilateral in form, executed by another, does not make the former a party to the contract so as to bind him to its performance.

Specific performance — unilateral contract.

2. Equity will not specifically enforce a contract to sell real estate which is sufficient to satisfy the statute of frauds so far as the vendor is concerned, but which the purchaser does not promise to perform until after the vendor has withdrawn his offer.

(February 23, 1909.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County in complainants' favor in a suit to compel specific performance of an alleged contract to convey certain real estate. Reversed.

Statement by Hiscock, J.:

The action was brought by the respondents

Note.—The right of a party not originally bound by a contract within the statute of frauds because he did not sign the same, against another party who did sign, is discussed in the case note to *Western Timber Co. v. Kalama River Lumber Co.* 6 L.R.A. (N.S.) 397. It will be noted that none of the earlier New York cases upon which the court, in *LEVIN v. DIETZ*, relies, involved a contract in which the lack of mutuality resulted merely from the fact that the party who sought to enforce specific performance had not signed the contract so as to become bound thereby under the statute of frauds. The somewhat analogous question as to the right to specific performance of an option to purchase, as affected by the lack of mutuality of obligation, is treated in a case note to *Pollock v. Brookover*, 6 L.R.A. (N.S.) 403.

as vendees to enforce the specific performance of a contract claimed to have been made by the appellant for the sale of certain real estate. The facts relied on as constituting an enforceable contract are set forth in the findings of fact, and are quite brief. It is there stated that the appellant was the owner of the premises in question, and that, "on December 1, 1904, plaintiff and defendant and said Dakin [a broker authorized by the defendant to sell the real estate in question] met and discussed a sale of the property . . . for \$16,500; that, on December 3, 1904, defendant wrote and signed a letter addressed to plaintiffs, in which he stated that he would mail the deeds of said property to certain brokers in Brooklyn, and requiring plaintiffs to be present on December 5th at a place indicated in the letter, with \$16,500 in cash, and that they would receive a deed of said property; that, on the day last mentioned the defendant wrote and signed a letter addressed to said Dakin, . . . in which the defendant stated that he had written the intending purchasers . . . [meaning plaintiffs] to be ready at the office of Jackson & Dombek on December 5, 1904, at 3 o'clock P. M., and to have the money ready, and that the property would then be turned over; . . . that the plaintiffs were present at the time and place on the day mentioned, . . . and . . . produced and tendered the sum of \$16,500, and demanded a deed of the premises, . . . and that the defendant was not then and there present, and that no deed of said premises was offered to plaintiffs." There was no finding of any other or different contract, by parol or otherwise, than that above set forth.

Mr. Hadley M. Greene, for appellant:

The contract is unilateral, and unenforceable by specific performance.

Colt v. O'Connor, 59 Misc. 83, 109 N. Y. Supp. 696; *Ide v. Brown*, 178 N. Y. 39, 70 N. E. 101; *Edson v. Parsons*, 155 N. Y. 568, 50 N. E. 265; *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903; *Wadick v. Mace*, 191 N. Y. 5, 83 N. E. 571; *Palmer v. Gould*, 144 N. Y. 678, 39 N. E. 378; *German v. Machin*, 6 Paige, 288; *Phillips v. Berger*, 8 Barb. 528; *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. C. 416, 9 N. Y. Supp. 779; *Gall v. Gall*, 64 Hun, 600, 19 N. Y. Supp. 332; *Hamlin v. Stevens*, 177 N. Y. 47, 69 N. E. 118; *Tousey v. Hastings*, 127 App. Div. 94, 111 N. Y. Supp. 344; *Fry, Spec. Perf.* § 449; *Norris v. Fox*, 45 Fed. 406; *Strang v. Richmond*, P. & C. R. Co. 41 C. C. A. 474, 101 Fed. 511.

The contract was not a complete contract.

Milliman v. Huntington, 68 Hun. 258, 22 N. Y. Supp. 997; *Brown v. Norton*, 50 Hun, 20 L.R.A. (N.S.)

248, 2 N. Y. Supp. 869; *Kirwan v. Byrne*, 9 Misc. 76, 29 N. Y. Supp. 287; *Templeton v. Wile*, 22 N. Y. S. R. 251, 3 N. Y. Supp. 931; *Sanders v. Pottlitzer Bros. Fruit Co.* 144 N. Y. 215, 29 L.R.A. 431, 43 Am. St. Rep. 757, 39 N. E. 75.

Messrs. Morgan J. O'Brien and Frank H. Platt, with **Mr. Walter L. Durack**, for respondents:

The signature by the defendant, grantor, was a sufficient basis for a judgment of specific performance.

Bleecker v. Franklin, 2 E. D. Smith, 93; *Kittel v. Stueve*, 10 Misc. 696, 31 N. Y. Supp. 821; *Earl v. Campbell*, 14 How. Pr. 330; *National F. Ins. Co. v. Loomis*, 11 Paige, 431; *Champlin v. Parish*, 11 Paige, 405; *Edwards v. Farmers' F. Ins. & L. Co.* 21 Wend. 492; *M'Crea v. Purmort*, 16 Wend. 465, 30 Am. Dec. 103; *Clason v. Bailey*, 14 Johns. 484; *Re Hunter*, 1 Edw. Ch. 5; *Ballard v. Walker*, 3 Johns. Cas. 60; *Worrall v. Munn*, 5 N. Y. 244, 55 Am. Dec. 330; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Pettibone v. Moore*, 75 Hun, 465, 27 N. Y. Supp. 455; *Jones v. Barnes*, 105 App. Div. 290, 94 N. Y. Supp. 695; *Quinto v. Alexander*, 123 App. Div. 1, 107 N. Y. Supp. 422.

Hiscock, J., delivered the opinion of the court:

Respondents, as vendees, are seeking to compel the appellant, as vendor, to specifically perform a contract for the sale of real estate, and he is resisting on various grounds. We deem it unnecessary to discuss more than two of the questions involved in the controversy. We shall assume, simply for the purposes of this discussion, that the letters signed by the appellant and set forth in the findings already quoted constituted a sufficient compliance with the requirements of the statute of frauds. After making this assumption, however, there remain the other questions, whether there was any contract binding respondents to buy the real estate, which it is claimed appellant agreed to sell, and, if not, whether a court of equity, at the suit of a party not himself bound, will enforce performance by his adversary. We think that both of these questions must be answered in the negative, and that it must be held that the respondents were not under any obligation to buy appellant's land, and that therefore there was lack of consideration for the latter's contract, and lack of that mutuality of obligation, which are both essential to the successful prosecution of this action.

It has sometimes been intimated, in earlier cases in other jurisdictions, if not in this state, that the mere physical acceptance

and attempted enforcement by one party of a contract unilateral in form, executed by another, made the former a party to and bound by the contract. This doctrine, however, has not been adopted or affirmed by later decisions in this state, even if elsewhere. In certain cases cited by the respondents the court has enforced a contract signed by only one party, but in these cases it expressly appeared, where the agreement sought to be enforced was one to buy, that the seller had agreed by parol to sell upon the terms mentioned in the paper signed by the purchaser (*Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190); or that the written agreement sought to be enforced gave an option which the party seeking to enforce had expressly accepted within the term of its life (*Pettibone v. Moore*, 75 Hun, 461, 27 N. Y. Supp. 455; *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695); and under these circumstances it was held that there was a "binding agreement" or a "completed bargain," and that the written contract, although unilateral in form, could be enforced. We regard those cases as decided on principles not applicable to this one, where there is not claimed to have been any express agreement by the vendees to buy, and where there has been no acceptance by them of the promise of the vendor, except such as was involved in their offer to perform at a time when he had withdrawn from his promise. On such facts, we see no opportunity to claim that the respondents were under any obligation to buy appellant's land, or that there was any mutuality of obligation; and thus we come to the remaining question.

The decision in this state of the question whether equity will enforce against one party performance of a contract not imposing mutual obligations on the other has been attended by more or less confusion and conflict of authorities. This was early exemplified by the opinions of Chancellor Kent in two cases. In the early case of *Benedict v. Lynch*, 1 Johns. Ch. 370, 373, 7 Am. Dec. 484, he wrote, in an action for specific performance of a contract relating to the sale of real estate: "I need not stay to examine how far the objection of a want of mutuality is applicable to this contract, since the decision can be placed with more satisfaction upon the intrinsic merits of the case. But, the point being stated by the counsel, I am unwilling to pass it by without observing that it has been ruled in several cases [citing them] that a bill for specific performance will not be sustained, if the remedy be not mutual, or where one party only is bound by the agreement. This doctrine received a very clear illustration, and an explicit sanc-

tion, in a late decision by Lord Redesdale. . . . Though there are other cases in which an agreement has not been deemed within the statute of frauds, and a specific performance has been decreed, when the contract was signed only by the party sought to be charged, . . . yet the contrary opinion appears, from the most recent decisions, to be now prevailing." Later, in the case of *Clason v. Bailey* (14 Johns. 489), the chancellor, again writing on this subject, said: "I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. . . . But, notwithstanding this objection, it appears from the review of the cases that the point [that a contract not mutual would be enforced] is too well settled to be now questioned." And cases may be found in this state sustaining this later view of the chancellor. *Re Hunter*, 1 Edw. Ch. 1; *McCrea v. Purmort*, 16 Wend. 460-465, 30 Am. Dec. 103; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576.

One case is especially relied on by respondents, as deciding that a contract may be enforced notwithstanding lack of mutual obligations and resulting consideration, which cannot fairly be cited as authority for that doctrine, and that is the case of *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330. Because of its apparent direct conflict with the later cases hereafter to be referred to, this case deserves especial attention. It was brought by plaintiff to compel the specific performance by defendants of a contract for the sale of real estate. The defendants had executed an agreement to convey the lands in question. A counterpart of the agreement was executed by "Henry Worrall for Noah Worrall," the plaintiff, the seal being affixed at the end of the agent's name. It was contended, amongst other things, that the agreement was not properly executed in behalf of the vendee and plaintiff, Worrall, by his agent, and that therefore the agreement, not being binding on him, was not binding on defendants for want of mutuality. Judge Paige finally reached the conclusion that the contract executed by the agent was binding on his principal, and this determination established the proposition that there was an agreement executed by both vendor and vendee, and therefore free from the vice of lack of mutuality. Having done this, he then proceeded further, and reached the view that, even if the agreement was void as to the vendee because of lack of

proper execution, still it could be enforced notwithstanding the lack of mutuality. Thus, he placed his opinion on two grounds, and, this being so, the concluding paragraph of the opinion does not make it plain on which ground the majority of the court concurred with him in his conclusion that specific performance should be enforced.

However, whatever conflict and uncertainty may have been created by earlier decisions, in comparatively recent years a series of cases have come to this court, finally leading up to that of *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571, whereby it has been finally and firmly established that specific performance of a unilateral contract will not be adjudged against the party who has executed it on behalf of the opposite party, who is not in any manner bound by the contract. *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378, was an action to enforce specific performance of a contract for the sale of land. A judgment decreeing specific performance was reversed, and, although the other members of the court reached this decision on other questions, Judge Gray very fully reviewed the authorities bearing on the question whether specific performance of a contract for the sale of lands would be decreed if there was not a mutual obligation and remedy, and very decisively reached the conclusion that it would not be so decreed. *Stokes v. Stokes*, 148 N. Y. 708, 716, 43 N. E. 211, 214, was an action to enforce specific performance of a contract for the sale of certain stock, and this court, in upholding the judgment of the trial term dismissing plaintiff's complaint, approved the rule that "a contract must possess certain elements in order that a court of equity may exercise jurisdiction to compel its performance. 'It must be upon a valuable consideration. . . . It must be, in general, mutual in its obligations and its remedy.'" *Mahaney v. Carr*, 175 N. Y. 454, 460, 67 N. E. 903, 905, was an action to enforce specific performance of an alleged agreement to adopt a child and give it a certain share of the adopted father's property. This court reversed the judgment of the courts below awarding plaintiff a recovery, and Judge O'Brien, writing for a majority of the court, said: "If this was a contract, it certainly was not a mutual one, binding the child and her father [claiming to have made and seeking to enforce the contract] as well as the grandfather. . . . In order to justify a court of equity to decree specific performance, there must be a contract which in general is mutual in its obligations and its

remedy, reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it is made." *Ide v. Brown*, 178 N. Y. 20, 39, 70 N. E. 101, 105, was an action to enforce a contract somewhat similar in its nature to the one involved in the last action. And again Judge O'Brien reiterates the doctrine that a contract, in order to be specifically enforced by the court, must be mutual; and that "a party not bound by the agreement itself has no right to call upon a court of equity to enforce specific performance against the other contracting party, by expressing his willingness, in his plea to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract, upon his part, but upon its original obligatory character." The last case, that of *Wadick v. Mace*, was an action like the present one, brought by the vendee to compel specific performance of a contract for the sale of lands. The contract sought to be enforced contained a provision, "that, in the event of a breach of the within contract by the party of the second part [vendee and plaintiff], and the said party of the second part being unable to fulfil the terms and conditions of the within contract, then this contract shall be null and void, . . . and no suit or action whether for specific performance or damages shall be maintained by the party of the first part against the party of the second part." Page 3 of 191 N. Y. It was assumed that the clause thus quoted resulted in the same lack of mutuality of obligations as would have existed if the contract had simply been executed by the vendor, and, on this assumption, Judge Willard Bartlett discussed the question whether specific performance would be enforced of a contract thus lacking in mutual obligations, and, after a review of many authorities bearing on that question, and including those last above cited, he reached the conclusion, concurred in by all of the members of the court, that such specific performance of a contract would be denied in the absence of mutuality of obligation and remedy in both parties to the contract.

In view of the principles thus approved and adopted, it must be held that the order and judgment appealed from were erroneous, and must be reversed, and a new trial awarded, with costs to abide event.

Cullen, Ch. J., and Gray, Haight, Werner, Willard Bartlett, and Chase, JJ., concur.

UTAH SUPREME COURT.

MARTHA CHRISTENSEN, by Guardian
ad Litem, Respt.,
v.

OREGON SHORT LINE RAILROAD COM-
PANY, Appt.

(— Utah, —, 99 Pac. 676.)

Carrier — slamming door — injury.

1. Negligence on the part of a railroad company will not be inferred from the mere fact that a car door slammed shut, catching and crushing the hand of a passenger, who, while attempting to pass through it, rested his hand on the door jamb.

Same — contributory negligence.

2. It is not necessarily negligence *per se* for a passenger to rest his hand on the door jamb while attempting to leave a car, so as to prevent his holding the carrier liable in case the door slams shut, catching and crushing his fingers.

(January 13, 1909.)

APPEAL by defendant from a judgment of the District Court for Weber County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. P. L. Williams, George H. Smith, and John G. Willis, for appellant:

The doctrine of *res ipsa loquitur* is not applicable.

3 Thomp. Neg. §§ 2977, 2978; Goss v. Northern P. R. Co. 48 Or. 439, 87 Pac. 149; Harwick v. Georgia R. & Bkg. Co. 85 Ga. 507, 11 S. E. 832; Skinner v. Wilmington & W. R. Co. 128 N. C. 435, 39 S. E. 65.

The passenger's negligence in placing her hand on the door jamb precludes recovery.

Texas & P. R. Co. v. Overall, 82 Tex. 247, 18 S. W. 142; Guthman, v. Manhattan R. Co. 53 N. Y. Supp. 139.

Mr. C. R. Hollingsworth also for appellant.

Messrs. W. L. Maginnis and S. T. Corn for respondent.

Frick, J., delivered the opinion of the court:

This is an action for personal injuries alleged to have been caused by the negligence of appellant. The action was prosecuted by respondent as guardian *ad litem* for the benefit of his daughter, a minor. After al-

leging the corporate capacity of appellant, and that the appellant, on the 15th day of September, 1907, did receive the minor aforesaid as a passenger for hire, the complaint states the following as constituting negligence on the part of appellant, namely: "That the said defendant company so managed, constructed, and operated its passenger car in which the said Martha Christensen was riding that the door thereof would stand open, and was permitted to swing upon its hinges, and that, when the said Martha Christensen undertook to alight from said train at Bountiful, and while waiting for other passengers to alight, standing in the aisle, by a sudden jerk of said train she was thrown against the said door, and the same closed upon her fingers, catching the three first fingers of the left hand between the door and the jamb thereof, crushing the same." It is further alleged "that said accident was caused by reason of the said door not being held firmly in its place, and also by reason of the careless and negligent causing of said train to jerk whilst the passengers were alighting therefrom." It will be observed that no negligence is directly charged except to "jerk" the train. No defect is alleged in any appliance or instrumentality, nor is it alleged that the door was left open negligently, or that the appellant was negligent because the door was "not being held firmly in its place." The negligence, therefore, if any, must be inferred from the facts stated, except that the appellant was negligent in causing the train to "jerk," as stated above.

The evidence upon the part of the respondent to establish the foregoing allegations is, in substance, as follows: Martha Christensen, the injured minor, as appears from the printed abstract, testified: "My name is Martha Christensen, and I am thirteen years old. About the middle of last September, I went with my father from Ogden to Woods Cross. Father bought a ticket for me. I put my left hand on the door frame, and the door came shut on it. I was going out of the car. Father went out of the car ahead of me, and was out on the platform. The car had stopped before I got up to go out. I came out and was outside on the platform of the car. I just came out and then put my hand on the door frame. I was on the platform outside. I don't know what I put my hand on the door frame for. I can't describe just what I was doing, and how I happened to put my hand on the door frame. I was going out, and then I just put my hand on the door frame, and then the door slammed shut on it." On cross-examination she said: "I noticed the door was slamming when I was sitting in the car, and that was before I got

Note. — The general subject of the presumption of negligence from injury to a passenger is treated in a subject note to McGinn v. New Orleans R. & Light Co. 13 L.R.A. (N.S.) 601.
20 L.R.A. (N.S.)

up to go out. It was just about soon after I got on the train that I noticed the door. . . . That was soon after I got on the train at Ogden, and it continued to slam backwards and forwards."

The father, after stating that he and Martha, on September 15, 1907, were passengers in appellant's train, in part testified: "The accident happened through the door shutting on her fingers as she was getting off. The first I knew of it (I was already down on the platform of the station at Woods Cross) was when she came down crying and holding her hand. When I got off the train, it had stopped. . . . I noticed the door on the train. It was on the swing, and every little while when the train slacked up it would go shut with a crash. I have no knowledge as to what caused it to go shut at the time it crushed her hand. I didn't see that. I have frequently observed passenger cars and the doors to them, most of them which I have seen have a catch. When the train is stopped at a station and the passengers are getting off the car, the door is fastened back with a catch. . . . I do not know just what kind of a catch it is. It is a clasp that goes back. A clasp comes back to that hook to hold it, with a spring on it. . . . It is automatic, and you just push it back and it catches. It is for the purpose of holding it open." On cross-examination the witness said: "The door was open back when I got off. I couldn't tell particularly when was the last time I saw it swing to with the noise. It was before I got to Woods Cross, but I couldn't tell you just where it was."

The conductor testified: "I first learned of it [the accident] when she stepped off the station platform down on the ground. I made an examination of the door of the car. It was O. S. L. 151, I think. I made an examination of the fastenings provided for holding the door open. They were in perfect condition. The door held when it was pushed back. I simply looked to see what was the cause of the door slamming. I got up to see after the train started. . . . The fastening was all right on the door." He further said, on cross-examination, that he made the examination after the train had left the station; that he could not say whether the door was clamped back at the time the girl got off the train; that both doors of the car were open all the way from Ogden to Salt Lake City; that they were open because the weather was warm.

The foregoing substantially is all the evidence adduced at the trial. At the close of the evidence, the appellant requested the court to direct the jury to find for it. The court refused the request, and submitted 20 L.R.A. (N.S.)

the case to the jury upon the evidence. The jury rendered a verdict in favor of respondent, upon which the court entered judgment, and hence this appeal.

The appellant excepted to the refusal of the court to direct a verdict, and now urges that the court erred in submitting the case to the jury upon the evidence adduced at the trial. There certainly is no evidence whatever to sustain the allegation of negligence with regard to the moving or jerking of the train. This, therefore, is eliminated from the case. Is there any evidence of negligence in any other respect? It certainly cannot be contended that there is any direct evidence that any appliance or instrumentality in use by appellant was defective, or that the injury was caused by any such defect. Is there any indirect or circumstantial evidence from which such negligence may be inferred, or are the facts and circumstances, as disclosed by the evidence, such as bring the case within the maxim of *res ipsa loquitur*? In other words, are the circumstances surrounding the accident in question such that negligence upon the part of appellant may be assumed or inferred from the mere happening of the accident? Appellant contends that there is no evidence of negligence, either direct or circumstantial, and that the undisputed facts, as they appear from the evidence, do not bring the case within the maxim aforesaid. Upon the other hand, respondent insists that the facts and circumstances are such as bring the case within the maxim, and that all that was incumbent upon him to prove to entitle him to a verdict at the hands of the jury was proved at the trial. We have very recently had occasion to discuss and apply the maxim of *res ipsa loquitur* as between carrier and passenger in the cases of Dearden v. San Pedro, L. A. & S. L. R. Co. 33 Utah, 147, 93 Pac. 271, and Paul v. Salt Lake City R. Co. 34 Utah, 1, 95 Pac. 363. The maxim *Res ipsa loquitur* is merely a rule of evidence applicable in a certain class of cases, and is generally applied in cases of injuries to passengers.

The maxim, when applicable to the facts and circumstances of a particular case, is not intended to, and does not, dispense with establishing negligence. In all cases when negligence is the gist of the action, the negligence must be proved, but in case of an injury to a passenger he is only required to prove that the injury was occasioned by a collision, derailing or upsetting of coaches, breaking of machinery or appliances, or things of that character, or through some act or acts of the servants operating the machinery or appliances, or in the management of the instrumentalities or the means used

in the business over which the carrier has control, and for the conduct and management of which he is responsible. *Paul v. Salt Lake City R. Co.* 30 Utah, 49, 83 Pac. 563. The law imposes the duty upon the carrier of exercising the utmost care to protect his passengers against accidents; and, in case an accident occurs, the inference arises that the carrier has not exercised that high degree of care which the law imposes. If such care had been exercised, the inference is that the accident would have been avoided; that is, if the degree of care which the law imposes had been exercised in the construction and maintenance of the track and in the selection and inspection of machinery, instrumentalities, and appliances of all kinds, and in handling them, by the servants, then it may be inferred that the accident would not have occurred. But this inference in its last analysis amounts simply to one way of proving or establishing negligence. It means, too, just what the maxim implies. "The thing speaks for itself." That is, an accident has happened, therefore it may be inferred that, by the exercise of the degree of care required, it could have been avoided. The only difference between an ordinary case of negligence arising between master and servant, or between those sustaining other relations, and one arising between a carrier and passenger, consists in the manner of establishing the negligence constituting the gist of the action. In the first instance referred to, the happening of the accident causing the injury ordinarily is no proof of negligence; while, as between carrier and passenger, when arising as above indicated, the happening of the accident may be, and usually is, *prima facie* proof of negligence. It must not be assumed, however, as it sometimes is, that the maxim of *res ipsa loquitur* is limited to cases arising between carrier and passenger. This is well illustrated by the New York court of appeals in the case of *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, in which case there is a learned and interesting discussion with regard to the application and legal effect of the maxim. Nor should it be assumed that the maxim is applicable under all circumstances as between carrier and passenger. There may be, and are, accidents which cause injuries to passengers where the maxim cannot be applied. The conditions under which the maxim does or does not apply are illustrated and applied in the following, among other, cases: *Herstine v. Lehigh Valley R. Co.* 151 Pa. 244, 25 Atl. 104; *Græff v. Philadelphia & R. R. Co.* 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107; *Morris v. New York C. & H. R. R. Co.* 106 N. Y. 678, 13 N. E. 455; *Griffen v. Manice*, *supra*; *Pennsylvania* 20 L.R.A. (N.S.)

R. Co. v. MacKinney, 124 Pa. 462, 2 L.R.A. 820, 10 Am. St. Rep. 601, 17 Atl. 14; *Goss v. Northern P. R. Co.* 48 Or. 439, 87 Pac. 149; *Paul v. Salt Lake City R. Co.* 30 Utah, 41, 83 Pac. 563; *Dearden v. San Pedro, L. A. & S. L. R. Co.* and *Paul v. Salt Lake R. Co.* *supra*.

Referring now to the evidence in this case, does it show any negligence on the part of appellant? As we have seen, there was no negligence in the management of the train. It stood still before the accident occurred, and remained so until after it had occurred. There is no evidence that any act of an employee in any way caused or contributed to the happening of the accident. There is no evidence of any defect in any appliance or instrumentality used by appellant, unless such defect may be inferred from the fact that a door closed while the passenger was in the act of alighting from the train after passing through the open door. But can it be inferred that there is some defect in an ordinary door simply because it swings upon its hinges, and closes unexpectedly? If we bear in mind that a door swings upon hinges, that it is intended to open and close for the use of passengers to enter and leave the car, how can any inference of negligence arise merely because a door closes at a time when it was not expected to do so by a particular person, and for some unexplained reason? Can it be said that, because there is some evidence that car doors are usually provided with a catch to hold the door open while passengers are passing in or out of the car at stations, and that because this door was not held open, therefore the catch was defective? Before this inference can prevail, it seems to us it should be made to appear that the door was in fact placed back so as to come in contact with the catch, and that it was not held in place by it. If, under such circumstances, the catch did not hold, it might possibly be inferred that the catch was defective. Can it be assumed that the appellant was negligent in not seeing that the door was placed back sufficiently to interlock with the catch? This, it seems, would be wholly unreasonable. Car doors, as a matter of common, if not universal, knowledge, are not entirely under the control of the employees of the railroad company, but are used at pleasure by the passengers for the purpose of passing in and out of the car, or in passing from car to car. If, therefore, it be said that it is the duty of the railroad company to see that every car door is fastened back when it is opened, it must follow that the company must station a servant at every door to attend to the fastening of it in case the passing passenger either leaves it unlatched in closing it or unfastened to the back catch when opening it.

To merely have a servant fasten the door, and then leave it, would be of little, if any, use, since any passenger might unfasten it the next moment. If the law does not impose the duty upon the railroad company to keep a constant watch upon the car doors, then no negligence is shown in this case. There is no evidence that the door was not fastened back at the proper time, unless the fact that it closed raises a presumption that it was not so fastened. If such a presumption arises at all, it cannot prevail against the known fact that both ingoing and outgoing passengers interfere with car doors. There is evidence that there were other passengers on the car platform, but there is no evidence whatever to show that the door was not caused to be closed by some passenger or someone in the car or from some other natural cause. The movement of the train did not cause it to close because the train did not move. It is not shown that any act of the appellant or of any servant caused the door to close. Therefore the real cause is left to mere conjecture. When it is remembered that doors are made to swing upon their hinges for the purpose of opening and closing at any time, then the closing of a door is such a usual and natural occurrence that no negligence can be inferred from the simple fact that the occurrence took place. But, if an inference would arise that the back catch was defective because the door closed, this inference was entirely overcome by the positive testimony of the conductor, who testified that the catch provided to hold the door back when open was in perfect order and held the door in place when it was forced back into the catch. There is no evidence disputing this testimony. The rule, therefore, applies which is well and tersely stated in a similar case by the supreme court of Oregon in the syllabus of that case in the following language: "Where the evidence of negligence is entirely inferential, and the testimony for the defendant is clear and undisputed, to the effect that there was no negligence, the plaintiff's case is overcome as a matter of law, and it becomes the duty of the judge to take the case from the jury." *Goss v. Northern P. R. Co. supra.*

Taking the whole evidence in this case, we are unable to see how respondent can sustain the judgment in the light of sound reason and correct principles. But the decisions need not be rested upon reason and principle alone. There is direct, and what we consider good, authority to sustain our conclusions.

In the case of *Skinner v. Wilmington & W. R. Co.* 128 N. C. 435, 30 S. E. 65, the facts were almost identical with those in this case. The only difference between that case and this is that there the train was

moved, while in this case it stood still. The court, in the course of the opinion at page 437 of 128 N. C., disposes of the alleged negligence as follows: "We cannot see the least negligence in the management of the defendant's train, and there was no testimony of any fault in the condition or construction of the coach door. The occasion was purely an accident. Nothing short of stationing a man at both doors in each coach at every stopping place to watch the doors to prevent injury to passengers could prevent just such accidents, and such a requirement would be most unreasonable under present conditions."

A similar accident was before the court in the case of *Goss v. Northern P. R. Co.* 48 Or. 439, 87 Pac. 149, wherein the supreme court of Oregon held that the mere closing of a door does not come within the maxim of *res ipsa loquitur*, but it should be made to appear that there was some defect in the door or in the fastening, or that the door was closed by some other act of negligence on the part of the company. It is true that in that case it was also held that it constituted negligence upon the part of the passenger to place his fingers on the door frame against which the door naturally closed.

In the case of *Hardwick v. Georgia R. & Bkg. Co.* 85 Ga. 507, 11 S. E. 832, it was held that the closing of a car door by which a passenger's hand was injured under circumstances which raised a much stronger inference of negligence than is present in this case was a pure accident, and did not authorize a recovery.

No case has been cited where, under circumstances as disclosed by this record, a recovery was permitted, and we do not think such a case can be found. It is possible that in case of an adult passenger the fact of exposing himself to such an injury may be held to be negligence upon his part which would prevent a recovery. Some of the courts held it to be such as a matter of law. 3 *Thomp. Neg.* § 2987. But the cases, so far as we know, all hold that an injury caused by the mere closing of an ordinary car door, either while the train is in motion or while standing still, is a pure accident for which the carrier is not liable, unless the injury is caused by some defect in the door or its appendages, or is attributable to some act constituting negligence upon the part of the carrier. It seems to us that this is good law and good sense in view that the carrier is not an insurer as against an injury to passengers. If, in view of the evidence in this case, it should be held that respondent can recover, it would have to be based upon the theory that a common carrier of passengers assumes and insures against every risk and danger to which a passenger may be exposed, including the consequent injury arising

therefrom. Such is clearly not the law. While the carrier is required to exercise the utmost degree of care to prevent accidents and injury to his passengers, he nevertheless is not an insurer of their safety. We remark, however, that, independent of the fact that the injured passenger in this case was an infant, we are not prepared to subscribe to the doctrine that, under all circumstances in case of an injury to a passenger by the closing of a car door against his hand, it should be held negligence as a matter of law for the passenger to place his hand upon the door frame at the place where the closing of the door would cause him injury. We prefer to rest our decision upon the ground that the evidence in this case does not establish culpable negligence under any rule of law by which negligence is established, and hence there can be no recovery. Upon the question of contributory negligence, therefore, we express no opinion.

From what has been said it follows that the court erred in refusing appellant's request to direct a verdict, and in submitting the case to the jury, and in entering judgment for respondent on the verdict. The cause is reversed, with directions to the trial court to grant a new trial, appellant to recover costs.

Straup, Ch. J., and McCarty, J., concur.

COLORADO SUPREME COURT.

CHARLES T. WILMORE, Appt.,

v.

HARRY MINTZ.

(42 Colo. 328, 95 Pac. 536.)

Election of remedies — judgment — replevin.

Obtaining a judgment and execution to enforce the alleged lien under a clause in a lease giving the landlord the first lien on all crops and chattels of the lessee for rent and damages precludes the maintenance of a replevin suit to obtain possession of the property on the theory that the contract was a chattel mortgage, in the absence of anything to show that the property could not be secured by the sheriff under an execution.

(March 2, 1908.)

APPEAL by plaintiff from a judgment of the District Court for the City and County of Denver in defendant's favor in an action brought to recover possession of certain chattels. Affirmed.

The facts are stated in the opinion.
20 L.R.A. (N.S.)

Messrs. Thomas B. Stuart and Charles A. Murray, for appellant:

The lien clause in the lease is a chattel mortgage.

Jones, Chat. Mortg. p. 2, § 1, p. 13, § 12; 5 Am. & Eng. Enc. Law, 2d ed. p. 947, note; Mitchell v. Badgett, 33 Ark. 387; Smith v. Dayton, 94 Iowa, 102, 62 N. W. 650; Smith v. Taber, 46 Hun, 313; Fejavary v. Broesch, 52 Iowa, 88, 35 Am. Rep. 261, 2 N. W. 963; Sioux Valley State Bank v. Honnold, 85 Iowa, 352, 52 N. W. 244; Ellington v. Charleston, 51 Ala. 166; Coty v. Barnes, 20 Vt. 78; Langdon v. Buell, 9 Wend. 80; Greeley v. Winsor, 1 S. D. 117, 36 Am. St. Rep. 720, 45 N. W. 325, affirmed on rehearing, in 1 S. D. 618, 48 S. W. 214; 1 Mills's Anno. Stat. (Colo.) § 390-392; Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Roberts v. Johnson, 5 Colo. App. 406, 39 Pac. 596; Hall v. Johnson, 21 Colo. 414, 42 Pac. 660.

An agreement to surrender possession of personal property gives clear title to that possession, and the clear right to maintain replevin for it when refused.

Shinn, Replevin, p. 207, § 214; Nessley v. Taylor, 63 Kan. 674, 66 Pac. 993; Jones, Chat. Mortg. § 699; Atchison v. Graham, 14 Colo. 222, 23 Pac. 876; Newman v. People, 4 Colo. App. 46, 34 Pac. 1006; Crocker v. Burns, 13 Colo. App. 54, 56 Pac. 199; Morse v. Morrison, 16 Colo. App. 449, 66 Pac. 169.

On petition for rehearing.

The court has determined the case wholly upon an entirely new question which is contrary to the settled policy of the court.

Case Note. — *Attempt to enforce lien under clause in a lease giving landlord lien on crops and chattels, as election preventing its enforcement as a chattel mortgage.*

The plaintiff in the foregoing case, in his first action to establish a lien upon the crops, proceeded upon the theory that the title thereto was in the defendant. In his second action, however, he proceeded upon the theory that, under the terms of the lease, the title to the property was in himself upon the failure of the defendant to fulfill the requirements of the lease. This falls clearly within the general principle that no suitor is allowed to invoke the aid of the courts by contradictory principles of redress upon one and the same line of facts. 7 Enc. Pl. & Pr. p. 363.

A search has failed to reveal any other case in which the lessor attempted to recover possession of the crops and chattels under the terms of the lease after having attempted to enforce an alleged lien thereon; but there are two or three cases in which the plaintiff has attempted to assert his title to property after he has sought to enforce a lien thereon. These cases present

Kelley v. Union P. R. Co. 16 Colo. 459, 27 Pac. 1058; Antlers Park Regent Min. Co. v. Cunningham, 29 Colo. 284, 68 Pac. 226; O'Connor v. Hitzler, 20 Colo. App. 385, 80 Pac. 474; Denver & R. G. R. Co. v. Burchard, 35 Colo. 539, 86 Pac. 749, 9 A. & E. Ann. Cas. 994; Chilcott v. Hart, 23 Colo. 40, 35 L.R.A. 41, 45 Pac. 391; Wyatt v. Freeman, 4 Colo. 14; Kelly v. E. F. Hallack Lumber & Mfg. Co. 22 Colo. 221, 43 Pac. 1003.

There is no election of inconsistent remedies.

Wetsel v. Mayers, 91 Ill. 497; Ogden v. Warren, 36 Neb. 715, 55 N. W. 221; Barchard v. Kohn, 157 Ill. 579, 29 L.R.A. 803, 41 N. E. 902.

Mr. J. E. Robinson, for appellee:

The holder of an equitable title cannot maintain replevin, as such action is maintainable only by the holder of the legal title.

Cobbeey, Replevin, §§ 100, 159; Groton Mfg. Co. v. Gardiner, 11 R. I. 626; Jackson v. Rutherford, 73 Ala. 155; Hennessey v. Barnett, 12 Colo. App. 254, 55 Pac. 197; Dalton v. Laudahn, 27 Mich. 529; Otis v. Sill, 8 Barb. 102; Green v. Jacobs, 5 S. C. 280; Brown v. Chickopee Falls Co. 16 Conn. 87; Marquam v. Sengfelder, 24 Or. 2, 32 Pac. 676; Daniel v. Daniel, 6 B. Mon. 230; Lewis v. Buttrick, 102 Mass. 412; Garrett v. Carlton, 65 Miss. 188, 3 So. 376; Leete v. State Bank, 141 Mo. 584, 42 S. W. 927; Woodruff v. Clark, 42 N. J. L. 198; Wheeler v. Allen, 49 Barb. 460, affirmed in 51 N. Y. 37.

The clause in the lease did not operate as a chattel mortgage.

Fallon v. Worthington, 13 Colo. 559, 6 L.R.A. 708, 16 Am. St. Rep. 231, 22 Pac. 900.

Bailey, J., delivered the opinion of the court:

In the year 1900 the appellant made a lease of certain property in Jefferson county to one Milstein, the lease containing the following clause: "(9) That all goods and

chattels, or any other property used or kept on said premises, shall be sold for the rent or damages under this lease, whether exempt from execution or not, meaning or intending hereby to give the party of the first part a valid and first lien upon any and all goods and chattels, crops and other property belonging to said party of the second part." About the 29th day of April, 1901, Milstein assigned the lease to appellee. Appellee took possession of the property and held it until the expiration of the lease. Milstein owned certain personal property which he kept upon the premises until he assigned the lease to appellee, at which time he sold it to appellee, and it continued to remain on the premises until appellee moved away, at which time he took all of the property with him. Later appellant brought an action in the county court of Jefferson county against Milstein, appellee, and one Rosenbaum. Appellant obtained judgment on the 25th of June, 1902, against the defendants in that action for \$400, in which judgment it was held that "the plaintiff has and holds a first lien for the amount of the judgment herein upon the property of the defendant, Mintz, described as follows [then follows a description of the property], and that said lien accrued on the 29th day of April, 1901, and that said property be sold as other property is sold upon execution for the payment and satisfaction of the plaintiff's judgment herein." The judgment also provides for the issuance of an execution. Nothing appears to have been done under this judgment, and in November, 1902, the appellant brought this action in the district court of Arapahoe county to replevin the property mentioned in the decree, and which is the same that was owned and kept by appellee upon the premises leased from appellant. At the trial in the district court and upon proof of the acts hereinbefore stated, a judgment of nonsuit was rendered, and plaintiff appeals to this court.

the same question, and the decisions are in line with WILMORE v. MINTZ.

In James v. Avery, 3 Ga. App. 357, 59 S. E. 1118, it was held that one who, in the sale of personal property, reserved title thereto, might, by trover, recover the same, even against the purchaser at a judicial sale; but, where personal property to which title has been reserved, is sold, and the vendor, who has reserved the title, elects to claim a lien upon the fund, he is estopped thereafter from asserting his title as against the property, and is confined to the proceeds of the sale.

In McFadden v. Thorpe Elevator Co. (N. D.) 118 N. W. 242, the plaintiff, in his original complaint, based his right of recovery upon a chattel mortgage, claiming 20 L.R.A. (N.S.)

merely a special property in the grain. Subsequently he was permitted to amend his complaint by abandoning such theory and alleging ownership of the grain by virtue of a farm contract. As a matter of fact the chattel mortgage had not yet attached to the grain, and it was subsequently held that there had been no election of remedies, as the plaintiff, in bringing the first action, was merely mistaken in attempting to pursue a remedy which he did not have, and this could not be construed as an election to waive or abandon the only remedy which he did possess.

As to the waiver of a lien or chattel mortgage by attachment or execution, see note to Dix v. Smith, 50 L.R.A. 714.

The basis of the replevin suit was the clause contained in the lease hereinbefore set forth, to the effect that appellant should have a first lien upon the property and the judgment of the county court, wherein the amount of damages sustained by appellant had been determined. The appellant contends that the clause in the lease operated as a chattel mortgage, and that upon default in the payment of the rent he was entitled to possession of the property; while the appellee contends that the clause created but an equitable lien in favor of the landlord, and that the landlord was not entitled to possession of the property upon a breach of the conditions of the lease, but that a suit should be brought to foreclose the lien. It is not necessary for us to determine in this action whether the lease amounted to a chattel mortgage or simply created an equitable lien, for the reason that the appellant has determined that question for us. An election once made with knowledge of the facts between coexisting remedial rights which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that asserted by the election. 15 Cyc. Law & Proc. p. 262, and cases therein cited. In bringing his action in the county court of Jefferson county, and obtaining a decree that he was entitled to a lien upon this property and that the same should be sold under execution, appellant elected to treat his contract as one of lien, and, having done so, and having obtained his judgment, he could not abandon those proceedings and treat the matter as a chattel mortgage, pure and simple, after having obtained a judgment authorizing the issuance of an execution and the taking of this property to satisfy the judgment. He did not have the right to ignore these proceedings and take personal possession of the property for the purpose of satisfying the lien.

In the absence of a showing that the judgment was ineffectual, and that the possession of the property could not be secured by the sheriff upon the execution, the plaintiff was not entitled to maintain the action.

The judgment of the District Court being correct, it will not be disturbed, and is therefore affirmed.

Steele, Ch. J., and Goddard, J., concur.

Petition for rehearing denied May 4, 1908.
20 L.R.A. (N.S.)

CONNECTICUT SUPREME COURT OF ERRORS.

NATIONAL FIRE PROOFING COMPANY

v.

TOWN OF HUNTINGTON et al.

(81 Conn. 632, 71 Atl. 911.)

Mechanics' lien — public building.

A statute providing for a mechanics' lien on any building does not include a building belonging to the public, such as a school-house.

(February 16, 1909.)

RESERVATION by the Superior Court for Fairfield County for the advice of the Supreme Court of Errors of a suit brought to foreclose a mechanics' lien on a public school building. Judgment for defendants advised.

Statement by Baldwin, Ch. J.:

Action by a subcontractor against the town of Huntington and sundry other subcontractors, who, like the plaintiff, had filed certificates of mechanics' lien on a town schoolhouse, to foreclose the plaintiff's lien, to ascertain what balance was due from the town on the "purchase price," and the respective amounts of the several liens, and to have the balance due from the town apportioned among the several lienors, brought to the superior court for Fairfield county and reserved (Gager, J.) for the advice of this court on a stipulation as to the facts. One of these was that the town of Huntington in the case of the plaintiff's lien

Case Note. — Mechanics' lien on public buildings.

This note is confined to a review of the decisions since 1896, collected in the note appended to First Nat. Bank v. Malheur County, 35 L.R.A. 141. From the authorities reviewed in that note it may be laid down as an almost universal rule of law that there can be no mechanics' lien upon public buildings unless expressly permitted by statute, though Kansas and perhaps Louisiana have adopted a contrary rule. The later authorities also almost unanimously deny the right of a mechanics' lien upon public buildings, even though the statute may not expressly exclude such right. Thus, in all the following cases it was held that, under such statutes, a mechanics' lien could neither be acquired nor enforced upon or against public buildings: *Scruggs v. Decatur* (Ala.) 46 So. 980; *Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 62 Pac. 41; *Kruse v. Wilson*, 3 Cal. App. 91, 84 Pac. 442; *Florman v. School Dist. No. 11*, 6 Colo. App. 319, 40 Pac. 469; *Emory v. Laurel*, 3 Penn. (Del.) 67, 55 Atl. 1118; *Albany v.*

and the lien of each of the defendants appearing had on hand at the time of the filing of the lien and of the service of notice of intention to claim lien an amount of money sufficient to pay such lien, and subject to such lien under the contract with the contractor if such lien is valid.

Mr. Edward A. Harriman, with Messrs. Williams & Harriman, for plaintiff:

The statute covers public schoolhouses.

Botsford v. New Haven, M. & W. R. Co. 41 Conn. 464; *Badger Lumber Co. v. Marion Water Supply Electric Light & P. Co.* 48 Kan. 187, 30 Am. St. Rep. 306, 30 Pac. 117; *Wilson v. School Dist. No. 2*, 17 Kan. 104; *Moore v. Protestant School Dist. 5 Manitoba L. Rep.* 49.

Public policy does not confer exemptions upon school districts.

McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689.

Mr. William S. Downs also for plaintiff.

Messrs. Alfred C. Baldwin and John W. Banks, for defendants:

On grounds of public policy, the mechanics' lien laws do not, in the absence of express provisions, apply to public buildings; and schoolhouses erected for the use of public schools come within such exemption.

2 Jones, Liens, § 1375; 2 Dill. Mun. Corp. 4th ed. § 577; Boisot, Mechanics' Liens, § 38; Phillips, Mechanics' Liens, § 179; Kneeland, Mechanics' Liens, § 84; 27 Cyc. Law & Proc. p. 25; 20 Am. & Eng. Enc. Law, 2d ed. p. 295; *Williams v. Controllers*, 18 Pa. 275; *Board of Education v. Salt Lake Pressed Brick Co.* 13 Utah, 211, 44 Pac. 709; *Panola County v. Gillen*, 59 Miss. 198; *Hall's Safe & Lock Co. v. Scites*, 38 W. Va. 691, 18 S. E. 895; *Parke County v. O'Con-*

ner, 86 Ind. 536, 44 Am. Rep. 338; *Patterson v. Pennsylvania Reform School*, 92 Pa. 229; *Phillips v. University of Virginia*, 97 Va. 472, 47 L.R.A. 284, 34 S. E. 66; *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816; *Florman v. School Dist. No. 11*, 6 Colo. App. 319, 40 Pac. 469; *Neal-Millard Co. v. Chatham Academy*, 121 Ga. 208, 48 S. E. 978; *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Young v. Falmouth*, 183 Mass. 80, 97 Am. St. Rep. 418, 66 N. E. 419; *Jordan v. Board of Education*, 39 Minn. 298, 39 N. W. 801; *Abercrombie v. Ely*, 60 Mo. 23; *Fatout v. School Comrs.* 102 Ind. 223, 1 N. E. 389; *Charnock v. Colfax Dist. Twp.* 51 Iowa, 70, 33 Am. Rep. 116, 50 N. W. 286; *Board of Education v. Neidenberger*, 78 Ill. 58, 20 Am. Rep. 259; *Thomas v. Board of Education*, 71 Ill. 283; *Thomas v. Illinois Industrial University*, 71 Ill. 310; *Hovey v. East Providence*, 17 R. I. 80, 9 L.R.A. 156, 20 Atl. 205; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Bell v. New York*, 105 N. Y. 139, 11 N. E. 495; *Portland Lumbering & Mfg. Co. v. School Dist. No. 1*, 13 Or. 283, 10 Pac. 350; *First Nat. Bank v. Malheur County*, 30 Or. 420, 35 L.R.A. 141, 45 Pac. 781; *Ripley v. Gage County*, 3 Neb. 397; *A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436, 57 Atl. 581; *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646; *Knapp v. Swaney*, 56 Mich. 345, 56 Am. Rep. 397, 23 N. W. 162; *Whiteside v. School Dist. No. 5*, 20 Mont. 44, 49 Pac. 445.

Baldwin, Ch. J., delivered the opinion of the court:

Gen. Stat. 1902, §§ 4135-4138, provide for the creation, under certain conditions, of a mechanics' lien in favor of any original

Lynch, 119 Ga. 491, 46 S. E. 622; *Neal-Millard Co. v. Chatham Academy*, 121 Ga. 208, 48 S. E. 978; *Rathbun v. State (Idaho)* 97 Pac. 335; *Salem v. Lane & B. Co.* 189 Ill. 593, 82 Am. St. Rep. 481, 60 N. E. 37, affirming 90 Ill. App. 560; *Townsend v. Cleveland Fire Proofing Co.* 18 Ind. App. 568, 47 N. E. 707; *Green Bay Lumber Co. v. Independent School Dist.* 125 Iowa, 227, 101 N. W. 84; *Thompson v. Stephens*, 131 Iowa, 51, 107 N. W. 1095; *Noonan v. Hastings*, 101 Ky. 312, 72 Am. St. Rep. 419, 41 S. W. 32; *Allen County v. United States Fidelity & G. Co.* 122 Ky. 825, 93 S. W. 44; *A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436, 57 Atl. 581; *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Young v. Falmouth*, 183 Mass. 80, 97 Am. St. Rep. 418, 66 N. E. 419; *Burlington Mfg. Co. v. Court-House & City Hall Comrs.* 67 Minn. 327, 69 N. W. 1091; *Whiteside v. School Dist. No. 5*, 20 Mont. 44, 49 Pac. 445; 20 L.R.A. (N.S.)

Arrison v. Company D. N. D. N. G. 12 N. D. 554, 98 N. W. 83, 1 A. & E. Ann. Cas. 368; *Herring-Hall-Marvin Co. v. Kroeger*, 23 Tex. Civ. App. 672, 57 S. W. 980; *Manly Mfg. Co. v. Broadus*, 94 Va. 547, 27 S. E. 438; *Hicks v. Roanoke Brick Co.* 94 Va. 741, 27 S. E. 596; *Phillips v. University of Virginia*, 97 Va. 472, 47 L.R.A. 284, 34 S. E. 66; *R. Connor Co. v. Olson (Wis.)* 115 N. W. 811.

On the other hand, in *Pullis Bros. Iron Co. v. Natchitoches Parish*, 51 La. Ann. 1377, 26 So. 402, it was held that a court house was subject to a mechanics' lien; which conclusion would seem to be in accord with the Louisiana decisions cited in the earlier note above referred to.

And a mechanics' lien statute, though not expressly so providing, was held, in *McArthur v. Dewar*, 3 Manitoba L. Rep. 72, to apply to a city hall; and in *Moore v. Protestant School Dist. 5 Manitoba L. Rep.* 49, to a schoolhouse.

contractor or subcontractor having a claim for over \$10 for material furnished or services rendered in the construction of "any building, or any of its appurtenances." These general words, if taken literally, cover every kind of building, public or private. It is clear, however, that they could not be construed to embrace buildings belonging to the state. *State v. Kilburn*, 81 Conn. 9, 11, 69 Atl. 1028. Nor do they include any public buildings belonging to corporations or communities created by the state as governmental agencies for purely public purposes, to defray the cost of which they can freely exercise the power of taxation.

The mischief which the statute was designed to remedy is an important guide in ascertaining its meaning. A thing within the letter of a statute may be unaffected by its provisions, if not within the intention of the makers; and if what was this intention sufficiently appears from the terms which they used, in connection with the conditions calling for such legislation. *Bridgeport v. Hubbell*, 5 Conn. 237, 243; *Wetherell v. Hollister*, 73 Conn. 622, 625, 48 Atl. 326; *Kelley v. Killourey*, 81 Conn. 320, 70 Atl. 1031. The statute under consideration created a new means of securing the claims of a particular class of creditors. It is in derogation of the common law, and of a kind calling for a strict, rather than a liberal, construction. *Chapin v. Persse & B. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263; *Hubbell v. Kingman*, 52 Conn. 17, 19. The mischief to be prevented was loss to those furnishing services or materials in the construction of a building if unable to collect what might be due them on such account from the owner of the real estate. The original contractor for the erection of a public building for such a public corporation as has been described is always sure of his pay. His debtor commands the resources of the whole community. As no lien is necessary for his protection, it is not to be presumed, in view of what such a lien would put it in his power to do, that the general assembly intended to give him one. The possessor of a mechanics' lien on real estate can gain title to it by foreclosure. If such a lien can be imposed upon public buildings, they can thus be turned into private buildings. If it can attach to a schoolhouse, it is difficult to see why it would not equally attach to a city hall, a county courthouse, or a county jail. It would be intolerable to put it in the power of a private citizen, in case the negligence of a county should result in his obtaining a foreclosure of a mechanics' lien, to take possession of a courthouse, and turn out the courts, or of a jail, and turn out the prisoners.

20 L.R.A. (N.S.)

It is suggested that the statute may be so construed as to permit a lien, but not its enforcement against the public corporation. This would strip the privilege of most of its value. The right and the remedy must stand or fall together. True, should the corporation sell the building to a private citizen, such a lien might be foreclosed; but it is ordinarily to be presumed that a building devoted to public uses will continue permanently to be devoted to them. It is therefore our opinion that the statute was not intended to give any lien on a public building to an original contractor. This being so, it cannot have been within its purpose to give one to subcontractors. To them the owner of the building owes no debt. Their equities are derived from their relation to the original contractor, and are not superior to his. We have held that a railroad station owned by a railroad corporation may be the subject of a mechanics' lien. *Botsford v. New Haven, M. & W. R. Co.* 41 Conn. 454. Such a corporation, being a private one, though serving public as well as private uses, and having no power of taxation to pay its debts, is not at all in the position of a strictly governmental agency, such as is a town or county. *Bradley v. New York & N. H. R. Co.* 21 Conn. 294, 306; *McKeon v. New York, N. H. & H. R. Co.* 75 Conn. 343, 348, 61 L.R.A. 730, 53 Atl. 656.

The claims for relief other than that for a foreclosure are subsidiary to that, and must fall with it.

The Superior Court is advised to render judgment for the defendants; and they will recover costs in this court.

The other Judges concur.

NEW HAMPSHIRE SUPREME COURT.

ELIZABETH B. STEER

v.

M. IVAN DOW.

NEW YORK LIFE INSURANCE COMPANY, Trustee.

(75 N. H. 95, 71 Atl. 217.)

Garnishment — Insurance commissions.

1. Renewal commissions due by an insurance company to its general agent under contract are subject to garnishment in the hands of the company in favor of his creditor, although they accrued partly from the efforts of subagents and, under the contract, were payable at his residence in another state.

Same — foreign corporation.

2. A foreign insurance company authorized to do business within the state is chargeable there as trustee for money due its agent for commissions on business done there, under a statute providing that a person doing business in the state and residing outside may be charged as trustee, as if he were an inhabitant of the state, for any credits of the defendant by reason of contracts performed within the state.

(November 4, 1908.)

TRANSFER by the Superior Court for Hillsborough County for the opinion of the Supreme Court of a garnishment proceeding to reach funds alleged to be due to plaintiff's debtors. Trustee charged.

Case Note. — Place of payment of debt as affecting jurisdiction to garnish the same.

This subject was covered in a case note to *Baltimore & O. R. Co. v. Allen*, 3 L.R.A. (N.S.) 608. A number of decisions in point have been rendered since the preparation of that note. As there shown, while the United States Supreme Court, in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, settled the proposition—so far as the duty of a court of one state under the full faith and credit clause of the Federal Constitution to recognize a judgment rendered in another is concerned—that a court of a state in which the debtor is domiciled has jurisdiction to subject the debt to garnishment, although the creditor is a nonresident and is served constructively, and the debt is payable generally, and not expressly payable in the jurisdiction in which it is sought to garnish it. The same court, in *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084, removed any doubt as to the jurisdiction, for the purposes of the full faith and credit clause, under circumstances otherwise the same, although the garnishee is a nonresident, if personal jurisdiction can be obtained over him by service of process within the state. While the principle upon which these decisions rest seems broad enough to cover a case where the debt is, in express terms, payable in a state other than that in which it is sought to garnish it, the question, under such circumstances, has not been definitely and authoritatively settled by that court, even for the purposes of the full faith and credit clause, and the state courts are, of course at liberty in any event to deny their own jurisdiction in domestic garnishment proceedings under such circumstances.

The Alabama supreme court, in *Planters' Chemical & Oil Co. v. A. Waller & Co.* (Ala.) 49 So. 89, upon the authority of the decisions of the Federal Supreme Court, held that a court of Alabama had jurisdiction to garnish an indebtedness due from an Alabama corporation to a Kentucky corporation. 20 L.R.A. (N.S.)

Upon the disclosures first made by the trustee no debt appeared, but at a subsequent date the trustee was shown to be indebted to the defendant. He had been its general agent in New Hampshire with sub-agents in his employ. His contract entitled him to renewal commissions on business transacted in New Hampshire, which, by a modification of the contract, were payable to him in Boston, at which place he had acquired a residence.

Further facts appear in the opinion.

Messrs. **Andrews & Andrews**, for plaintiff:

The insurance company, although a non-resident, is chargeable.

Goodwin v. Claytor, 137 N. C. 224, 67 L.R.A. 217, 107 Am. St. Rep. 479, 49 S. E.

tion which was served constructively only and appeared specially for the purpose of questioning the jurisdiction. It will be observed that in this case the debtor was a domestic corporation of Alabama and the debt seems to have been payable in Alabama. The ground on which the majority opinion attempts to distinguish the earlier Alabama cases suggests that the result might have been different if the garnishee had been a foreign corporation and the debt had been contracted in and payable in another jurisdiction. *McClellan, J.*, while concurring in the decision, was of the opinion that the former decisions should have been expressly overruled, and the decision in the case at bar referred to the broad principle underlying the *Sturm Case* that the jurisdiction of the court in garnishment proceedings rests upon its juridical power over the person of the garnishee. This, not necessarily because the position formerly taken by the court, that the situs of a debt for the purpose of garnishment is at the domicile of the creditor, was wrong in principle, but as a matter of expediency and justice in view of the necessity, in consequence of the decisions of the Federal Supreme Court, of abandoning that position when a judgment of garnishment rendered in another state is concerned. He elaborates his views on this subject at length in an able opinion in the case of *Shuttleworth v. Marx* (Ala.) 49 So. 83, in which the court held, with his concurrence so far as the decision was concerned, that a court of Alabama had jurisdiction to garnish a debt due from residents of that state to persons domiciled in Kentucky, who were served constructively only. The defendant's plea to the jurisdiction, a demurrer to which was sustained, alleged that the indebtedness was for goods sold and delivered to the garnishee in Kentucky, and "that such debt was payable at Louisville in that state, and not in Alabama." It is difficult to determine whether the decision of the majority in that case may properly be regarded as authority for upholding the jurisdiction under such circumstances, when the debt is expressly payable in another state, as distinguished from

173; 14 Am. & Eng. Enc. Law, 2d ed. p. 805; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084.

Mr. Henry N. Hurd for defendant.

Messrs. Burnham, Brown, Jones, & Warren for the trustee.

Parsons, Ch. J., delivered the opinion of the court:

A trustee is chargeable, not only for the funds of the defendant in his hands at the time process is served upon him, but also, with certain exceptions, for all that may come to his hands up to the time of disclosure. Pub. Stat. 1901, chap. 245, § 19; Gove v. Varrell, 58 N. H. 78; Palmer v. Noyes, 45 N. H. 174, 178; Smith v. Boston, C. & M.

a case where the debt is payable generally; for the reason that it does not appear whether the language above quoted from the plea imports that the debt was, by express terms of the contract, payable in Kentucky, or was merely by legal implication payable there. If used in the latter sense, the debt would seem to fall within the category mentioned in the Sturm Case of debts "payable generally," and the decision, therefore, upon its facts would be subject to the same limitation as the Sturm Case. The opinion of McClellan, J., argues that the place of the payment of the indebtedness does not affect the question of jurisdiction whether the garnishee be a resident or nonresident, assuming that such garnishee is personally subject to the jurisdiction of the court. He was apparently of the opinion that the grounds upon which the majority decisions in these two cases rest leave the question as to the jurisdiction in doubt if the garnishee is a nonresident though personally subject to the jurisdiction, and the indebtedness did not arise out of business transacted in the state, and is in express terms payable in another state, or possibly if, under such circumstances, it is payable generally and not in express terms payable in the jurisdiction in which it is sought to be garnished.

The Georgia supreme court, in Harvey v. Thompson, 128 Ga. 147, 9 L.R.A.(N.S.) 765, 119 Am. St. Rep. 373, 57 S. E. 104, upheld the constitutionality of the act of August 13, 1904 (Acts 1904, page 100), expressly providing that, when any suit is brought by attachment against a nonresident of the state, and the attachment is levied by service of summons of garnishment, the situs of any debt due by the garnishee to the defendant shall be at the residence of the garnishee in Georgia, and any sum due the defendant in attachment shall be subject thereto—notwithstanding that the doctrine was previously established in that state that the situs of a debt for the purpose of garnishment was exclusively at the residence of the creditor,—at least if there was no agreement as to the place of payment. The court further said that the 20 L.R.A.(N.S.)

R. Co. 33 N. H. 337, 345; Edgerly v. Sanborn, 6 N. H. 397. Wages for labor performed by the defendant after service upon the trustee are an exception. Pub. Stat. 1901, chap. 245, § 20. If the renewal commissions are payments for labor performed in placing the original policy, the fund disclosed is not within the exception because it is to be inferred such labor was performed before the defendant left the state prior to the service, and for the further reason that the wages excepted are only those accruing as payment for purely personal service. A fund created in part by the labor of others than the wife and minor children of the defendant is not excepted. Robbins v. Rice, 18 N. H. 507, 510; Hale v. Brown, 59 N. H. 551, 47 Am. Rep. 224; Gray v. Fife, 70 N. H.

fact that the contract under which the debt sought to be garnished arose is by its terms payable in another state would not oust the jurisdiction, in the event that the court had personal jurisdiction of the garnishee, although the latter was a foreign corporation.

The question in the last case having been decided by the supreme court in answer to a question certified to it by the court of appeals, its conclusion was accepted and acted upon by the latter court. (Harvey v. Thompson, 2 Ga. App. 569, 60 S. E. 11.)

It is also held in A. B. Baxter & Co. v. Andrews, post, 268, that the fact that a debt due a nonresident is payable in the state where the principal defendant resides does not prevent its subjection to garnishment in Georgia. The garnishee in this case was a national bank located in Georgia.

In Central R. Co. v. Collum, 130 Ga. 434, 60 S. E. 1060, holding that since the passage of the act of 1904 the situs of a debt for the purpose of garnishment is the residence of the garnishee, it does not appear where the debt was payable.

It will be observed that, while the indebtedness which was held subject to trustee process in STEER v. DOW (even assuming that the trustee was to be regarded as a nonresident doing business in the state) was payable in another state, it arose out of business in New Hampshire.

In Cavanaugh Bros. v. Chicago, R. I. & P. R. Co. (N. H.) 72 Atl. 694, which holds, upon the authority of STEER v. DOW, that a debtor is properly chargeable in New Hampshire upon a transitory cause of action, even if the debt due from it to the principal defendant (a nonresident corporation) is payable in another jurisdiction, the trustee was a resident of New Hampshire.

In Ryan v. Kimberly, 118 Ill. App. 361, where it was said that it is well established in Illinois that a debt payable outside of Illinois is subject to garnishment in Illinois, the creditors were nonresidents, and were served by publication. For aught that appears the debtor (garnishee) was a resident of Illinois.

It will be observed that in McShane v.

89, 85 Am. St. Rep. 603, 47 Atl. 541. Where "no means are furnished by which it is possible to extricate the privileged labor from the other ingredients composing the cause of indebtedness and to ascertain its value," the trustee is chargeable.

Prior to the act of June 30, 1841 (Laws 1841, chap. 601, p. 527; Rev. Stat. 1843, chap. 208), a trustee could not be charged on account of his liability to the defendant on a negotiable promissory note or by rea-

son of any chose in action of the defendant in his possession. The negotiable character of the instrument evidencing his liability in the first case whereby, if he were charged, a bona fide holder might suffer a loss or the maker be compelled to pay twice, and the lack of means for enforcing the security in the second, were the reasons for the holding that such liabilities or securities were not included within the terms "money, goods, chattels, rights, or credits," used in the act

Knox, post, 271, holding that the place of payment is not material upon the question of jurisdiction to garnish a debt due to a nonresident, both the principal defendant and the garnishee were personally served with process within the state, so that it was not necessary to proceed *in rem*.

In *Krafve v. Roy*, 98 Minn. 141, 116 Am. St. Rep. 346, 107 N. W. 966, holding that an indebtedness, due to one foreign corporation from another foreign corporation maintaining an agency in Minnesota for the transaction of business, was subject to garnishment in Minnesota, the court emphasizes the facts that the indebtedness grew out of a transaction that took place in Minnesota, was payable at Minneapolis (the usual method of payment being by draft upon a bank in Minnesota mailed to the creditor corporation at its place of business in Washington). The court said, however, that a debt has its situs, for the purpose of attachment, wherever the debtor can be found; and that wherever the creditor might sue for its recovery there it might be attached as his property; and that the place of payment is immaterial. The court suggests that there may be an exception to the rule in case of a debtor temporarily within the state.

In *Johnson v. Union P. R. Co.* 145 Fed. 249, it was held that an indebtedness due from the New York, N. H. & H. R. Co. (incorporated in Connecticut, Massachusetts, and Rhode Island, its affairs being administered by one board of directors and by a single organization) to the Union P. R. Co. (a foreign corporation), payable at the principal office of the former company in Connecticut, was subject to garnishment in Rhode Island, whether the garnishee be regarded as a single corporation incorporated in three states, or three corporations which practically have become so consolidated that their affairs cannot be separated. The court does not appear to have considered the effect upon the jurisdiction to garnish the debt of the fact that the debt was expressly payable in another state, apart from its possible effect upon the question whether the court had personal jurisdiction of the debtor.

The decision in the last case was followed by the Rhode Island supreme court in *Johnson v. Union P. R. Co.* (R. I.) 69 Atl. 298, upon the same state of facts.

In *Missouri, K. & T. R. Co. v. Swartz* (Tex. Civ. App.) 115 S. W. 275, holding that a debt due by a railroad company for wages

earned by a resident of Texas for services rendered partly in Texas and partly in Oklahoma—they being usually paid in Texas, and that being where the principal defendant expected to receive them—were subject to garnishment in Missouri, where the company operated a line, it does not expressly appear whether or not the garnishee was a domestic corporation of the latter state. That, however, in any view, would seem to be immaterial, since the debt does not seem to have been in express terms payable in Texas, and was therefor within the category of debts "payable generally," mentioned in the *Sturm Case*, and so the case fell directly within either the *Sturm Case* or the *Balk Case*.

The same is true of *Hadacheck v. Chicago, B. & Q. R. Co.* 74 Neb. 385, 104 N. W. 878, holding, upon the authority of the *Sturm Case*, that a judgment of garnishment rendered in Mississippi for wages due a laborer for services performed in Nebraska was binding upon a Nebraska court. It seems to have been assumed, although it is not expressly so stated, that the creditor (the principal defendant in the garnishment proceedings) was not a resident of Mississippi, and was served constructively only.

It is provided by statute in Illinois that wages earned out of the state and payable out of the state shall be exempt from attachment or garnishment in all cases where the cause of action arose out of the state, unless the defendant in the attachment or garnishment suit is personally served with process. It was held in *Baltimore & O. R. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 761, that, it not appearing that the cause of action upon which garnishment proceedings in Illinois were predicated arose outside of that state, it was error to strike from the evidence in an action in Indiana a transcript of a judgment rendered by a justice of the peace in Illinois garnishing a debt due to a nonresident for wages which, it appeared by the agreement of the parties, were earned and payable outside of Illinois.

In *Rykard v. Seaboard Air Line R. Co.* 80 S. C. 52, 61 S. E. 252, the court refused to give effect to a judgment of garnishment rendered by a court of limited jurisdiction in Georgia, because the record did not show that the court had jurisdiction of the garnishee, or that there was due service by publication upon the principal defendant, a non-resident.

of 1791. By the act of 1841 negotiable promissory notes "made or payable in this state, or the parties to which, at the time of making the same, resided in this state," were made subject to attachment by this process. The legislation was subsequently extended (Gen. Stat. 1867, chap. 230, § 21) so as to include all negotiable paper "made and payable in this state, or the parties to which, at the time of making the same, resided in this state." Pub. Stat. 1901, chap. 245, §§ 21, 22; Laws (ed. 1792) p. 151; *Cox v. Severance*, 70 N. H. 86, 85 Am. St. Rep. 602, 46 Atl. 739; *Kibbling v. Burley*, 20 N. H. 359; *Fletcher v. Fletcher*, 7 N. H. 452, 453, 454, 28 Am. Dec. 359; *N. H. I. F. Co. v. Platt*, 5 N. H. 193; *Stone v. Dean*, 5 N. H. 502. Therefore, where it is sought to hold the trustee as liable upon negotiable paper, the trustee will be discharged, unless the instrument comes within the description of the statute. *Chadbourn v. Gilman*, 63 N. H. 353; *Carbee v. Mason*, 64 N. H. 10, 4 Atl. 791.

By the terms of the contract between the defendant and trustee, the fund in question was, at the time of the attachment, payable in Massachusetts. It does not appear that the original contract or the variation relied upon were reduced to writing. But, assuming that they were, the instrument was not negotiable. So far as it is disclosed, it was a mere contract of employment specifying the agreed remuneration for service rendered. It is not within the exception existing before the legislation extending the process of foreign attachment to cover certain negotiable paper, and the provisions of the statute have no application. The plaintiff is not seeking to enforce the contract, but to reach property in the trustee's hands which the contract shows to belong to the defendant. The contract is material only on the question of title, and performs the same office as a bill of sale or deed of land in a proceeding to hold the trustee for the purchase price of goods or land. The fund in the possession of the trustee here is attachable, regardless of the agreement of the trustee to transport it to the defendant at Boston, precisely as a horse or car load of goods would be. The fact that payment of a debt is agreed to be made out of the state is not an answer to the trustee process. *Sturtevant v. Robinson*, 18 Pick. 175; *Blake v. Williams*, 6 Pick. 286, 315, 17 Am. Dec. 372. It does not appear that, by the contract, a demand by the defendant in Massachusetts was made a condition precedent to his right of action to recover the debt. If it were, in the absence of such a demand, the defendant could not maintain an action for the fund here or elsewhere. To the general rule that the trustee can be charged

only for what the defendant could recover of him in an action on the contract there are exceptions. *Libby v. Mt. Monadnock Mineral Spring & Land Co.* 67 N. H. 587, 32 Atl. 772. He may be charged where the defendant could not maintain a suit without proof of a demand, although none has been made. *Quigg v. Kittredge*, 18 N. H. 137; *Woodbridge v. Morse*, 5 N. H. 519. "The trustee is to be charged whenever it appears he has money in his hands which the principal has a right to receive upon demand, whether a demand has been made or not."

In argument in this court it appears to be urged that the trustee is not an inhabitant of the state. It has been held that a resident and inhabitant of another state, although served with process here, cannot be charged as trustee except upon a contract to be performed here, or for goods of the defendant actually in his possession here at the time of the service of the writ upon him. *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Young v. Ross*, 31 N. H. 201; *Sawyer v. Thompson*, 24 N. H. 510; *Jones v. Winchester*, 6 N. H. 497. This objection does not appear to have been taken in the superior court, and the facts as to the residence of the trustees are not fully found; but, from the absence of objection to the validity of the attachment by service upon the insurance commissioner, it may be inferred that the trustee is a foreign "joint-stock or mutual insurance company," duly admitted to and doing business in this state subject to its laws. Pub. Stat. 1901, chap. 169, § 4. In view of the statutory provisions on the subject (Pub. Stat. 1901, chap. 170, § 14; *Id.*, chap. 169, § 4), whether such a party appearing as a litigant in the courts of the state is to be regarded as a resident of the state or otherwise may be a question requiring serious consideration. Time need not be now taken for the purpose; for, assuming that the trustee is to be regarded as a nonresident doing business in the state, the case is fully covered by the statute. "A person doing business in this state and residing outside the state may be summoned on trustee process, . . . and he may be charged as trustee, as if he were an inhabitant of this state, . . . for any rights or credits of the defendant by reason of contracts made or performed within the state." Pub. Stat. 1901, chap. 245, § 5. The credits for which it is sought to charge the trustee accrue to the defendant "from business in New Hampshire, done by him and his sub-agents." In the language of the statute, they are "credits of the defendant by reason of contracts . . . performed within the state," wherever the contract was made,

which does not appear. The trustee therefore is to be charged "as if it were an inhabitant of this state."

Trustee chargeable.

All concur.

GEORGIA SUPREME COURT.

A. B. BAXTER & COMPANY, Plff. in Err.,

v.

D. A. ANDREWS.

(— Ga. —, 62 S. E. 42.)

Garnishment — debt due nonresident.

1. A debt due by a resident of this state to a nonresident may be reached by garnishment proceeding sued out upon a tax execution issued by a tax collector for a special tax due the state by such nonresident.

Same — place payable.

2. This is true notwithstanding the debt due the nonresident may have been payable in the state where the creditor of the garnishee resided.

(July 22, 1908.)

ERROR to the Superior Court for Muscogee County to review a judgment in plaintiff's favor in a garnishment proceeding on a tax execution to reach a general bank deposit in the name of a nonresident. Affirmed.

Statement by Beck, J.:

A. B. Baxter & Company, incorporated, the plaintiff in error, was in the year 1904, from January until some time in February, engaged in Columbus, Georgia, as brokers or dealers in futures. In February of the year 1904, Baxter & Company failed. The tax collector issued a *fi. fa.* for the special state tax of \$1,000 for that year. This *fi. fa.* was levied upon the office furniture of Baxter & Company, which was sold, and the proceeds applied to the execution. No other property was found. While Baxter & Company were engaged in business, and up to the time and date of their failure, they transacted their banking business with the Fourth

Headnotes by Beck, J.

Note. — The general question as to the right to garnish a debt due to a nonresident when the latter is not personally subject to the jurisdiction is treated at length in the note to *Goodwin v. Claytor*, 67 L.R.A. 209; and the effect on that general question of the fact that the debt is payable in another jurisdiction is specifically treated in a case note to *Baltimore & O. R. Co. v. Allen*, 3 L.R.A. (N.S.) 608, 20 L.R.A. (N.S.)

National Bank of Columbus, Georgia, as a depository. E. W. Wood was the local agent or manager up to the time of failure, and deposits were made in said bank in the name of A. B. Baxter & Company, Inc., and additional deposits were made in the name of E. W. Wood, manager of A. B. Baxter & Company, thus making two deposits. The deposit in the name of A. B. Baxter & Company was not subject to the check of the local manager, E. W. Wood, but it is set forth in the answer of the garnishee, the bank, that it was payable in New York, the residence of A. B. Baxter & Company, by New York draft, and sometimes by wire, upon the order of Baxter & Company from New York. The deposit was general and not special. "The money would be forwarded to Baxter & Company by New York check or by wire. The deposit was not checked against, but this garnishee, after such deposits were made, and after notification to the defendant in New York, would pay the same by its check on its New York correspondent, or by wire, as requested." The deposit to the account of E. W. Wood, as manager of A. B. Baxter & Company, was subject to check by the local manager, though the deposit belonged to Baxter & Company, residents of New York. Andrews, tax collector, upon the *fi. fa.* issued for this special tax, issued garnishments which were served upon the Fourth National Bank as garnishee, who answered, in substance, as above stated, but somewhat more in detail. Baxter & Company were nonresidents of Georgia and residents of New York. At the time of the service of the garnishments they had ceased to do business in Georgia. They had no agents in Georgia. The answer and the amended answers were not traversed or denied. The defendants specially appeared and protested against the jurisdiction of the court, and moved for a dismissal of the garnishment proceedings upon the grounds therein set forth, which are, in substance, as follows: (1) That it appeared from the answer of the garnishee that Baxter & Company were nonresidents of Georgia. That the garnishee was indebted to these nonresidents on a general deposit payable in New York, which debt was sought to be reached by the garnishment proceedings. That the debt was a general deposit in the garnishee bank, constituting a loan. That the situs of the debt, the chose in action, due to Baxter & Company by the garnishee bank, was with the creditor, Baxter & Company, in a foreign state, and was not within the jurisdiction of the trial court, the defendant having done nothing to enable the court to acquire jurisdiction of its personal property. (2) That the trial court was without

jurisdiction to render a binding judgment condemning the debt or chose in action due to a nonresident defendant. The court overruled the motion, and the defendant excepted. Andrews, tax collector, introduced in evidence the tax *fi. fa.* with the entries of levy thereon of the service of garnishments, and of the sale of personal chattels under the levy and the application of the proceeds to the reduction of the *fi. fa.*, and, there being no other evidence, moved for a judgment against Baxter & Company and the surety on the bond dissolving the garnishment and a judgment against the funds in the hands of the garnishee. Baxter & Company, still specially appearing for such purpose, objected to such judgments being rendered, upon the ground that the answer of the garnishee had not been traversed, and that Andrews, tax collector, was not entitled to judgment upon such answer, that the defendant was a nonresident of Georgia, residing in the state of New York, and the debt due by the garnishee was due and payable in New York, and that the court was without jurisdiction of the defendant and without jurisdiction to seize such debt. The court overruled the objections, and rendered judgment against the defendant and against the debt due by the garnishee. To this judgment defendant excepted.

Messrs. Charlton E. Battle, for plaintiff in error:

Under the laws of Georgia the situs of a debt is with the creditor; and, where the creditor is a nonresident, the court is without jurisdiction to entertain a garnishment proceeding to reach the debt.

Birdseye v. Underhill, 82 Ga. 146, 14 Am. St. Rep. 142, 7 S. E. 863; *Central R. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597; *Henry v. Lennox-Haldeman Co.* 116 Ga. 9, 42 S. E. 383; *Beasley v. Lennox-Haldeman Co.* 116 Ga. 13, 42 S. E. 385; *High v. Padrosa*, 119 Ga. 648, 46 S. E. 859; *Wells v. East Tennessee, V. & G. R. Co.* 74 Ga. 548.

The larger deposit, being, by contract, payable in New York, could in no event be touched by the garnishment proceedings.

High v. Padrosa, *supra*.

Mr. T. T. Miller, for defendant in error:

An execution for taxes is final process, and has all the force and effect of a judgment *in personam*, and cannot be classed with an attachment where no personal service is had upon a nonresident defendant.

Code, §§ 883-886, 896.

An execution for taxes is classed with ordinary executions as to the period when such executions shall become dormant; and its binding force and dignity is more sacred.

Code, §§ 881, 903.

20 L.R.A. (N.S.)

Beck, J., delivered the opinion of the court:

The plaintiff in error, in the maintenance of the position taken by it, contends that, under the laws of Georgia, the situs of a debt is with the creditor, and that, where it appears that the creditor is a nonresident, the courts of this state are without jurisdiction to entertain garnishment proceedings which seek to seize or hold the debt due to such nonresident. It is insisted that the rule just stated, relative to the situs of a debt, is general and capable of universal application under the decisions of our court. However varied and conflicting may be the decisions of other courts in this country, touching the universal applicability of that rule, and several decisions of our court cited in support of the theory advanced, an examination of those cases shows that each of them which touches the question under consideration was an attachment case; but in several of them very broad language is used, broad and general enough in fact to support counsel for plaintiff in error in the position taken in his brief. In the case of *High v. Padrosa*, 119 Ga. 648, 46 S. E. 859, it was said: "In the case of *Central R. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597, which was followed in *Johnson v. Southern R. Co.* 110 Ga. 303, 34 S. E. 1002, each being a decision by six justices, the rule that the residence of the creditor fixes the situs of the debt was recognized and applied in garnishment cases. This rule was also applied in the cases of *Henry v. Lennox-Haldeman Co.* 116 Ga. 9, 42 S. E. 383, and *Beasley v. Lennox-Haldeman Co.* 116 Ga. 13, 42 S. E. 385; each being a decision by only five justices. Application is now made to review the two decisions first mentioned. Respectable authority may be found on either side of the questions involved in this case; but, after diligent investigation and mature reflection, the court as constituted when the decisions referred to were rendered adopted and followed the line indicated in the opinions in those cases." But the case of *High v. Padrosa* is a case in which summons of garnishment issued in proceedings begun by attachment and the cases cited in the decision under consideration were of a similar nature, and the rulings there made are not necessarily controlling in the present case. So far as we are advised, it has never been ruled in this state, in a suit where there has been personal service such as would authorize the rendition of a judgment and an execution *in personam* against the defendant, that, although the defendant might have been a nonresident of this state, a debt due him by a resident of this state, upon whom summons of garnishment could have been served, was not lia-

ble to be seized or held by garnishment proceedings properly sued out. Under the circumstances last supposed, the authorities for holding that garnishment proceedings could be maintained to seize and hold such a debt are numerous, and the reasons in support of them seem sound and conclusive. "For most purposes—taxation, distribution, etc.—it has long been a recognized and established fiction of law that their situs is at the domicile of the owner. It would seem almost impertinent to remark that this is a fiction merely, and that it is impossible, from the nature of things, for intangible property to have an actual location, were it not for the fact some courts and text writers have at times appeared oblivious to it. Though it is not discussed in the opinion, Chancellor Kent, as early as 1809 [*Embree v. Hanna*, 5 Johns 101], seems to have taken it for granted that this fiction does not apply to debts when they are sought to be reached by garnishment in a jurisdiction where the owner does not reside, and the same doctrine has been recognized and applied tacitly, or positively and directly asserted, in almost every court of last resort in America to which the question has ever been submitted since that time, so that, notwithstanding some dissent, and more *obiter*, we may lay it down as a general proposition that the residence of the defendant does not affect the question as to whether the debt should be considered as having a situs within the jurisdiction of the court for the purposes of garnishment, whether such principal defendant was personally served with process within the jurisdiction or not." Rood, *Garnishment*, § 242. The writer from whose work the above extract was taken cites a large number of decisions directly in point. The same writer, in a subsequent section of his work, said: "It is impossible to bring harmony out of chaos. Let us for a moment consider the reason and nature of things. It is essential elements, a garnishment suit is a suit brought by the principal defendant against the garnishee in the name and for the benefit of the plaintiff. The plaintiff is empowered by law to step into the shoes of the garnishee's creditor and acquire his rights; no more, and no less. Whatever he could do, the plaintiff, under the statutory novation of garnishment, may do, as his assignee and attorney in fact, by operation of law. Wherever the garnishee could be sued by the defendant for the demand, he may be charged as garnishee on account of it. Other states must recognize this right, if they recognize garnishment at all. This would seem to follow as of course, and the writer offers it as his humble opinion that this is the only true solution of the matter. The following cases declare 20 L.R.A. (N.S.)

the doctrine, and to these the reader is referred." [§ 245.] In addition to submitting several sound reasons for the conclusion reached, Mr. Rood again cites a large number of cases in support of the position taken by him. With a large number of strong authorities and well-reasoned cases holding that a debt due to a nonresident may be reached by garnishment proceedings, we are unwilling to extend the ruling made by this court in attachment cases, unless the issue in the case at bar is of such a nature as will necessarily bring it within the rulings made in those cases, and, after a careful examination of the decisions by this court above referred to and the reasoning upon which they are based, we are of the opinion that they are not controlling upon the question raised in this record.

In the absence of personal service or notice, an attachment is a quasi proceeding *in rem*, or similar to such a proceeding. It depends entirely upon being levied by seizure or by garnishment. If no property can be seized, it is of no effect. The process is *mesne*, and, if a levy is made, the cause must proceed to final judgment. A tax execution is final, not *mesne*, process. No further proceeding is necessary upon it than to levy and collect it. It is more nearly analogous to an execution issued upon judgment in a common-law suit. The garnishment issued upon it is more like a garnishment based upon a final judgment. After this court had held that, in attachment cases, debts due to a nonresident did not have such a situs as to authorize seizure by garnishment as a basis for further proceedings, the legislature passed an act declaring that they should have a situs sufficient for that purpose. Thus the legislature evinced an intention to fix the situs of a debt due by a resident debtor as sufficiently in this state to be subject to garnishment. Acts 1904, p. 100. It is true that the act of the legislature only in terms referred to attachment cases, but that was doubtless because the situs had only been declared in attachment cases not to be sufficiently located in Georgia to support a seizure by garnishment. The act of the legislature went as far as the decisions had gone. We hardly think that it was the legislative intent to declare that the situs of the debt should be in Georgia to such an extent as to furnish the basis for the entire litigation, and yet not sufficiently here to furnish a basis for a garnishment based upon final judgment, or upon a tax execution more nearly analogous thereto than to an attachment process. Moreover, it has been held that, where a nonresident had an agent in Georgia who sold goods to him partly on a

credit, took notes, and forwarded them to the principal office, and they were collected there, or, if collected in this state, the proceeds were sent to the principal office out of the state, there was sufficient situs to authorize the taxation of such debts in this state. *Armour Packing Co. v. Clark*, 124 Ga. 369, 52 S. E. 145. In the present case the execution was for taxes on account of the very business of the defendant in Georgia. The money, (which apparently arose from the business) was deposited in a bank in this state. It does not appear that there was any specific contract for its payment elsewhere, but that the bank would telegraph to the defendant and would pay the money as directed, or honor its draft. Thus, there was a tax due on account of the business in Georgia, final process issued therefor, on which a garnishment could be based under the statute, and money of the defendant deposited in a bank in this state. This was on general deposit, and therefore might be called a debt of the bank; but we think that there was such situs in this state as to authorize a garnishment to be served upon the bank and to subject the accounts of such deposit.

Judgment affirmed.

All the Justices concur

MINNESOTA SUPREME COURT.

LEWIS L. McSHANE, Appt.,
v.

J. A. KNOX et al.

NORTHERN PACIFIC RAILWAY COMPANY, Garnishee.

(103 Minn. 268, 114 N. W. 955.)

Garnishment — nonresident defendant — personal service — jurisdiction.

1. The courts of this state have jurisdiction to entertain garnishment proceedings against nonresident parties in all cases where the defendant and garnishee are both personally served with process while within the state.

Same — situs of property.

2. Where no personal service is made upon the defendant in this state, the situs of the property sought to be reached by the garnishment determines the jurisdiction of the court; but, where personal service is had upon both defendant and garnishee, the situs of the property, as determined by the residence of the parties, is immaterial.

Same — place of payment.

3. Nor is the place of payment material, where the garnishee interposes no claim that he cannot be compelled to make payment at a place other than that agreed upon.

(February 7, 1908.)

APPEAL by plaintiff from so much of a judgment of the District Court for Clay County as dismissed proceedings against the garnishee in an action brought to recover the amount alleged to be due upon a certain promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Sharp & Chapin for appellant.

Messrs. N. I. Johnson and L. L. Twichell for respondents.

Brown, J., delivered the opinion of the court:

This action was brought by plaintiff, a resident of North Dakota, against defendant, also a resident of that state, to recover upon a promissory note theretofore executed by him to one Ellis, and by Ellis transferred to plaintiff. At the time of its commencement a garnishee summons was duly issued therein against the Northern Pacific Railway Company, a corporation organized under the laws of Wisconsin but maintaining an agency and doing business in this state. The summons in the principal action was personally served upon the defendant in the city of Moorhead, this state, on June 17, 1907, together with a copy of the garnishee summons, with the usual notice to defendant and proof of service upon the garnishee.

Note. — See note to *Baltimore & O. R. Co. v. Allen*, 3 L.R.A.(N.S.) 608, and supplementary note to *Steer v. Dow*, ante, 263, on the place of payment of the debt as affecting the jurisdiction to garnish the same. With the exception of *McSHANE v. Knox*, all the cases in those notes proceed upon the assumption that the creditor (the principal defendant) was not personally subject to the jurisdiction of the court, so that if the jurisdiction was to be upheld it must be on the theory that the proceeding was one *in rem*, and that the debt had a situs within the state so as to support such a proceeding, or at least that the judicial power over the debtor was sufficient to sustain the jurisdiction to condemn the debt without jurisdiction of the person of the creditor. As intimated in the opinion in the *McSHANE CASE*, there would seem to be no question about the jurisdiction where the principal defendant (the creditor) as well as the garnishee (debtor) were both personally subject to the jurisdiction; at least the question of jurisdiction in such case would seem to depend upon the local statute, and not involve any constitutional question.

The garnishee disclosed an indebtedness to defendant in the sum of \$140.10. Defendant made no appearance in the action, and, on July 9, 1907, default judgment was rendered against him for the sum of \$124.67. Thereafter application was made to the court for judgment against the garnishee upon its disclosure, on which defendant appeared specially and for the purposes of the motion only, and moved the court to dismiss the garnishment proceedings on the ground that, as all the parties were nonresidents of the state, the court had no jurisdiction. The motion was granted, and plaintiff appealed.

It is contended by defendant, in support of the order appealed from, that the case comes within the rule of *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 42 L.R.A. 283, 71 Am. St. Rep. 492, 75 N. W. 740, and *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452, and should be affirmed, for the reason that all the parties—plaintiff, defendant, and garnishee—are nonresidents of this state; that the indebtedness sought to be reached by the garnishee proceedings was not payable in this state, but in North Dakota, where defendant was in the employ of the railway company, and did not arise out of a transaction occurring in this state; hence that the court had no jurisdiction. The contention is not sound. The cases referred to are not here in point. Much has been said and written on the subject of the jurisdiction of the courts in garnishment proceedings against nonresident parties, particularly in actions where the property sought to be reached is in the form of an indebtedness due the defendant from the garnishee. Many of the courts maintain with plausible argument that, for the purposes of garnishment, the situs of intangible property, such as debts, is at the domicile of the debtor, and may be attached wherever he may be found, whether in the state of his actual residence or elsewhere; while other courts of equal prominence, and with equal force and earnestness, insist that the debt has its situs with the creditor, and cannot be reached by garnishment proceedings, except in the state of his residence. The authorities are collected and reviewed in a note to *Goodwin v. Claytor*, 67 L.R.A. 209; 7 Current Law, p. 1868. It is unnecessary to review them in this case, for the question is not here presented. They are all cases where no personal service of the summons was made upon the principal defendant in the state where the action was brought, and were actions or proceedings *in rem*, pure and simple. In actions of that nature the jurisdiction of the court extends only to the *res*, the money or property in the hands of the garnishee; and the court has no authority to proceed unless the subject-matter, by 20 L.R.A. (N.S.)

proper service of process, is brought within the control of the court. But we have found no case wherein it has been held that the court is without jurisdiction, though it appear that all the parties are nonresidents of the state, where the summons was personally served upon the principal defendant, as well as upon the garnishee, in the state where the action was brought. In the case at bar, while the nonresidence of the parties is conceded, it appears that both the summons in the principal action and also the garnishee summons, with notice to defendant, were personally served upon defendant while within the state; and, further, that the garnishee, a Wisconsin corporation, is permanently engaged in conducting its business in this state, with an agency herein, and that the garnishee summons was served upon it in the manner required by law. Such facts take the case without the rule of any of the cases referred to. The jurisdiction of the court in a case where personal service is had within the state is not, strictly speaking, *in rem*, but *in personam*, and, whether the situs of the debt be with the creditor, at his domicile, or with the debtor, the debt in question in this action had a situs in this state within all of the decisions; for both creditor and debtor were found within the borders thereof, and were therein personally served with process in the action. There can be no doubt of the full and complete jurisdiction of the court in such case. *Commercial Nat. Bank v. Chicago, M. & St. P. R. Co.* 45 Wis. 172; *East Tennessee, V. & G. R. Co. v. Kennedy*, 83 Ala. 462, 3 Am. St. Rep. 755, 3 So. 852; *Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 41 L.R.A. 331, 72 Am. St. Rep. 181, 23 So. 825; *Young v. Ross*, 31 N. H. 201; *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084; *Louisville & N. R. Co. v. Deer*, 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207; 1 Shinn, Attachment & Garnishment, § 5.

There is no suggestion that defendant was fraudulently induced to come within the state, to the end that the summons might be personally served upon him; and the rule laid down in *Chubbuck v. Cleveland*, 37 Minn. 466, 5 Am. St. Rep. 864, 35 N. W. 362, does not apply. The place of payment of the debt, if it be conceded that it sufficiently appears in this case that it was payable in North Dakota, is not important; for the garnishee makes no claim that it cannot be compelled to make payment elsewhere than at the place agreed upon with the creditor. *Krafve v. Roy*, 98 Minn. 142, 116 Am. St. Rep. 346, 107 N. W. 966; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905. Nor is it material that plaintiff is a nonresident of this state.

He had an undoubted right to bring his action in the courts of this state, under the clause of the Federal Constitution guaranteeing to the citizens of each state all the rights and privileges of citizens of the several states. 1 Shinn, Attachment & Garnishment, § 76. The statement in McKinney v. Mills, *supra*, that garnishment proceedings should in all cases be dismissed where it appears that all the parties are nonresidents of the state, was not intended to apply to cases where personal service was made upon both defendant and garnishee within the state. The learned trial court apparently relied upon the language of that decision in dismissing the proceedings; but there was no personal service in that case, and the proceeding was one strictly *in rem*. In the case at bar there was personal service both upon defendant and the garnishee, and the case referred to is not in point.

The order appealed from is reversed.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

ORMAL W. FINCH, Appt.

(75 Kan. 582, 89 Pac. 922.)

Sentence — felony committed during stay.

Where a person who has been convicted and sentenced to the penitentiary for one felony appeals from the judgment, and, while enjoying his liberty under a bond given to stay the execution thereof, commits a second felony, for which he is convicted and sentenced to a term to begin upon the expiration of the former term, such second sentence is valid.

(April 6, 1907.)

APPEAL by defendant from a judgment of the District Court for Finney County sentencing him for the commission of burglary. Affirmed.

The facts are stated in the opinion.

Messrs. J. L. Seeds and W. R. Hopkins, for appellant:

The sentence must be definite and certain, and not be dependent on any contingency.

Morris v. State, 1 Blackf. 37; 1 Bishop, Crim. Proc. 3d ed. § 1309; Picket v. State,

Headnote by SMITH, J.

Note. — As to cumulative sentences, see case note to Harris v. Lang, 7 L.R.A. (N.S.) 124.

20 L.R.A. (N.S.)

22 Ohio St. 405; People ex rel. Johnson v. Webster, 92 Hun, 378, 32 N. Y. Supp. 995; Elliott v. Peirsol, 1 Pet. 341, 7 L. ed. 170; Re White, 50 Kan. 299, 32 Pac. 36.

The sentence of imprisonment to commence after the expiration of former sentence is too indefinite.

Larney v. Cleveland, 34 Ohio St. 599.

Messrs. Fred S. Jackson, Attorney General, John S. Dawson, Edgar Robert, and Albert Hoskinson, for appellee:

A term of imprisonment may be made to begin when another ends.

19 Enc. Pl. & Pr. p. 484; Mier v. McMillan, 51 Iowa, 240, 1 N. W. 525; Kite v. Com. 11 Met. 581; Fitzpatrick v. People, 98 Ill. 269; Ex parte Irwin, 88 Cal. 169, 25 Pac. 1118; Mims v. State, 26 Minn. 498, 5 N. W. 374; Dolan's Case, 101 Mass. 219; Brown v. Com. 4 Rawle, 259, 26 Am. Dec. 130; McCormick's Petition, 24 Wis. 492, 1 Am. Rep. 197.

Smith, J., delivered the opinion of the court:

At the termination of a trial in a criminal action the appellant was, by the verdict of a jury, found guilty of the crime of manslaughter in the fourth degree. This verdict was returned in the district court of Finney county on the 23d day of November, 1904, and was approved by the court, and appellant was sentenced to the penitentiary for a term not exceeding two years; the sentence being pronounced on December 31, 1904. From this judgment and sentence he appealed to this court, gave bond, and was given his liberty during the pendency of the appeal. While so at large, he was again arrested, tried, and convicted in the same court of the crime of burglary and larceny alleged to have been committed on the 8th day of May, 1905. For this latter crime he was, on the 18th day of July, 1905, sentenced to confinement and hard labor in the penitentiary for a term not exceeding fifteen years, said imprisonment to commence at the expiration of his term in the former case. To test the validity of this judgment the appellant again comes to this court.

The appellant's brief urges several trial errors, but the record is so lacking in statutory requirements that it was conceded on the presentation of the case that the only question for our consideration is whether this cumulative sentence can be sustained. This question must be answered in the affirmative. Bishop, New Crim. Law, § 953; Ex parte Turner, 45 Mo. 331; 19 Enc. Pl. & Pr. p. 484. It is contended that, under the common law, the rule is that successive sentences are concurrent and not cumulative.

tive, and that a cumulative sentence in this state must be justified, if at all, under § 5695, Gen. Stat. 1901, and that, as this case does not technically come within the provisions of the statute, the sentence herein is erroneous. The authorities do not uniformly support the contention, but are conflicting. The Missouri statute is substantially like our own, yet in *Ex parte Turner*, supra, we find a sentence sustained which is very analogous to the one at bar. In that case a prisoner before the expiration of his term escaped, and while at large committed another crime for which he was arrested, tried, convicted, and sentenced while still under sentence for the first offense. The second sentence was held valid, and it was also held that the term of imprisonment would commence at the expiration of the term under the former sentence. While our statute only provides for cumulative punishment of an offender who has been convicted of two or more offenses at the same term of court, it indicates the legislative policy and the justice of adapting the punishment to the number as well as to the enormity of crimes committed by one person, and, without regard to strict technicality, it is incumbent upon the courts of the state so to conform the procedure as to make the purpose of the law effective.

It is further contended that a sentence must be so definite and certain that the prisoner and the officers responsible for his custody may know when his term of imprisonment begins and when it ends, without consulting any record except the commitment. This is desirable, but not paramount, and must yield so far as is necessary for the accomplishment of justice. See 19 Enc. Pl. & Pr. p. 484. In *Ex parte Jackson*, 96 Mo. 116, 8 S. W. 800, a prisoner was sentenced for three felonies. The term of imprisonment for the second offense was, by the sentence, to commence upon the expiration of the first term, and the third offense to begin upon the expiration of the second term. He appealed, and the second judgment was reversed. He served out his first term, and thereupon, through a habeas corpus proceeding, sought to recover his liberty, but the supreme court of Missouri held that, under the facts, his third term commenced upon the expiration of the first, and denied the writ.

The sentence in this case is as certain as to the beginning and ending of the imprisonment imposed as was possible under the circumstances.

The judgment is affirmed.

All the Justices concur.
20 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

DAVID KETTERER, Admr., etc., of Fred Ketterer, Deceased, Appt.,

v.

KENTUCKY STATE BOARD OF CONTROL et al.

(— Ky. —, 115 S. W. 200.)

Charity — state asylum — assault — liability.

1. A state board having control of a lunatic asylum which is supported by state funds is not liable for injuries inflicted by its employee on an inmate of the asylum, although it knew, or might have known, that he was in the habit of mistreating such inmates.

Master — state superintendent — liability.

2. The superintendent of a state lunatic asylum is not, under the doctrine of *respondere superior*, responsible for injuries inflicted upon inmates of the asylum by employees whom he appointed.

(January 14, 1909.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Fayette County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. J. Franklin Wallace and George Denny for appellant.

Messrs. James Breathitt, Attorney General, and Charles H. Morris, for appellee:

Neither the state, nor the superintendent, is liable for the injuries inflicted by the asylum employee.

Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461; Murtaugh v. St. Louis, 44 Mo. 479; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Summers v. Daviess County, 103 Ind. 262, 53 Am. Rep. 512, 2 N. E. 725; Hall v. Smith, 2 Bing. 156; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; Leavell v. Western Kentucky Asylum, 122 Ky. 215, 4 L.R.A. (N.S.) 269, 91 S. W. 671, 12 A. & E. Ann. Cas. 827; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A.

Note.—As to the liability of an eleemosynary institution maintained by state or municipality for personal torts of an agent or servant, see the note to Leavell v. Western Kentucky Asylum, 4 L.R.A. (N.S.) 269. No other cases have been found upon the question presented in *KETTERER v. KENTUCKY STATE Bd. OF CONTROL*, as to the personal liability of a superior officer of a charitable institution for the tort of his subordinate.

200, 44 Am. St. Rep. 243, 24 S. W. 1085; Farnham v. Pierce, 141 Mass. 203, 55 Am. Rep. 452, 6 N. E. 830; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Dawnes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836.

Messrs. Gourley, Redwine, & Gourley for appellee J. S. Redwine, superintendent.

Nunn, J., delivered the opinion of the court:

This action was instituted by appellant against appellees, the Kentucky State Board of Control and J. S. Redwine, superintendent of the Eastern Kentucky Lunatic Asylum, to recover damages for the loss of the life of appellant's intestate by reason of the negligence of the members of the board of control and J. S. Redwine, the superintendent of the asylum. A demurrer was filed and sustained to the petition, and appellant filed an amended petition, which, in substance, contains his real cause of complaint against appellees. It is as follows: "The plaintiff, by way of amendment to his original petition herein, says that he reiterates all the statements made therein,—as much so as if copied herein verbatim. He alleges that the defendant J. S. Redwine is a superintendent of the Eastern Kentucky Lunatic Asylum, and that said Redwine, as such superintendent, and the Kentucky State Board of Control for Charitable Institutions, manage and control and employ the servants and agents of the Eastern Kentucky Lunatic Asylum for the Insane, located in the city of Lexington, and that the said defendants discharge said servants and employees upon their own volition. Plaintiff says that defendants, the Kentucky State Board of Control for Charitable Institutions and J. S. Redwine, superintendent of the Eastern Kentucky Asylum for the Insane, knew, or by the exercise of reasonable diligence could have known, of the vicious and outrageous tendencies of the servants who had been employed by them who were in charge of the plaintiff's decedent, Fred Ketterer, at the time of his death, and that the said defendants did know, or by the exercise of reasonable diligence could have known, that the decedent, Fred Ketterer, was badly beaten and maltreated by said employees of the defendant before the 22d day of June, 1906, when he was cruelly beaten and bruised by them as alleged in his original petition; and, although the defendants knew, or by the exercise of reasonable diligence could have known, that said servants were mistreating said Ketterer, they still retained them in

their employ, and the said Ketterer lost his life through the gross negligence and carelessness of said defendants,—all to this plaintiff's damage in the sum of \$50,000." To this amendment a demurrer was also filed and sustained, and, upon appellant's failure to plead further, the court dismissed his action.

This court has several times passed upon similar questions. The policy of the law in this state is to the effect that neither the state nor its officials, such as are sued herein, are liable for the wrongdoing of one acting under them, who, by his negligence, causes an injury to be inflicted upon another. All the authorities relieve the state and such officials from responsibility in such cases and place the responsibility upon those persons who commit the acts which are the direct cause of the injury.

Counsel for appellant rely for a reversal chiefly upon the cases of Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458, 28 L.R.A. 394, 53 Am. St. Rep. 414, 30 S. W. 971; Central Kentucky Asylum v. Hauns, 23 Ky. L. Rep. 1016, 64 S. W. 643; Hauns v. Central Kentucky Lunatic Asylum, 103 Ky. 562, 45 S. W. 890, and Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675. The questions determined in these cases are easily distinguished from the question involved in the case at bar. The first case mentioned was a proceeding to obtain an injunction to prevent appellee from polluting a stream of water which ran through appellant's farm. Of the propriety of this, there can be no doubt. In polluting the stream of water that ran through appellant's farm, appellee decreased the value of his farm, and it amounted to the taking of his property without just compensation and due process of law, and it was an illegal act of the state and the officials in charge of the asylum. The Hauns Cases were similar to the first case mentioned, except in the first there was a judgment against the asylum for polluting a stream of water which flowed through his premises, and the second case related only to the collection of the judgment by execution. The only case cited by appellant in which a similar question arose is Glavin v. Rhode Island Hospital, supra. In that case it was held that the hospital was liable to a paying patient for negligent treatment, although the hospital was administered largely as a charity, with income derived mainly from endowments and voluntary contributions. As will be observed, there is a material distinction between that case and the one before us. In that case the patient injured was paying for services rendered him, and the funds of that institution were of that character which could be diverted and applied to the payment of a

judgment, while the funds for the maintenance and support of the institution in the case at bar are appropriated by the state, and are made up of sums collected from the citizens of the state in the way of taxes. The purpose of the appropriations is purely a charitable one,—that is, to take care of the poor, unfortunate ones confined in the institution,—and is a governmental duty, and the institution is managed and controlled by the state with that sole end in view. Neither the state nor officials derive any benefit or profit from the funds appropriated for such purposes, and to allow them to be diverted from their sacred purpose to pay judgments for injuries inflicted by employees, when acting beyond the scope of their employment, would be contrary to law and public policy, and would in time wreck all the charitable institutions in the state, because in the control of these unfortunate people force must necessarily in many cases be used. This is the reason of the law, and the reason why it has been so announced in many cases, and has been directly so held in this state. See the cases of *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065, and *Leavell v. Western Kentucky Asylum*, 122 Ky. 213, 4 L.R.A. (N.S.) 269, 91 S. W. 671, 12 A. & E. Ann. Cas. 827. The facts in the first case above referred to were that *Williamson*, a boy ten years of age, was placed in a school of reform, and it was alleged in the petition, in an action instituted by his next friend, that, without fault on the part of the boy, "one of the servants and employees of the appellees, and known by it to be incompetent and unfit for such service, struck and beat the appellant in such cruel and inhuman manner that he was caused great suffering in mind and body, and was permanently injured and damaged," etc. The lower court sustained a demurrer to this petition, and, on an appeal, it was affirmed by this court. The second case referred to was where a young lady employee of the asylum was engaged in ironing clothes which belonged to the inmates of the asylum, and, when she was in the act of placing a garment between the rollers of the ironing machine, an irresponsible lunatic started the machine, which caught her fingers and injured her severely. She alleged that this lunatic was incompetent and unfit to perform this labor, which fact was known to those in charge of the asylum, but, by their gross negligence this lunatic was permitted to perform this labor, and by their negligence caused the injury to her hand. The lower court sustained a demurrer to her petition and dismissed the action, and upon an appeal this court affirmed the judgment. 20 L.R.A. (N.S.)

Appellant contends that *Redwine*, the superintendent of the asylum, is personally responsible for the injury and death of his intestate, because he, with the members of the board of control, appointed the subordinate officials of the asylum, including the subordinate who actually inflicted the injury which caused the death of his intestate. The principle *respondeat superior* does not apply to public officers, such as are sued herein, but only applies to individuals and corporations who employ servants in the furtherance of their private business. A man in private life is not compelled to employ any servants to assist him in his business, and, in fact, is not bound to carry on any business; but, if he does transact business and employ servants to aid him, his responsibility for the acts of the servant will be governed by the rule stated, for they are employed for the purpose of increasing their employer's wealth, which is not so with reference to the officers sued herein. Their relations are very different. The officers sued in the case at bar were appointed to their positions for the purpose of the administration of a public benefit and necessity, and were directed and compelled by law to employ persons to assist in the proper performance of the functions of that office. To apply the rule that exists with reference to master and servant to such officials as appellee would do violence to the principle upon which the rule is based, and would have the effect to prevent persons of responsibility from accepting such a position. In 19 Am. & Eng. Enc. of Law, 1st ed. p. 495, it is said: "A public officer is not responsible for the acts or defaults of his subordinates [in office] . . . even though they are selected by him and subject to his orders,"—and cites *Story on Agency*, § 319, and *Throop on Public Officers*, § 592, and over twenty cases from foreign states supporting the text. The under officers appointed by the board of control and *Redwine* did not act, in the performance of their duties, as the servants of or for the benefit of the board and *Redwine*, but were supposed to act for the good of the public in the furtherance of a charity, and therefore the board and *Redwine* are not responsible for their acts. See *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *M'Millan v. Eastman*, 4 Mass. 378; *Seymour v. Van Slyck*, 8 Wend. 403. Many other cases to the same effect could be cited.

In view of the authorities, we are of the opinion that the lower court did not err in sustaining the demurrer to appellant's petition.

For the reasons stated, the judgment of the lower court is affirmed.

KENTUCKY COURT OF APPEALS.

SPRING GARDEN INSURANCE COMPANY, Appt.,
v.
IMPERIAL TOBACCO COMPANY OF KENTUCKY.

CONNECTICUT FIRE INSURANCE COMPANY, Appt.,
v.
SAME.

CALEDONIAN INSURANCE COMPANY, Appt.,
v.
SAME.

HANOVER FIRE INSURANCE COMPANY, Appt.,
v.
SAME.

PENNSYLVANIA FIRE INSURANCE COMPANY, Appt.,
v.
SAME.

(— Ky. —, 116 S. W. 234.)

Riot — definition.

1. A riot exists where a hundred or more armed and masked men overawe and terrorize the civil authorities and the inhabitants of a town, and burn and otherwise destroy property of private citizens, which they assume is intended for a use detrimental to their interests.

Insurance — riot — liability.

2. One who has insured property against all direct loss or damage by fire, except as

Case Note. — Insurance; liability of insurer for property destroyed by mob or during riot.

An insurance company is relieved from liability, by virtue of a condition in a policy that it shall not be liable "for any loss . . . caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power," where, in the nighttime, a party of armed men violently and with the discharge of firearms drive away the watchman from insured property, and set fire to it. *Lycoming F. Ins. Co. v. Schwenk*, 95 Pa. 89, 40 Am. Rep. 629.

And the destruction of an insured building by fire communicated to it from a building burned by a riotous mob is within a similar exception, notwithstanding the fire was communicated to the insured building through an intervening building. *Michigan F. & M. Ins. Co. v. Whitelaw*, 25 Ohio C. C. 197, affirmed without opinion in 73 Ohio St. 365, 78 N. E. 1141.

So, where it appears that five masked men broke into and entered a building in the nighttime and compelled the occupants, by threats of personal violence, to vacate, and then burned the building, it is error to sustain a demurrer to an answer of the insurer setting up its nonliability under a 20 L.R.A. (N.S.)

hereafter provided, among which exceptions is loss caused directly or indirectly by riot, is not liable for property burned by an armed and masked body of men who overawe and terrorize the civil authorities and inhabitants of a town, and proceed to burn the property, because they think it is intended to be put to a use detrimental to their interests.

(February 10, 1909.)

APPEAL by defendants from judgments of the Circuit Court for Caldwell County in plaintiff's favor in actions brought to recover the amounts alleged to be due under fire-insurance policies. Reversed.

The facts are stated in the opinion.

Messrs. Charles H. Sheld, J. Wheeler Campbell, and Thomas Bates, with Mr. Bernard Flexner, for appellants:

The invasion of a large body of armed men was a riot, within the meaning of the standard insurance policy.

Prather v. Lexington, 13 B. Mon. 559, 56 Am. Dec. 585; *Ward v. Louisville*, 16 B. Mon. 184; *Madisonville v. Bishop*, 113 Ky. 106, 57 L.R.A. 130, 67 S. W. 269; *Marshall v. Buffalo*, 50 App. Div. 149, 64 N. Y. Supp. 411; *Lycoming F. Ins. Co. v. Schwenk*, 95 Pa. 89, 40 Am. Rep. 629; *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868; *Dupin v. Mutual Ins. Co.* 5 La. Ann. 482; 5 Hawk. P. C. chap. 65, § 9; *Follis v. State*, 37 Tex. Crim. Rep. 535, 40 S. W. 277; *Aron v. Wausau*, 98 Wis. 592, 40 L.R.A. 733, 74 N. W. 354; *State v. Brazzil, Rice*, L. 257; *State v. Sims*, 16 S. C.

similar clause as the loss fell within such exception. *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

So, the destruction of insured property by fire set by a riotous assemblage will relieve the insurer from liability under such a provision of a policy. *Dupin v. Mutual Ins. Co.* 5 La. Ann. 482.

And it is immaterial that the rioters originally assembled for a lawful purpose, and were afterwards guilty of a riot. *Ibid.*

Nor is it necessary, in order to relieve an insurance company from liability, that the guilt of the rioters be first established in a criminal proceeding. *Ibid.*

The effect of a similar clause relieving the insurer from liability unless proof is made that a loss was due to causes other than a riot is to permit it to demand such proof before being sued. *Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. Rep. 247.

It was held in *Drinkwater v. London Assur. Co.* 2 Wils. 363, that the burning of insured property by a mob was not within the exception of a policy relieving an insurer if a loss is due to an invasion, foreign enemy, or any military or usurped power.

486; 15 Am. & Eng. Enc. Law, p. 698; *State v. Snow*, 18 Me. 346; *State v. Boies*, 34 Me. 235; *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *Bell v. Mallory*, 61 Ill. 167; *United States v. Stockwell*, 4 Cranch, C. C. 671, Fed. Cas. No. 16,405; *United States v. Fenwick*, 4 Cranch, C. C. 675, Fed. Cas. No. 15,086; *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670; *People v. Judson*, 11 Daly, 1.

The "riot" clause of the standard fire insurance policy exempts the companies from the payment of the losses sued on.

Montgomery v. Firemen's Ins. Co. 16 B. Mon. 427; *Michigan F. & M. Ins. Co. v. Whitelaw*, 25 Ohio C. C. 197, affirmed in 73 Ohio St. 365, 78 N. E. 1141; *Conner v. Manchester Assur. Co.* 70 L.R.A. 106, 65 C. C. A. 127, 130 Fed. 743; *Insurance Co. v. Express Co.* (Imperial F. Ins. Co. v. Fargo) 95 U. S. 229, 24 L. ed. 430; *St. John v. American Mut. F. & M. Ins. Co.* 11 N. Y. 516; *Williamsburgh City F. Ins. Co. v. Willard*, 164 Fed. 404; *Baker & Hamilton v. Williamsburgh City F. Ins. Co.* 157 Fed. 281; *Lycoming F. Ins. Co. v. Schwenk*, supra.

The riot was the proximate cause of the loss.

Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 128, 130, 24 L. ed. 398, 399; *Barton v. Home Ins. Co.* 42 Mo. 156, 97 Am. Dec. 329; *German F. Ins. Co. v. Roost*, 55 Ohio St. 581, 36 L.R.A. 238, 6 Am. St. Rep. 711, 45 N. E. 1097.

Messrs. Yeaman & Yeaman for appellee.

Carroll, J., delivered the opinion of the court:

These several appeals involve the same questions of law. The litigation grows out of the refusal of the appellant insurance companies to pay the amount of fire policies issued to the appellee tobacco company. The refusal of the companies was rested upon the ground that the property insured was destroyed by fire caused by a "riot," and hence they were not liable because of clauses in the policies that exempted them from liability for fire resulting from such cause. The policy issued by each company contains the same conditions and exceptions. They are what is known as the "Standard Fire Insurance Policy of the States of New York, New Jersey, Connecticut, and Rhode Island," and stipulate that the company insures the property of the appellee tobacco company against "all direct loss or damage by fire, except as hereinafter provided." These words appear in large printed letters in the body of the policy and as a part of the insuring clause. In small printed letters in the body of the

policy are the exceptions that relieve the company from liability. Among these exceptions, and in a separate clause, is the following: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power; or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon." The defense relied upon was presented in answers, to which a general demurrer was sustained; and, declining to plead further, the petitions were taken as confessed and judgments entered for the full amount claimed by the insured.

So much of the answers to which a demurrer was sustained as is material to the questions involved reads as follows:

"This defendant further says that said policy of insurance was issued by it to the plaintiff and accepted by the plaintiff as aforesaid, and provides that it does insure the Imperial Tobacco Company of Kentucky for the term of one year from the — day of November, 1906, at noon, to the — day of November, 1907, against all direct loss or damage by fire, except that said company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion or military or usurped power, or by order of any civil authority; and this defendant avers and charges the fact to be that said loss mentioned and set forth in the plaintiff's petition was caused directly or indirectly by invasion, riot, or commotion or usurped power, in violation of the terms and provisions of said policy, and that, under the express terms and conditions of said policy, the same thereby became and at the time of the bringing of this suit and at all times after said fire occurred was and is, wholly null and void.

"This defendant further says that all of the property mentioned and described in said petition, and which is described in and by said policy of insurance, was destroyed and burned by fire on the night of November 30, 1906, or early in the morning of December 1, 1906, by reason of an invasion, riot, and commotion and usurped power, within the true intent and meaning of said provision contained in said policy of insurance above set forth; and that said property was destroyed and burned as aforesaid by a large body of men, about 100 or more in

number, who invaded the city of Princeton, Kentucky, on said night of November 30, 1906, or morning of December 1, 1906, and who were armed and disguised at the time of said invasion, and who unlawfully conspired and confederated and banded themselves together for the purpose and with the intention of destroying all the property mentioned and described in the plaintiff's petition, including the three and one story, brick and frame, metal roof building, and its contents, consisting of tobacco in bulk and in packages, and described in the petition, and being the property referred to in the petition as well as a large amount of other property located in said city of Princeton and owned by numerous other parties, and that, in pursuance of said conspiracy, confederation, and unlawful purpose, on the night of November 30, 1906, or morning of December 1, 1906, said large body of men armed and disguised and banded together as aforesaid for the purpose of destroying the property described in plaintiff's petition, as well as a large amount of other property in said city of Princeton, invaded the city of Princeton, Kentucky, and took forcible possession of the police station, and the police force of said city, and also surrounded and took forcible possession of the fire department of said city of Princeton, Kentucky, and also surrounded and took forcible possession of the town hall of said city of Princeton, Kentucky, and of all telegraph and telephone offices in said city of Princeton, and, by the numbers and strength of said invaders, they overawed and intimidated and terrorized and usurped the power of the civil authorities of said city, and took forcible possession of said civil authorities and of the civil administration of said city, and also of the inhabitants and citizens thereof, and by use of their firearms said mob did hold up, overawe, intimidate, terrorize, and utterly subject and usurp the power of the civil authorities as well as the inhabitants of said city of Princeton to their unlawful control, and, after doing this, proceeded to the property of the plaintiff, as well as to large amount of other property in said city of Princeton, and tore down, dynamited, blew up, shot into, and destroyed and burned the property of said plaintiff, as well as the property of other citizens of said city of Princeton, Kentucky, all of said acts being committed and commotion being created in an unlawful and riotous manner by said large body of men who invaded said city of Princeton for the purpose of creating said riot and of destroying said property."

Two questions are presented for our consideration: First. Was the fire that produced the loss caused by "riot?" Second. 20 L.R.A. (N.S.)

If this be admitted, do the conditions in the policies relieve the companies from liability for loss thus caused.

Taking up these questions in the order named, we will first determine whether or not the fire was caused by "riot," and, in considering this question, the facts stated in the answers to which demurrers were sustained must be taken as true; so that, accepting these facts as true, do they constitute a "riot," within the meaning of that term as used in the policies? Curiously enough, we have no statute defining or describing a "riot," although it is mentioned in § 1268 of the Kentucky Statutes of 1903 as a punishable misdemeanor; and sections 375 and 381 of the Code of Criminal Practice contain provisions for the dispersement and quelling of riotous assemblies. Nor do we find any decision of this court in which the word has received judicial construction. We must therefore look to the common law for a definition of its meaning and a description of the acts that will constitute a riot. In the common-law authorities there is no substantial disagreement concerning the definition of a riot. In 4 Blackstone (Chitty's ed.) p. 147, we find the following: "A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as, if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner." In 1 Russell on Crimes, p. 265, an old English work of high repute, the author states: "A 'riot' is described to be a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. . . . It seems to be agreed that the injury or grievance complained of and intended to be revenged or remedied by a riotous assembly must relate to some private quarrel only, . . . or such like manners relating to the interests or disputes of particular persons in no way concerning the public. . . . It seems to be clearly agreed that in every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people. . . . But it is not necessary, in order to constitute this crime, that personal violence should have been committed.

. . . But the violence and tumult must in some degree be premeditated; for if a number of persons being met together at a fair, market, or any other lawful or innocent occasion happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray. . . . But, if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous." This definition is also found in 1 Hawkins, Pleas of the Crown, p. 513. Webster defines a riot to be "the tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object;" and Bouvier, in his Law Dictionary, as "a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority, with an intent mutually to assist each other against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." The common-law definition of a riot is generally approved by modern text writers on the subject of criminal law. Thus, Bishop, in his work on New Criminal Law (vol. 2, §§ 1143, 1149), although he makes slight criticism of the definition laid down by Russell on Crimes, says: "A 'riot is such disorderly conduct in three or more assembled persons, actually accomplishing an object, as is calculated to terrify others."

. . . The act of the rioters need not be such as it would be unlawful for one to perform. Whether in this sense lawful or unlawful, if it is done by three or more in a turbulent manner, calculated to excite terror, it is a riot." Wharton, in his work on Criminal Law (vol. 2, §§ 1537, 1539, 1544), defines a riot as a "tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object. . . . It must be also shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror; such as being armed, making threatening speeches, turbulent gestures, or the like. . . . To constitute a riot it is not necessary that there should be actual fright in the public generally. It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened." These general definitions are approved in Aron v. Wausau, 98 Wis. 592, 40 L.R.A. 733, 74 N. W. 354; State v. Stal-

cup, 23 N. C. (1 Ired. L.) 30, 35 Am. Dec. 732; Lycoming F. Ins. Co. v. Schwenk, 95 Pa. 89, 40 Am. Rep. 629; Dupin v. Mutual Ins. Co. 5 La. Ann. 482; Com. v. Gibney, 2 Allen, 150; State v. Snow, 18 Me. 346; State v. Hughes, 72 N. C. 27. It will thus be seen that the modern definition of a riot is in harmony with and follows the common law definition, and that the legal meaning of the word corresponds with the meaning given to it in ordinary usage. It has no technical import as distinguished from its signification when used in the everyday affairs of life. If we look to either Blackstone or Webster, we have the same result.

But it is said by counsel for appellee that it would be absurd to hold that, if two persons assembled to burn a person's property in a tumultuous manner, the insurance companies would be liable for the loss, but that, if a third man joined them in the unlawful enterprise, the companies would not be liable. Hence, it is argued that the definitions noted should not control, but that a riot, in the meaning of the word as used in the policies, must be a condition more or less analogous in its effect to an invasion, insurrection, civil war, or usurpation of power, something aimed not at a single or several individuals engaged in a particular business, but at society as organized, having for its purpose the overturning permanently or temporarily of the existing order of things. But, in view of the well-understood meaning of the word, it cannot be given this construction. In using it in the policies the companies must have intended that it should have and receive the only meaning given to it by both lawyers and laymen,—in short, its popular and usual meaning. In fact, no other definition can be attached to it without going outside of the standard authorities that have treated on the subject, and doing violence to the accepted rules concerning the construction of words in a contract or writing. It is everywhere agreed that words in a contract must be interpreted according to their ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense, or by the usage of trade or the custom of the country they have and were understood by the parties to have a particular or peculiar meaning as distinguished from their ordinary meaning. 17 Am. & Eng. Enc. Law, p. 12; 9 Cyc. Law & Proc. pp. 578, 583; 1 Chitty, Contr. p. 113. And it may here be observed that what constitutes a riot does not depend so much on the number of persons engaged or assembled, as it does in the manner in which they act. It is the disorder, the tumult, the terrorizing, the putting in fear, the violence, the unlaw-

ful acts that are the essential things. Three armed men, banded together for the purpose of doing an unlawful act, with force and violence, acting in a tumultuous and disorderly manner, might be guilty of conduct amounting to a riot; whereas, a hundred or more, although acting in concert, in a disorderly and noisy manner and disturbing the peace, would not constitute a riot, unless some unlawful act was committed, although such a body might be an unlawful assembly. We are not, however, called upon in this case to make any nice or refined distinctions as to what number of persons, or what character of conduct, would constitute a riot if only a few were engaged in it and their actions might leave room for doubt as to whether or not what they did amounted to a riot. We can easily understand that there might be serious doubt as to whether the acts of three, or a small number of persons, or, indeed, any number, acting in concert for an unlawful purpose, would amount to a riot. Whether what they did would or not be a riot within the meaning of the definitions given would depend upon the facts and circumstances presented in the particular case. But we can say without any feeling of hesitation or sense of uncertainty that, if the facts stated in the answers do not describe a riot, it would be impossible to frame an answer that would. If a body of 100 or more men, armed and disguised, unlawfully confederated and banded together for the purpose and with the intention of destroying the property of an individual, and who, in pursuance of such unlawful conspiracy do destroy it, and at the same time intimidate, overawe, and terrorize the inhabitants and civil authorities, is not a riot, we are at a loss to know what facts it would take to constitute a riot under any definition the word has ever received.

As the riot was the direct cause of the fire, the next question is: Did the policies relieve the companies from liability? In the consideration of this feature of the case, it must be kept in mind that the policies only insured against direct loss or damage caused by fire. Loss or damage from any other cause, except lightning, was not insured against. The contract of insurance did not undertake to protect the insured against loss by riot or invasion, or insurrection, or civil war, or military or usurped power, or by order of any civil authority, or by theft; so that the words "except as hereinafter provided," following the words "against all direct loss or damage by fire," if they are to have any meaning at all, or are to be given any effect whatever, must exempt the companies from loss by fire "caused directly or indirectly by an inva-

sion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority," because the policies did not undertake to protect the insured, either directly or indirectly, against loss resulting from either of the causes mentioned. If the words "except as hereinafter provided" had been omitted from the contracts, then the insurance would have been against fire from any and all causes. But, not desiring to assume responsibility for all fires, the companies limited their undertaking and agreed to indemnify the insured against loss by fire except as provided in the policies. It will thus be seen that the words "except as hereinafter provided" are material and important in their effect upon the rights of both the parties to the contracts. It would be folly to say that the purpose was to exempt the companies from loss caused by riot alone, unaccompanied by fire, when nothing but fire was insured against; as in no event and under no circumstances were the companies liable for loss by riot alone or loss not occasioned by fire. Manifestly, when the insurance was protection against fire alone, the companies could not be held liable for the injury or destruction of the property by a riot without a fire. In other words, if the rioters had torn down the building, or had carried off the property covered by the policies, or had injured or damaged it in any way, the companies would not be responsible. Therefore we again repeat that, unless it was intended by the contracts of insurance to relieve the companies from liability for fire caused by riot, the words "except as hereinafter provided" are absolutely meaningless. The companies had the unquestioned right to insert as many reasonable provisions in the policies exempting them from liability as they thought proper or necessary. We know of no rule of law that denies to insurance companies this privilege. They may limit the amount of insurance they will offer, may limit the species of property they will insure, may provide reasonable conditions that the insured must observe, as well as conditions that will in certain states of case operate as a forfeiture of the policies or waiver of the right of the insured to recover upon them, and may protect themselves from loss resulting from causes that they do not desire to offer indemnity against. Why, then, should these words by which the companies undertook to limit their liability be stricken from the policies or ignored in their construction? They are not obnoxious to any principle of law or public policy. They are not surplusage. They are not in conflict with any other provisions in, or words of, the policies. They may be read harmoniously in connec-

tion with the other and subsequent clauses, and, when so read, become a material intelligent part of the contracts. They were inserted for a purpose, intended to have a meaning, are not of doubtful or uncertain import, and, when fairly and reasonably applied, they exempt the companies for loss by fire when the fire is caused by riot. In the construction of policies the same rules obtain as do in the construction of other contracts, with the exception that a policy will be construed in favor of the insured so as not to defeat, without plain necessity, his claim to the indemnity which, in taking the insurance, it was his object to secure; and, when the words are fairly susceptible of two interpretations, that which will sustain his claim and cover the loss must by preference, be adopted. It may also be said that ambiguities, and words, sentences, or clauses of doubtful meaning, will be construed against the insurer; and this for the reason so often declared, that the companies themselves prepare the policies with great care and deliberation; and, as the insured has no election except to accept them as prepared and presented to him, it is fair that they should be construed most strongly against the insurer and most liberally in favor of the insured, so that the purpose for which the insurance was obtained may be effectuated, if this can be done without doing violence to the contract. It is also a familiar principle, everywhere recognized in the construction of contracts, including contracts of insurance, that the intention of the parties is to be gathered from an inspection of the entire instrument; and that all parts of it, and all words employed, should be given meaning and effect if this can be done. *May, Ins.* § 176; *Joyce, Ins.* § 271; *American Acci. Co. v. Reigart*, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *German F. Ins. Co. v. Roost*, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097; *Mutual Ben. L. Ins. Co. v. Dunn*, 106 Ky. 591, 51 S. W. 20; *Imperial F. Ins. Co. v. Co's County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Mouler v. American Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. 242.

The views herein expressed as to the proper construction of the contracts and the consequent exemption of the companies from liability is fully sustained by the opinion of the United States circuit court of appeals in *Williamsburgh City F. Ins. Co. v. Willard*, 164 Fed. 404; *Heuer v. North Western Nat. Ins. Co.* 144 Ill. 393, 19 L.R.A. 594, 33 N. E. 411; *Hustace v. Phenix Ins. Co.* 175 N. Y. 292, 62 L.R.A. 651, 67 N. E. 20 L.R.A. (N.S.)

592; *German F. Ins. Co. v. Roost*, supra; *Insurance Co. v. Express Co.* (*Imperial F. Ins. Co. v. Fargo*) 95 U. S. 229, 24 L. ed. 430, and by the opinion of this court in *Montgomery v. Firemen's Ins. Co.* 16 B. Mon. 427. In that case the boat was set on fire and burned by the bursting of the boiler. The contention of the insured was that the excepting clause merely relieved the company from liability for loss arising from the damage caused by the bursting of the boiler, and not from loss occasioned by fire that resulted from the bursting of the boiler. But the company was held not liable; the court ruling that the exception in the policy saved it from liability for fire that was directly caused by the bursting of the boiler, the contract of insurance and the excepting clause being in all substantial particulars like the contracts here involved. The contract describing the perils or risks undertaken by the insurer as set out in the opinion states that "they are of rivers, fire, enemies, pirates, assailing thieves, etc. And after the usual clause authorizing the insured, in case of loss or misfortune to labor, travel, etc., for the defense, recovery, etc., of the boat, follows a clause by which 'it is agreed that this insurance company is not liable for any loss or damage which may arise from, or be occasioned by, the said boat being unduly laden, nor for any loss arising from the explosion of gunpowder, the bursting of the boilers, the collapsing of the flues, or breaking of the engine, or any part thereof; except from unavoidable external cause or causes.'" Said the court: "We think there is no room for reasonable doubt on the evidence that the fire which actually destroyed the boat was caused directly and immediately by the bursting of the boiler. . . . The argument is that loss by fire being expressly, and loss by bursting of boilers impliedly, included among the perils insured against, and the insurer being by the succeeding clause exempt from liability for loss by bursting of boilers only, the liability for loss by fire remains, whatever may have been the cause of the fire, because the insurance against loss by fire is not restricted by any reference to the cause which may produce it; that the clause containing the exemption is an exception of hazards or losses of a particular description from the general undertaking of the insurer, which must have been understood as including them, and that, as the description of the perils insured against should be liberally construed to effectuate the expected indemnity, the same reason requires that the exception inserted by the insurer for his own benefit should be construed strictly, and forbids the exemption of the insurer from his express undertaking

without the express exception of a loss within that undertaking. . . . We think that, when it is plainly said in the negative clause that the company is not liable for any loss arising from the bursting of boilers, the insured must have understood this language according to its obvious meaning, and could not have expected the company to be liable for any loss arising from the bursting of boilers; and that although the burning of the boat or any injury by fire does not always nor often attend the bursting of its boilers, yet, as he must have known that it did sometimes, or at least that it might sometimes, be the necessary and inevitable consequence of that cause; and as he must have understood that a loss so happening would be a loss arising from the bursting of boilers,—he could not have expected the company to be liable for such loss, when it was expressly agreed that they were not liable for any loss arising from the bursting of boilers. Even if the policy had expressly insured against the bursting of boilers as well as against fire, it would not have occurred to an ordinary mind that the comprehensive declaration that the company is not liable for any loss arising from the bursting of boilers should be restricted to the immediate effects of the explosive force of the steam, and would not embrace a loss by fire, although it should be in fact the necessary and immediate consequence and attendant of the actual explosion. As the company did not in terms assume the peril of any loss arising from the bursting of boilers, there is no reason on the face of the policy why the declaration of nonliability for any such loss, if regarded as an exception to a liability which would otherwise exist, should not be understood as an exception to the liability for a loss by fire necessarily and immediately caused by the bursting of boilers."

We have endeavored to point out that it was intended by the contracts to exempt the insurer from liability from loss by fire caused by riot, and that the policies when read as a whole have this effect, and have shown that this interpretation is supported by ample authority. But it is strongly pressed upon us by counsel for appellee that the words upon which the exemption is based do not have the effect intended, and that the construction contended for by the companies is not only unreasonable, but at variance with respectable authority. The argument is made: That, if the companies intended to protect themselves from loss by fire caused by riot, they should have inserted in and as a part of the clause the words "by fire," so that it would read: "This company shall not be liable for loss

by fire caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority. . . ." That the clause is written only exempts the companies from loss caused by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by authority of any civil authority, independent of fire. That the words "except as hereinafter provided," in the sentence before mentioned, mean, when applied to the excepting clause, that the insurer shall not be liable for loss caused by riot alone, but not loss caused by fire that is the result of the riot. This construction, as we have heretofore noted, does violence to the meaning of the contract, and renders utterly meaningless the words "except as hereinafter provided." But, as counsel for appellee has furnished us with some authority that apparently supports his contention, we will notice the cases relied upon.

The principal case depended upon to support the contention of appellee is Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557. The policy in that case provided that the company should not be liable "for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power, . . . nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." It was contended for the company that this clause protected it from liability from any loss by fire if the fire was produced by an explosion. On the other hand, it was argued for the insured that the clause protected the company only against loss occasioned directly by an explosion, and not against loss from fire where the fire was caused by an explosion. In considering the case the court said: "It will be observed that, in a clause of the policy preceding the one under consideration, the company stipulated that it should not be liable 'for any loss or damage by fire caused by means of an invasion, insurrection,' etc. Here exemption is specially secured against liability for losses by fire caused in a certain manner. But the clause under consideration leaves out the words 'by fire.' It secures exemption from liability for losses caused by explosion, but not from liability for losses by fire caused by explosion. The difference in phraseology between the two clauses is so marked that, when we consider their connection with each other, we cannot resist the conclusion that the difference was intended. . . . But, say the counsel for appellant, this company does not profess to insure against losses by explosion, but only by fire, and the clause, construed as we construe it, is unmeaning,

or, at least, useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss. Suppose fire is carelessly applied to powder or other explosive substance. An explosion follows which rends furniture and building. This explosion is the result of the ignition of the explosive material, and it might be claimed that the loss caused thereby was a loss caused by fire. The courts might not so hold, independently of the clause in the policy, but we can well understand, when we examine these policies, that the insurers may have introduced this clause for the purpose of leaving no room for argument or doubt. Again, suppose a case where a fire is speedily subdued, but before it is, it has ignited powder, and an explosion has taken place which has caused much damage, but has not extended the fire. In such a case the company would claim they were protected by this clause from the liability for the consequences of the explosion." We gather from this opinion that the ground upon which the court held the company liable was due to the peculiar phraseology of the exemption clauses, as in one clause the words "by fire" were inserted, and in the other omitted, thereby leaving room for doubt whether or not it was intended to exempt the company from liability for fire caused by explosion; and to the further fact that explosion and fire are often so closely identified, as when the fire follows an explosion or an explosion follows the fire, that it was deemed prudent to insert a provision exempting the company from liability for loss caused by the explosion as distinct from the loss caused by the fire.

In *Heffron v. Kittanning Ins. Co.* 132 Pa. 580, 20 Atl. 698, the exemption clause was the same as the one in the *Robinson Case*. Here, as in the *Robinson Case*, the fire was caused by an explosion; and the court followed the reasoning in that case. As illustrating that no little importance was attached to the fact that the fire was caused by an explosion, and for that reason the exemption clause was strictly construed against the company, the court said: "Indeed, damage by these two instrumentalities (that is fire and explosion) are so quite alike that the two are very naturally associated together, and may well appear in conjunction with each other in the midst of excepted losses by fire. Nor are losses by explosion foreign to the risks assumed by insurance against fire. They are like the damages by smoke and water, losses by theft, destruction by the falling of buildings, or injury by fire agencies, without actual ignition, all of which are to be found among the losses excepted against in clauses 20 L.R.A. (N.S.)

in policies of insurance similar to the one under consideration. Losses by explosions, as by concussions merely, which we find joined together in this policy, are thus proper subjects of exception from the general liability assumed thereby, and there is nothing which requires us to hold that more than this was intended to be covered." In the case of *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85, 13 Am. Rep. 228, the fire was also caused by an explosion. The exemption clause was similar to the one in the *Robinson Case*, and the court, in holding the company liable, turned its decision largely on the wording of the exemption clause; thus distinguishing the case from *United Life F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735, in which the same court reached a different conclusion.

Other cases might be cited in which the courts have construed ambiguous exemption clauses against the insurer properly resolving all questions of doubtful construction in favor of the insured; but it would serve no useful purpose to further extend this opinion in distinguishing this class of cases from the ones before us. If we were in doubt as to the correct construction of these policies, we would resolve the doubt in favor of the insured. If the policies were reasonably susceptible of two constructions, we would give them that construction that would save the risk for the policy holder. But, as in our opinion the contracts are not fairly open to any construction other than the one we have given them, the judgment of the lower court in each case must be reversed, with directions to overrule the demurrer to the answer as amended in each case, and for further proceedings in conformity with this opinion.

MISSOURI SUPREME COURT.

STATE OF MISSOURI

v.

ABRAM ROSENBERGER, Appt.

(212 Mo. 648, 111 S. W. 509.)

Intoxicating Liquor — sale C. O. D.

1. Upon the filling of an order for liquor sent from a prohibition county to one where the sale is lawful, by delivering it to a carrier to be transported C. O. D., the sale is complete at the place where the order is filled, and lawful.

Note. — As to when and where title passes upon shipment of liquor C. O. D., see case note to *Golightly v. State*, 2 L.R.A. (N.S.) 383, and subsequent case of *State v. Mullin*, 18 L.R.A. (N.S.) 609.

Trial — issues — interstate commerce.

2. Whether or not the transportation of liquor from one county, where the sale is lawful, into another in the same state, by a route leading through another state, is interstate commerce, is immaterial to any issue presented by a prosecution for an alleged unlawful sale in the latter county.

(Woodson, J., dissents in part.)

(June 6, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Webster County convicting him of an unlawful sale of intoxicating liquors. Reversed.

The facts are stated in the opinion.

Messrs. J. E. Haymes, J. C. Rosenberger, Clyde Taylor, and E. H. Gamble for appellant.

Messrs. Herbert S. Hadley, Attorney General, and N. T. Gentry for the State.

Burgess, J., delivered the opinion of the court:

At the September term, 1907, of the circuit court of Webster county, under an information filed by the prosecuting attorney of said county, charging the defendant with selling 1 gallon of whisky in said county, on the 2d day of February, 1907, to one Ira Morton, in violation of the local-option law in full force and effect in said county at that time, the defendant was found guilty, and his punishment assessed at a fine of \$300. Defendant appealed in due course, after filing unsuccessful motions for new trial and in arrest of judgment.

The evidence tended to prove that the defendant was a wholesale and retail liquor dealer, with office and place of business in Kansas City, Jackson county, Missouri, and did business under the tradename of "Penwood Company." Ira Morton, a resident of Marshfield, in Webster county, Missouri, some time in January, 1907, ordered a gallon of whisky from said Penwood Company, and, on February 2, 1907, the whisky was received by him from the agent of the Wells-Fargo Express Company at the office of said company in Marshfield. The whisky was sent in a package marked C. O. D., and Morton paid said express agent the price thereof, \$3.50, at the time of delivery, and the express agent sent the money to defendant's office at Kansas City, where it was received. Morton testified that he mailed the order to defendant of his own motion, without any solicitation on the part of defendant, or anyone on his behalf, and solely because he wanted the liquor for his own use. The express company received the package containing the whisky from one of

the defendant's employees at Kansas City, and shipped the same to Morton, at Marshfield. The evidence further tended to prove that the transaction was carried out by defendant's clerks, without his knowledge, while he was at Hot Springs, Arkansas; that, while he had been making similar sales and shipments on C. O. D. terms to parties in other states, he had no knowledge that his clerks were making for him any such shipments to any local-option county in Missouri; that he had never solicited any business of that kind in Missouri either by agent or through the mails; and that up until the time of his arrest he was unaware that any such shipments had been made, nor had he authorized any. The state introduced evidence tending to prove that at the time of the alleged sale of liquor, and prior thereto, the local-option law was in force in Webster county.

The important question presented by this appeal is whether the place of sale of the liquor which the defendant is charged with selling unlawfully was in Webster county, or Jackson county, Missouri. Defendant insists that the sale was at Kansas City, Jackson county, where he was authorized by law to sell liquor, and that he was guilty of no offense in accepting and filling an order from a party in a local-option county requesting the shipment to him C. O. D. of a specified amount of liquor to a point in said local-option county of Webster. As a general rule, the delivery of goods by the vendor to the carrier, when the goods are to be sent that way, is equivalent to delivery to the purchaser, subject only to the right of stoppage *in transitu*. 2 Kent, Com. 490; *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; *Kerwin v. Doran*, 29 Mo. App. 397; *Garbracht v. Com.* 96 Pa. 449, 42 Am. Rep. 550; *Dunn v. State*, 82 Ga. 27, 3 L.R.A. 199, 8 S. E. 806. And this is true although the purchase money is afterwards collected by the vendor or agent at the place from which the goods are shipped. *State v. Hughes*, 22 W. Va. 743. But, when the goods are shipped upon order C. O. D., as in the case at bar, there is much conflict in the authorities as to where and when the title passes—that is, whether at the point of shipment or at the point of destination—upon payment of the purchase price. In *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182, it is said: "True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment; some courts holding that, under such a shipment, the property is at the risk of the buyer, and therefore that delivery is completed when the merchandise reaches the hands of the carrier for transportation, oth-

ers deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price, and delivery to the consignee at the point of destination." Among the authorities which hold that a sale C. O. D. is not complete until delivery, acceptance, and payment of the purchase price by the person ordering the goods may be cited: *United States v. Shriver* (D. C.) 23 Fed. 134; *United States v. Cline* (D. C.) 26 Fed. 515; *State v. United States Exp. Co.* 70 Iowa, 271, 30 N. W. 568; *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586; *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706, 9 Atl. 823; *United States v. Chevallier*, 46 C. C. A. 402, 107 Fed. 434; *Baker v. Bourcicault*, 1 Daly, 24; *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *Dunn v. State*, 82 Ga. 27, 3 L.R.A. 199, 8 S. E. 806; *Wagner v. Hallack*, 3 Colo. 176; *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; *Canton v. McDaniel*, 188 Mo. 207, 86 S. W. 1092. But in 17 Am. & Eng. Enc. Law, 2d ed. p. 301, it is said: "At least so far as cases dealing with intoxicating liquors are concerned, however, the weight of authority is against the foregoing view, and it is generally held that, where intoxicating liquors are ordered to be shipped C. O. D., the sale is completed when the liquor is delivered to the carrier,"—citing *Pilgreen v. State*, 71 Ala. 368; *Hunter v. State*, 55 Ark. 357, 18 S. W. 374; *Berger v. State*, 50 Ark. 20, 6 S. W. 15; *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437; *Com. v. Russell*, 11 Ky. L. Rep. 576; *Com. v. Kearns*, 15 Ky. L. Rep. 332; *Current v. Com.* 11 Ky. L. Rep. 764; *James v. Com.* 102 Ky. 108, 42 S. W. 1107; *State v. Intoxicating Liquors*, 73 Me. 278; *Com. v. Fleming*, 130 Pa. 138, 5 L.R.A. 470, 17 Am. St. Rep. 763, 18 Atl. 622; *State v. Flanagan*, 38 W. Va. 53, 22 L.R.A. 430, 45 Am. St. Rep. 836, 17 S. E. 792; *State v. Hughes*, 22 W. Va. 743. The same doctrine is announced by the courts of Texas and other states. In *Com. v. Fleming*, supra, it is decided that the term "C. O. D.," placed upon an express package, means that the carrier is thereby directed to collect the price of the goods at the time of delivering them to the consignee, and to withhold such delivery until payment is made, and is authorized, upon receipt of such payment, to discharge the purchaser of the goods from liability for their price; that "when, in pursuance of an order for goods, directed by the purchaser to be shipped to him C. O. D., the vendor has delivered them to a common carrier, with instructions to collect their price from the consignee before delivering them to him, the transaction as a sale is complete so far as the vendor is concerned. In such 20 L.R.A. (N.S.)

case, while the title to the goods does not pass to the purchaser if they be not delivered to him by the carrier, that circumstance does not affect the character of the transaction as a completed contract of sale. The seller's right to recover the price, if the purchaser refuse to take the goods, is as complete as if he had taken them without payment." In that case the facts were that a liquor dealer in a certain county of Pennsylvania received an order for liquor to be shipped to the purchaser in another county of said state C. O. D., and, in pursuance of the order, the dealer delivered the liquor to a common carrier in the county where the dealer resided for shipment to the vendee, at the latter's expense, C. O. D. It was held that the delivery to the carrier was a delivery to the purchaser in such a sense as to complete the sale in the county from which the shipment was made. The same doctrine is announced and upheld by a long line of decisions of the courts of Texas; also, in *State v. Flanagan* and *American Exp. Co. v. Iowa*, supra; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606. What was said by this court upon this question in *State v. Wingfield*, supra, and in *Canton v. McDaniel*, supra, was unnecessary to a decision of either of those cases, because the shipments were not C. O. D., and therefore what was said respecting such shipments in those cases may properly be regarded as *obiter*, and, while the *dictum* is supported by many high authorities, we are satisfied that the weight of authority is contrary to what is announced in those cases as the law. The great mercantile interests of the country seem to demand that the law by which such interests are governed should be uniform, and we are of opinion that, so far as concerns the title to goods delivered to a carrier for shipment, the same rule applies to C. O. D. shipments as to those in ordinary cases, in the absence of any express contract to the contrary between the shipper and the consignee. There is no question that Morton ordered the liquor in question for his own use, C. O. D., and, when it was so shipped, the sale became complete at the place of shipment.

The defendant next insists that the transaction shown in evidence constituted interstate commerce within the meaning of § 8, art. 1, U. S. Const., for the reason that the route of the shipment was partly through the state of Kansas, and that it is and was beyond the power of the state to restrict, prohibit, or interfere therewith. Upon the other hand, the state contends that the shipment in question was not an interstate shipment; that is, a shipment from one state to another, and that whether it was so or not

is immaterial in this case, which is a prosecution for the unlawful sale of liquor in a county which had theretofore adopted the local-option law. The question was properly presented by instructions asked by the defendant, and refused by the court, to which action of the court the defendant saved an exception. Conceding, for the sake of argument, that the shipment was interstate, as contended by defendant, we cannot see how or in what way such fact is available to him as a defense in this case. This is simply a prosecution for the alleged unlawful sale of liquor in Webster county, Missouri, and whether its transportation into the county was a matter of interstate commerce or otherwise, as the liquor was sold in Jackson county, Missouri, is not material to any issue in the case.

Our conclusion is that the sale of the liquor was completed when shipped at Kansas City, Jackson county, Missouri, and not at Webster county, Missouri, as charged in the information.

The judgment should be reversed and the defendant discharged. It is so ordered.

All concur, except Woodson, J., who concurs in what is said with respect to the place of sale of the liquor, but dissents from the view expressed on the last proposition, and Valliant, J., who is absent.

NEW YORK COURT OF APPEALS.

VILLAGE OF HAVERSTRAW, Resp't.,

v.
J. ESLER ECKERSON et al., Appts.

(192 N. Y. 54, 84 N. E. 578.)

Highway — lateral support.

1. The owner of land abutting on a highway is burdened with the duty of preserving lateral support to the highway as constructed and operated for public use.

Injunction — injury to highway — suit by village.

2. An incorporated village having exclusive control of its highways may maintain a suit in equity to restrain excavation of adjacent lands so as to affect the lateral support and cause or threaten the subsidence of a highway.

(April 14, 1908.)

APPPEAL by defendants from an order of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Rockland County in plaintiff's favor in a suit to enjoin the removal of lateral support from a highway. Affirmed.

20 L.R.A. (N.S.)

Statement by Gray, J.:

Appeal from an order of the appellate division in the second judicial department affirming an interlocutory judgment, which overruled a demurrer to the complaint. Permission was given to appeal to this court, and the following questions were certified:

"First. Has a village incorporated under the general village law capacity to maintain an action in equity to restrain threatened injury to a public street?

"Second. Has such a village the right to maintain an action in equity to restrain the taking down, removing, or otherwise interfering with the lateral support of a public street by the lands of a defendant abutting on such public streets?

"Third. Has the public any right to the lateral support of the adjacent land abutting upon, but wholly outside of the lines of, such public street, for the purpose of sustaining the bed of the public highway?

"Fourth. Is the land belonging to a private individual, adjacent to a public highway but wholly outside the lines of such public highway, subject to the burden in favor of the public of affording lateral support to such public highway?

"Fifth. Does the complaint in this action state sufficient facts to constitute a cause of action?

"Sixth. May the plaintiff, a municipal corporation, maintain this action against the defendants under all the facts and circumstances alleged in the complaint?"

The complaint alleges that the plaintiff

Case Note. — Duty of abutting owner to preserve lateral support to highway.

The decision in *HAVERSTRAW v. ECKERSON* appears to present for the first time the question of the right of the public to the lateral support of the adjacent land abutting upon a street, for the purpose of sustaining the bed of the road as a public highway.

The case of *Milburn v. Fowler*, 27 Hun, 568, involving the same principles, is sufficiently commented on in the above opinion. Careful research has disclosed but few authorities on the general subject of the note.

In *Finegan v. Eckerson*, 26 Misc. 574, 57 N. Y. Supp. 605, excavations along the line of a public street were enjoined, and the restoration of the street ordered, at the suit of an individual adjoining landowner whose building was threatened by the removal of the lateral support afforded by the street, and whose right of access to his property was interfered with. This case was before the appellate division of the New York supreme court (32 App. Div. 233, 52 N. Y. Supp. 993) on an appeal from an order granting a temporary injunction; and, on the authority of that holding and

was incorporated under the former village law of the state, and that it is subject to the present general village law, as enacted in 1897. Laws 1897, chap. 414, p. 306. It sets forth the jurisdiction of the plaintiff's board of trustees over its public streets and highways, the existence of a certain street known as "Jefferson street," which, with other streets and highways, had been established and dedicated for the public use, and had been duly accepted by the plaintiff, the public use of the streets for more than fifty years, under the jurisdiction and control exercised by the plaintiff's officers, and the ownership by the defendant Eckerson of certain lands adjacent to Jefferson street. It alleges that the defendants have wrongfully and unlawfully excavated and removed clay, sand, and other materials from Eckerson's land, adjacent to Jefferson street, for use in brickyards, and have interfered with, endangered, and destroyed the lateral support of said street, encroaching upon it, and rendering it unsafe for passage, and creating, by reason thereof, a public nuisance. It alleges that they are still engaged in such acts, that they threaten and intend to continue the same, and that, by reason thereof, the street "is greatly endangered and rendered liable to slide and cave into such excavations," and that the properties of various persons on that side of the street are likewise in danger. Judgment is demanded enjoining and restraining the defendants "from excavating and removing clay, sand, and other materials from the land . . . adjacent to Jefferson street, so as to cause said street . . . to subside or slide down into the excavations upon said adjoining property," from "interfering with

the lateral support of said street," and requiring them to "restore said street to its former and original condition, . . . and to restore the lateral support thereof where the same has been removed or otherwise interfered with." The defendants demurred to the complaint for want of legal capacity in the plaintiff to maintain the action, and for the insufficiency of the facts stated to constitute a cause of action.

Messrs. Henry Bacon and Ralph E. Prime, for appellants:

A village organized under the general laws has no authority to maintain an action in equity to restrain the excavation of land adjacent to the highway.

Palmer v. Ft. Plain & C. Pl. Road Co. 11 N. Y. 376; People v. Albany & V. R. Co. 24 N. Y. 261, 82 Am. Dec. 295; Rozell v. Andrews, 103 N. Y. 150, 8 N. E. 513; Moore v. Brooklyn City R. Co. 108 N. Y. 98, 15 N. E. 191; Cornell v. Butternut & O. Turnp. Co. 25 Wend. 305; Cornell v. Guilford, 1 Denio. 510; People v. New York & H. R. Co. 45 Barb. 73; Coykendall v. Durkee, 13 Hun, 260; People ex rel. Lehmaier v. Interurban Street R. Co. 85 App. Div. 407, 83 N. Y. Supp. 622; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012; Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co. 50 Pa. 91, 88 Am. Dec. 534; Sparhawk v. Union Pass. R. Co. 54 Pa. 401; Bigelow v. Hartford Bridge Co. 14 Conn. 565, 36 Am. Dec. 502; Milwaukee v. Milwaukee & B. R. Co. 7 Wis. 86; 2 Wood, Nuisances, 3d ed. § 819.

As to villages, the only remedy is by ordinance.

the Milburn Case, above referred to, the permanent injunction was here granted.

United States v. Peachy, 36 Fed. 160, was an action for damages to a sidewalk due to excavations by the defendant on the opposite side of a public street, which caused the street to cave in and injure the walk. The court recognized the duty of abutting owners to maintain the lateral support of the street, saying: "The right of every abutting owner, as well as the public, to the maintenance of a street intact, necessarily implies the right of the public and the abutting owner to whatever support is necessary, whether lateral or subjacent, for the street, from all the land that abuts upon it, and this whether the structures of the street be natural or artificial;" but held that it was an exaggeration of the principle just stated to suppose that, by reason of it, the defendant became the insurer of the opposite neighbor against all injury, and that he was only bound to proceed with due caution to do the work in a skilful and workmanlike manner. No negligence was 20 L.R.A. (N.S.)

shown on the part of the defendant, and the verdict was therefore in his favor. It is submitted that the conclusion thus reached is but the application of principles already generally accepted, where the question of lateral support is one as to the rights between themselves, of adjoining landowners.

Land adjoining a public road is held to be burdened with the lateral support of the road, in Hudson County v. Woodcliff Land Improv. Co. 74 N. J. L. 355, 65 Atl. 844; but in that case the defendant had conveyed to the plaintiff the land upon which the road was built to be used for that specific purpose, and the case was decided upon the theory that an easement of lateral support for the road had been granted by implication.

As to the liability of a municipal corporation for the removal of the lateral support of abutting property in making street improvements, see note to Talcott Bros. v. Des Moines, 12 L.R.A. (N.S.) 696.

Brockport v. Johnston, 13 Abb. N. C. 469; *New Rochelle v. Lang*, 75 Hun, 608, 27 N. Y. Supp. 600; *People ex rel. Todd v. New York, N. H. & H. R. Co.* 11 Hun, 297.

The village, as such is not given power to maintain the action; nor can it be given to the village by analogy because commissioners of highways are authorized to sue in the name of their respective "towns."

Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; *People ex rel. Van Keuren v. Esopus*, 74 N. Y. 310; *People ex rel. Loomis v. Little Valley*, 75 N. Y. 316; *Pittstown v. Plattsburgh*, 18 Johns. 407; *Galway v. Stinson*, 4 Hill, 136; *Gould v. Glass*, 19 Barb. 179; *Victory v. Blood*, 25 Hun, 515.

No right to lateral support existed in favor of the village.

Re Furman Street, 17 Wend. 649; *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719; *Graves v. Otis*, 2 Hill, 466; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Callender v. Marsh*, 1 Pick. 418; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Washb. Easements & Servitudes*, 4th ed. chap. 4, p. 581, § 1, part 1; *20 London Law M. & R.* 82; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Farrand v. Marshall*, 19 Barb. 380, s. c. 21 Barb. 417; *Hendricks v. Spring Valley Min. & Irrig. Co.* 58 Cal. 190, 41 Am. Rep. 257; *Ryckman v. Gillis*, 57 N. Y. 68, 15 Am. Rep. 464; *Ludlow v. Hudson River R. Co.* 4 Hun, 239.

Mr. William McCauley, with *Mr. Alonzo Wheeler*, for respondent:

A village incorporated under the general village law has capacity to maintain an action in equity to restrain threatened injury to a public street, including the right to lateral support.

Oxford v. Willoughby, 181 N. Y. 162, 73 N. E. 677; *Elliott, Roads & Streets*, 2d ed. p. 713; *2 Beach, Modern Eq. Jur.* p. 816; *1 Dill. Mun. Corp.* 2d ed. § 520; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *New York v. Knickerbocker Trust Co.* 104 App. Div. 229, 93 N. Y. Supp. 937; *Milburn v. Fowler*, 27 Hun, 568; *Finegan v. Eckerson*, 26 Misc. 574, 57 N. Y. Supp. 605.

The public has the right to the lateral support of the adjacent land for the purpose of sustaining the public highway, and the land belonging to a private individual, adjacent to a public highway, is subject to the burden in favor of the public of affording lateral support to such public highway.

White v. Tebo, 43 App. Div. 418, 60 N. Y. Supp. 231; *Riley v. Continuous Rail Joint Co.* 110 App. Div. 787, 97 N. Y. Supp. 283; *Milburn v. Fowler*, supra; *Finegan v. Eckerson*, 26 L.R.A. (N.S.)

son, 26 Misc. 574, 57 N. Y. Supp. 605, 32 App. Div. 233, 52 N. Y. Supp. 993.

Gray, J., delivered the opinion of the court:

The questions presented by this appeal are simply whether the village of Haverstraw has the legal capacity to maintain an action for equitable relief, and, if it has, whether a cause of action is made out upon the allegations of its complaint. I think that the first of these questions was settled by our decision in the case of *Oxford v. Willoughby*, 181 N. Y. 155, 73 N. E. 677. Upon its authority, as in reason, we must hold that a municipal corporation may resort to a court of equity for the preservation of its streets and highways, and for the protection of the rights of the public therein, when their permanency and the public use thereof are menaced. In *Oxford's Case* the judgment, which we upheld, restrained the defendant from continuing a certain encroachment upon a street of the village, which consisted in an excavation within its lines for the foundations of a building. In that case the right of the municipality to maintain an action for equitable relief was contested and the question was carefully considered. It was held that the village possessed this right, not only under the general rule, which concedes to the municipal corporation the right to exercise, beyond the powers expressly granted, such incidental powers as are indispensable for the proper protection of the public rights, when menaced by an act which amounts to a public nuisance, but also under the general highway law of the state. The powers conferred by the provisions of the general village law which relate to the administration of village streets imply every incidental power essential to conserve the public rights therein. By the highway law, whose provisions, are generally applicable, unless modified by other and special provisions, the highway commissioners of towns are empowered to maintain such an action in the name of the town; but, inasmuch as the village law creates "a separate highway district" of the village, vesting an exclusive control in the village trustees over the streets, the special provision modifies the general highway law, and the authority of the highway commissioners is transferred to, and vests in, the village authorities. The question was discussed in *Oxford's Case*, and I think further discussion needless here.

As to the other question in this case, the proposition of the appellants is that "the doctrine of lateral support does not apply to the conditions which arise between an owner along a public street and the public inter-

ested in the highways." I do not think the proposition is quite correct. As between the proprietors of adjacent lands, neither proprietor may excavate his own soil so as to cause that of his neighbor to loosen and fall into the excavation. The right to lateral support is not so much an easement as it is a right incident to the ownership of the respective lands. It is true that the application of the doctrine in the case of a public street or highway will be somewhat broader. In the case of adjacent landowners the right is only to the support of the land in its natural state, while in the case of the street or highway the improvement of the land, to fit it for its intended use as a public highway, may tend to add to the lateral pressure. But that would be the permanent and natural condition of the land acquired for the public travel. It is further true that the municipality is not under a similar obligation to the abutting owner, and for the reason that, with respect to the construction and maintenance of the public highway, it exercises a governmental function and can come under no liability in its reasonable performance thereof. It constitutes an exception to the general rule of lateral support. See 2 Dill. Mun. Corp. 4th ed. § 991, and *Moore v. Albany*, 98 N. Y. 396, page 407. I think that the preservation of lateral support to a highway as constructed and prepared for the public use is an obligation to the community which rests upon the adjacent landowner. It is an absolute right of the public, in the maintenance of which the members of the community are concerned. It is of no materiality whether the fee of the street or highway is in the municipality, or whether it holds and controls it by a lesser title. The municipality is the incorporation of the inhabitants of the village district, and it is their representative, and the trustee of their equitable rights. In its board of trustees is vested, by the statute, the exclusive control and supervision of the streets and public grounds, and it is but a just result that, whatever the rights, legal or equitable, of the public therein, they should be enforceable at the suit of the municipality. It would be a vain grant of power by the statute if the interests of the public in a street or highway could not be prevented from destruction or impairment and protected by resort to the courts. In my opinion no legitimate consideration militates against the restriction of the adjacent owner's property rights to such acts upon his land as will not injuriously affect the public rights in the highway. Our attention is not called to any case in this court which presents this precise question, and I have not been able to find any; but in *Milburn v. Fowler*, 27 Hun, 568, we have an explicit 20 L.R.A. (N.S.)

utterance upon the subject by the present chief judge of this court. In that case an injunction was granted at the suit of an owner of land abutting upon a highway which restrained the defendants from so digging on their own land as to endanger the safety of the highway. It was observed by Judge Cullen, speaking for the general term, that "it is claimed that there is no right of lateral support for the street, unless it is alleged and shown that the highway is in its natural state, and free from superincumbent earth, which may increase the lateral pressure. This doctrine which, in the absence of any statutory regulations, controls the relative rights between adjacent owners, has no application to the case of a highway."

My conclusion is that, whether the acts of persons menace the condition of a highway in a direct manner, or indirectly, by so digging or excavating upon the adjacent lands as to affect the lateral support, and to cause or to threaten the subsidence of the highway, the exercise of the equitable power of the court may properly be invoked by the municipality in restraint of their continuance.

For these reasons, I advise that the order appealed from should be affirmed, with costs, and that the questions certified should be answered in the affirmative.

Cullen, Ch. J., and Haight, Vann, Werner, Hiscock, and Chase, JJ., concur.

OHIO SUPREME COURT.

CHARLES G. BLAKE, Plff. in Err.,
v.
HAMILTON DIME SAVINGS BANK
COMPANY.

(79 Ohio, 189, 87 N. E. 73.)

Check — certification — effect.

1. The certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its sat-

Headnotes by the Court.

Case Note. — Right of drawer to stop payment of certified check.

Where the drawer of a check causes it to be certified by a bank, and it is charged to his account and registered by it, it being the drawer's intention that the check shall circulate as currency, he cannot, after the check has been stolen, stop payment by the bank so as to defeat the right of a bona fide holder, who acquires it for

isfaction, and that they shall be so applied whenever the check is presented for payment.

Same — liability of certifier.

2. The transfer of a certified check is an assignment of money to meet it; and the bank making the certification is liable therefor to the holder.

Certified check — deposit — stopping payment — effect.

3. The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay; and a bank that has received a certified check for deposit, and has credited the depositor with the amount of it, is a bona fide holder, and may enforce payment of it, notwithstanding it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor.

(December 22, 1908.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas

value three years after its certification, from recovering the amount thereof from the bank. *Nolan v. Bank of New York*, 67 Barb. 24.

And it was said in *Poess v. Twelfth Ward Bank*, 43 Misc. 45, 86 N. Y. Supp. 857, that the drawer of a check who has it certified, cannot, after its loss before delivery, stop payment thereon so as to operate to the prejudice of a bona fide holder who obtains it in the usual course of business, without notice of the fact that it has been lost or stolen.

And the following cases contain *dicta* to the effect that the right of a drawer of a check to revoke or countermand its payment is terminated when the drawee, either by certifying the check or obligating itself to pay it, has become liable for the amount thereof. *National Commercial Bank v. Miller*, 77 Ala. 176, 54 Am. Rep. 50; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Pease & Dwyer v. State Nat. Bank*, 114 Tenn. 693, 88 S. W. 172.

After an accommodation check has been certified by the drawee bank at the instance of a creditor of the payee to whom it was delivered without indorsement in payment of a pre-existing debt, the drawer of the check cannot stop payment thereof. *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 352, affirming 12 Hun, 537.

So, where the payee of a check which was obtained by fraud and without consideration secured its certification, and the drawer subsequently stopped its payment, and, when presented by a transferee, the bank wrote upon it "payment stopped" and re-

in plaintiff's favor in an action brought to recover upon a certain certified check. Affirmed.

The facts are stated in the opinion.

Messrs. Burch & Johnson, for plaintiff in error:

The bank was not entitled to protection as a bona fide purchaser.

Dan. Neg. Inst. 5th ed. § 1652, p. 680; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; *Mann v. Second Nat. Bank*, 30 Kan. 412, 1 Pac. 579; *Central Nat. Bank v. Valentine*, 18 Hun, 417; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309, 37 N. W. 420.

Receiving a certified check of another bank, and crediting it to the account of a depositor upon his indorsement thereof, do not make the receiving bank a purchaser for value.

Blake v. Hamilton Dime Sav. Bank, 29 Ohio C. C. 465; *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; *Atlas Nat. Bank v. Rheinstrom*, 4 Ohio N. P. 20; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696.

Messrs. Pogue & Pogue, for defendant in error:

When a check is certified the fund is

turned it to the holder, who erased these words and placed a revenue stamp over the place where they were written; and the check afterwards came into the possession of a holder for value in due course of business, without notice of any defects therein,—the latter may recover the amount of the check from the drawee bank. *Nassau Bank v. Broadway Bank*, 54 Barb. 236.

The drawer of a check given for the purchase price of stolen property, after the payee has secured its certification and the bank has charged the amount thereof against the drawer's account, and the payee has sold the check for value to a bona fide purchaser, cannot countermand its payment. *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 52 Am. St. Rep. 450, 33 N. E. 237, 34 N. E. 608.

And it is immaterial that the check was payable to and indorsed by the payee in a fictitious name. *Ibid*.

Where the payee of a check obtained by fraudulent representations, and, without consideration delivered it without indorsement to another, subsequently notifying the bank not to pay it, a subsequent certification by the bank, at the holder's request, will not constitute a defense when the bank is sued by the drawer for the amount of the check,—he also, after the check was certified, having notified the bank not to pay it,—as one taking an unindorsed check is not a bona fide holder, and the bank, before certifying the check, was placed upon inquiry by the conduct of the payee, who still held the legal title thereto. *Public Grain & Stock Exchange v. Kune*, 20 Ill. App. 137.

transferred immediately to the payee or his assigns, and no one has any claim upon the fund except the owner and holder, free from any claim or right of the drawer to stop payment.

Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; *Willetts v. Phoenix Bank*, 2 Duer, 121; *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 290; *Meads v. Merchants' Bank*, 25 N. Y. 146, 82 Am. Dec. 331; *Farmers' & M. Bank v. Butchers' & D. Bank*, 4 Duer, 219; *Farmers' & M. Bank v. Butchers' & D. Bank*, 14 N. Y. 624; *Brown v. Leckie*, 43 Ill. 497; *Girard Bank v. Bank of Penn. Twp.* 39 Pa. 92, 80 Am. Dec. 507; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229; *Dan. Neg. Inst.* § § 1601, 1602.

Messrs. Murphy & Williams also for defendant in error.

Summers, J., delivered the opinion of the court:

The action was brought by the defendant in error, the Hamilton Dime Savings Bank Company, of Hamilton, Ohio, against the Franklin Bank of Cincinnati, Ohio, upon a check drawn by C. G. Blake & Company upon the Franklin bank for \$275, payable to the order of C. G. Blake, and certified by the Franklin bank to be good, and indorsed by C. G. Blake and Charles Werbel.

On Friday, October 16, 1903, Blake bought a horse from Werbel and indorsed the check to the order of Werbel and delivered it to him in payment for the horse. The indorsement of certification was as follows:

Good for \$275.00 when properly indorsed.

The Franklin Bank,
H. Sachteleben, Teller.

Werbel indorsed the check, and on the following Monday, October the 20th, deposited it to his account with the Hamilton Dime Savings Bank Company, and was given credit therefor on the books of the bank. The Hamilton Dime Savings Bank Company sent the check to the Atlas National Bank, of Cincinnati, for collection, and it was protested for nonpayment for the reason "payment stopped." Thereupon, on November 19, 1903, the defendant in error sued the Franklin Bank on the check, and the Franklin Bank, under § 5016, Rev. Stat. 1908, filed a motion for an order of interpleader, which was granted, the amount of the check with interest was paid into court, and C. G. Blake was substituted as defendant. Blake filed an answer averring that he had been induced to purchase the horse and to deliver the check in payment therefor by the false and fraudulent representations of Werbel, that Werbel is the owner of the check, that the plaintiff, the Hamilton Dime

Savings Bank Company, received the check only as collecting agent for Werbel and with knowledge that Werbel had been notified that payment on the check would be stopped. A jury was waived, and the court stated its findings of fact separately from its conclusions of law. Judgment was given for the bank for the amount paid into court, less costs to the date of that payment. The court found that the Hamilton Dime Savings Bank Company was the purchaser of the check for value and before notice and without knowledge of Blake's claim. On error the circuit court affirmed the judgment, not, however, on the ground that the bank was entitled to the protection afforded to bona fide purchasers; the court stating in its opinion, as a matter of law, that the savings bank was not a purchaser for value, but that the transaction was the ordinary and usual one of a deposit by a depositor, and not a purchase of the check for value by the bank. At the time the bank received notice of the claim of Blake, it had on deposit to the credit of Werbel a sum in excess of the amount of the check. No question is made as to the authority of the teller of the bank to bind the bank by the certification of the check. The circuit court affirmed the judgment on the ground that "Werbel became the absolute owner of the check free from the claim of Blake to the same extent as if it had been money. 2 Dan. Neg. Inst. § 1601; Morse, Banks & Banking, § 414."

The circuit court was right in its opinion that the Hamilton bank was not a purchaser of the check. In the absence of special agreement, the deposit in bank to his credit of an uncertified check by the holder, whether drawn on that bank or another, is deemed to be for collection, and not for payment; and, if there be no funds to meet it, or if it be returned dishonored, the deposit bank may return it to the depositor and cancel the credit. Dan. Neg. Inst. § 1623; Morse, Banks & Banking, 320, 321; National Gold Bank & T. Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697. And in such case, if the bank receives notice of the invalidity of the check, it cannot become a bona fide holder by subsequent payment. "The mere discounting of paper and placing the amount thereof to the credit of a depositor, who already has a large balance to his credit, does not make the bank a purchaser for value so as to protect it against infirmities in the paper. Entering the amount of the discount to the credit of the depositor simply creates the relation between the bank and the depositor of debtor and creditor; and, so long as that relation remains, and the deposit is not drawn out, the bank has simply promised to pay the

depositor, has parted with no value, and is not entitled to the protection of a bona fide holder of paper." *Mann v. Second Nat. Bank*, 30 Kan. 412, 1 Pac. 579. "The mere credit of a check upon the books of a bank, which may be canceled at any time, does not make the bank the bona fide purchaser for value. If after such credit, and before payment for value, upon the faith thereof, the holder receives notice of the invalidity of the check, he cannot become a bona fide holder by subsequent payment." *Dan. Neg. Inst.* 5th ed. § 1652; *Central Nat. Bank v. Valentine*, 18 Hun, 417; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309, 37 N. W. 420. The Hamilton bank therefore, upon the evidence, was not a purchaser of the check, or entitled to the protection of a bona fide holder of the paper, unless it is so entitled by reason of the fact that the check was certified.

In this state a bank check for part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn (*Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94), and the holder cannot maintain an action against the bank for the amount of the check, although it has funds to the credit of the drawer sufficient to meet it (*Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700). This is now made the law by statute. Section 3177v, Rev. Stat. 1908, provides: "A check is a bill of exchange drawn on a bank payable on demand." And § 3177z is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

But this is a certified check. Mr. Daniel says (§ 1602) that the certification of checks is an expedient and outgrowth of modern commerce quite recent in its origin, but now of daily and extensive occurrence. And in *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008, decided in 1871, Mr. Justice Swayne says in the opinion that "it is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than \$100,000,000," and that "we could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity." And, speaking of their legal effect, he says: "By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of

the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available, also, to him for all the purposes of money. Thus, it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion. A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in 'certified check account,' and, when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process. The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money." Daniel (§ 1603) says that, when the check is certified, the bank becomes at once the principal debtor, and that, when the holder procures the bank to certify the check "in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. In other words, a certified check is a shorthand certificate of deposit in favor of the holder, and payable to him, or to him or order, or to bearer, according to its terms." Again, he says: "It will be too late after the bank has certified the check for the drawer to revoke it, and the bank will be bound to pay it though notified by the drawer not to do so." And, again, he says, in § 1605, that "the check when certified circulates as the representative of so much cash in bank, payable, whenever demanded, to the holder. It is then like cash, but still it is not the same as cash, for *nullus simile est idem*."

The drawer, by delivery of a certified check in the absence of special agreement, is not discharged from liability, the only effect of the certification being to add the credit of the bank to that of the drawer (Dan. Neg. Inst. § 1626; Oyster & Fish Co. v. National Lafayette Bank, 51 Ohio St. 106, 46 Am. St. Rep. 560, 36 N. E. 833); and the same is true as to a holder who procures the check to be certified before delivery. He is a new drawer and will be held liable as well as the bank. If, after delivery, the holder procures a check to be certified, the drawers and indorsers are thereby discharged. Dan. Neg. Inst. § 1601a; Rev. Stat. 1908, § 3177y. In this case the payee, Blake, procured the certification of the check after delivery to him and before delivery by him to Werbel, thereby discharging Blake & Company, the drawers, and making himself as well as the bank liable on the check. Section 3177x, Rev. Stat. 1908, provides that, where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance, and, under § 3177z, Rev. Stat. 1908, by necessary implication, the certification operates as an assignment of the funds to meet the check, and makes the bank liable to the holder.

What, then, are the rights of the parties? If Blake had given Werbel money, instead of the check, and Werbel had deposited the money to his credit in the Hamilton bank, the relation of debtor and creditor between the bank and Werbel would thereby have been created. In *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 71, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700, 702, it is said by Spear, J.: "The relation of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and *cestui que trust*." And again: "The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous." The money would belong to the bank, and Blake could not acquire any interest in it or impose any liability on the bank merely by notifying it that Werbel had obtained the money from him by defrauding him in a horse trade. If, instead of money, Blake had traded a piano to Werbel for the horse, it may be that Blake could repudiate the trade on the ground of fraud, and that after tender back of the horse the title to the piano would reinvest in him, and that he could then recover it from anyone excepting a bona fide purchaser; but money loses its identity, and, if the relation of debtor and creditor between the bank and Werbel

would arise upon the deposit of the money, then the bank would necessarily be treated as a bona fide purchaser, and title to the money would not be restored to Blake even by a repudiation of the trade and a tender back of the horse. Now, while it is true, as has been pointed out, that the delivery of the check was not payment for the horse, and that Blake was liable on the check, still, if certified checks are to circulate as money and to perform the useful purpose in trade they have heretofore, the deposit of them in bank to the credit of the holder must be, so far as the rights of the indorser are concerned, treated as a deposit of money. The transaction under consideration may serve in some slight measure to illustrate their use. Blake may have supposed that Werbel would want cash for the horse and would not accept his check, and, not wishing to carry the money from Cincinnati to Hamilton, he procured the certification of the check, and Blake accepted it as readily as he would have accepted cash; but, if he could not accept it with the same security that he could cash, then, under such circumstances, a certified check could not be used at all, or the indorsee of such a check, if he wishes to avoid embarrassment and delays, such as have resulted in this case, must at once present the check for payment and then deposit the money, instead of the check, in bank. This being so, then the obligation of the Franklin bank to pay the check was not affected by the notice to it by Blake not to pay, and the right of the Hamilton bank to enforce payment was not affected by notice of Blake's claim.

Some question is made as to the right to an order of interpleader in such a case as this; but, in view of the conclusion reached, it is not necessary to consider it. And it may be added that, even if the certified check were not treated as money, but as property Blake had given Werbel for the horse, Blake could neither recover it nor defend against payment of it in a suit upon it, in the absence of a showing that he had repudiated the trade and had tendered the horse to Werbel, which was not done in this case, nor was Werbel made a party to the action. *Morrison v. Eaton, Tappan* (Ohio) 173; *Manhattan L. Ins. Co. v. Burke*, 69 Ohio St. 294, 100 Am. St. Rep. 666, 70 N. E. 74; *Archer v. Bamford*, 3 Starkie, 175; *Lewis v. Cosgrave*, 2 Taunt. 2; *Heaton v. Knowlton*, 53 Ind. 357; *Grubbs v. Barber*, 102 Ind. 131, 1 N. E. 638.

The judgment is affirmed.

Price, Ch. J., and Shauck, Crew, and Spear, JJ., concur.

UNITED STATES CIRCUIT COURT
OF APPEALS, SIXTH CIRCUIT.

ERIE RAILROAD COMPANY, Plff. in Err.,
v.
GEORGE F. REICHERD

(— C. C. A. —, 166 Fed. 247.)

Arrest — Imprisonment — Liability.

1. The arrest without warrant, by one clothed with the authority of a police officer, of a person found by him in a public place in a state of intoxication and acting in a disorderly manner, is not a false arrest; nor is his detention for the action of the proper police authorities a false imprisonment.

Same — falsity — waiver.

2. One who, upon being arrested for intoxication and disorderly conduct, to secure his release, enters a plea of guilty and waives the reading of the affidavit and the right to be present in court upon trial, waives any claim he may have against the officer who arrested him, for false arrest or imprisonment.

(January 8, 1909.)

Case Note. — Plea of guilty as affecting action for illegal arrest, false imprisonment, or malicious prosecution.

Only a few cases have been found on the question as to the effect a plea of guilty on an action for illegal arrest, false imprisonment, or malicious prosecution; and, although the question, to a great extent at least, seems to depend upon the facts of each particular case, there appears to be some conflict among the cases.

In *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738, it was held that a plea of guilty to a charge of peddling without a license besides the payments of a fine, though possibly made in preference to staying in jail over night, will effectually bar an action for false imprisonment. The court said: "This action is similar to the cognate one of malicious prosecution; and, if the defendant has been adjudged guilty of the crime, he cannot maintain a civil remedy against those instrumental in securing his conviction as long as the judgment stands unreversed. The theory on which each of these actions is sustainable is that the proceeding out of which the action arose has terminated successfully to the defendant, exonerating him from the charge made. It would be inconsistent to have a judgment of a court of competent jurisdiction, proving guilt, and a verdict by a jury in a civil action, based upon the assumption of innocence. Had respondent been tried and convicted, the judgment would not be of greater verity than that entered upon a confession of guilt of the crime alleged in the warrant. He was not falsely imprisoned, but the judgment of conviction established that his arrest and detention were justifiable." 20 L.R.A. (N.S.)

ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment in plaintiff's favor in an action brought to recover damages for false arrest and imprisonment. Reversed.

The facts are stated in the opinion.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Messrs. Cushing & Siddall, for plaintiff in error:

The plea of guilty barred all right to recover damages for false arrest and imprisonment.

Wilkinson v. Howell, 1 Moody & M. 495; *Mayer v. Walter*, 64 Pa. 283; *Welch v. Cheek*, 125 N. C. 353, 34 S. E. 531; *Langford v. Boston & A. R. Co.* 144 Mass. 431, 11 N. E. 697; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *Gallagher v. Stoddard*, 47 Hun, 101; *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149; *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738; *Emery v. Ginn*, 24 Ill. App. 65; *Leyenberger v. Paul*, 40 Ill. App. 516; *Bigelow*, Torts, 7th ed. § 193;

In *Duerr v. Kentucky & I. Bridge & R. Co.* (Ky.) 116 S. W. 325, a plea of guilty to a charge of feloniously burning a barn was held to be conclusive evidence of probable cause, and therefore to preclude a recovery for malicious prosecution.

In *Lawrence v. Cleary*, 88 Wis. 473, 60 N. W. 793, it was held, in an action for malicious prosecution, that a petition which shows on the face that plaintiff pleaded guilty without sufficiently alleging that such plea was procured by defendant's fraud, is fatally defective.

However, a plea of guilty, procured by fraud and conspiracy, implies no consent to a conviction, and is therefore no defense to an action for damages for malicious prosecution. *Johnson v. Girdwood*, 7 Misc. 651, 28 N. Y. Supp. 151, affirmed without opinion in 143 N. Y. 660, 39 N. E. 21.

In *McCullough v. Greenfield*, 133 Mich. 463, 62 L.R.A. 906, 95 N. W. 532, 1 A. & E. Ann. Cas. 924, where a person was arrested in one town without a warrant upon the directions of an officer of another town, it was held that the liability of the latter officer for illegal arrest was not waived by the accused pleading guilty of the offense for which the arrest was made. This case was approved in *Gold v. Campbell* (Tex. Civ. App.) 117 S. W. 463.

In *Texas & P. R. Co. v. Parker*, 29 Tex. Civ. App. 264, 68 S. W. 831, where two traveling musicians who were sleeping in a box car to escape the rain were, at the instigation of the station agent, unlawfully arrested as "hobos," and committed to jail on the charge of unlawfully riding on a freight train, it was held that a plea of guilty and the payment of a fine, entered on the advice of the county attorney to avoid remaining in jail, the justice being out of

Douglas v. Allen, 56 Ohio St. 156, 46 N. E. 707; Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35; Lamprey v. Hood, 73 N. H. 384, 62 Atl. 380; Columbus, H. Valley & T. R. Co. v. Burke, 54 Ohio St. 123, 32 L.R.A. 329, 43 N. E. 282; Cuniff v. Beecher, 84 Hun, 137, 32 N. Y. Supp. 1067; Williamson v. Wilcox, 63 Miss. 336; Billington v. Hoverman, 18 Ohio C. C. 637; Truman v. Walton, 59 Ohio St. 517, 53 N. E. 57; Twilley v. Perkins, 77 Md. 252, 19 L.R.A. 632, 39 Am. St. Rep. 408, 26 Atl. 286; Richardson v. Dybedahl, 14 S. D. 126, 84 N. W. 486; Ellis v. Cleveland, 54 Vt. 437.

Mr. E. J. Anderson for defendant in error.

Richards, Circuit Judge, delivered the opinion of the court:

Action in tort. The petition averred that the defendant company was a common carrier of passengers; that the plaintiff, while a passenger upon one of its cars in a train standing in its station at Cleveland, Ohio, was assaulted and beaten by one of its employees, a certain special railway detective, and violently ejected from said car with great force, by which he sustained injuries, etc. A second cause of action was in these words: "Plaintiff, for his second cause of action, incorporates above first cause of action as fully as if same were herein rewritten, and further says that the defendant company did, on said 1st day of July, and at said Erie depot, by said employee, unlawfully, maliciously, and without any reasonable or probable cause, arrest plaintiff, and with force and violence, and against the will of plaintiff, unlawfully place plaintiff in a patrol wagon, and cause plaintiff to be carried to the city prison of said city of Cleveland, where plaintiff was unlawfully and against the will of plaintiff imprisoned and detained, from whence he was discharged."

town, would not bar an action against the railroad company for damages for false imprisonment. The court said: "This action is for damages for illegally confining plaintiff in a car, for illegally causing him to be arrested without a warrant, and confining him in jail without carrying him before a magistrate. There is no evidence tending to show that any complaint or information was ever filed against him for any offense, nor that any warrant was ever issued for his arrest. None had been issued at the time of the illegal arrest. No presumption arises that any was ever issued, and giving to the judgment all the effect to which it is entitled, it does not relieve the defendant from the consequences of the illegal acts prior to its rendition. Upon the plea of guilty being entered, plain-

20 T. R. A. (N.S.)

The amended answer was as follows:

"The defendant, Erie Railroad Company, for its amended answer to the plaintiff's petition, says that it admits that at the time stated in plaintiff's petition it was a common carrier operating a railroad between the cities of Cleveland, Cuyahoga county, Ohio, and Youngstown, Ohio, and was a carrier of passengers for hire.

"This defendant further admits that, on the 1st day of July, 1906, plaintiff was ejected from one of its trains at the passenger station of this defendant, in the city of Cleveland, but avers that he was so ejected because he was intoxicated and disorderly and was disturbing other passengers upon said train.

"Defendant also avers that plaintiff was thereupon arrested by a policeman duly appointed and commissioned to act as such for defendant and upon the premises of its railroad, and by him turned over to police officers of the city of Cleveland on the charge of intoxication, and by them taken to the station house of said city, where he was detained for a short time upon said charge; and then, plaintiff having become quieter and promising to make no further trouble, and having, in writing signed by him and duly filed, waived the reading of affidavit in the proceeding against him and the right to be personally present in the police court of said city in said proceeding, and entering a plea of guilty to said charge, and throwing himself upon the mercy of the court, he was suffered to and did go at large, a short time after his arrival at such station house, at his own desire, and with plaintiff's assent, and his said waiver and plea of guilty were duly entered upon the journal and docket of said court, and upon the calling of the proceeding against him in said court and entry discharging him was duly made by said court.

tiff was discharged and no damages accrued thereafter, nor was any awarded to plaintiff subsequent thereto. Plaintiff was entitled to recover the damages that accrued up to the time the plea of guilty was entered, and the judgment was no bar to such recovery."

For cases on effect on presumption of probable cause for prosecution, of fact that conviction was procured by fraud, or perjury, or other undue means, see case note to Carpenter v. Sibley, 15 L.R.A. (N.S.) 1143.

Verdict of guilty set aside or reversed, and followed by acquittal or a *nolle prosequi*, as evidence of probable cause, see case note to Macdonald v. Schroeder, 6 L.R.A. (N.S.) 701.

"This defendant, further answering, denies each and every allegation in plaintiff's petition contained, not hereinbefore specifically admitted, and avers that the said ejection and arrest of said plaintiff were made without force other than was reasonably necessary to effect the same."

There was a verdict and judgment for the plaintiff. The errors assigned relate only to the second cause of action.

Reicherd was originally arrested under the accusation of being found on one of the company's passenger cars in its station at Cleveland, Ohio, in a state of intoxication and disorderly, by a special police officer in the employment of the railway company. He was removed from the car in which he was so found, and detained in the company's station until a police officer of the city could be called, by whom he was taken to the central police station and there detained for examination. In the course of an hour the accused promised to behave, and, upon signing a stipulation, was discharged and allowed to resume his journey. This stipulation was according to the usual practice in petty misdemeanors, and was in these words:

State of Ohio, Cuyahoga County—ss.

In the Police Court of the City of Cleveland.
The City of Cleveland, v. George Reicherd.
Waiver.

Cleveland, O., July 1, 1906.

I hereby waive the reading of the affidavit in the above-entitled action, waive the right to be personally present in the police court of said city, upon my trial enter a plea of guilty to the charge of intoxication, and throw myself upon the mercy of the court.

George Reicherd.

Witness: A. Walker, Lieut.

At a session of the police court the following morning the case was disposed of by an entry covering this and other cases where like waivers had been signed, in these words:

"Monday, July 2, 1906. George Reicherd. Intoxication. Waiver filed. Plea of guilty entered in each case [referring to other persons in similar situations, whose names are also set out], and defendants are discharged."

Under these undisputed facts, we think the second cause of action was not made out, and that the court erred in not so instructing the jury. An arrest without a warrant, by one clothed with the authority of a police officer, of one found by him in a public place in a state of intoxication, or acting in a disorderly manner, and his detention for the action of the proper police authorities, is not 20 L.R.A. (N.S.)

a false arrest, nor his detention a false imprisonment. Cooley, Torts, 3d ed. p. 307.

Being found in a state of intoxication is a statutory misdemeanor in Ohio. Rev. Stat. §§ 6,940, 6,795. The employee of the railway company who made the arrest, and who removed Reicherd from the car in which he was found, was a regularly qualified and commissioned police officer, clothed with all the authority and powers "of policemen of cities of the first class," when directly in the discharge of his duties for the railway company upon its premises. Ohio Rev. Stat. §§ 3427, 3428, 3429. The city of Cleveland is a city of the first class, and its police court has jurisdiction of misdemeanors committed within its limits and within 4 miles thereof. Ohio Rev. Stat. § 1785; Act January 22, 1904 (97 Ohio Laws, p. 7). The powers of its police court are those incident to courts of common pleas so far as necessary to exercise its jurisdiction. Ohio Rev. Stat. § 1791. And it may make rules of practice. Ohio Rev. Stat. §§ 1794, 1795. One arrested upon an accusation of misdemeanor within its jurisdiction may, in writing, admit his guilt and be tried by the court without a jury, and in his absence, upon such plea of guilty. Ohio Rev. Stat. § 7301. His arrest without a warrant was authorized, if he was in fact found either disorderly or in a state of intoxication by the special officer who made the arrest. Section 7129, Revised Statutes of Ohio, provides expressly that any sheriff, constable, watchman, or public officer "shall arrest and detain any person found violating any law of this state, or any legal ordinance of a city or village, until a legal warrant can be obtained."

But, if we assume that there was evidence upon which Reicherd might have gone to the jury upon the question as to whether he was arrested upon a view of the special officer, or whether in point of fact he was either intoxicated or disorderly, or that the arrest was made without probable cause to believe that he was at the time of arrest either intoxicated or disorderly, the plaintiff, by his voluntary waiver of a warrant, and his voluntary plea of guilty, thereby waived any right to deny the legality of his arrest or detention. So are the weight of the authorities and the clear preponderance of reason. 2 Am. & Eng. Enc. Law, 2d ed. p. 910; Billington v. Hoverman, 18 Ohio C. C. 637; Williamson v. Wilcox, 63 Miss. 335; Howe Mach. Co. v. Lincoln, 24 Kan. 123; Junction City v. Keffe, 40 Kan. 275, 19 Pac. 735; Williams v. Shillaber, 153 Mass. 541, 27 N. E. 767; Saunders v. Galaher, 2 Humph. 445; Ilsley v. Harris, 10 Wis. 96; Maxwell v. Deens, 46 Mich. 35, 8

N. W. 561. That Reicherd's plea of guilty would be a complete defense to an action for malicious prosecution is clear. Such a termination of the prosecution would establish conclusively that the prosecution was upon probable cause, and probable cause is an answer to a suit for malicious prosecution. *Wheeler v. Nesbitt*, 24 How. 544, 16 L. ed. 765; *Stewart v. Sonneborn*, 98 U. S. 187, 195, 25 L. ed. 116, 119; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472. A termination of a prosecution by *not. pros.* by consent of the defendant, or by a compromise, is such a termination as to leave no foundation for denying that there was probable cause. *Wilkinson v. Howell*, 1 Moody & M. 495; *Mayer v. Walter*, 64 Pa. 283; *Welch v. Cheek*, 125 N. C. 353, 34 S. E. 531; *Langford v. Boston & A. R. Co.* 144 Mass. 431, 11 N. E. 697; *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149; *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738; *Williamson v. Wilcox*, 63 Miss. 335; *Billington v. Hoverman*, 18 Ohio C. C. 637. While there are material differences between actions for illegal arrest and actions for false imprisonment or malicious prosecutions, yet in most important respects the actions are cognate.

Take the case at bar. Reicherd was arrested upon an accusation of being intoxicated. The arrest was made without a warrant, but by one having the power and authority of a police officer, and therefore the right to arrest and detain one found by him in a state of intoxication until a warrant could be obtained. Now, this arrest was plainly lawful, although without a warrant, if he was found by the special officer in a state of intoxication. Whatever the offense of Reicherd, if any, it was one in view of the officer who made the arrest. When, therefore, he waived the production of an affidavit which might have been made after the arrest, and pleaded guilty to the accusation upon which he was arrested, that waiver and plea destroyed the very foundation of any action for illegal arrest, whether the arrest was for a past offense without a warrant, or without probable cause to believe him in a present state of intoxication. In this respect the principles applicable to this case are those applicable to a case of malicious prosecution. Sound principles of public policy are opposed to sustaining a suit which is inconsistent with the voluntary action of the plaintiff in waiving an affidavit, as well as evidence of the truth of the accusation by a plea of guilty, thereby shutting out evidence which might have established the lawfulness of the arrest.

The verdict was a general verdict. If, 20 L.R.A. (N.S.)

upon either one of the causes of action there was no liability, the judgment was erroneous. We say nothing as to the first cause of action, as no assignments of error have been made.

Judgment reversed, and new trial awarded.

OKLAHOMA SUPREME COURT.

G. H. LOGAN, Plff. in Err.,
v.
HATTIE A. BROWN.

(— Okla. —, 95 Pac. 441.)

Statute of limitations — fraud — to whom applicable.

1. The statutory limitation of the time within which "an action for relief on the ground of fraud" must be commenced only applies when the party against whom the bar of the statute is interposed is required to allege fraud in pleading his cause of action, or to prove fraud to entitle him to relief.

Trust — parol promise — accounting.

2. A petition for an accounting for the proceeds of the sale of certain real estate, title to which was placed in defendant un-

Headnotes by DUNN, J.

Case Note. — *Parol agreement to take title to real property, sell the same, and account for the proceeds, as affected by the statute of frauds.*

Many of the cases considering this question are so elaborately commented on in *LOGAN v. BROWN* as to render it unnecessary to set them out in this note. It is not intended to include cases where, as a part of the consideration for real estate, the grantee agrees, in the event of the sale within a prescribed period of time, to give the vendor a portion of the proceeds. Such cases are gathered in a note appended to *Allen v. Rees*, 8 L.R.A. (N.S.) 1137.

Courts of equity are loathe to assist a grantee to commit a fraud on his grantor by using either the statute of frauds or the statute of uses and trusts as a means to that end. While due effect is given to such statutes, many exceptions thereto have been created by equity to prevent fraud, either actual or constructive. These exceptions generally fall within two lines of cases. One, and the first to be considered herein, is where land was conveyed by a deed absolute in its terms, in reliance upon a promise to convey and account for the proceeds to the grantor. Upon a sale by the grantee, the proceeds will be impressed with a trust in favor of the grantor.

This doctrine is well stated in *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584, where land was conveyed to a third person by the legal owner, at the request of the equitable owner, under a parol

der a verbal promise for this purpose, is not vulnerable on demurrer on the ground that a parol trust in real estate is declared on.

Same.—sale of property.

3. One who takes title to real property under a parol agreement to sell the same as an agent, and sells it and receives the money therefor, is liable to the grantor for the proceeds.

Fraud — statutes — executed contract.

4. The provisions of the statute of frauds, or of uses and trusts, have no application where the agreement has been completely performed as to the part thereof which comes within the statute, and the part remaining to be performed is merely a payment of the money, the promise to do which is not required to be in writing.

Appeal — reference — harmless error.

5. Where, in a suit, defendant denies any

liability to plaintiff and any foundation for the suit, but agrees for a reference of the same for trial before a referee, it is not error for the court, in its order, to state, "it appearing to the court that this is a case involving an accounting," etc., in the absence of any evidence that the referee was influenced in his findings thereby.

Same — oath of referee.

6. Where a record is silent upon the question of a referee having taken an oath as required by law, the presumption will be indulged that such oath was taken; and, even though omitted it will be held an irregularity only, and waived by a party who proceeds to trial without objection on this point.

(Williams, Ch. J., and Kane, J., dissent.)

(March 9, 1908.)

agreement to sell it for the benefit of the equitable owner, which was void under the statute of frauds because creating an express trust by parol. It was said that it was lawful for the grantee to perform the trust, and, upon disposing of the land, he was no longer protected by the statute of frauds as to the proceeds of the sale; that as to the proceeds, he was a trustee of personal property realized for the equitable owner's benefit by virtue of an agency for such owner, which he had so far performed, pursuant to the owner's instructions and his own agreement, as to obtain the money his agency was constituted to produce. The court said that equity approved his performance so far as he had performed; and, as the statutes referred to no longer applied, there was no law which he could invoke to shield him from the full performance of his duty.

And parol evidence is competent to show that a deed absolute on its face was to secure an indebtedness to the grantee, and that there was also a parol arrangement that lands conveyed thereby should be sold, and the balance over and above such indebtedness should be returned to the grantor; it appearing that the lands had been sold and a surplus over and above the indebtedness received. *Spencer v. Richmond*, 46 App. Div. 481, 61 N. Y. Supp. 397.

So, where a transfer of land by a deed absolute in form is made better to enable the grantee to sell the same as the agent of the grantor, parol evidence to establish such purpose is not within the statute of frauds where there has been a part performance by a sale of the property by the grantee. *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398.

While a trust based on a parol agreement by the grantee, a creditor of the grantor, in a deed absolute on its face, that he would manage and sell the property conveyed thereby and hold the proceeds over and above the amount due him, and certain other claims, is unenforceable against the land itself in the hands of the grantee, because of the statute of frauds, yet the proceeds from the 20 L.R.A. (N.S.)

sale of the land, in his hands, under this arrangement, are impressed with a trust in favor of the grantor, enforceable in equity, unaffected by any original illegality. *Bechtel v. Ammon*, 199 Pa. 81, 48 Atl. 873.

And, where lands are conveyed under a parol trust to sell and convert into money and divide the proceeds, and the trust has been so far executed by the trustee as to sell the land and receive the money, and has been recognized by him, an action for money had and received will lie for the money, by the person entitled thereto. *Collar v. Collar*, 86 Mich. 507, 13 L.R.A. 621, 49 N. W. 551.

To the same effect, also, is *Collar v. Collar*, 75 Mich. 414, 4 L.R.A. 491, 42 N. W. 847.

An agreement by a grantee, made long after the conveyance to him, that he would dispose of the land received thereunder and retain the proceeds for the use and benefit of the original grantor, upon sale of the property, creates a trust relating to personal estate, and is therefore valid, as such a trust may be created by parol. *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244.

So where, as a part of the transaction by which the land was deeded by a deed absolute in its terms, the grantee was to execute a written agreement to dispose of the land and account to the grantor for the proceeds over and above his claim against the land, equity, regarding that as done which ought to be done, will treat the written agreement as executed, and will enforce it out of the proceeds of the sale. Such agreement is, therefore, not within the statute of frauds. *Hacker's Estate*, 5 Pa. Co. Ct. 586. In the foregoing case, *Penrose*, Judge, in concurring therein, gave as an additional reason for sustaining the promise of the grantee, that such agreement was an equitable assignment, and the proceeds were unquestionably personal property, and hence an agreement with relation to them was not affected by the statute of frauds; and added that an agreement as to a fund to come into existence will, when it does come, be enforced as an equitable assignment.

But in *Cameron v. Nelson*, 57 Neb. 381,

ERROR to the District Court for Kingfisher County to review a judgment in plaintiff's favor in an action brought to compel defendant to render an accounting of moneys alleged to have been received by him as trustee in the management of plaintiff's property. Affirmed.

Statement by Dunn, J.:

On June 24, 1901, Hattie A. Brown, who will hereafter be denominated "plaintiff," filed her petition in the district court of Kingfisher county against G. H. Logan, who will hereafter be denominated "defendant," in which she alleged that she was a widow sixty-five years of age, and sister-in-law to defendant, and that, on the 9th day of December, 1896, and for many months prior

and subsequent thereto, was sick and infirm in body and mind, and unable both mentally and bodily to attend to her ordinary business affairs. That, on said date, defendant persuaded her to turn over to him her property and the management of her business and financial affairs, assuring her "that if she would do so he would handle and manage the same, and render her a strict account, and to turn over to her all rents and moneys that he could realize from her property;" and that she, trusting and confiding in him, made him her confidential and trusted agent for the purposes mentioned, and that the relations aforesaid between the plaintiff and defendant, and on the terms and conditions aforesaid, began between them on the 9th day of December, 1896, and continued until

77 N. W. 771, it was held that an absolute deed of land could not be affected by proof of a parol contemporaneous agreement that only a beneficial interest in one half of the land conveyed would pass to the grantee, and that he would be a trustee for the grantor for the other half, and would sell it as his agent, whereupon he would promptly turn over the proceeds of the one half less the encumbrances on the property, although the land had actually been disposed of, and an amount been derived therefrom over and above the encumbrance, one half of which the grantor sought to reach. In reaching this conclusion the court distinguished between an attempt to enforce an oral promise without establishing any interest in the land, and one where the right to recover depended upon the establishment of an interest in land. In the former case it was said that the statute did not apply, while the latter was an attempt to raise an oral trust, and must fail. And it was said that, if it had appeared that the conveyance in question was absolute, and the grantee merely promised, as part of the consideration, that, in case of a sale, he would pay the grantor a portion of the proceeds, it could not be said that there was any attempt to create a trust in the land. The conclusion of the court was in part influenced by a difference in the language between the statute of frauds in Nebraska and the statute of Charles the Second. The Nebraska statute is said to have been intended to extend the application of the statute of frauds beyond that of the English statute, which was aimed against technical trusts in land, while the Nebraska statute applied not only to trusts in land, but to all trusts concerning land or in any manner relating thereto.

And a parol agreement by a grantee in a deed of land, absolute on its face, that he would hold the land and sell it for the benefit of the grantor, is within the statute of frauds, and void where neither fraud nor deceit is claimed, although the trust has been partly performed by a sale of the property by the grantor, and the action is to reach the proceeds in his hands. *Marvel v. 20 L.R.A. (N.S.)*

Marvel, 70 Neb. 498, 113 Am. St. Rep. 792, 97 N. W. 640.

To the same effect is *Benson v. Dempster, 183 Ill. 297, 55 N. E. 651*, as to a deed absolute on its face, but intended to secure payment of a debt due the grantee, who orally agreed to dispose of the lands conveyed thereby, and account to the grantor for the proceeds over and above the amount owing him.

So, a parol agreement by the grantee in a deed without conditions, that he will convert the property into money, and, after reimbursing himself for money advanced, pay the balance of the proceeds to the grantor's daughter, is an attempt to establish an express trust in land by parol, and is therefore void under the statute of frauds, although the grantee has actually disposed of the land. *McGinness v. Barton, 71 Iowa, 644, 33 N. W. 152.*

It is important to note, however, that the preceding cases holding such a promise invalid and unenforceable, even though the property has been sold and the action is to reach the proceeds, do not consider the question from the point of view of *Bork v. Martin, supra*; but, without apparently considering that question, the same rule is applied as would be were the property still in the hands of the grantee and the action one to impress it with the trust, rather than to impress the proceeds with a trust.

Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295, goes to the extreme of holding that, even though the grantee in such a deed in good faith attempts to carry out the trust by disposing of the property and investing the proceeds in property for the benefit of the original grantor as against the creditors of the grantee, the trust is invalid because resting in parol; and he cannot thus carry it out where it appears that, after receiving the proceeds from the property impressed with the original trust, he deposited the same in a bank to his credit until making the investment in question.

In another class of cases a constructive trust is raised from the actual or constructive fraud of the grantor in inducing or accepting the transfer in reliance upon his

on or about the 1st day of January, 1900. That, on January 2, 1897, she executed a deed to the defendant for lots Nos. 21, 22, 27, 28, 29, 30, 31, and 32, in block 39, Oklahoma City, Oklahoma territory; and that between the 9th day of December, 1896, and the 1st day of January, 1900, the defendant collected rents from the premises mentioned in the sum of about \$1,200. That, in addition thereto, he collected a judgment in the sum of about \$500 owned by plaintiff. That, on October 4, 1898, he received from Pearl E. Stafford the sum of \$2,500 for lots Nos. 29, 30, 31, and 32, in block 39, Oklahoma City. That, on the 18th day of April, 1899, he received from A. J. Burnham the sum of \$1,250 for lots Nos. 21 and 22 in block No. 39, Oklahoma City. That, on July 17, 1899,

he received from Virginia R. Allen the sum of \$1,200 for lots Nos. 27 and 28 in block No. 39, in said Oklahoma City. That, during the time the relation above mentioned existed, the defendant had received the moneys of plaintiff from rents, collection of judgment aforesaid, and sales of real estate mentioned, to about the sum of \$7,650; averring that she was unable to give the exact amount by reason of the fact that he refused to give her any account thereof. "That, on and since the 1st day of January, 1900, the plaintiff has repeatedly asked and demanded of the defendant that he render to her a full and correct account of all her business handled by the defendant as aforesaid, and asked and demanded of him that he turn over to her all moneys held by him

promise to sell for the benefit of the grantor that he does not fulfil. These cases recognize a distinction between contradicting a deed, or impairing its legal operation, and raising out of the transaction an equity *dehors* the deed, binding the grantee's conscience to hold the land for the real purpose of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work a fraud. Such an equity is independent of the deed, and not excluded by it as a mere conveyance of the legal estate. It may be established by parol, not as contradicting the terms of the deed, but as explanatory of the transactions creating the trust or equity.

This is the doctrine of the English cases, although in *Leman v. Whitley*, 4 Russ. Ch. 423, it was held that an unconditional conveyance of real estate by a son to his father, nominally the purchaser, could not be shown by parol to have been made upon an oral agreement by the father, or his solicitor, to negotiate a loan thereon for the benefit of the son, as such evidence, in the absence of fraud or misapprehension as to the effect of the instrument, came within the statute of frauds against creating an express trust in realty by parol. In disposing of the case, the master of the rolls, Sir John Leach, treated it as one wherein was involved no pretense of fraud or misapprehension, apparently regarding the mere failure to carry out the oral promise as not amounting to a fraud. The soundness of this decision was questioned by Lord St. Leonards, in his treatise on Vendors and Purchasers (Sugden), 14th ed. § 702. It was expressly overruled in *Re Marlborough* [1894] 2 Ch. 133, on the authority of *Haigh v. Kaye*, L. R. 7 Ch. 469. In the *Marlborough* Case the doctrine was enunciated that the statute of frauds would not prevent the establishing of a trust in realty by parol, where it would amount to a fraud on the grantor in an absolute conveyance of realty not to do so. In this case the Duchess of Marlborough conveyed to the Duke, her husband, certain real estate to enable him to mortgage it to pay certain of his debts, he agreeing to

reconvey to her, subject to the mortgage. The Duke died without having made the reconveyance, and, in holding him to be a trustee of such property for his wife, the Duchess, the foregoing doctrine was enunciated.

So, the violation by the grantee, the wife of the grantor, of her promise to mortgage property conveyed to her by absolute deed for the benefit of the grantor, and to reconvey it to their children, is constructively fraudulent, and gives rise to a constructive trust which may be established by parol, where, without consideration, the grantee obtained from the grantor the deed by means of such promises. *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9.

A transaction of the character of the foregoing involves more than a mere breach of contract. There is also involved the element of confidence reposed by the grantor in one upon whom he had a right to rely, and a betrayal of such confidence. This is sufficient to raise a constructive trust which may be established by parol, as it does not fall within the provision of the statute of frauds. *Ibid*.

In Texas it is uniformly held that a parol express trust is raised, enforceable in equity, where a grantor is induced to execute a conveyance of land, absolute on its face, in reliance upon a parol agreement by the grantee to dispose of the land for the benefit of the grantor. No statute of frauds, however, is in effect which resembles the 7th section of original statute of frauds (Stat. 29 Car. II. chap. 3). *Diffie v. Thompson* (Tex. Civ. App.) 90 S. W. 193; *Clark v. Haney*, 62 Tex. 514, 50 Am. Rep. 536; *Lott v. Kaiser*, 61 Tex. 672.

The doctrine that, where a grantee receives land by deed absolute in its terms, under a parol agreement to sell and account for the proceeds to the grantor or a third person designated by the grantor, his refusal to perform his promise amounts to a constructive fraud, and he will be held to be a trustee for the grantor or such third person, and the trust will not be within the statute, is not generally recognized in this country, unless it also appear that the

as the proceeds of said collections of money had and received by the defendant in the capacity aforesaid, all of which the defendant refuses and neglects to do." That, since being vested with the authority and the property of plaintiff as aforesaid, the defendant has in no manner accounted to her for money received by him, except the sum of about \$1,450, the exact amount being unknown to plaintiff, by reason of the fact that defendant refuses to inform her thereof, which sum was used in payment of mortgage indebtedness on her property, and except the further sum of \$1,400 that the defendant has paid to her in money. "This plaintiff now avers to the court that the defendant caused her to turn over to him her business affairs as aforesaid, for no other reason than that of cheating and defrauding her out of her property, money, and effects; and that, in procuring this plaintiff to so trust him as

herein stated, the plaintiff in her weak and sick condition was misled by the defendant, and led to believe that he was her friend, and would be her confidential adviser, and would aid her in all possible ways to conduct her business affairs in a careful and economic manner. That, as soon as the defendant obtained possession of her said property and business affairs aforesaid, the defendant at once began to treat the plaintiff in a harsh manner, and, when the plaintiff would seek to advise with the defendant about her business matters, the defendant would at once fly into a rage and abuse the plaintiff and inform her that it was none of her business what he was doing with her property or what he was doing with her business affairs, and for her to keep her mouth shut and let him alone,—that he would neither advise with her as to said business matters, nor allow her to ask him

promise of the grantee was made by him to induce a conveyance, and with the intention on his part, at the time, not to perform it. The mere subsequent breach of this promise is of itself insufficient to raise the trust. This statement finds support in the following cases, in none of which, however, was it claimed that the agreement was made upon the part of the grantee for the purpose of inducing the conveyance, with an existing intention on his part not to perform the promise:

Thus *Kinsey v. Bennett*, 37 S. C. 319, 15 S. E. 965, held that a trust in relation to land could not be created or established, except by some writing; and hence a trust in land could not be established by a parol agreement by a grantee, in a deed absolute on its face, who also held a mortgage on the property conveyed by the deed, that he would dispose of the land, and, after deducting the amount of the mortgage, would account to the grantor for the balance. In so holding attention was directed to the fact that there was no allegation of any fraud in obtaining the deed, the only fraud being in the manner in which the alleged trust was discharged; and the court said that until the trust was established it would be irrelevant to inquire into the manner in which it had been discharged (bill to enforce trust in land).

So, an agreement by a grantee, in a deed absolute in its terms, that he would dispose of the land conveyed thereby, and pay the proceeds of the sale to certain legatees in a will executed by the grantor contemporaneously with the deed, is an attempt to create a parol express trust in the land, and is therefore within the statute of frauds and void, and cannot be enforced by compelling the grantee to sell the lands and apply the proceeds as agreed. *Adams v. Adams*, 79 Ill. 517. In this case, however, the court said that the conveyance was made to the grantee without solicitation on his part; and no undue influence, imposition, or fraud was used. No claim was made that the facts

gave rise to a constructive trust (action to enforce the trust in the property which still remained in the possession of the grantee).

Neither can a conveyance of land by a debtor to a creditor, by a deed absolute on its face, be affected by proof of an oral agreement by the grantee therein that he would sell the land conveyed thereby, and, after paying himself, apportion the proceeds among certain other creditors, as such agreement is in the nature of an express trust, which cannot be established by parol. *Byers v. McEniry*, 117 Iowa, 499, 91 N. W. 797 (bill to enforce trust in land in possession of grantee).

A trust in lands for the benefit of a third person cannot be created by a parol agreement by a grantee in an unconditional deed to dispose of the land and pay a part of the proceeds to designated persons, including such third person. *Pearson v. Pearson*, 125 Ind. 341, 25 N. E. 342 (bill to compel sale of real estate still held by grantee).

To the same effect, where land had been sold by the grantee, is *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420. The foregoing case and the *Pearson Case* are based on the theory that there was no consideration paid by the third person to whom the conveyance was made; and the rule is applied that a party who has not parted with anything of value cannot be permitted to prove by parol that a purchase of land was made for his benefit or on his account.

An absolute and unconditional deed cannot be assailed by parol evidence that the purpose of the deed was to enable the grantee to mortgage the property for the benefit of the grantor, and which he agreed to do, where such agreement is denied by the grantee; since it is an attempt to create an express trust in land by parol. *Walker v. Brungard*, 13 Smedes & M. 723. In the foregoing case the land had been subsequently conveyed by the grantor, and it was sought to set aside the original deed or reach the proceeds of the subsequent sale.

about same." She then prayed the court to take an account of all the transactions had and done between herself and the defendant, and to compel him to render a full and complete account of all his doings in the matter set forth, and that she take judgment against him for such sums of money as the court finds are due her.

To this petition the defendant filed a demurrer, which was overruled by the court, and to which ruling an exception was saved. He thereafter filed an answer in two counts, the first being a general denial, and the second alleging that the transfer of the real property by plaintiff to defendant was a bona fide transaction between them, and that he paid her a reasonable and fair price for the lots; that the same was true in reference to the assignment of judgment which he purchased at the same time. He further denied that he was in any way indebted to the plaintiff, or that he ever held any of her property as alleged by her.

On March 2, 1903, the court made an order based upon a written stipulation signed by the attorneys of the parties, referring the case to A. H. Huston to try on both law and fact. The reply, which was a general denial under the terms of the stipulation, was filed with the referee.

Thereafter, and in July, 1903, both parties appeared personally and by counsel, at the office of said referee, in the city of Guthrie, Logan county, territory of Oklahoma, and submitted their evidence, consisting of the testimony of themselves and one witness delivered orally, certain documentary evidence, and deposition of witnesses taken on both sides. On this evidence the referee made his findings, the salient and controlling portions of which are as follows:

"That, in the year 1896 and prior thereto, plaintiff was the owner of several parcels of real estate in Oklahoma City, Oklahoma county, Oklahoma territory, included in which were lots one (1) and two (2) in block forty (40), and lots twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), and thirty-two (32), in block thirty-nine (39).

"That the defendant is now, and was at all times mentioned in the pleadings, a brother-in-law of the plaintiff.

"That in the year 1896 the plaintiff, who was then an old lady of about sixty years of age, had become embarrassed with debt and worried over financial matters.

"I find from the evidence, and also from the appearance and demeanor of the plaintiff at the time of the trial, that she was in ill health, exceedingly nervous, and not capable of fairly and intelligently attending to the details of business transactions, and that 20 L.R.A. (N.S.)

such condition had existed during all the times mentioned and referred to in the pleadings and evidence in said case.

"That, on the 2d day of January, 1897, the plaintiff conveyed to the defendant said lots 21, 22, 23, 28, 29, 30, 31, and 32 in said block 39, Oklahoma City, and that the consideration expressed in the deed was \$1,500, and that said premises were then of the value of \$3,000, but that the real purpose of said conveyance was to give the defendant control and management of the said property of the plaintiff in trust for her.

"That, on the said 2d day of January, 1897, the plaintiff also assigned to the defendant a certain judgment which she had obtained in the district court of Oklahoma county against E. T. Wood and W. J. Wood. That this judgment was obtained upon a certain note, but that the lower court refused to decree the foreclosure of the mortgage securing the same; that plaintiff appealed to the supreme court of the territory, and that in the month of September, 1896, the supreme court handed down a decision reversing the lower court and ordered a decree of foreclosure; and it is found, that at the time of the assignment of said judgment the same was worth the sum of \$500; and it is further found that said assignment was made by the plaintiff for the purpose of giving to the defendant the control and management of the same, and to collect the same and hold the proceeds in trust for her.

"That the plaintiff is entitled to an accounting with the defendant, and that in such accounting the defendant should be charged as follows:

To proceeds of sale of lots 29, 30, 31, and 32, block 39	\$2,000 00
To proceeds of sale of lots 21 and 22, block 39	1,250 00
To proceeds of sale of lots 27 and 28, block 39	1,200 00
To sum collected from rents and Wood judgment	936 88
Total	\$5,386 88

And the defendant is entitled to credits as follows:

By debts and expenses paid	\$1,300 00
By cash paid to plaintiff	1,500 00
By compensation for services rendered	250 00
Total	\$3,149 00
To balance	\$2,237 88

"I find that the plaintiff first demanded of the defendant a settlement and a payment to

her of all moneys in his hands belonging to her on or about the 1st day of January, 1900, and that the defendant refused to comply with such demand, and that the plaintiff is entitled to recover interest of and from the defendant on the sum of money in his hands belonging to her from the 1st day of January, 1900."

From the findings of fact the referee concludes: "That the plaintiff is entitled to recover of and from the defendant the sum of \$2,237.88, together with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1900, and costs of suit."

On returning the report, accompanied by the evidence, to the district court of Kingfisher county, the defendant filed a motion to set aside the report of the referee, setting out numerous grounds therefor; those which are argued and relied upon in the brief being considered in the opinion.

On the 18th day of May, 1904, the court overruled said motion, confirming said report, and rendered judgment in favor of plaintiff and against the defendant in the sum of \$2,924. Motion for new trial was filed and overruled, and the case is regularly before this court for consideration on appeal.

Messrs. H. H. Howard and P. S. Nagle for plaintiff in error.

Messrs. J. C. Roberts and Roberts & Bowman for defendant in error.

Dunn, J., delivered the opinion of the court:

Under the demurrer filed by the defendant to plaintiff's petition, three propositions are argued: First, that the action herein was one for relief on the ground of fraud, and that the same was not commenced within two years of the discovery; second, that, "inasmuch as it concerns an interest in land, and is in parol, it is void by the statute of frauds, and, appearing as it does on the face of the bill, the defense of the statute of frauds may be taken advantage of on demurrer;" and, third, under the allegations of the petition, defendant was constituted trustee of an express trust, and "that no trust in relation to real property is valid unless in writing;" and that, under either or all of these contentions, the petition showed that it did not "state facts sufficient to constitute a cause of action against the defendant and in favor of plaintiff."

We are unable to agree with defendant that this action is one for relief on the ground of fraud committed by the defendant against the plaintiff, and from which fraud she is seeking relief. The allegations of the petition in reference to the fraud are

more in the nature of inducement and explanation than a statement of the grounds upon which she relied to recover. These are set forth to show the relationship existing between the parties, and the conditions under which she claims the contract was made, rather than a statement of the gist of her action. She alleges that the property which defendant secured from her produced a certain amount of money, that he received this money in the capacity of her agent, and that, having so received it, he was indebted to her in this sum, and then asked in her prayer for an accounting between them. She would be just as much entitled to recover without these allegations of the deceit as she is with them. They add nothing to her right to the money received by Logan on the sale of her property. It would be a sad commentary upon the law of our land if it were such that, leaving out all question of confidential relationship or deceit, a man dealing with another could receive from him on a verbal contract a deed to his real property for the purpose of sale and then sell it and appropriate the money, refuse it on demand, and the courts be unable to assist the owner in getting it. Such is not the case, however, for they may do so, and that, too, when there is absolutely no fraud committed. The grantor cannot compel grantee to sell because of the written letter of the statute, but when he does sell and receives the money, the courts will compel him to account for it.

The limitation fixed by the statute for actions of this character comes within the provisions of the 2d subdivision of § 18, art. 3, chap. 66, of the Code of Civil Procedure, which provides that such a cause of action can only be brought within three years after it shall have accrued, and not under the 3d subdivision, which provides "for relief on the ground of fraud," which can only be brought within two years. The limitation in the subdivision last mentioned is that "the cause of action in such case (fraud) shall not be deemed to have accrued until the discovery of fraud." In our judgment, the petition, even though it were strictly sounding in fraud, and sought damages by reason thereof, would not be barred under its allegations, as it alleges that, "on and since the 1st day of January, 1900, the plaintiff has repeatedly asked and demanded of the defendant that he give to her a full and correct accounting," etc. There does not appear to have been any demand and refusal of accounting prior to this time. The discovery of fraud, if fraud existed, would not be concluded against plaintiff until a demand on her part for an accounting, and the refusal of the defendant, had transpired,

The last sale of property was made July 17, 1899. This action having been begun on June 24, 1901, was within the two-year limitation, even though fraud was relied upon. But this is not an action sounding in fraud. Plaintiff was not required to allege fraud in her pleading, nor to prove fraud to entitle her to relief. In the case of *Brown v. Cloud County Bank*, 2 Kan. App. 352, 42 Pac. 593, the court held in the syllabus that "the statutory limitation of the time within which 'an action for relief on the ground of fraud' must be commenced only applies when the party against whom the bar of the statute is interposed is required to allege fraud in pleading his cause of action, or to prove fraud to entitle him to relief."

The defendant next contends that the petition fails to state a cause of action for the reason that it was based on a contract for the sale of real property or interest therein, and hence invalid unless in writing. An inspection and reading of the petition fails to disclose whether the agreement plaintiff contends for was in writing or was merely oral, and the rule seems to be that, "if the complaint fails to show whether the contract in suit was verbal or in writing, it will be presumed to have been in writing for all the purposes of the demurrer." *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; 20 Cyc. Law & Proc. p. 308, and cases cited. Hence the demurrer cannot be sustained on this ground.

The third proposition raised by the defendant is one most insistently argued and contended for both under the allegations of the demurrer and under the proof offered in the case, and the statute invoked is § 64, art. 4, chap. 65, *Wilson's Rev. & Anno. Stat.* 1903, under the title of "Uses and Trusts," which provides as follows:

"No trust in relation to real property is valid, unless created or declared:

"First: By a written instrument, subscribed by the trustee (trustor) or by his agent thereto authorized by writing.

"Second: By the instrument under which the trustee claims the estate affected; or

"Third: By operation of law."

If the petition was good against the demurrer under the statute of frauds, it was also good under the provisions of the statute of uses and trusts. The former statute provides that the contract shall be invalid, and the latter statute provides that no trust in relation to real property is valid unless in writing; but the statute last referred to provides, in addition thereto, "unless created or declared by operation of law." Under this last provision, the courts have exercised very broad discretion in excepting and taking out of the operation of the statute many

cases where accident, fraud, or mistake have intervened, and where it would be inequitable to allow the grantee to retain real property, title to which had been procured under a verbal promise. So that the demurrer must of necessity be overruled for the reason that the petition is not vulnerable owing to any of the deficiencies mentioned appearing on its face, as well as appearing that it is not a suit to enforce an unwritten trust in relation to real property.

The provisions of the two statutes last mentioned are again invoked by the defendant under the findings of the referee and are insistently argued and relied upon for a reversal; hence it becomes necessary to discuss them and the authorities cited in connection therewith. He assumes that this case is within the restricting provisions of the statute of frauds and the statute of uses and trusts, and that appellee cannot recover herein because the contract as shown by evidence was not reduced to writing; that it involved a trust for an interest in real estate and was void; and that the deed and conveyance made by Mrs. Brown to defendant, by reason of these facts, was absolute and valid. In support of this proposition he cites the Kansas case of *Gee v. Thraikill*, 45 Kan. 173, 25 Pac. 588, and so strenuously insists in his brief and oral argument that the case at bar is controlled by the principles involved in that case that we recite the facts on which it was decided for the purposes of distinguishing it. Thraikill owned some real estate in the town of Harper, Kansas, and conveyed the same in fee to his sister, Mrs. Gee, by a general warranty deed, absolute on its face, with an expressed consideration of \$1,500, but with no actual consideration except a parol understanding between them that she would sell or mortgage the property and thereby obtain funds for the grantor, and would convey back to him, whenever he might so desire, any part of the property remaining in her hands. Under this state of facts, the grantee, neither selling nor mortgaging the land, and Thraikill, demanding that she reconvey the same to him, on her refusal brought an action in the district court to obtain title to the property. The court held that the parol trust with respect to the real estate involved was void, and that the deed and conveyance was absolute and valid. The statutes of Kansas relating to frauds and perjuries § 5, *Gen. Stat.* 1901, p. 674), and to conveyances (§ 8, *Gen. Stat.* 1901, p. 274), and to trusts and powers (§ 1, *Gen. Stat.* 1901, p. 1596), all carry with them substantially the same language that is contained in our statute of uses and trusts, which makes invalid any trust relation to real property unless in writing, except it be by operation of law. These Kan-

sas statutes referred to were all cited by Justice Valentine in support of his opinion, and the force given them in the conclusion reached was practically a holding that the trust sought to be created was one in real property which must of necessity be in writing to be valid; and the circumstances surrounding the case were not such as to create a trust by operation of law. Three cases, namely, *Morrall v. Waterson*, 7 Kan. 199; *Knaggs v. Mastin*, 9 Kan. 532, and *Ingham v. Burnell*, 31 Kan. 333, 2 Pac. 804, are cited to support the text of the opinion, but a critical reading of them will readily show that they fail to support it. In neither of them do the controlling facts approach the condition in the *Gee v. Thraikill* Case, and indeed we question very much whether it were possible to find any Kansas authority to support it. Under the facts of the case, the holding is practically an exception to the rule, as the courts have nearly always granted relief in similar instances. Indeed, this has so universally been done that the supreme court of Wisconsin, in the case of *Fairchild v. Rasdall*, 9 Wis. 387, says: "It is impossible to reconcile with principle very many of the adjudications upon the statute of frauds. Courts seem to have been so intent upon administering justice in the particular case that they have frequently lost sight of its provision, and their action has often amounted to little less than the exercise of the right to appeal, or suspend its operation whenever they deemed that the real justice of the case required it." Hence the hard and fast rule adopted by the Kansas court in this case makes it virtually an exception among the adjudications. The courts very generally, under the power given them by virtue of the force of the provision, or by operation of law, and other similar clauses, exercise the utmost liberality in extending a helping hand to those who, through fraud, accident, or mistake, or even misdirected confidence, have been deprived of their real estate by virtue of a contract not reduced to writing. Indeed, as was said in the Wisconsin case, "they have been so intent upon administering justice in the particular case" that they have virtually made of it a statute to be followed only when it would not bring about the result of defrauding someone, and to ignore it when such result would follow. "The court will not allow the statute of frauds to be used as an instrument of fraud if it can prevent it." *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584. But the facts in the case of *Gee v. Thraikill* are not similar to the facts in the case at bar. In that case the deed was taken by the grantee under a parol agreement to sell or mortgage and to recon-

vey any overplus. Grantee refused to do either, and the court held that she could not be compelled to do so. An altogether different condition exists in the case at bar. Here the defendant took the deed to this property for the purpose of selling it, and he did sell it and has the money; and this suit is brought, not to recover any interest in real property, nor to compel a reconveyance, but for the money received by an agent from its sale. If Logan had kept the property, no court could compel him to sell it. Whether he could have been compelled to account for its value or not is not in this case, but practically all of the authorities so hold. "Where lands are conveyed to defendant on his parol agreement to pay a mortgage thereon, sell the land and account to the grantor for the proceeds; and, after getting possession, defendant refuses to perform such agreement,—plaintiff may recover the value of the property, even though the agreement is within the statute of frauds." *O'Grady v. O'Grady*, 162 Mass. 290, 38 N. E. 196. "If one conveys land to another under an oral agreement which the other refuses to perform and cannot be compelled to perform on account of his setting up the statute of frauds, he who conveyed the land can recover its value from the grantee on the ground that the consideration for the conveyance has failed and he is entitled to be reimbursed." *Cromwell v. Norton*, 193 Mass. 291, 118 Am. St. Rep. 499, 79 N. E. 433. Also, *Peabody v. Fellows*, 177 Mass. 290, 58 N. E. 1019.

But we are not to deal with the situation suggested by either proposition above mentioned, but a situation where the grantee, under a parol contract to sell, has actually fulfilled that portion of the contract within the statute of frauds, and nothing remains to be enforced by a court but that part of the contract that never was in the statute and against which it does not operate. 29 Am. & Eng. Enc. Law, 2d ed. p. 832, under the title of "Verbal Agreements," and the subtitle relating to lands, holds: "The statute of frauds has no application where, . . . the agreement has been completely performed as to the part thereof which comes within the provisions of the statute, and the part remaining to be performed is merely the payment of money or the performance of some act the promise to do which is not required to be put in writing." The authorities seem to support this statement. The case of *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386, was one which involved a parol agreement to convey real property. The trust had been executed and the court said: "The trust having been executed, we need not determine whether it was one arising

by implication of law, or whether it was an express trust." So that in the case at bar, the trust having been executed, it is of no consequence whether the agreement between the plaintiff and defendant in reference to the land was a parol agreement, or whether it had been reduced to writing.

The facts in a New York case, *Bork v. Martin*, supra, are very similar to those in this case. Martin took the naked title to certain lots, agreeing at the time to convey the same upon grantor's request to such purchasers as could be procured, and pay over the purchase money received. He sold the lots and refused to pay the money, just as did Logan in this case. When he was sued, as was Logan, he set up the statute of frauds and of uses and trusts, just as does Logan, and the court, in passing on that case, said: "Assuming that the land was conveyed to the defendant upon an oral trust, invalid under the statutes of frauds and of uses and trusts (2 Rev. Stat. 1st ed. p. 134, § 6; 1 Rev. Stat. 1st ed. p. 728, § 51), yet it was lawful for him to perform it, and he has fully performed it so far as it required him to dispose of the land. The land is all sold, and he has the price of the last five lots in his pocket. The language of the cases is to the effect that he cannot, in good conscience, retain it, and that it belongs to the plaintiff. *Robbins v. Robbins*, 89 N. Y. 258; *Dunn v. Hornbeck*, 72 N. Y. 80; *Foote v. Bryant*, 47 N. Y. 544. Though the statutes might have justified the defendant's refusal to dispose of the land as he had orally agreed, yet, having disposed of it, he has voluntarily emerged from the field of their protection, and exposed himself to the law, which deals with him as a trustee of personal property realized for plaintiff's benefit, by virtue of an agency for the plaintiff, which he has so far performed, pursuant to the plaintiff's instructions and his own agreement as to obtain the moneys his agency was constituted to produce. Equity approves his performance, so far as he has performed, and, as the statutes referred to no longer apply, there is no law which he can invoke to shield him from the full performance of his duty. The court will not allow the statute of frauds to be used as an instrument of fraud if it can prevent it. Cases supra; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Levy v. Brush*, 45 N. Y. 596; *Simon v. Schurck*, 29 N. Y. 598."

A Michigan case, *Lasley v. Delano*, 139 Mich. 602, 102 N. W. 1063, is one in some respects similar to the case at bar. When the grantor in that case attempted to compel the party taking the grant to account for the moneys realized from the sale of the real property based on a verbal agreement, defendant, as is done in this case, set up the statutes of frauds, and of uses and trusts, and the court, in considering same, speaks

as follows: "Neither the statute of frauds, nor that of uses and trusts, applies to this case. The parol contract between complainant and Mr. Delano has been performed, and the parol trust imposed upon him fully executed. No contract for the sale of lands is involved. The relation of vendor and vendee did not exist between them. Complainant concedes his right to sell and receive the money, and that he did sell and receive the money. The relation, then, between them was not other or different than it would have been if she had sold the lands herself and intrusted the money to him, to be disposed of as directed and agreed by her. *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. 1076; *Carr v. Leavitt*, 54 Mich. 540, 20 N. W. 576; *Edinger v. Heiser*, 62 Mich. 598, 29 N. W. 367. If, however, the trust rested in parol, and, while so resting, could not be enforced as an executory contract, yet, when the parol agreement has been executed, neither party can invoke the statute. The courts have repeatedly held that a party may perform a promise which he could not legally be compelled to perform, and that, when so performed, it is binding upon him and the other party to it. *Moore v. Crawford*, 130 U. S. 122, 32 L. ed. 878, 9 Sup. St. Rep. 447; *Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877; *Collar v. Collar*, 86 Mich. 507, 13 L.R.A. 621, 49 N. W. 551; *Bork v. Martin*, 132 N. Y. 282, 28 Am. St. Rep. 570, 30 N. E. 584; *Gwaltney v. Wheeler*, 26 Ind. 415."

In a Connecticut case, *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398, Collins, owning some property near Chicago, Illinois, made a warranty deed of the land to one John Tillou under a parol agreement that he should act as Collins's general agent in making a sale of the same. The deed recited the consideration as "a valuable sum in dollars, and other considerations received, to our full satisfaction," although there was no actual consideration. After selling the land, Tillou refused to make any accounting to Collins, and subsequently died, and this was a suit by Collins against his estate for the amount of money received for the land. The statute of frauds, and the rule that parol evidence was inadmissible to vary the terms of a valid written instrument, were both invoked, but the court held that there was no force in either objection, and gave judgment to Collins for the amount received, allowing Tillou's estate compensation for the services rendered, just as was done by the referee in the case at bar.

The case of *Collar v. Collar*, 75 Mich. 414, 4 L.R.A. 491, 42 N. W. 847, was one wherein Hamblin D. Collar, under a parol understanding, received title to certain lands for the purpose of sale and accounting to the grantors. He sold the same, and this action

was to compel him to pay the money to those to whom it belonged, the suit being for money had and received, and the court, under the facts stated, directed a verdict for the defendant. The theory presented by the appellant in the case at bar was urged and the supreme court, by Long, J., says: "It was not an interest in the land which plaintiff was seeking to recover, but his proportionate share of the fund growing out of the sale of the land." And the court, in the syllabus, holds "that an action will lie for money had and received by a grantee on the sale of land conveyed to him under a parol trust to make such sale and distribute the proceeds among the grantors."

In the case of *Edinger v. Heiser*, 62 Mich. 598, 29 N. W. 367, a tract of land was conveyed to Andreas Heiser under a parol agreement that he would sell the same and use the avails as an investment for his support, and, on his death, that the same should go to the grantors. He sold his land for \$3,700 to one Vincent Greiff, and refused to make any account to the grantors of the proceeds. The grantors were his children by his first wife. The question of whether or not the children could recover the money paid by Greiff to their father for this land was disposed of by the court in the following words: "It is the same, in my opinion, as if the children had themselves deeded direct to Greiff and received the money into their own hands, and then afterwards placed it in the keeping of their father on the same terms as he now holds it,—to use the interest, but to reserve the principal for them at his death. There is no question but such a trust is valid and enforceable. See *Perry*, Tr. § 86, and cases cited; *Chadwick v. Chadwick*, 59 Mich. 87, 26 N. W. 288; *Leland v. Collver*, 34 Mich. 418; *Ellis v. Secor*, 31 Mich. 186, 18 Am. St. Rep. 178."

See, also, to the same effect, *Bitley v. Bitley*, 85 Mich. 227, 48 N. W. 540; *Wiseman v. Baylor*, 69 Tex. 63, 6 S. W. 743; *Desmond v. Myers*, supra; *Whipple v. Parker*, 29 Mich. 369; *Karr v. Washburn*, 56 Wis. 303, 14 N. W. 189; *Bourne v. Sherrill*, 143 N. C. 381, 118 Am. St. Rep. 809, 55 S. E. 799.

It will thus be seen from the law as declared in the foregoing authorities that, where one takes title to real property under a parol agreement to hold the same and sell it as an agent for the grantor, after having sold it and received the proceeds, he is liable for the proceeds thereof to the grantor.

The other objections made are now considered. It was contended that it was error for the referee to overrule the objection to the introduction of evidence for the reason that the petition did not state a cause of action. Appellant calls attention to the authorities cited in support of his demurrer to 20 L.R.A. (N.S.)

the petition, and, as we have dealt with them and held that the petition stated a cause of action, no error was committed by the referee in hearing the evidence thereunder.

The point is then made that the referee erred in proceeding to take an accounting between the parties, and allowing plaintiff to introduce depositions and certified copies of deeds before any testimony was introduced to show a trust; stating: "No testimony could be properly received by the referee in this case until the trust was first established and the fraud of Logan proved as a substantive fact." As the referee was authorized to try the case as a court, the order of proof was a matter clearly within his right to control, and the objection made by the defendant cannot be sustained, as no prejudice was shown by this procedure. Whether the deeds and depositions were introduced prior to the evidence given by the plaintiff and defendant, or subsequent thereto, was practically of no consequence.

The next point made is to the refusal of the referee to allow the defendant to answer the question, "I will ask you if you were not called down there by Mrs. Brown for the reason that he (meaning Riley) was demanding payment?" In view of the fact that this is immediately followed in the record by the statement of the witness, "She wrote for me to come and help her, . . . she wanted me to help her out," this error, if error it was, was not prejudicial, because, if the question to which objection was sustained were answered in the affirmative, it would not have proved more than the affirmative evidence given by the witness on the same point.

It is next contended that the referee erred in sustaining objection to the question asked by the defendant, "Did she at that time call for any statement or account of these lots?" The next question asked by counsel was, "You may state if any conversation was had," and the answer was, "I cannot recall any;" so that here again the evidence asked for was secured under another question, and no error followed.

It is contended that the referee erred in not allowing Logan to introduce in evidence the \$1,000 in notes. The plaintiff testified that she never received these notes, and the referee specifically finds "that no notes were delivered to the plaintiff at the time of the conveyance and assignment of judgment referred to, and that the notes offered in evidence were retained by the agent of the defendant, R. C. Brennon." The objection made in the case of their being offered in evidence was that they were incompetent and immaterial, and the referee's ruling was, "The objection is sustained for the present,

excepted to by defendant." This ruling is followed in the record by a number of copied notes with the statement thereon, "The following are the notes offered in evidence." The testimony in reference to the notes by witness Brennon and the incorporation of them in the record, and a specific finding upon them by the referee, convinces us that they were afterward admitted in evidence and considered by the referee, and hence there was no error on this point. In view of the fact, however, that the referee finds that no notes were ever delivered to Mrs. Brown, we question whether error would have been committed even though they had been excluded altogether.

The next point made is that the referee erred in not allowing this question to be answered by the defendant: "Did you have any agreement with Mrs. Brown whereby you were to return this property to her?" Objection was urged and sustained. The most that appellant could expect from an answer to the question was a negative, and all that a negative would show in answer to that question was testified to, fully and completely, by defendant when he stated in his examination that he never had any of her property in his name, and that he did not owe Mrs. Brown anything then or at the time of the filing of her suit; and, furthermore, there is no allegation in the petition nor any evidence offered that defendant ever agreed that he was to return the property to her. The question was not within the issues of the case, and there was no error in not allowing it to be answered.

The point is also made that there was no formal or proper reference made in the case. Stipulation was filed by the parties as follows: "That said cause shall be referred, and that the referee shall make findings of fact and report his conclusions of law, and that the issue may be joined after such reference." On this stipulation the court made the following order: "It appearing to the court that this is a case involving an accounting and same should be referred, and both parties consenting thereto, it is ordered that said cause be and hereby is referred to A. H. Huston on law and facts as appeared by stipulation on file." Defendant argued that this reference was prejudicial, because, under the pleadings, it was necessary to find Logan guilty of a fraud before he could be compelled to account. While it is true before any accounting could be had it was necessary to find an indebtedness which was denied, it would not have been necessary to find fraud, and even though it were the entire matter, either of fraud or indebtedness, was before the referee, and we can hardly say, in the absence of any evidence whatever, that he was influenced by the language 20 L.R.A. (N.S.)

mentioned to find for the plaintiff and against the defendant. .

The defendant next objects to the consideration of the report of the referee on the ground that he was not sworn, and cites in support thereof *Province v. Lovi*, 4 Okla. 672, 47 Pac. 476. In that case it appears that an oath was taken by the referee, and it was contended that it was not in the form prescribed by the statute. In the present case the record appears to be silent on the question of whether the referee was sworn, and it is our judgment that in cases of this character the presumption would be upon such a record that the referee took the oath as prescribed by law, as all officers are presumed to do their duty. The failure of a referee to take the oath required by law is a mere irregularity which is waived by the parties proceeding to trial without objection on that ground. *Lamaster v. Scofield*, 5 Neb. 148; *Milwaukee County v. Ehlers*, 45 Wis. 281; *Newcomb v. Wood*, 97 U. S. 581, 24 L. ed. 1085. The referee Huston was agreed upon by the parties, and defendant appeared personally before him in his office in Logan county, outside the judicial district in which the case was pending, and submitted, without objection, his evidence, thereby waiving any irregularity either in the trial of the case at that place or the consideration thereof by the referee at such place, although there is nothing in the record to show that the same was considered and the conclusion arrived at outside of Kingfisher county.

It is next objected that motion of plaintiff to affirm the report of the referee was sustained by the court without reading the testimony in said cause, and this action of the court is urged as error. We know of no authority, and none is cited us by counsel, holding that it is error for a court to sustain the findings of a referee without reading the testimony introduced. Furthermore, the judgment rendered by the court herein contains a specific statement, "Thereupon plaintiff's motion for judgment upon the report of the referee coming on, and all parties being present, after due consideration thereof, the court finds that the acts and conduct of said referee in the trial of said cause are regular and legal in all respects." And, while the recital in the case made contains the statement that the court sustained the report of the referee "without reading the testimony in said cause," this cannot overcome the specific finding of the court in the judgment of due consideration. See *Day v. Territory*, 2 Okla. 409, 37 Pac. 806; *Abel v. Blair*, 3 Okla. 399, 41 Pac. 342. In the case last cited the court says in the syllabus: "The records of the court incorporated into a

case made cannot be contradicted by other statements contained in the case made."

We see no reason to depart from the holding of this court in the case *Re Dossett*, 2 Okla. 369, 37 Pac. 1066, hence the objection made by defendant to the jurisdiction of the trial court to render judgment herein on the 18th day of May, 1904, the same being at an adjourned day of the March, 1904, term of the district court of Kingfisher county, and this notwithstanding the fact that between the setting of the said March, 1904, term of said court and the reconvening of the said court in May of the same year, there had been held by the judge of said district one or more regular terms of court therein. Hence there was no merit in the objection urged.

The issues herein have been submitted to a referee, who heard the evidence and made his findings thereon. The district court to which he made report confirmed and approved such finding, and, there appearing no error raised by the appellant in this court, the judgment is accordingly affirmed.

Turner and Hays, JJ., concur. Williams, Ch. J., and Kane, J., dissent.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

ATLANTIC COAST LINE RAILWAY COMPANY, Plff. in Err.,

v.

GERATY.

(— C. C. A. —, 166 Fed. 10.)

Railroad — refrigerator cars — nonpossession.

1. A railroad company which owns no refrigerator cars may be held liable for not furnishing them to shippers of garden truck, if it led them to expect that, if they raised the truck, the refrigerator cars necessary for its proper transportation would be furnished.

Same — unusual crop.

2. A railroad company which has obligated itself to furnish refrigerator cars to transport garden truck to market cannot escape liability for breach of that duty upon the ground that the crop was unusually large, if it was no larger than might reasonably have been expected from the acreage planted, knowledge of which the railroad company either had, or had the means of obtaining.

Damages — crop — failure to gather.

3. A railroad company which refuses to supply refrigerator cars for shipping garden truck to market according to its obligation to do so may be liable for the value of truck not gathered and tendered for shipment, where the failure to gather it

was for the purpose of avoiding useless expense, and it was to be sold free on board at point of shipment.

(Waddill, District Judge, dissents.)

(November 5, 1908.)

ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment in plaintiff's favor in an action brought to recover damages for losses alleged to have been caused by defendant's failure to furnish refrigerator cars for the proper transportation of garden truck in violation of its duty to do so. Affirmed.

The facts are stated in the opinion.

Argued before Pritchard, Circuit Judge, and Morris and Waddill, District Judges.

Mr. W. H. Fitz Simons for plaintiff in error.

Mr. W. A. Holman for defendant in error.

Morris, District Judge, delivered the opinion of the court:

This is an action at law brought by the plaintiff, Geraty, against the railroad com-

Case Note. — *Duty of carrier to furnish cars of a type not owned by it.*

The question whether a carrier may be held liable for failure to furnish a type of car which it does not own is also considered in *Mathis v. Southern R. Co.* 65 S. C. 271, 61 L.R.A. 824, 43 S. E. 684, where a requested instruction that, if a railroad company simply held itself out to the public as prepared and willing to haul the refrigerator cars of refrigerator transportation companies, when shippers perfected their arrangements with such refrigerator companies, that would not bind the railroad company itself to furnish refrigerator cars, was held to embody an erroneous principle of law. The court said: "Such a rule would enable a railroad company to shift its responsibility as a common carrier on others, which cannot be done. It must transport when the demand is made, unless excused; and it cannot refuse on the ground that others had assumed any part of the duty resting on it as a common carrier."

As to the duty of a carrier to furnish cars, independently of contract, see case note to *Di Giorgio Importing & S. S. Co. v. Pennsylvania R. Co.* 8 L.R.A. (N.S.) 108.

As to duty of carrier with respect to refrigerator cars, see case note to *St. Louis, I. M. & S. R. Co. v. Renfro*, 10 L.R.A. (N.S.) 317; also *C. C. Taft Co. v. American Exp. Co.* 10 L.R.A. (N.S.) 614.

As to duty of carrier to furnish car adapted to the subject of the shipment see case note to *Forester v. Southern R. Co.* 18 L.R.A. (N.S.) 508.

pany to recover damages for losses on early cabbages shipped, or intended to be shipped, from a station on the railroad called Meggets, in South Carolina, and destined for places in the West in the month of May, 1905. It is claimed that for proper transportation of the cabbages the only proper cars were refrigerator cars, and that the railroad failed to furnish refrigerator cars, although seasonably notified by the plaintiff; and that in consequence the cabbages which were shipped, being transported in unsuitable cars, became decayed and worthless and were a total loss, and those which were ready to be cut, crated, and shipped on refrigerator cars, the plaintiff being notified by the railroad company that the refrigerator cars would not be furnished, could not be saved, and perished in the fields. The jury returned a verdict of \$7,466.96. Upon a motion for a new trial, the learned trial judge held that the verdict was excessive, in that a large part of the damages allowed was for loss on cabbages not actually cut or tendered for shipment, as to which the loss was to a large extent speculative, and directed that, unless all of the verdict in excess of \$4,000 was remitted, there should be a new trial. Thereupon the plaintiff remitted the excess, and judgment was entered for \$4,000 and costs. The railroad company sued out this writ of error.

The assignments of error all relate to the instructions of the trial court with respect to the duty of the railroad to furnish the refrigerator cars in compliance with the demands of the plaintiff, and as to whether the plaintiff could recover anything for cabbages not actually tendered for shipment. The testimony tended to show that it had been the custom of the railroad company for some years prior to 1905 to furnish refrigerator cars for the transportation of early cabbages. That the demand increased from year to year. That the railroad company did not own the refrigerator cars as part of its own equipment, but they were supplied by independent car companies by some arrangement between the railroad company and the car companies. There was testimony to show that the railroad, in order to reach the truck planters of the territory where the plaintiff had his farms, had built spurs of railroad running through the fields, and that agents of the railroad and of the car companies had gone through the territory early in the season to get information as to the acreage planted with each kind of vegetable, and asking the farmers what time their crows would probably be ready for shipment and in what quantities. There was testimony tending to show that, while the cabbage crop of 1905 was large, it was not larger than what might reasonably have been

expected from the acreage planted, and that of this the railroad company and the car companies either actually had information or had the means of knowing.

The defendant asked the court to instruct the jury as follows:

"(1) The railroad company as a common carrier is not bound to furnish refrigerator cars for transportation of cabbage."

The court said: "The court refuses to give you that instruction. The law on the subject is this: It is the duty of the railroad company, holding itself out as a common carrier of vegetables, to provide suitable and necessary means and facilities for the proper transportation of such vegetables. Such proper means and facilities depend upon the nature of the article to be transported, and the necessities of the respective localities in which it is to be received. . . . It is the duty of the railroad company engaged as a common carrier to study the wants of each community, and to keep pace with a growing demand for such facilities of transportation as may be needed. It is for you to say in this case whether the railroad company has performed its duty in that respect, and, while the court has refused to charge you that it is not the duty of the railroad company to furnish refrigerator cars, it must also state that its duty in this particular case depends upon circumstances. Now, it appears that, prior to 1901, these refrigerator cars were little used, if used at all, for the transportation of cabbage, and consequently, if you believe that testimony,—and there is no reason why you should not,—the railroad company could not justly be required to keep on hand a large number of refrigerator cars which were only of use for certain purposes and only required at a certain season of the year; but it was the duty of the company to provide, as far as they reasonably could, for the growing demand for refrigerator cars. That business, although it was conducted by private companies, was a business so intimately connected with the business of the defendant as a common carrier that it granted to the agents of that company facilities for drumming up that kind of business, allowing these agents to go down and induce these truck farmers to make use of the refrigerator cars. It therefore remained the duty of the railroad company, as far as it reasonably could, to respond to the demands which they thus permitted to be created; and, if you find from the testimony that they held themselves out to furnish refrigerator cars, then it is for you to say whether in this particular case they have violated their duty in failing to furnish them.

"The testimony shows that, prior to 1905,—that is, prior to the time when this suit

had its origin,—the railroad company and the owners of refrigerator cars had furnished the people at Meggets 51 cars, and, so far as the testimony shows, that number of cars seemed to be all that was required at that locality. Now it is for you to say whether there is any testimony to satisfy you that the increased demand in the neighborhood of Meggets would be so great as to require it to furnish more than it actually did furnish. The testimony is that in 1905 it furnished about 130 or 140 refrigerator cars. Now it is a question for you whether the railroad company had any notice or reasonable ground to believe that the demand for these refrigerator cars was greater than the number which it was prepared to furnish. If you believe from the testimony that they had no reasonable ground to believe that there would be an unusual demand for refrigerator cars as Meggets that season, then it cannot be imputed to the railroad company as a fault for which it is liable in damages that it failed to respond to this unusual demand, if you believe that it was an unusual demand. So that it seems to the court that the case turns upon that point. The railroad undoubtedly was advised through its agents, actually advised, and it was its duty to be advised whether it was or not, as to the amount of truck planted in that neighborhood, as it was advised as to the quantities of truck vegetables planted in other neighborhoods.

"Now, whether there was such an increase in the amount of cabbage planted down there over previous years the testimony, so far as the court recalls it, does not disclose. There is probably sufficient evidence to show that there was a gradual increase in the trucking business in that section, but whether there was reasonable ground for the railroad company to prepare such a number of refrigerator cars as seems to have been demanded is a question for you to decide from the testimony. While the company as a common carrier should be held to a very high degree of care and duty responding to the demands of its patrons, it should not be held to respond to an unreasonable demand; and you will take the testimony and from that determine whether the railroad company had such notice beforehand that this unusual number of refrigerator cars would be required.

"It appears that the first demand proved in this case was on May 4th, and the cars were required the next day. If you believe from the testimony that it was possible for the railroad to respond to that demand, send the cars the next day, and that it failed to do it, then it would be responsible; but, if you believe from the testimony that it had no notice beforehand that such an unusual num-

ber of refrigerator cars was to be required, it could not justly be held responsible for failing within a day or two days to respond to that demand, for these cars, it appears from the testimony, were not owned by the railroad company itself. They were provided by other companies, and the railroad company had to make its arrangements, and, in the nature of the case, some time ought reasonably to be expected to be given before it could be held responsible for failure to send the cars.

"But the whole question, to the mind of the court, depends upon this: As to whether the company had reasonable ground to believe that at that season at Meggets these cars would be demanded in time to have made provision for them. If it had, then it was its duty to provide those cars in some way or other."

Having given these instructions to the jury, the learned trial judge proceeded to pass upon the special propositions of law submitted on behalf of the defendant railroad company, as follows: "(2) Unless the jury believe that the railroad company held itself out as conducting a refrigerator-car business for the furnishing to shippers refrigerator cars for the shipment of cabbage, then the railroad company cannot be held liable for any injury to the plaintiff arising by his inability to procure refrigerator cars."

The court said: "That instruction is given. That is, if the railroad company, by its course of business, held itself out to the community at Meggets as ready to furnish refrigerator cars, it should have furnished them; and the testimony you have heard on that point is that they not only did hold themselves out, but that it actually furnished cars, for the court holds that cars furnished by these car lines and by the railroad are practically the same thing. If it knew of the demand for refrigerator cars in that neighborhood and undertook to supply that demand, whether through itself or through the agency of other car lines, it is all the same."

The third instruction asked by the defendant was: "(3) If the jury believe that the demands for refrigerator cars for shipment of strawberries and cabbage was of unusual volume, and that the requests for refrigerator cars were made at the time when the railroad company could not obtain the refrigerator cars from the refrigerator companies, then the railroad company is not responsible for any injury the plaintiff suffered by reason of the failure to obtain refrigerator cars."

The court said: "The court has already practically given you that instruction, and it gives it to you."

The sixth instruction asked for by the

defendant was as follows: "(6) If the jury believe that the railroad company only obtained refrigerator cars from the refrigerator company, and that at the time he made his requests it was impossible for the railroad company to procure such cars from the refrigerator company, then the railroad company would not be responsible to the shipper for failure to obtain refrigerator cars."

The court said: "The court gives you that instruction, to be taken in connection with what it has already said. The question is whether they knew or had reasonable cause to believe that there was going to be this great demand for refrigerator cars at Meggets at that time, a demand two or three times greater than that of the preceding year. That seems to the court the turning point in the case, for the demand was actually made on May 4th for cars for the next day; if the railroad company was not in possession of the cars and had to obtain them from other sources, and although the court has charged you, and charges you again, that it was its duty to have foreseen the demand so far as it reasonably could, and to have provided suitable means of transportation, yet, if it had no reasonable cause to believe that there was going to be a great demand for refrigerator cars, and it was impossible at the late date at which the formal demand was made to comply with it, that would relieve it from its liability."

The eighth instruction asked for by the defendant was as follows: "(8) If the jury believe that the number of refrigerator cars provided by the refrigerator company to the plaintiff was equal to all reasonable expectation said company had of the demands for such cars in that season, then the railroad company would not be responsible for a sudden and unexpected demand for that kind of equipment."

The court said: "The court gives you that instruction. It has so expressly charged you, and that really seems the turning point in the case."

The fourth instruction asked for by the defendant had reference to the plaintiff's claim for cabbage which rotted in the fields, the plaintiff not having cut and crated them because the railroad company had notified the plaintiff that it could not furnish the cars. The fourth instruction asked for by the defendant was as follows: "(4) The jury are charged that, unless a shipper tenders his freight to the carrier in proper condition for shipment and at a reasonable time, the railroad company is not responsible for loss occasioned thereby; and in this case the jury is charged that no recovery can be had against the railroad company for that portion of Mr. Geraty's crop which perished

in the field, was never crated, or tendered to the railroad company for shipment."

The court said: "The court cannot give you that instruction. If you find from the testimony that in the circumstances of the case the railroad was bound to furnish refrigerator cars to Mr. Geraty upon his demand made at the time stated, and that it notified him that it could not furnish the cars, there was no reason why Mr. Geraty should go to the additional expense of cutting and crating his cabbages in order to ship them. If you believe the cabbages were there and ready to be crated and to be shipped in the event he could get the cars, then the company is just as liable as if the cabbages had been actually cut and crated and put up for shipment. The railroad company, of course, is not responsible as an insurer of truck farmers; it does not insure them against weather, or against the conditions of the market, and it cannot be held responsible for any loss that may have been sustained from any other cause than its own negligence, failure to do its duty, as the court has instructed you its duty was."

At the instance of the plaintiff, the court instructed the jury as follows: "(1) The jury is instructed that it is the duty of a common carrier to use every reasonable effort to provide suitable means of transportation for the carrying of all truck vegetables and other products raised for the markets; and that a railroad company, for its failure to furnish cars or other means of transportation, cannot shield or relieve itself by showing that it does not own such cars or such equipment."

And, at the instance of the plaintiff, the court instructed the jury as follows: "(3) The jury is instructed that a common carrier of freight cannot relieve itself of liability for the failure to furnish suitable and proper cars for the transportation of vegetables and other perishable truck on the ground that it owns no such equipment, and that the same has to be secured from another company; but that such common carrier is primarily liable to the shipper for the failure to furnish such cars."

The defendant excepted to the granting of the first and third instructions asked for by the plaintiff, and to the refusal to grant the first and fourth instructions asked for by the defendant.

The trial judge's instructions to the jury should be considered as a whole. The jury were told that the granted instructions were to be taken in connection with what the court had already said to them. In no other way could the law of the case be presented. The jury were plainly told that, in the first place, whether or not the railroad company was liable at all for not fur-

nishing refrigerator cars, depended upon whether or not it had held itself out to shippers of early cabbages as engaging in that special character of transportation. In the next place, the jury was told, if the quantity tendered for shipment was unusually large, and the railroad company had no reason to expect the increased demand for refrigerator cars, then the railroad company was not liable for not meeting an unusual and unexpected demand. These conditions of liability were clearly and fully explained in the court's instructions. There was testimony to support the contentions of both sides, and the finding of the facts was properly left to the jury. There was testimony to show that the railroad company, through the car companies, led truck growers in that region to expect that, if they raised the vegetables, the refrigerator cars necessary for their proper transportation would be obtainable. That the finding of this fact was necessary to the plaintiff's right of action was very plainly and clearly explained to the jury by the learned judge's instructions. This statement of the law we think correct. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128-133, 35 L. ed. 73-76, 11 Sup. Ct. Rep. 461, 462. It was said by Mr. Justice Harlan in that case: "The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier, or by someone in its behalf, are sufficient for the reasonable accommodation of the public. . . . The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported as well as to the necessities of the respective localities in which it is received and delivered."

This is not the case of a railroad carrying ordinary freight being called upon to provide unusual facilities. The testimony tends to show that Meggets was the station of a great truck-growing region, and that the railroad had constructed spurs of tracks running into it for the purpose of transporting the products grown there, and had been furnishing refrigerator cars in previous years, and had permitted the car companies furnishing the refrigerator cars, under some arrangement with the railroad company, to

solicit the business. When, encouraged by these facilities, the farmers gradually increased the acreage under cultivation with the knowledge of the railroad company, it could not be successfully contended that the railroad company fulfilled its duty to provide proper instrumentalities of transportation, if, when a perishable crop was ready for the market, the grower was obliged to let it perish for want of proper cars. All the findings of fact necessary to impose the duty on the defendant railroad were left to the jury. There was evidence from which the jury was justified in finding them, and we think they were sufficient to support the verdict.

As to the cabbages which, because of notice from the railroad company that the cars would not be furnished, the plaintiff, although he had them at hand, did not incur the useless expense of tendering them, we think the ruling of the trial court was correct. The cabbages were of no value unless they could be shipped to markets where they were in demand. They were grown for that purpose. They would not have been grown but for the expectation and previous experience that the railroad would transport them so as to arrive in a salable condition. The failure to furnish the refrigerator cars directly destroyed their value. Undoubtedly, the amount of a claim of this kind should be closely scrutinized. In this case the computation was rendered less uncertain by the fact that the plaintiff was not obliged to ship his cabbages to a distant market for sale, but sold them deliverable on the cars at his shipping station, the purchasers agreeing to accept them f. o. b. the cars, provided they were shipped in refrigerator cars. That the learned trial judge did exercise careful scrutiny of the damages arising from the loss of sales is shown by his requiring as a condition of refusing a new trial a remission of nearly 50 per cent of the jury's assessment of the loss.

Finding no reversible error, the judgment is affirmed.

Waddill, District Judge, dissenting:

I am unable to concur with the majority of the court in this case. While it is true the question presented is one of difficulty, and the lower court, in the instructions given, has shown much ability in reaching what would appear to be a fair solution of the same, yet I cannot see how, under the circumstances of this case, the carrier could have met the requirements imposed upon it, or have escaped liability, although it had substantially done so.

UNITED STATES CIRCUIT COURT
OF APPEALS, SEVENTH CIRCUIT.IRON MOLDERS' UNION NO. 125, OF
MILWAUKEE, WISCONSIN, et al.,
Apts.,

v.

ALLIS-CHALMERS COMPANY.

(— C. C. A. —, 166 Fed. 45.)

Appeal — parties — voluntary association.

1. The objection that defendant, an unincorporated voluntary association, was sued in its common name, cannot be raised for the first time on appeal.

Injunction — strike — violence.

2. An employer is entitled to an injunction to restrain his striking workmen from keeping other workmen away from his plant by the use of vile and abusive language, threats of violence and assaults.

Strike — violence — legality.

3. The employment of assault and duress by members of labor unions in furthering a strike undertaken against the representatives of a certain line of business in a certain city to enforce demands with respect to wages, time, work, apprentices, etc., will not be regarded as within the terms of a statute making it illegal to combine for the purpose of "doing harm maliciously for the sake of the harm as an end in itself," so as to make illegal the whole strike.

Injunction — strike — interference with contracts.

4. Striking employees may be enjoined from using persuasion to force apprentices to break their contracts to serve for definite times.

Same — persuasion.

5. Striking employees cannot be enjoined from using persuasion to prevent other workmen from taking their places, or to induce those who have done so without making a definite contract from quitting work.

Same — picketing.

6. Striking employees cannot be enjoined from picketing if the efforts of the pickets are limited to getting into communication with candidates for employment for the purpose of presenting arguments and appeals to their free judgments to persuade them not to supply the places of the strikers.

Same — boycott.

7. Striking employees cannot be enjoined from inducing employees in factories by which their former employer is attempting to get the work done to fill his contracts, to refuse to work on it, although it results

in the owners of such factories breaking their contracts.

(October 9, 1908.)

APPEAL by defendants from a judgment of the Circuit Court of the United States for the Eastern District of Wisconsin in plaintiff's favor in a suit to enjoin unlawful interference with plaintiff's business. Modified.

Statement by Baker, Circuit Judge:

The appeal is from a final decree in a strike-injunction suit.

On the bill, supplemental bill, and showing in connection therewith, a temporary injunction was issued. Later, certain of the individual defendants were found to have violated the temporary injunction, and were accordingly punished. The pleadings, the temporary injunction, and the petition and evidence in the contempt proceedings are all stated in *Allis-Chalmers Co. v. Iron Molders' Union No. 125* (C. C.) 150 Fed. 155.

By agreement of parties the cause was submitted for final hearing upon the "proofs taken on the motion to commit for contempt, as well as upon the other proofs in the case."

The final decree enjoins the defendants, four Wisconsin local unions of the national organization of iron molders and some sixty individuals who were officers and members, from doing the following:

"(1) From in any manner directly interfering with, hindering, obstructing, or stopping the business of the said complainant, or its agents, servants, or employees, in the maintenance, conduct, management, or operation of its business.

"(2) From compelling or inducing, or attempting to compel or induce by threats, intimidation, force, or violence, any of the said company's employees to fail or refuse to work for it, or to leave its service.

"(3) From preventing, or attempting to prevent, any person or persons, by threats, intimidation, force, or violence, from freely entering into or continuing in the said company's service.

"(4) And from congregating upon or about the company's premises, or the streets, approaches, and places adjacent or leading to said premises, for the purpose of intimidating its employees or preventing or hindering them from fulfilling their duties as such employees, or for the purpose of in such manner as to induce or coerce by threats, violence, intimidation, or persuasion, any of the said company's employees to leave its service or any person to refuse to enter its service.

"(5) From congregating upon or about the company's premises or the sidewalk,

Note. — The law as to picketing is discussed in *Jensen v. Cooks' & Waiters' Union*, 4 L.R.A. (N.S.) 302, with especial reference to the question whether picketing *per se* may be enjoined.
20 L.R.A. (N.S.)

streets, alleys, or approaches adjoining or adjacent to or leading to said premises, and from picketing the said complainant's places of business or the homes or boarding houses or residences of the said complainant's employees.

"(6) From interfering with the said company's employees in going to and from their work.

"(7) From going singly or collectively to the homes of the said company's employees for the purpose of intimidating or threatening them, or collectively persuading them to leave its service.

"(8) From enforcing, maintaining, or aiding any illegal boycott against the said company, its agents or employees.

"(9) From endeavoring to illegally induce people not to deal with said company, its agents and employees.

"(10) From preventing or attempting to prevent by threats, intimidation, persuasion, or in any other manner any person or corporation from performing work for said complainant, and from doing business with it.

"(11) From intimidating or threatening in any manner the wives and families of said employees at their homes or elsewhere.

"(12) From doing any of the aforesaid or any other acts for the purpose of compelling and inducing, or attempting to compel or induce, the complainant, by threats, intimidation, force, or violence, against its will or the will of its officers, to employ or to discharge any person or persons whomsoever, and especially to employ members of said unions or discharge persons who are not members of said unions.

"(13) From combining, associating, agreeing, mutually undertaking, concerting together or with other persons for the purpose of doing or causing to be done any of the aforesaid prohibited acts.

"(14) From combining, associating, agreeing, mutually undertaking, concerting together or with other persons for the purpose of preventing [or hindering the complainant from doing or performing] any lawful act in the conduct of its aforesaid business or for the purpose of injuring the complainant in its aforesaid business, or of compelling the complainant, against its will, from doing or performing any lawful act or from injuring the said complainant in its trade and business.

"(15) From directing and abetting or counseling any acts whatsoever or in any manner whatsoever the conspiracy and combination found by the court to exist, to prevent the complainant and its officers and employees in the free and uninterrupted control and direction of its business and affairs and to prevent the complainant from 20 L.R.A. (N.S.)

doing or performing any and all lawful acts in the conduct of its business, and to compel the complainant against its will from doing and performing its lawful business, and to prevent the complainant from doing or performing all lawful acts in the conduct or management of its business.

"(16) From, by threats, intimidation, persuasion, force, or violence, compelling, or attempting to compel or induce, any of the apprentices in the employ of the said complainant to break their contracts and leave the employ of the said complainant."

Under various assignments of error appellants contend that the unions were improperly included in the final decree because they were voluntary unincorporated associations; that the decree as a whole should be reversed for the reason that it is not supported by the evidence; that the parts of the decree are wrong which deny appellants the use of persuasion and the use of pickets; and that the finding of a boycott is contrary to the evidence.

The further facts are stated in the opinion.

Argued before Grosscup, Baker, and Seaman, Circuit Judges.

Messrs. W. B. Rubin and Frederick N. Judson, for appellants:

The decree of injunction must be considered in view of the conceded right of employees to combine in leaving their employment for any cause or no cause, for the betterment of their conditions; and that any injury incidentally ensuing to the employer from the peaceable exercise of this right cannot be made the basis of any right of action, or of any charge of unlawful conspiracy.

Flickinger v. United States, 79 C. C. A. 515, 150 Fed. 155; Wabash R. Co. v. Hannahan, 121 Fed. 563; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744. 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 917; Ames v. Union P. R. Co. 62 Fed. 7; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 40 Am. St. Rep. 640, 38 Pac. 547; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172; Karges Furniture Co. v. Amalgamated Woodwork-

ers Local Union No. 131, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 A. & E. Ann. Cas. 829; Butterick Pub. Co. v. Typographical Union No. 6, 50 Misc. 1, 100 N. Y. Supp. 292; Everett Waddey Co. v. Richmond Typographical Union No. 90, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, 8 A. & E. Ann. Cas. 798; 1 Eddy, Combinations, § 437; 18 Am. & Eng. Enc. Law, 2d ed. p. 87.

Incidental injury to the employer from the exercise of the lawful rights of the employees should be distinguished from malicious injury.

State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3.

The employer and the employee enjoy the equal right of entering into combinations for the betterment of their own conditions; and no public right is involved.

Arthur v. Oakes, *supra*; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; United States v. Debs, 63 Fed. 436, 5 Inters. Com. Rep. 163, 64 Fed. 724, 158 U. S. 564; United States v. Workmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 904; Knudsen v. Benn, 123 Fed. 636; Clune v. United States, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; Re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658.

Where there is no breach of contract, intimidation, or coercion, a union may persuade employees or their former employer to join with them.

18 Am. & Eng. Enc. Law, 2d ed. p. 87; Eddy, Combinations, 1031; High, Inj. 4th ed. 14; Pom. Eq. Jur. 594; United States v. Kane, 23 Fed. 749; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; Everett Waddey Co. v. Richmond Typographical Union No. 90, *supra*.

Peaceful picketing by the striking members of a labor union in reasonable numbers for the purpose of observation only is lawful.

Everett Waddey Co. v. Richmond Typographical Union No. 90, *supra*; 1 Eddy, Combinations, § 437; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 and Gray v. Building Trades Council, *supra*; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn. 59 N. J. Eq. 59, 46 Atl. 208; Longshore Printing Co. v. Howell, *supra*; Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 N. Y. Supp. 438; Butterick Pub. Co. v. Typographical Union No. 6, *supra*; Levy v. Rosenstein, 66 N. Y. Supp. 20 L.R.A.(N.S.)

101; Vegelah v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Goldberg, B. & Co. v. Stablemen's Union Local No. 8760, 149 Cal. 429, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 A. & E. Ann. Cas. 1219; Lyons v. Wilkins [1896] 1 Ch. 811, [1899] 1 Ch. 255.

The refusal of members of a union to handle "struck" work from a factory wherein members of the same union have struck is not a boycott in any legal or popular sense.

Searle Mfg. Co. v. Terry, *supra*; National Protective Assn. v. Cumming, *supra*; Loewe v. California State Federation of Labor, 139 Fed. 71.

Messrs. William J. Turner, James M. Beck, and Max W. Babb, for appellee:

A combination of men to ruin a third party because he will not accede to their demands, by preventing him from employing labor, is an actionable conspiracy at common law, and all means employed to carry out such an unlawful conspiracy are proper subjects for restraint by a court of equity.

Com. ex rel. Chew v. Carlisle, Brightly (Pa.) 36; Quinn v. Leatham [1901] A. C. 530; 1 Eddy, Combinations, § 475; Leatham v. Craig [1899] 2 Ir. Q. B. 676; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; Consolidated Steel & Wire Co. v. Murray, 80 Fed. 811; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Vegelah v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Walker v. Cronin, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; Curran v. Galen, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; State v. Stewart, 59 Vt. 286, 59 Am. Rep. 710, 9 Atl. 559; State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534.

Persuasion and picketing should be absolutely enjoined under circumstances such as here exist.

Bowen v. Hall, L. R. 6 Q. B. Div. 338; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Knudsen v. Benn, 123 Fed. 636; Atchison T. & S. F. R. Co. v. Gee, 139 Fed. 582, 140 Fed. 153; Barnes v. Chicago Typographical Union No. 16, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940; Vegelah v. Guntner, *supra*; Jersey City Printing Co.

v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Re Doolittle, 23 Fed. 548; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 Fed. 614; United States v. Kane, 23 Fed. 749; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 889; State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Randall v. Lonstorf, 126 Wis. 147, 3 L.R.A.(N.S.) 470, 105 N. W. 663, 5 A. & E. Ann. Cas. 371.

A combination without any just cause or excuse, and without the purpose to advance or further the interests of the members thereof, but maliciously to induce third persons not to trade with a certain person, is actionable conspiracy.

Martin, Conspiracy; 8 Cyc. Law & Proc. p. 615; Loewe v. California State Federation of Labor, 139 Fed. 71.

The striking employee should be enjoined from attempting to compel apprentices to break existing contracts with complainant and go out on a strike; and it is well settled that "persuasion" for such purpose is tortious.

Knudsen v. Benn, *supra*; Beattie v. Callanan, 82 App. Div. 7, 81 N. Y. Supp. 413; Jersey City Printing Co. v. Cassidy, *supra*; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240.

Baker, Circuit Judge, delivered the opinion of the court:

No Wisconsin statute authorized an unincorporated voluntary association to be sued in its common name. So, the objection might have prevailed if it had been seasonably made. Karges Furniture Co. v. Amalgamated Wood-workers Local Union No. 131, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 A. & E. Ann. Cas. 829; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638. But the members could have been reached, of course, either by naming and serving them all, or, if that were impracticable on account of their numbers, by suing some as representatives of all. The bill treated the unions as representative of their membership; an individual member filed a verified answer in the names of the unions, alleging that he had been authorized by them so to do; and the case was carried through three hearings (temporary injunction, contempt, final decree) without a suggestion that

there was a defect of parties, or rather a defect in the form under which appellee asked to have the membership of the unions brought into court. An objection of this kind will not be entertained on appeal unless it has been first duly presented in the trial court. Barnes v. Chicago Typographical Union No. 16, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940.

The evidence showed that appellee was entitled to injunctive relief. To keep other workmen out of appellee's foundries, some of the union men went to the extent of using vile and abusive language, threats of violence, and actual assaults. This was effective enough to damage appellee's business quite seriously, and was carried on under circumstances that might be held to indicate the unions' tacit approval. None of the appellants ever challenged by appeal the justice of the temporary injunction or of the punishments for its violation; and on this appeal from the final decree not a shadow of justification is found for these acts of violence and intimidation. The only substantial question is whether or not the trial court has stepped beyond the line of safeguarding the legal rights of appellee, and has thereby deprived appellants of some of their legal rights.

To organize for the purpose of securing improvement in the terms and conditions of labor, and to quit work and to threaten to quit work as means of compelling or attempting to compel employers to accede to their demands for better terms and conditions, are rights of workmen so well and so thoroughly established in the law (Thomas v. Cincinnati, N. O. & T. P. R. Co. [C. C.] 4 Inters. Com. Rep. 788, 62 Fed. 803; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 320; Wabash R. Co. v. Hannah [C. C.] 121 Fed. 563), that nothing remains except to determine in successive cases as they arise whether the means used in the endeavor to make the strike effective are lawful or unlawful.

By § 4466a, Wis. Stat. 1898, and, appellee asserts, by the common law as well, it is illegal for two or more persons to combine for the purpose of "doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired." Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3. As the combination among appellants was entered into and carried on in Wisconsin, a threshold inquiry is whether the present is a malicious-mischief case under this paragraph, wherein otherwise innocent means are condemned because the end is wicked, or a true strike case under the preceding para-

graph, wherein, because the end is lawful, all means may be called into play except those that are unlawful in themselves.

The record shows that the local unions had a conference in regard to conditions in all the foundries in the city and county of Milwaukee; that they formulated demands respecting wages, overtime, double time on holidays, piecework, weekly pay day, limitation of the number of apprentices, and a joint arbitration board; that these demands were made alike upon all the foundry owners within that territory; and that, when the demands were rejected, the union men in all the foundries struck. Nothing in the record indicates that there was any want of good faith in making these demands, or that the strike was undertaken with any other purpose than to enforce them, or that appellee received or was singled out to receive different treatment from that dealt out to other foundry owners. So the employment of assault and duress in the progress of the strike should be attributed to a combination to accomplish a lawful end by unlawful means, rather than the employment of unlawful means should be taken as proof that the end sought to be accomplished by such means was itself unlawful. And consequently the parts of the decree which prohibit the use of persuasion and picketing can be justified only on the basis that such means are not lawfully to be applied in a genuine struggle of labor to obtain better terms and conditions; for surely men are not to be denied the right to pursue a legitimate end in a legitimate way, simply because they may have overstepped the mark and trespassed upon the rights of their adversary. A barrier at the line, with punishment and damages for having crossed, is all that the adversary is entitled to ask.

So far as persuasion was used to induce apprentices or others (§ 16 of the decree) to break their contracts to serve for definite times, the prohibition was right. And the reason, we believe, is quite plain. Each party to such a contract has a property interest in it. If either breaks it, he does a wrong, for which the other is entitled to a remedy. And whoever knowingly makes himself a party to a wrongful and injurious act becomes equally liable. But in the present case the generality of the men who took or sought the places left by the strikers were employed or were offered employment at will, as the strikers had been. If either party, with or without cause, ends an employment at will, the other has no legal ground of complaint. So, if the course of the new men who quit or who declined employment was the result of the free play of their intellects and wills, then against

them appellee had no cause of action, and much less against men who merely furnished information and arguments to aid them in forming their judgments. Now it must not be forgotten that the suit was to protect appellee's property rights. Regarding employments at will, those rights reached their limit at this line: For the maintenance of the incorporeal value of a going business appellee had the right to a free access to the labor market, and the further right to the continuing services of those who accepted employment at will until such services were terminated by the free act of one or the other party to the employment. On the other side of this limiting line, appellants, we think, had the right, for the purpose of maintaining or increasing the incorporeal value of their capacity to labor, to an equally free access to the labor market. The right of the one to persuade (but not coerce) the unemployed to accept certain terms, is limited and conditioned by the right of the other to dissuade (but not restrain) them from accepting. For another thing that must not be forgotten is that a strike is one manifestation of the competition, the struggle for survival or place, that is inevitable in individualistic society. Dividends and wages must both come from the joint product of capital and labor. And in the struggle wherein each is seeking to hold or enlarge his ground, we believe it is fundamental that one and the same set of rules should govern the action of both contestants. For instance, employers may lock out (or threaten to lock out) employees at will, with the idea that idleness will force them to accept lower wages or more onerous conditions; and employees at will may strike (or threaten to strike), with the idea that idleness of the capital involved will force employers to grant better terms. These rights (or legitimate means of contest) are mutual and are fairly balanced against each other. Again, an employer of molders, having locked out his men, in order to effectuate the purpose of his lockout, may persuade (but not coerce) other foundrymen not to employ molders for higher wages or on better terms than those for which he made his stand, and not to take in his late employees at all, so that they may be forced back to his foundry at his own terms; and molders, having struck, in order to make their strike effective may persuade (but not coerce) other molders not to work for less wages or under worse conditions than those for which they struck, and not to work for their late employer at all, so that he may be forced to take them back into his foundry at their own terms. Here, also, the rights are mutual and fairly balanced. On

the other hand, an employer, having locked out his men, will not be permitted, though it would reduce their fighting strength, to coerce their landlords and grocers into cutting off shelter and food; and employees, having struck, will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business. The restraints, likewise, apply to both combatants and are fairly balanced. These illustrations, we believe, mark out the line that must be observed by both. In contests between capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual. But attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself. And for the enforcement of these mutual rights and restraints organized society offers to both parties, equally, all the instrumentalities of law and of equity.

With respect to picketing as well as persuasion, we think the decree went beyond the line. The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. Prohibitions of persuasion and picketing, as such, should not be included in the decree. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 131*, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 A. & E. Ann. Cas. 829; *Everett Waddey Co. v. Richmond Typographical Union No. 90*, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, 8 A. & E. Ann. Cas. 798.

We have not found anything in the evidence that justified the decree as to an "illegal boycott." No attempt was made to

touch appellee's dealings or relations with customers and users of its goods. *Oxley Stave Co. v. Coopers' International Union* (C. C.) 72 Fed. 695; *Loewe v. California State Federation of Labor* (C. C.) 139 Fed. 71; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301. After the strike was on, appellee sent patterns, on which the strikers had been working, to foundries in other cities. The strikers procured the molders in those foundries, who also were members of the Iron Molders' Union of North America, to refuse to make appellee's castings. Those molders notified their employers that they would have to cancel their contracts to make castings for appellee, or they would quit work. Some employers discharged the notifiers, others refused to cancel and the union men struck, and others complied and the union men stayed. In those instances where the foundry men fulfilled their contracts, appellee was not damaged; in those where foundry men broke their contracts, there is no proof that appellee has not collected or cannot collect adequate damages. That might be taken as a reason why appellee, on this branch of the case, is not entitled to the aid of equity. But there is a more important reason. Appellants were aiming to prevent, and appellee to secure, the doing of certain work in which the skill of appellants' trade was necessary. Here was the ground of controversy, and here the test of endurance. If appellee had the right (and we think the right was perfect) to seek the aid of fellow foundry men to the end that the necessary element of labor should enter into appellee's product, appellants had the reciprocal right of seeking the aid of fellow molders to prevent that end. To whatever extent employers may lawfully combine and co-operate to control the supply and the conditions of work to be done, to the same extent should be recognized the right of workmen to combine and co-operate to control the supply and the conditions of the labor that is necessary to the doing of the work. In the fullest recognition of the equality and mutuality of their rights and their restrictions lies the peace of capital and labor for so they, like nations with equally well drilled and equipped armies and navies, will make and keep treaties of peace, in the fear of the cost and consequences of war.

The decree is modified by striking out "persuasion" and "persuading" from the 4th and 7th paragraphs; further modified by adding after "picketing" in the 5th paragraph "in a threatening or intimidating manner;" vacated as to the 1st, 8th, 9th, 10th, 14th, and 15th paragraphs; affirmed as to the 2d, 3d, 6th, 11th, 12th, 13th, 16th,

and the modified 4th, 5th, and 7th paragraphs. Costs of this court to be divided equally.

Grosscup, Circuit Judge, concurring:

The foregoing opinion so compactly and clearly sets forth the correlative rights and the correlative obligations of employer and employees when engaged in a strike or lock-out that it is with hesitation that I add this word; and I only add it that nothing that is contained in the opinion may be construed to relate to the correlative rights and the correlative obligations of employer and employees in any relationship other than their somewhat anomalous relationship pending a strike or lockout.

A strike is cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms. Neither strike nor lockout completely terminates, when this is its purpose, the relationship between the parties. The employees who remain to take part in the strike or whether the lockout do so that they may be ready to go to work again on terms to which they shall agree,—the employer remaining ready to take them back on terms to which he shall agree. Manifestly, then, pending a strike or a lockout, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment. And it is with respect to this somewhat anomalous relationship that, as I understand it, this opinion speaks; a statement that it seems to me ought to be made to confine the opinion to the actual situation to which it is intended to relate,—to differentiate what we say from what might arise in cases where, neither strike nor lockout pending, persuasion is resorted to, to induce other employers not to employ given applicants for employment, or to persuade employees not to take employment with given employees, upon which questions we do not, as I understand it, express any opinion.

ARKANSAS SUPREME COURT.

FRANK PARTRIDGE, Appt.,

v.

STATE OF ARKANSAS.

(— Ark. —, 114 S. W. 215.)

Intoxicating liquors — sale — agent — mistake.

The proprietor of a stand where soft
20 L.R.A. (N.S.)

drinks are sold is not guilty of selling or being interested in the sale of intoxicating liquors without a license, contrary to the provisions of the statute, because an adult employee, in his absence, sells a bottle of beer which he had provided for his own use and which he gave no authority to anyone to sell.

(November 30, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Clark County convicting him of being interested in the sale of intoxicating liquor without a license,

Note.—The subject of the criminal responsibility for the sale of intoxicating liquor by a partner, servant, or agent is discussed in a note to *Williams v. Hendricks*, 41 L.R.A. 660, and in a case note to *State v. Gilmore*, 18 L.R.A. (N.S.) 786. A few cases on the subject have been reported since the latter note.

Under a statute providing that "no person . . . shall knowingly sell [ardent spirits] to any intoxicated person," and declaring that any person violating any provisions of the act shall be guilty of a misdemeanor and fined not less than \$50 nor more than \$100, it was held in *O'Donnell v. Com.* 108 Va. 882, 62 S. E. 373, that a licensed bartender may be convicted upon a sale made at his bar to an intoxicated person by his son, who was employed in the barroom, and intrusted with the conduct of the same in the absence of the defendant, although the defendant was in fact at the time of the sale absent from the place of business.

Loeb v. State (Ga. App.) 64 S. E. 338, holds that there is no fatal variance between an indictment alleging a sale of liquor by defendant and proof that the liquor was sold by his agent or employee.

In *Pulver v. State* (Neb.) 119 N. W. 780, the court said that, while the proceeding was in the form of a criminal prosecution for keeping a place for the sale of liquor open after hours, it was in fact a civil action to recover a penalty, and it was not, therefore, necessary to show any guilty intent on the part of the owner, the act charged having been committed by his agent in charge of the place.

In passing upon a remonstrance against the granting of a license on the ground that the applicant had, during the previous year, violated the liquor law by illegal sales, the court, in *Re Berger* (Neb.) 120 N. W. 960, held that, where a barkeeper sells intoxicating liquors to a minor or to an habitual drunkard, the proprietor of the place will be held responsible for such sales in the absence of evidence that they were made in violation of his orders; but that illegal sales made to minors by the barkeeper against the express instructions of the proprietor cannot operate against the latter.

contrary to the provisions of the statute. Reversed.

The facts are stated in the opinion.

Mr. John E. Bradley for appellant.

Messrs. William F. Kirby, Attorney General, and Daniel Taylor for the State.

McCulloch, J., delivered the opinion of the court:

Appellant was tried upon an indictment charging him with unlawfully selling intoxicating liquor without license; and the court gave to the jury a peremptory instruction to find him guilty as charged.

The following is the state of the testimony: Appellant was conducting a stand at a picnic in Clark county for the sale of lemonade, soda pop, candy, etc., and employed a salesman named Worley. A witness named Palmer went to the stand in appellant's absence, and called for a drink of hop ale, whereupon Worley handed him out a bottle of beer, or which he paid Worley the sum of 25 cents. Worley testified that he did not know the bottle sold to Palmer contained beer, and that appellant had employed him to sell for him, but did not give him particular instructions what to sell. Appellant testified that he kept no intoxicating liquor for sale; that he put four bottles of beer in a box at the stand to keep for his own private use, and did not authorize anyone to sell it; that the bottles of beer were not put in the ice box where other cold drinks were kept for sale; and that he intended when he got ready to drink it, to shave ice in it to cool it. He also testified that Worley and the other salesman in the stand were grown men, and that he supposed they knew better than to sell the beer. If appellant's statement of the facts was true, he was not guilty of any offense, and he had the right to have the jury pass upon the question. It was error to take the case from the jury.

If appellant kept the beer at his place of business solely for his own consumption, and gave no authority, either express or implied, for its sale, the fact that his clerk sold it by mistake would not render him guilty of the unlawful sale. The statute under which appellant stands accused provides that it shall be an offense for any person to "sell, either for himself or another, or be interested in the sale" of, the prohibited liquors without license. This court held that, under a statute making it a criminal offense for anyone to sell or be interested in the sale of intoxicating liquor to a minor, a sale by one partner in the absence and without the knowledge, consent, or connivance of his co-partner rendered both liable criminally for the unlawful act. *Robinson v. State*, 38 Ark. 20 L.R.A. (N.S.)

641. The court, speaking through Chief Justice English, in giving a reason for a departure from the well-established rule that a person who is not a party to the commission of a criminal offense cannot be adjudged guilty of the offense, said: "The law says to persons wishing to engage in selling spirituous liquors, or to be interested in sales thereof: 'You must be careful in the selection of your partners or servants, and watchful of their conduct in your business; for, if they make forbidden sales, you are responsible. You must see that sales in which you are interested are not made without license, nor made to minors, without proper permission from their parents or guardians. If you are not willing to engage or be interested in the business on these terms, there is no compulsion upon you to do so.'" There cannot be, we think, any application of this rule to a person not engaged nor interested at all in the liquor traffic, whose employee inadvertently, or without authority from him, makes a sale of liquor at his place of business. In that case he is not interested in an unauthorized sale, and does not come within the statute. The case should have been submitted to the jury upon the question whether the sale was made by mistake and without authority from appellant, or whether it was a mere subterfuge to cover an unlawful sale of liquor. The attorney general confesses error, and we think his views of the case are correct.

Reversed and remanded for a new trial.

CALIFORNIA SUPREME COURT. (In banc.)

PURA JANE STILL et al., Respts.,
v.
SAN FRANCISCO & NORTHWESTERN
RAILWAY COMPANY, Appt.

(— Cal. —, 98 Pac. 672.)

Evidence — competence of conductor — sufficiency.

1. The incompetence of a railroad conductor may be found from evidence that, although he had worked in several capacities on the railroad for some time, he had only recently been placed in charge of a

Case Note.—*May breach of duty to employ or retain none but competent servants be inferred from the fact of their incompetence.*

It should be observed that this question presupposes that the incompetence has been established by competent evidence, and that the master was ignorant of such incompetence, or that there was no evidence, aside from the mere fact of incompetence, or repu-

scheduled train, with nothing to show that he was instructed, or knew, that, when directed to pass an inferior train at a particular point by special order, he was bound to await its arrival; and that, upon arriving at the meeting place under such order, and not finding the other train there, he directed the engineer to go forward, under the general rule that trains moving in the direction that his train was going had the right of way, and inferior trains from the opposite direction must keep out of the way.

Trial — jury — care of master.

2. The question whether or not a railroad company made sufficient investigation as to the qualification of one placed in charge of a scheduled train as conductor, who is

tation of incompetence, tending to show that the master had knowledge thereof. Therefore, cases in which it appears that the master had actual knowledge of the servant's incompetence, and cases which merely pass upon the question of the sufficiency of evidence to establish incompetence, are not here included.

It is the duty of the master to employ and retain competent servants only, and it is presumed that he performs this duty; therefore, one injured through the incompetence of a servant has the burden of proving such incompetence, and he must also show that the master knew, or in the exercise of ordinary care should have known, of the incompetence at the time he employed the servant, or that he retained him after being charged with notice of his incompetence. *Labatt, Mast. & S. § 193a.*

This preliminary statement would seem to answer in the negative the question formulated by the title to this note. And this is found to be the position generally taken by the authorities, except where the incompetence was so notorious that the master would have known of it had he exercised ordinary care, in which case he is charged with constructive notice and consequently a breach of duty.

Incompetence at time of employment.

It has been held that, since the law presumes that an imposed duty was properly performed, the mere fact that a fellow servant was incompetent did not tend even prima facie to establish negligence on the part of the master in employing him; but the burden was upon the plaintiff to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in the selection of the servant, and that the negligence of the master in this respect could not be inferred from the circumstance that the servant was in fact incompetent. *Roblin v. Kansas City, St. J. & C. B. R. Co.* 119 Mo. 476, 24 S. W. 1011; *Van Dusen v. Lake Shore & M. S. R. Co.* 12 N. Y. S. R. 351.

But in *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea, 46, it was held that an 20 L.R.A. (N.S.)

shown not to have had the requisite knowledge of the meaning of orders to make him competent, to relieve itself from the charge of negligence in that regard, is for the jury, where the only evidence of investigation is that the train master made some inquiry as to his competency, and had some discussion with him relative to the duties to be performed, about the time he was promoted to that service from inferior service which required no such knowledge, the information received not necessarily indicating that he possessed the requisite knowledge.

Railroad — incompetent servant — liability.

3. A railroad company which, without proper investigation as to his qualification, places in charge of a scheduled train

instruction substantially in the words of the preceding paragraph was properly refused, since it ignored a degree of incompetence which, of itself, might, in the opinion of the jury, import notice, and because the language was equivocal in the clause "tend even prima facie to establish negligence."

In *Thomas v. Herrall*, 18 Or. 546, 23 Pac. 497, it was held that the mere fact of the incompetence of a servant was not enough to warrant the jury in finding the master guilty of negligence in employing him.

And so it was held in *Murphy v. St. Louis, I. M. & S. R. Co.* 71 Mo. 202, although the court added that the testimony by which the incompetence of a servant is established may be such as to warrant the inference that the master had notice of his incompetence, or that he omitted to make such inquiries as common prudence would have dictated.

In *Taylor v. Western P. R. Co.* 45 Cal. 323, it was held that, although inability to read showed incompetence where the servant was placed in a position which required him to read, it was error to charge the jury that placing him in that position was of itself an act of negligence, since the master may have taken all reasonable precautions to ascertain his competence for the place, and have been deceived by the servant's fraudulent practices.

In *Lee v. Michigan C. R. Co.* 87 Mich. 574, 49 N. W. 909, it was held that the presumption that the master did his duty in the selection of a competent servant was overcome by proof that the servant was incompetent when employed; that in such case proof of notice to the master was not necessary.

In *Crandall v. McIlrath*, 24 Minn. 127, it was held that, when incompetence is shown to have existed at the time of employment, a prima facie case of negligence is made out against the master; and the burden is upon him to disprove negligence.

In *Pleasant v. Raleigh & A. Air Line R. Co.* 121 N. C. 492, 61 Am. St. Rep. 674, 28 S. E. 267, it was held that the question of the master's negligence in such a case should be submitted to the jury under proper instructions.

a conductor who has not the requisite knowledge of the meaning of orders for meeting and passing trains, is liable for the death of a fireman on another train with which the train in charge of such conductor collides because of his failure to obey, through ignorance of its meaning, an order requiring him to pass the other train at a certain point.

Trial — instruction — refusal — emphasizing evidence.

4. Refusal of an instruction which emphasizes a particular portion of the evidence is not error in the absence of anything to show why it should be so singled out and emphasized.

(December 4, 1908.)

A PPEAL by defendant from a judgment of the Superior Court for Humboldt

And in *Kundar v. Shenango Furnace Co.* 102 Minn. 162, 112 N. W. 1012, it was held that in such case the jury would be justified in finding that the master did not exercise reasonable care in employing such servant.

In *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 25 L.R.A. 710, 47 Am. St. Rep. 392, 20 Atl. 994, it was held that the servant's general reputation for intemperance may be sufficient to overcome the presumption that the master exercised due care in his selection.

In *Monahan v. Worcester*, 150 Mass. 439, 15 Am. St. Rep. 226, 23 N. E. 228, it was held that the fact that a servant was generally reputed to be infirm in the senses of sight and hearing, and physically weak, had a tendency to show that the master, in employing the servant, did not take proper means to ascertain his qualifications.

But specific acts of negligence are not admissible to establish this fact. *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90.

Subsequently developed incompetence.

The legal presumption is that servants once competent continue so. *Southern P. Co. v. Hetzer*, 1 L.R.A.(N.S.) 288, 68 C. C. A. 26, 135 Fed. 272; *Chapman v. Erie R. Co.* 55 N. Y. 579.

The mere fact of incompetence, where it is shown that the servant was competent at the time of his employment, does not sufficiently show a breach of duty on the part of the master, unless the incompetence had become so notorious as to charge the master with notice. *Lee v. Michigan C. R. Co.* 87 Mich. 574, 49 N. W. 909.

Specific acts of carelessness or unskillfulness are insufficient to warrant the jury in inferring negligence on the part of the master in retaining the servant. *Huffman v. Chicago, R. I. & P. R. Co.* 78 Mo. 50; *Baulec v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325.

An act of casual neglect by an employee is not alone sufficient to establish negligence of the principal in his employment. *Rush* 20 L.R.A.(N.S.)

County in plaintiffs' favor in an action to recover damages for the alleged negligent killing of plaintiffs' husband and father. **Affirmed.**

The facts are stated in the opinion.

Messrs. Gillett & Cutler and F. A. Cutler for appellant.

Messrs. George T. Rolley and Coonan & Kehoe, for respondents:

It was sufficiently shown that defendant failed to exercise ordinary care in the selection of the conductor.

Labatt, Mast. & S. p. 404, § 186, p. 418; Murphy v. St. Louis, I. M. & S. R. Co. 71 Mo. 202; *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea, 46; *Lee v. Michigan C. R. Co.* 87 Mich. 574, 49 N. W. 909; *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450, 7 Am. St. Rep. 458, 17 N. E. 101; *Louisville*

v. Thomas D. Murphy Co. 135 Iowa, 376, 112 N. W. 814.

The simple fact that a fellow servant was guilty of negligence on the occasion when plaintiff was injured was not sufficient to authorize the jury to find that the master was negligent in employing him. *Conrad v. Gray*, 109 Ala. 130, 19 So. 398.

But, if a servant, competent at the time of employment, afterwards becomes habitually incompetent or unfit to perform his duties, the master is chargeable with notice of the incompetence, although he has no personal knowledge of its existence. *Whittaker v. Delaware & H. Canal Co.* 126 N. Y. 544, 27 N. E. 1042; *Houston & T. C. R. Co. v. Patton (Tex.)* 9 S. W. 175; *Meyers Sons v. Falk*, 99 Va. 385, 38 S. E. 178.

But in *Cameron v. New York C. & H. R. R. Co.* 145 N. Y. 400, 40 N. E. 1, it was held that the jury should not be permitted to find the master guilty of negligence in failing to ascertain that a competent servant had become incompetent, where it further appeared that the master had adopted suitable rules for the regulation of his conduct which the master had no reason to suppose were disregarded, and in which rules all servants were requested to make prompt report of any neglect or disobedience to the rules, and no complaint had been made.

Negligence in the retention of an incompetent servant may be established by evidence of the fact that he was generally reputed to be unfit, reckless, or unskilful, so that the master, in the exercise of due care, must have known of his incompetence. *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 241; *Calumet Electric Street R. Co. v. Peters*, 88 Ill. App. 112; *Cooney v. Commonwealth Ave. Street R. Co.* 196 Mass. 15, 81 N. E. 905; *Grube v. Missouri P. R. Co.* 98 Mo. 330, 4 L.R.A. 776, 14 Am. St. Rep. 645, 11 S. W. 736; *Texas & P. R. Co. v. Johnson*, 39 Tex. 519, 35 S. W. 1042; *Gulf, C. & S. F. R. Co. v. Hays*, 40 Tex. Civ. App. 162, 89 S. W. 29;

& N. R. Co. v. Wyatt, 29 Ky. L. Rep. 437, 93 S. W. 601; James Ramage Paper Co. v. Bulduzzi, 77 C. C. A. 393, 147 Fed. 151; Elliott v. Canadian P. R. Co. 129 Fed. 163; International & G. N. R. Co. v. Martinez (Tex. Civ. App.) 57 S. W. 689; Bunnell v. St. Paul, M. & M. R. Co. 29 Minn. 305, 13 N. W. 129; Mann v. Delaware & H. Canal Co. 91 N. Y. 495; O'Loughlin v. New York C. & H. R. R. Co. 87 Hun, 538, 34 N. Y. Supp. 297; Missouri P. R. Co. v. Patton (Tex. Civ. App.) 25 S. W. 339; Newell v. Ryan, 40 Hun, 286; Curran v. A. H. Stange Co. 98 Wis. 598, 74 N. W. 377; Fraser v. Schroeder, 163 Ill. 459, 45 N. E. 288; Postal Teleg. Cable Co. v. Coote (Tex. Civ. App.) 57 S. W. 912; Baldwin v. American Writing Paper Co. 196 Mass. 402, 82 N. E. 1; Wikberg v. Olson Co. 138 Cal. 481, 71 Pac. 511;

Scott v. San Bernardino Valley Traction Co. 152 Cal. 604, 93 Pac. 677.

Angellotti, J., delivered the opinion of the court:

This is an appeal by defendant from a judgment for plaintiffs, in an action brought by the surviving wife and two minor children of Charles Still, deceased, for damages resulting to them from the death of said Still, alleged to have been caused by the negligence of defendant. The principal claim of defendant is that the evidence given on the trial is insufficient to support the verdict.

Charles Still was killed on October 5, 1903, in a collision which occurred between two of defendant's trains, one known as "extra No. 4," a special train, in conductor Rolley's charge, which was running southerly from

El Paso & S. W. R. Co. v. Smith (Tex. Civ. App.) 108 S. W. 988.

The servant's general reputation for intemperance, acquired after being employed, is admissible to charge the master with notice of his incompetence, and thus to show a breach of duty in not discharging him. Gilman v. Eastern R. Co. 13 Allen. 433, 90 Am. Dec. 210; McPhee v. Scully, 163 Mass. 219, 39 N. E. 1007; Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97.

In *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437, 21 N. W. 878, it was held that, where it was shown that an accident occurred through the negligent act of an engineer who was intoxicated; and it was further shown that he was in the habit of drinking intoxicating liquors to excess, and such habit had extended over a period of nine months while in the defendant's employ, though no actual knowledge or notice had ever reached any superior officer of the engineer, the jury was justified in concluding that the defendant was negligent in failing to learn of such habit, and in retaining the engineer in its employment.

And so it was held where the habit of getting intoxicated two or three times a week had extended over a period of two years. *Tonnesen v. Ross*, 58 Hun, 415, 12 N. Y. Supp. 150.

In *Curtis v. Laconia Car Co. Works*, 73 N. H. 516, 63 Atl. 400, it was held that evidence that a striker in a blacksmith shop had used liquor to excess for twenty-five years was relevant, since it had a tendency to prove that the masters ought to have anticipated an injury to the blacksmith whom he assisted, if they retained him in their employ.

The master's knowledge of the incompetence of a servant may be shown by evidence tending to establish that such incompetence was generally known in the community. *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215, 63 Am. St. Rep. 663, 49 N. E. 674; *Lambrecht v. Pfizer*, 49 App. Div. 82, 63 N. Y. Supp. 591.
20 L.R.A. (N.S.)

In *McCarty v. Ritch*, 59 App. Div. 145, 69 N. Y. Supp. 129, it was held that evidence of reputation for incompetence, unconnected with any specific acts, was not admissible for the purpose of showing constructive notice to the master.

Negligence in the retention of an incompetent servant may be shown by specific acts of incompetence of such a nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. *First Nat. Bank v. Chandler*, 144 Ala. 286, 113 Am. St. Rep. 39, 39 So. 822; *Michigan C. R. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243.

Evidence of the commission of several previous acts of negligence similar to that which caused the injury warrants the submission to the jury of the question whether the master was negligent in keeping the delinquent servant in his employment. *Sutton v. New York, L. E. & W. R. Co.* 50 N. Y. S. R. 514, 21 N. Y. Supp. 312; *Wall v. Delaware, L. & W. R. Co.* 54 Hun, 454, 7 N. Y. Supp. 709, affirmed without opinion in 125 N. Y. 727, 26 N. E. 757; *International & G. N. R. Co. v. Branch* (Tex. Civ. App.) 56 S. W. 542.

In *Smith v. Chicago, P. & St. L. R. Co.* 236 Ill. 369, 86 N. E. 150, it was said that the conduct of a servant on a single occasion may be entirely sufficient to demonstrate his unfitness, and, after such an occurrence, to charge the master with a failure of duty in keeping him in the service.

Testimony going to show a servant's incompetence at a date previous to the accident is held proper as tending to show the master's negligence in retaining him. *Terrill v. Russell*, 16 Tex. Civ. App. 573, 42 S. W. 129; *Stoll v. Daly Min. Co.* 19 Utah, 271, 57 Pac. 295.

For cases upon the question whether the incompetence of a minor to perform the duties of a particular employment may be inferred upon his minority alone, see case note to *Wilkinson v. Kanawha & H. Coal & Coke Co.* post, 331.

South Bay, near Eureka, and the other known as "freight train No. 5," a regular schedule train, under Peter Clark as conductor, which was running northerly from Carlotta, the southerly terminus of the road, to South Bay. He was the fireman on "extra No. 4," and at the time of the collision was in the cab of the locomotive engaged in the discharge of his duties. His train was proceeding under an order addressed to its conductor and engineer, which was as follows: "Leave South Bay 6:45 October 5th. Take E. R. V. L. Co.'s empties to their switch. Return light to Gravel Pit. Meet P. L. Co.'s train at Singley's. Meet No. 5 at Cousins' switch. Exchange engines at Cousins' switch with No. 5." A special meet order had been given to the conductor and engineer of freight train 5, reading as follows: "October 5, '03. Train No. 5, Conductor Clark, Engineer Thayer. Meet Extra 4 at Cousins' switch. Exchange engines with her. Take E. R. V. Lbr. Co.'s train to S. Bay. It is conceded that such an order supersedes all schedules, and means exactly what it says, *viz.*, that the trains to which it is addressed must meet at the place named, and that the one arriving first at the designated place must stay at that place until the other train arrives, or until the order is withdrawn or changed. Train 5 started from Carlotta at its schedule time, and proceeded according to its schedule to Cousins's switch, which was almost midway between South Bay and Carlotta. Extra 4 had been delayed by an accident farther north, and had not yet arrived at Cousins's switch. Conductor Clark, of train 5, having taken on the E. R. V. Lumber Company's train as directed by his special order, proceeded north with his train, without waiting for extra 4, with the result that in the neighborhood of Fortuna, the next station north of Cousins's switch, his train came into collision with extra 4, which was proceeding south in strict accord with its orders. Concededly the failure of Clark to comply with the requirements of the meet order was the sole cause of the deplorable accident.

Under the law of this state as it was at the time of the collision, deceased and Clark were fellow servants, and no recovery could be had against defendant by the heirs of deceased for damages resulting solely from the negligence of Clark. The claim of plaintiffs, sustained by the jury that tried the case, was that Clark was incompetent to act as conductor of train 5, that defendant had failed to use ordinary care in selecting him to serve in that capacity, and that his incompetence was the cause of the accident, thus bringing the case within the rule of law that renders the employer liable to an em-

ployee for damages resulting from his failure to use ordinary care in the selection of other employees, and to select only those who are competent to properly perform the duties of the position for which they are selected,—the rule declared by § 1970, Civ. Code, as it was at the time of the accident, as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter . . . in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or unless the employer has neglected to use ordinary care in the selection of the culpable employee." In accord with this claim, the jury specifically found, in response to questions submitted to them: First, that Peter Clark was incompetent to act as conductor of train No. 5 at the time of the collision; second, that the collision was caused by such incompetence of Peter Clark to act as conductor; third, that the defendant failed to use ordinary care in the selection of Peter Clark for the position of conductor for such train; and, fourth, that the defendant, prior to the accident, knew that Clark was incompetent for the position of conductor on such train, or could have known it by the exercise of ordinary care on its part. A general verdict in favor of plaintiffs was also rendered.

It must be borne in mind that the question before us in considering the attack on the verdict of the jury is not how we would find the facts to be, but whether there was enough in the evidence from which the jury might find the existence of facts which would justify the verdict they rendered. It, of course, devolved on plaintiffs to show that Clark was in fact incompetent for the position to which he was assigned, that defendant, at the time of his selection therefor, either knew, or by the exercise of ordinary care would have known, of such incompetence, and that such incompetence was the cause of the accident. The verdict of the jury constituted findings in the affirmative upon all these propositions. Was there substantial evidence in support thereof? If so, the verdict must stand, however strongly such evidence may be opposed to other evidence given on the trial. In cases of mere conflict of evidence the conclusions of the trial jury and judge are conclusive on the question as to which side produced the "preponderance of evidence." See *Fowden v. Pacific Coast S. S. Co.* 149 Cal. 151, 159, 86 Pac. 178.

As we have said, it is necessarily conceded that the failure of Clark to hold his regular schedule train at Cousins's switch until the arrival of extra 4, in accord with the

requirements of the meet order, was the cause of the accident. Was this failure due to his incompetence or unfitness from any cause to act in the position to which he had been assigned, or was it due to his mere negligence in the discharge of duties which he was entirely competent to perform? The incompetence claimed is that he was not possessed of adequate knowledge of the meaning and effect of a "meet order," under such circumstances as confronted him at Cousins's switch on the day of the accident, the kind of incompetence referred to in *Nofsinger v. Goldman*, 122 Cal. 609, 617, 55 Pac. 425, 429, where it was said: "An engineer might not be careless. He might exercise extreme care within the limitations of his knowledge, and yet, for lack of adequate knowledge, might be unfit and incompetent for the position,"—and in *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450, 7 Am. St. Rep. 458, 17 N. E. 101, a case similar in many respects to this. Incompetence connotes the converse or reliability in "all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment." 1 Labatt, Mast. & S. § 181. It goes without saying that one who does not know the meaning of the rules or orders used on a railroad relative to the movement of trains is absolutely incompetent to act as a conductor of a train thereon, where he would be called upon to follow such rules and orders in moving his train. We are satisfied that the evidence amply warranted the jury in finding that Clark was without this knowledge, and that his ignorance in this respect was the sole cause of the accident.

Clark had been acting as conductor of this train for less than a month, having commenced on September 10, 1903. His employment on this train was practically his first experience as conductor on a schedule train, there being some testimony that between July 17, 1903, when he came to this road, and September 10, 1903, he had acted for a few days as conductor. During the same time he had acted for a few weeks as conductor of a gravel train, an inferior unscheduled train, running under special orders. During the same interval of less than two months he had also acted for a very short time as brakeman on a passenger train on this road. For nearly two years prior to July 17, 1903, he had been a brakeman on a passenger train on the railroad running from Eureka to Arcata, a short road which had only one train and one train crew, and where, consequently, there were no rules or orders as to the meeting and passing of trains. Prior to that time he had worked

for some years on the road where the accident occurred in the several capacities of sectionman, tunnel watchman, and fireman, positions in which he had not been required to know or charge his mind as to the effect of orders relative to the meeting of trains. Prior to assuming the work of conductor he had shown himself to be a reliable and competent man in the various positions in which he had been placed, which would rather tend to indicate that within the limits of his knowledge he would not be likely to make a mistake in such a vital matter as the one causing the accident. The evidence was not such as to compel the conclusion that he had ever before been confronted with the situation that confronted him at Cousins's switch on the day of the accident, or that he had ever been informed, or had ever learned, that a regular schedule train, arriving at a place where it had been directed by special order to meet an inferior train before the arrival of the latter, was bound to await such arrival, unless the special order was withdrawn or modified. Upon being made a conductor he was given a printed schedule or time-table of the various regular trains, on the back of which were printed what was styled "Time-Table Rules." A new time-table, to take effect October 5, 1903, at 12:01 A. M., was issued before the accident, and a copy placed in his hands. On this appears the schedule for his train "No 5 freight." At the bottom of the page, in large type, appeared the following: "North-bound trains are superior to and have the right of track over south-bound trains of same or inferior class." At the time of the accident his train was north bound, while extra 4 was south bound, and inferior to his train, under the express provisions of the rule printed on the back of the time-table. Among the other rules so printed on the back of such time-table was rule 8, providing that "inferior trains must keep out of the way of all superior trains," and rule 16, providing, "When the expected train is not found at the schedule meeting or passing point, the superior train will proceed on schedule; the inferior train will take siding and wait for the superior train." When Clark arrived at Cousins's switch," he had his special order in mind, as is fully shown by his compliance with that portion thereof requiring him to take on the "E. R. V. Lbr. Co.'s train," so that his action in proceeding with his train cannot be accounted for on the theory that he had forgotten the existence of any special order. In addition to this, Joseph Still, the fireman on train 5, testified that, before directing the engineer to move out from Cousins's switch, Clark told him (the engineer), "Our instructions were to meet No. 4, but

we are the superior train, and we will run on schedule, run on rule 16, and extra 4 will have to take siding and keep out of the way." It appears that this statement of Still was denied by Clark when he was recalled as a witness by defendant, and that Still was a brother of deceased, and also had a damage suit pending against defendant, arising out of the same accident, but we must assume that the jury believed the testimony of Still in this regard, and they were the sole judges as to his credibility. It also appeared that Still had given the same testimony in the presence of Clark on two previous trials of another action growing out of this accident, and that no denial thereof had then been made. Clark himself was not called by either party to testify at this trial as to the circumstances of the accident, or to explain why he had disregarded the "meet order." Of course, it is possible that Clark did know the full meaning and effect of such orders as applied to regular schedule trains, and that his proceeding on the day of the accident in violation of the order he had received was due simply to forgetfulness, and constituted merely an act of negligence on his part. But we have no doubt whatever that the evidence above set forth was sufficient to warrant a jury in concluding that he did not possess the knowledge that such an order superseded all schedules and printed rules in so far as such schedules and printed rules conflicted therewith, and that he believed that it was his duty to proceed from Cousins's switch with his regular schedule train under such printed rules, without waiting for the inferior train he had been directed to meet at that point. If they so concluded, they were necessarily compelled to find him to be incompetent to discharge the duties of the place to which he had been assigned.

This brings us to the question whether defendant used ordinary care in the selection of Clark as conductor of the freight train, or rather whether the evidence was such as to sustain the finding of the jury that it did not use ordinary care. Under all the authorities, the term "ordinary care," as used in this connection, means that degree of care that a man of ordinary prudence would use in view of the nature of the employment, and the consequences of the employment of an incompetent person,—a degree of care commensurate with the nature and danger of the business and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless or incompetent person. *Wood, Mast. & S. §§ 417, 418.* In accord with this rule, it is generally declared that, where the service in which the servant is employed is such as to endan-

ger the lives and persons of coemployees if the servant is not competent, an employer is bound, in the exercise of ordinary care, upon the plainest principles of justice and good faith, to make a reasonable investigation into his character, skill, qualifications, and habits of life. See *1 Labatt, Mast. & S. § 194*; *Bailey, Personal Injuries relating to Master & Servant, § 1407*; *Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 241*; *Mann v. Delaware & H. Canal Co. 91 N. Y. 495.* The question whether he has made such investigation as is reasonable under all the circumstances is peculiarly one for the jury. As has been said before, even where there is no conflict in the evidence on the question of negligence, if the conceded facts are such that reasonable minds might differ as to the conclusion to be drawn, the question is one of fact for the jury. *Seller v. Market-Street R. Co. 139 Cal. 271, 72 Pac. 1006.* The presumption is that the employer has done his duty in this regard (*Beasley v. San Jose Fruit-Packing Co. 92 Cal. 388, 28 Pac. 485*); and, as a general rule, the employer's knowledge of incompetence, or the fact that he would have obtained such knowledge had he made reasonable inquiry, must be shown by evidence independent of that showing the incompetence, and cannot be inferred therefrom. *Mr. Labatt, in his Master and Servant, says that the latter rule is subject to certain qualifications, one of which is that the testimony by which the incompetence is established may be such as to warrant a conclusion that the employer either had notice of the incompetence, or omitted to make such inquiries as common prudence would have dictated (§ 196); and that it seems impossible to deny that the delinquency which caused the injury may be of such a flagrant character that a jury might fairly infer that the master could not have failed to discover the servant's unfitness if proper inquiries had been instituted when he was hired. § 199.* See, also *Bailey, Personal Injuries relating to Master & Servant, § 1419.* In *Murphy v. St. Louis, I. M. & S. R. Co. 71 Mo. 202*, this is declared to be the law; and the statement is made that the inference is one of fact for the jury. In *Lee v. Michigan C. R. Co. 87 Mich. 574, 49 N. W. 909*, the evidence showing incompetence was of such a nature that the court said that proof that he was so incompetent when employed need not be supplemented by proof of the employer's knowledge thereof; the presumption that the employer had done his duty being overcome by the proof of incompetence. It further said that, where one competent at the time of employment becomes incompetent, or indulges in a habit which renders him incompetent during its

indulgence, notice of the incompetence must be brought home; but that, where the incompetence existed at the time of the employment, proof of notice is not necessary. This was said in reference to one who had been employed only a few weeks. In *Pleasants v. Raleigh & A. Air Line R. Co.* 121 N. C. 492, 61 Am. St. Rep. 674, 28 S. E. 267, the court said that there was no evidence that the defendant knew of the incompetence of Dunn when he was employed, except his action on the occasion of this fearful wreck, and the fact that he had been employed in this capacity only a few weeks; but that these facts raised such a presumption against the defendant as to make this an issue fit to be submitted to the jury under proper instructions. These are examples of decisions that support the statement of Mr. Labatt. If it be conceded that any of them states the rule in broader terms than is warranted, we think nevertheless that there can be no doubt under the authorities that the incompetence of an employee at the time of his employment may be of such a character that the evidence showing it will be legally sufficient to rebut the presumption that the employer used the requisite care in his selection, and make the question one for the jury. This is on the theory that the incompetence was of such a nature that a reasonable investigation would have disclosed it, and that, therefore, the employer either knew of it, or omitted to make such investigation,—the same theory upon which evidence of general reputation of the employee for incompetence is admissible to show want of care on the part of the employer. See *Gier v. Los Angeles Consol. Electric R. Co.* 108 Cal. 129, 41 Pac. 22; *Gilman v. Eastern R. Co.* 13 Allen, 433, 441, 90 Am. Dec. 210. When we speak of the time of his employment, we mean the time when he was assigned to the particular employment. An employer is bound to institute affirmative inquiries in order to ascertain the qualifications of an employee whom he transfers to a more responsible position, for which special qualifications are demanded, unless the employee has given proof of his capacity in some similar position. *Labatt, Mast. & S.* § 194. See also *Mann v. Delaware & H. Canal Co.* 91 N. Y. 495.

The rule we have just discussed appears to us to be peculiarly applicable to incompetence of the character found by the jury, on sufficient evidence, to exist in the present case, viz., want of knowledge by a conductor of a schedule train as to the meaning and effect of telegraphic orders referring to the movement of his train in relation to other trains on the road. The safety of all those associated with him is dependent on his having such knowledge, and the most or-

inary care requires reasonable affirmative investigation, on the part of the employer, to ascertain that the employee has it, before assigning him to the employment. Where such incompetence is shown, it is a fair inference that a reasonable investigation would have disclosed it, when it could have been remedied by proper instruction. The uncontested showing by an employer, in response to the *prima facie* case thus made, may doubtless be such, in some cases, as to require the conclusion, as a matter of law, that the requisite investigation was made, and that the result thereof fully warranted the employer in selecting the culpable employee. But the record here presents no such case. There was evidence showing some inquiry by the train master, and some discussion by him with Clark himself relative to the duties to be performed, about the time he was first assigned as a conductor; but the evidence in this behalf relied on by defendant was such that, assuming it to be without conflict, reasonable men might well differ as to whether it showed such investigation as was requisite under the circumstances. The proposed conductor was being taken from the position of brakeman, on a road where, by reason of the fact that there was only one engine and one train crew, it was not essential for even a conductor to know anything about the rules and orders for the meeting and passing of trains. His service in that capacity on that road had continued for nearly two years next preceding his employment on the road where the accident occurred. His former employment on the road where the accident occurred had been several years before, and in capacities wherein he was not required to charge his mind with rules and orders relative to the meeting and passing of trains. His reputation as a careful and competent man, and the recommendation of Mr. Rose, the former train master, amounted to no more than a showing that he was a competent railroad man within the lines of his knowledge and experience, and that he was the kind of man who might safely be made conductor of an extra train on defendant's road. Mr. Rose's statement to the train master was substantially that he was a valuable man, and that he had promised him a conductorship of a gravel train on this road when the same was put on. There was nothing in all this to warrant the conclusion on the part of the train master that, either by experience or actual instruction, Clark had acquired the adequate knowledge as to rules and orders relative to the meeting and passing of trains. The testimony as to the conversations between Clark and the train master at and about the time of his employment is not of such a nature as to re-

quire a conclusion that the train master was warranted in assuming that he had such knowledge, and the same must be said of the experience of Clark as conductor of the extra gravel train immediately prior to his employment as conductor of a regular freight train. A very clear knowledge, on the part of the conductor, of a regular schedule train as to the unprinted rule making a special "meet order" superior to all the printed "time-table rules" was especially essential, in view of the printed rules, which expressly declared extra trains "inferior to all regular trains," required "inferior trains" to keep out of the way of all "superior trains," and provided that, when the expected train is not found at the schedule meeting or passing point, the superior train will proceed on schedule time, and the inferior train will take siding and wait for the superior train.

The case of *Gier v. Los Angeles Consol. Electric R. Co.* supra, is much relied on by learned counsel for defendant, but we see nothing therein that is in conflict with what we have said. As the court there said, the act producing injury in that case "was not one evincing incompetence, employing the word strictly to denote a lack of skill or ability to use appliances or perform a duty in a workmanlike way, but was a single and signal exhibition of carelessness or recklessness," being the voluntary starting and sending ahead his electric car by a motorman under such circumstances that the car must strike the conductor who was standing at a switch. The motorman had been originally employed by the defendant as a driver of a horse car, and was subsequently trained as a motorman. At the time of his original employment, inquiry was made by the defendant of his former employers for whom he had acted in the capacity of driver of a horse car, and they had declared him "to be the best and most careful of men." It was in regard to such a case that the court said that defendant was not at fault in originally employing as a motorman a horse-car driver without questioning him personally, inasmuch as it took pains to avail itself of evidence upon the matter, "disinterested and superior,"—that of his former employers. But we do not desire to be understood as intimating that a personal examination of one about to be employed, even in such a responsible position as that of conductor of a railroad train, is always essential to the exercise of reasonable care. Such investigation as will warrant the assumption, under all the existing circumstances, that the employee has adequate knowledge and qualifications, is essential. Such an assumption may be warranted by the knowledge of the employer of the experience and reputation of the employee as to work calling for the

knowledge and qualifications adequate to the discharge of the duties of the place or by the recommendation of other persons on whom he is justified in relying. Each case must be determined on its own facts, and generally, as here, the question whether due care was exercised by the employer in this regard is one exclusively for the jury and trial judge. The verdict was not in conflict with any of the instructions.

The only other points made for reversal are as to the refusal of the trial court to give certain requested instructions to the jury. The first of these was one to the effect that, in determining the question of incompetence, the jury might take into consideration, "with other evidence" given on the trial, certain specified evidence. As to this instruction, it is sufficient to say that no reason appears why the court should have singled out a portion of the evidence given on the issue of incompetence, and specially directed that it might be considered. Under their general instructions, the jury must have known that this evidence, with all other evidence on the subject, was to be considered by them in determining the question. Instructions which are drawn solely for the purpose of, and which simply have the effect of, emphasizing some particular portion of the evidence, are not to be commended. The second, defendant's proposed instruction 9, was properly refused. While taken from the opinion in *Gier v. Los Angeles Consol. Electric R. Co.* 108 Cal. 129, 41 Pac. 22, it was misleading as applied to the facts in this case, and assumed facts as to which there was a conflict in the evidence, if, indeed, one of such assumed facts was not wholly at variance therewith. If the third, defendant's proposed instruction 12, had been limited to the proposition suggested by learned counsel, that, if defendant had made reasonable inquiry as to the fitness and competence of Clark at the time of his employment, with the result that Clark appeared to be competent, it had fulfilled its duty in the matter of selection, notwithstanding it was afterwards disclosed that Clark was in fact incompetent, it would doubtless have stated the law correctly. Such was the effect of other instructions given, as we read them. But by this proposed instruction it was attempted to have the court state what specific acts, inquiries, and information would constitute a reasonable investigation warranting the assumption of competence, and requiring a conclusion that defendant had used proper care. We think this proposed statement would have been very misleading as applied to the evidence given on the trial, and that the court properly refused to give it.

The instructions given by the learned

judge of the trial court were very complete and fair, and clearly and correctly stated the law applicable to the case.

The judgment is affirmed.

We concur: Beatty, Ch. J.; Shaw, J.; Sloss, J.; Lorigan, J.; Henshaw, J.

*Petition for rehearing denied January 2, 1909.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WILLIAM B. WILKINSON, Admr., etc.,
of Edward P. Wilkinson, Deceased.

v.

KANAWHA & HOCKING COAL & COKE
COMPANY, Plff. in Err.

(— W. Va. —, 61 S. E. 875.)

Pleading — variance.

1. The declaration charged it was defendant's duty to have a careful and competent person to "operate the knuckle where the cars were let down from the mine entry to the tippie below," but that, not regarding such duty, it employed "a totally incompetent and irresponsible boy of the tender age of fifteen years to operate said knuckle and levers necessary to operate

Headnotes by MILLER, J.

Case Note. — May incompetence of a minor to perform the duties of a particular employment be inferred from his minority alone.

In *Rickert v. Stephens*, 133 Pa. 538, 19 Atl. 410, it was held that, where there was nothing in the duty to be performed by the servant, a boy thirteen years old, which a boy of that age might not do as well as a full-grown man; and there was no evidence that he was incompetent,—the jury could not be asked to infer incompetence from the nature of his employment in connection with his age, since in civil cases there is no presumption that children under the age of fourteen are without judgment or discretion.

In *Rush v. Thomas D. Murphy Co.* 135 Iowa, 376, 112 N. W. 814, it was held that, in the absence of evidence as to the degree of skill required to operate an elevator, it could not be assumed that a boy fourteen years of age was so lacking in discretion as to be unable to perform such duties.

In *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 402, it was held that the hiring of a boy twelve years old to run an elevator in a store in which other children who were his fellow servants were required to ride was not in itself inferential evidence of the want of ordinary care in the hiring, on the part of the master, where there was no evidence that it could not be operated with perfect safety by a child of that age.

In *Walkowski v. Penokee & G. Consol.* 20 L.R.A. (N.S.)

said knuckle in letting down said cars off the hill." The evidence showed the word "knuckle" was sometimes used as an inclusive term, to embrace the drum house and all appurtenances at the head of the incline, but that the boy was employed simply to operate the chock blocks immediately at the knuckle, and that he was fifteen years and four months old. The word "knuckle" was employed in the declaration in its restricted sense. There was no material variance.

Negligence — infant over fourteen — discretion.

2. An infant, after reaching the age of fourteen years, is presumed to have sufficient discretion and understanding to be responsible for his wrongs, to be sensible of danger, and to have power to avoid it.

Master — employment of infant — incompetence — burden.

3. As a general rule, after a boy has reached the age of fourteen years, courts do not permit juries to presume him incompetent for the duties of a particular employment, because of minority alone; and, when over that age, the burden of proof is upon the one alleging incompetence.

Servant — Incompetence — appearance.

4. A jury cannot decide a person unfit for his employment on account of what they see, or suppose they see, or can read, in his face and manner while testifying before them.

Mines, 115 Mich. 629, 41 L.R.A. 33, 73 N. W. 895, it was held that there was no presumption of law that one seventeen or eighteen years of age could not operate a cage in a mine as safely and as well as one older.

In *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737, 26 N. E. 609, where it appeared that the only suggestion of the servant's incompetence as a telegraph operator was founded upon the fact that he was but a little over seventeen years of age; and it also appeared that he had more than a year's experience, and had discharged his duties intelligently, and that young men were generally better operators than older men,—it was held that the jury could not be permitted to infer that he was incompetent in fact from his age only.

In *Kansas & T. Coal Co. v. Brownlie*, 60 Ark. 582, 31 S. W. 453, a judgment for plaintiff was set aside upon the ground that the master was not guilty of negligence, where it appeared that the fellow servant who caused the injury was fourteen and one half years old; that his work required no great or special qualification; that it was a universal custom among others engaged in the same line of work to employ boys from twelve to fourteen years of age; that experience had shown that they were as efficient in that sphere as older persons; and that the trial court charged the jury that there was no evidence showing that the fel-

Master — negligence — employment of minor.

5. A case where the evidence failed to establish incapacity of a minor employee over fifteen years of age, and negligence in his employment and retention.

Same — competent and incompetent servants — employment.

6. The fact that other servants are competent will not excuse a master in employing an incompetent person to perform a particular service, although in conjunction with such competent fellow servants.

(March 17, 1908.)

ERROR to the Circuit Court for Kanawha County to review a judgment in plaintiff's favor in an action brought to recover damages for the killing of plaintiff's intestate, alleged to have been due to the defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Brown, Jackson, & Knight, for plaintiff in error:

There was a clear variance between the declaration and the evidence.

Snyder v. Wheeling Electrical Co. 43 W. Va. 661, 39 L.R.A. 499, 64 Am. St. Rep. 922, 28 S. E. 733; Richmond R. & Electric Co. v. West, 100 Va. 184, 40 S. E. 643; Richmond R. & Electric Co. v. Bowles, 92 Va. 738, 24 S. E. 388; Eckles v. Norfolk & W. R. Co. 96 Va. 69, 25 S. E. 545.

The rule making the age of fourteen the

low servant was incompetent, unless such deduction might be drawn from his age.

In Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187, where the injured employee contended that he was not engaged in the work for which he was hired, and that he, being a minor twenty years of age, was not qualified to do the hazardous work ordered, the court said: "When a person of apparently sufficient age, physical ability, and mental caliber to perform the service seeks an employment at the hands of a railway company, or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such a case we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competence for the place or that will convict the master of negligence for not so doing."

In Molaske v. Ohio Coal Co. 86 Wis. 220, 56 N. W. 475, it was held that the law presumes that a boy twelve years old is not competent to perform duties involving the personal safety of others, and requiring the exercise of a good degree of judgment and discretion, and constant care and watchfulness. The court placed its holding upon the presumption of the common law which fixes 20 L.R.A. (N.S.)

dividing line, on the one side, of which incapacity to appreciate and guard against danger will be presumed, and, on the other side, capacity will be presumed, is logical and reasonable.

Nagle v. Allegheny Valley R. Co. 88 Pa. 35, 32 Am. Rep. 413; Molaske v. Ohio Coal Co. 86 Wis. 220, 56 N. W. 475; Roanoke v. Shull, 97 Va. 419, 75 Am. St. Rep. 791, 84 S. E. 34; Williams v. Belmont Coal & Coke Co. 55 W. Va. 84, 46 S. E. 802; Bare v. Crane Creek Coal & Coke Co. 61 W. Va. 28, 8 L.R.A. (N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907; Sutherland v. Troy & B. R. Co. 125 N. Y. 737, 26 N. E. 609; Sullivan v. Lally, 166 Mass. 265, 44 N. E. 221; Kansas & T. Coal Co. v. Brownlie, 60 Ark. 582, 31 S. W. 453; Burke v. Syracuse, B. & N. Y. R. Co. 69 Hun, 21, 23 N. Y. Supp. 458; Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629, 41 L.R.A. 33, 73 N. W. 895; Smillie v. St. Bernard Dollar Store, 47 Mo. App. 402; Rickert v. Stephens, 133 Pa. 538, 19 Atl. 410.

Mere inexperience in duties involving no great amount of intelligence or skill is not necessarily evidence of incompetence.

National Fertilizer Co. v. Travis, 102 Tenn. 16, 49 S. W. 832.

Messrs. E. B. Dyer and J. W. Kennedy, for defendant in error:

It was negligence in the company to employ this boy, who was fifteen years old, and

the age when the presumption of capacity arises to commit crime at fourteen years.

In Carlson v. Wilkeson Coal & Coke Co. 19 Wash. 473, 53 Pac. 725, the court said that ordinary experience and observation would imply that a boy fourteen and one half years old was not ordinarily equal in strength or intelligence to a full-grown man, and that testimony showing that boys of the same age were frequently employed for the same character of work would not be determinative of competence.

In Bare v. Crane Creek Coal & Coke Co. 61 W. Va. 28, 8 L.R.A. (N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907, the employee was under thirteen years of age, and the court said: "The employer of a minor, without other notice, is charged with notice of such lack of capacity as is usual among minors of the same age, so far as his age is or should be known to his employer."

As to whether a breach of duty to employ or retain none but competent servants may be inferred from the fact of their incompetence, see case note to Still v. San Francisco & N. W. R. Co. ante, 322.

As to the necessity of instructing a minor who is of insufficient age or capacity to comprehend the dangers of his employment, see case note to Bare v. Crane Creek Coal & Coke Co. 8 L.R.A. (N.S.) 284.

As to the assumption of risks by minors, see case note to Mundhenke v. Oregon City Mfg. Co. 1 L.R.A. (N.S.) 279.

place him in the position of the highest importance.

Jackson v. Norfolk & W. R. Co. 43 W. Va. 382, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258; *Buswell, Personal Injuries*, § 202; *Giebell v. Collins Co.* 54 W. Va. 523, 46 S. E. 569; *Turner v. Norfolk & W. R. Co.* 40 W. Va. 680, 22 S. E. 83.

The age, the capacity, and discretion of the child to observe and avoid danger are questions of fact.

Bare v. Crane Creek Coal & Coke Co. 61 W. Va. 33, 8 L.R.A. (N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907.

Miller, J., delivered the opinion of the court:

The coal from defendant's mine No. 117 at Glen Ferris in Fayette county is brought out on cars of 2 tons' capacity, drawn by mules, over tracks distributed through the mine and extending out over a horizontal plane, whence the cars are let down in pairs over parallel tracks built upon an incline to a tippie at the railroad below, a distance of 1,200 feet. The point at which the incline begins is called the "knuckle," from its resemblance to a bent finger. The mechanism employed to lower the loaded cars and elevate the empty ones consists of a large drum, around which is wound a wire rope in opposite directions, the weight of the loaded cars on one track pulling the empty ones up on the other, their movement being regulated by a brake, controlled by one designated as "drum runner." At the knuckle is a mechanism designed to prevent the loaded cars brought out of the mine from going over the knuckle until the drum rope is attached. This consists of iron "chock blocks" 3 feet long, 3 inches wide, and 5 inches high, one for each rail of the double track, operated on pivots and so connected that they can simultaneously be thrown over the rails by means of one lever. The device is simple, and requires no special skill to operate it. The operator is designated as "chock-block tender." The lever for this device is located on one side of the double track, and that of the drum runner on the opposite side, and both located within what is called a "drum house." The drum itself is located some distance behind the drum house, and in front of it a hitching post so-called. When the loaded cars are brought out of the mine into the drum house and run down against the chock blocks, the rear car, coupled to the front one, is tied to the hitching post by use of a grass rope, and the end of the wire rope is attached to it also. When the cars are ready to descend, the chock-block tender, upon signal from the drum runner, opens the blocks

by use of the lever, and the cars are eased off by means of the grass rope in charge of one man, until the slack of the wire rope is taken up; and it is the duty of the chock-block tender, immediately after the empty cars come up over the knuckle, to close the blocks behind them. There are thus four persons employed in this operation,—drum runner, chock-block tender, hitching-post man, and the man who attaches the ropes to the cars. They each have other duties to perform about the work besides the special ones referred to, in taking the empty cars back to the mine, and bringing the loaded ones forward to the knuckle. The tippie at the foot of the incline is in charge of a weighmaster whose duty it is to weigh all coal dumped there. Others are employed at the tippie also, not necessary to mention.

On November 9, 1903, the defendant had employed as chock-block tender, Leonard Lloyd, a boy fifteen years and four months of age. He had been then employed about three days, but had performed faithfully and successfully the duties of his position, without complaint or cause of complaint so far as the record shows, up until 4 o'clock of that day, when two empty cars on the incline jumped the track just as they were coming up over the knuckle, and, before the chock-block lever could be operated, had to be gotten on the track and removed off the knuckle. This required the assistance of all employees at that point, including Lloyd, for some four or five minutes. After they passed the knuckle, all assisted in pushing them on towards the opening of the mine. Lloyd in the exigency forgot to throw the chock blocks back over the track, and about the same time two loaded cars from the mine, brought into the drumhouse by the drum runner, who failed to observe that the chock blocks had not been thrown over the track, escaped over the knuckle and down the incline to the tippie, where they struck the plaintiff's intestate, Edward P. Wilkinson, the weighmaster, and two other employees, resulting in the almost instant killing of each. It was to recover damages for the death of Wilkinson that this action was brought by his administrator.

The declaration, in one count, by way of charging the defendant's duty and breach thereof, avers that it was the duty of said defendant to have a careful and competent person "to operate the knuckle where the cars were let down from the mine entry to the tippie below," but that, not regarding such duty, it employed "a totally incompetent and irresponsible boy of the tender age of fifteen years to operate said knuckle and levers necessary to operate said knuckle in letting down said cars off the hill," knowing

that said boy was incompetent to perform said work; it further avers that certain loaded coal cars were permitted, through the incompetency of said boy in operating said knuckle, to run down the incline and kill the plaintiff's intestate. On the trial, there was a verdict and judgment for the plaintiff for \$5,500. For alleged errors committed by the trial court, the defendant has brought the case here for review.

First, it is claimed there is a fatal variance between the declaration and the proof. The argument on this point is that, as the evidence disclosed, the term "knuckle" is frequently used as an inclusive term, embracing the drum house and all appurtenances at the head of the incline, and was sometimes so employed by the witnesses in their testimony; and that it was in this sense the pleader intended to use it in the declaration. But we do not think the point meritorious. The declaration clearly distinguishes between the operation of the drum and that of the knuckle, and the negligence charged clearly relates to the employment of the boy to operate the knuckle. At the knuckle, according to the testimony, the boy was in fact employed; and we perceive no substantial variance between the *allegata* and *probata* in this respect. Another point of alleged variance is that the declaration charges the boy to have been fifteen years old, whereas the proof showed he was fifteen years and four months old. We see no merit in this point. It is customary to speak of one's age as of his last birthday. This is the common meaning of the word. In life-insurance contracts, the rule is to refer the age to the nearest birthday; and it would be most unusual in a declaration of this character to charge the age with literal accuracy as to months and days.

The motion of the defendant to exclude the plaintiff's evidence, the questions presented by its instructions 1, 5, 7, and 8, all refused, and the errors relied upon, all depend on this sole question, in its various phases, whether the defendant was guilty of negligence in employment of Lloyd as chock-block tender. Instruction No. 1 told the jury that the evidence would not support a verdict for the plaintiff; No. 5, that, if they found Lloyd "was smart and bright, of strength adequate to the performance of the duties of his employment, was instructed in the performance of those duties, and knew what would be the natural consequences of a failure to perform those duties," his employment was not negligence; No. 7 was practically of the same import, except that it took into account the previous experience of Lloyd in working about mines; No. 8 took into consideration the facts supposed in 5 and 7, 20 L.R.A. (N.S.)

and told the jury that, if they believed from the evidence Lloyd was placed under the direct supervision and subject to the orders of the drum runner, who was experienced, skilled, and competent, and whose duty it was to see that Lloyd and the other helpers performed their respective duties, and that the conditions of the work were such that the drum runner could see that his respective helpers, including Lloyd, performed their duties, then the defendant was not negligent in employing Lloyd, although he was without previous experience.

It is conceded that, in an action of this kind, the burden is upon the plaintiff, as a condition of recovery, to prove not only incompetence of Lloyd, but also negligence in his employment and retention; and, if he has failed in this, defendant's instructions 1, 5, 7, and 8 clearly should have been given. The evidence of the defendant stands uncontradicted, and Lloyd as a witness for plaintiff admits that, at the time of his employment, he was instructed in the duties of his position; and that these duties, which were simple, consisting simply of opening and closing the blocks by the operation of a lever, had been performed successfully up to the hour of the accident. That he had physical strength, intelligence, and discretion necessary to properly operate these blocks was practically demonstrated. That he was negligent, as it seems were all the other employees, in not seeing that the blocks were closed before the loaded cars ran down over the knuckle, is admitted; but such negligent act does not establish incompetence on his part. The plaintiff claims to have discharged the burden of proof by evidence of Lloyd's age, his previous inexperience in operating chock blocks, his appearance on the witness stand, his height of 5 feet and weight of only 110 pounds, together with the character of his testimony on cross-examination. There were no other facts proven from which it is even claimed the jury were justified in their finding of negligence.

As tending to show Lloyd's competence, the undisputed evidence was that he had been employed about the mines from the time he was ten years old, under his father, an experienced mine foreman; had helped mine coal, grease and couple cars; had been employed as "trapper" in tending the doors in the mines controlling ventilation; had "spragged" cars, involving the running alongside moving cars in the darkness of the mine and sticking in the revolving wheels pegs to chock or "sprag" them; had thrown the switches on the parting in the mine, the place where loaded cars are assembled to be taken to the outside and to which empty

cars are brought back for distribution. Some evidence tends to show that the mine foreman, at the time he employed Lloyd, though living for some time theretofore in the same house with him, did not know of this previous experience. But certainly, if Lloyd was competent, the fact that the foreman neither knew of this previous experience nor made inquiry on the subject could not render the company liable; if incompetent, failure to make investigation would, of course, be actionable negligence. Let us see now whether, under the authorities, the alleged evidence of incompetence was such as to justify the submission of that question to the jury. If so, we would not be justified in disturbing their verdict.

First, with respect to the age of the boy. It is conceded that, by common law, an infant after reaching the age of fourteen years is presumed to have sufficient discretion and understanding to be responsible for his wrongs, to be sensible of danger, and to have power to avoid it. *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *Molaske v. Ohio Coal Co.* 86 Wis. 226, 56 N. W. 475; *Rickert v. Stephens*, 133 Pa. 538, 19 Atl. 410. Our statute recognizes this common-law capacity, in providing by § 4, chap. 82, Code 1906, that if above that age he may nominate his own guardian, and, by § 3, chap. 83, that, when his land is to be sold by the proceedings there prescribed, he shall, if over fourteen, answer the bill on oath in proper person. Moreover, by § 13, chap. 15, Code 1906, coal companies are permitted to employ as workmen in the mines boys 12 years of age. It has been held, however, that statutes of this character do not raise a presumption of capacity in an infant. *Carlson v. Wilkeson Coal & Coke Co.* 19 Wash. 475, 53 Pac. 725. After the age of fourteen, therefore, as a general rule, the courts do not permit juries to presume a boy incompetent because of minority alone. *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737, 26 N. E. 609; *Sullivan v. Lally*, 166 Mass. 265, 44 N. E. 221; *Kansas & T. Coal Co. v. Brownlie*, 60 Ark. 582, 31 S. W. 453; *Walkowski v. Penokee & G. Consol. Mines*, 115 Mich. 629, 41 L.R.A. 33, 73 N. W. 895; *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 402; *Rickert v. Stephens*, supra. The above authorities hold that, where a boy is over the age of fourteen, the burden is upon the plaintiff to show incapacity; if under that age, the burden of showing capacity is upon the defendant. See also *Molaske v. Ohio Coal Co.* and *Carlson v. Wilkeson Coal & Coke Co.* supra.

It is true, however, that, "upon the clearest grounds of necessity and good faith, ordinary care in the selection and retention

of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered." *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932. It is admitted in this case that the position of a chock-block tender was an important one, in view of the danger to life from neglect of his duties; but it is not pretended that these duties required, for proper performance, any special skill or experience. Any person of adequate strength to work the lever, and of sufficient age and discretion to understand the results of failure to properly and faithfully perform the duties required, would be reasonably suitable for the position. Accordingly, it was held in *Sullivan v. Lally*, supra, that a boy fifteen years and four months old, of average intelligence, who had run a freight elevator a few times, would not be presumed incompetent to understand the dangers; in *Kansas & T. Coal Co. v. Brownlie*, supra, that a boy fourteen years old would not be presumed incompetent, by reason of youth, to trap in a mine; in *Burke v. Syracuse, B. & N. R. Co.* 69 Hun, 21, 23 N. Y. Supp. 458, that a boy seventeen years old would not be presumed incompetent as a switchman by reason of youth; in *Walkowski v. Penokee & G. Consol. Mines*, supra, that negligence is not shown by the mere fact of employing a boy of seventeen to manage a brake controlling passenger cages in a mine; in *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 48 S. W. 832, that mere inexperience in duties involving no great amount of intelligence or skill is not necessarily evidence of incompetency.

In *Sullivan v. Lally*, supra, the court said: "It does not appear that the plaintiff did not possess the average intelligence of boys of his age. There was nothing unapparent or complicated about the elevator or its operation. The plaintiff testified that he knew all there was to do with the elevator, and no reason is disclosed why he should not have known it, though he was only fifteen years and four months old at the time of the accident."

In *Smillie v. St. Bernard Dollar Store*, supra, where the boy employed to run an elevator in a store was only twelve years of age, the court said: "Nor [was there] any evidence whatever that the elevator, owing to its size, construction, or propelling power, could not be run with safety to all within by a boy of that age. There was no evidence whatever that boys of that age are not usually employed for similar work. As far as

that branch of the case is concerned, it rests on the simple proposition that the boy was twelve years of age, and that his employer might have known the fact, as the boy presumptively indicated it by his appearance, in the absence of evidence to the contrary." In that case the verdict for the plaintiff was set aside, on the ground that the proof was insufficient to establish negligence in employment of the boy.

In *Holland v. Tennessee Coal I. & R. Co.* 91 Ala. 444, 12 L.R.A. 233, 8 So. 524, on the authority of a number of other Alabama cases, the court said: "The selection of a servant must, of course, be made with a view to the nature of the employment. If it involves special knowledge or experience, only men of special knowledge and experience should be employed. If the work may be well done by the unskilled and inexperienced, it cannot be said that the master is lacking in the measure of care he owes to other employees should he employ unskilled and inexperienced men upon it."

It is said in 1 Labatt on Master & Servant, 407, that "the fact that the delinquent servant was a minor is an important, though not decisive, element in determining his competency. Its evidential weight depends upon the character of the work to be done, the servant's previous experience, and his actual age." In view of what is said in the decisions there cited and others, it is not to be inferred, however, that the writer means to say that the fact of age alone, when above fourteen, may be submitted to the jury on the question of capacity, but that where, as in those cases, there is other evidence of incapacity, the fact of infancy may be considered as an important one along with the other evidence; for, as well said in *Nagle v. Allegheny Valley R. Co.* supra: "That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury. It is a question of law for the court." Nor will a single act of negligence suffice to prove incompetency. 1 Labatt, Mast. & S. 409. This writer says, at page 411, that, "in regard to the question whether the plaintiff is entitled to introduce evidence that the delinquent servant had been guilty of several acts of negligence prior to the time of the accident in suit, the courts are not unanimous;" although he gives it as his opinion that, by the weight of authority, such evidence is competent on the question of unfitness.

In *Core v. Ohio River R. Co.* 38 W. Va. 456, 20 L.R.A. (N.S.)

18 S. E. 596, it is said that "the failure of the fireman to respond to the signals at Raven's Rock, the testimony of the conductor . . . that 'the fireman was not known and recognized to be a skilled engineer,' and the accident itself," were wholly insufficient to prove negligence in employing the fireman. But it is argued here that *Bare v. Crane Creek Coal & Coke Co.* 61 W. Va. 28, 8 L.R.A. (N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907, supports the proposition that, as matter of law, a boy of the age of Lloyd is presumptively incompetent, on account of youth, to fill a position of the importance of chock-block tender. That was a case of injury to the boy himself, and is not opposed to the authorities already cited applicable to injuries to a fellow servant. Even in cases of injury to the boy himself the rule, as stated in that case, is that the case should be taken from the jury "where the clear weight of the evidence shows that the child had a capacity for self-protection which he culpably omitted to use, in face of a danger which it knew and sufficiently apprehended."

What may be said of Lloyd's appearance and testimony before the jury, as evidential facts of incapacity? The courts, so far as we have been able to find decisions on the subject, hold that a jury is not authorized to decide a person unfit for his employment on account of what they see, or suppose they see, or can read, in his face and manner while testifying before them. *Corson v. Maine C. R. Co.* 76 Me. 244; *Peaslee v. Fitchburg R. Co.* 152 Mass. 155, 25 N. E. 71; *Keith v. New Haven & N. Co.* 140 Mass. 175, 3 N. E. 28; *Missouri P. R. Co. v. Christman*, 65 Tex. 369; *Core v. Ohio River R. Co.* supra. This court, in the latter case, quotes approvingly *Corson v. Maine C. R. Co.* supra: "If the jury undertook to decide that Arnold was an unfit person to be employed as a brakeman on account of what they saw, or supposed they saw, or could read, in his face and manner while testifying before them as a witness, they did fall into a grave error. As well might a jury find a man guilty of murder because in their opinion they could see guilt in his face. The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict upon, not even against a railroad corporation. In a case like this the law imposes upon the plaintiff the burden of proving that the defendant corporation has been guilty of negligence in employing a man known to be unfit for the place which he is to fill; and we feel no hesitation in saying that this burden cannot be sustained by the man's looks and manner while testifying as a witness."

The following testimony of Lloyd on cross-examination is relied on:

Q. You had been around the mouth of the mines, although you had not been there?

A. Yes, sir; I had been around, not very much.

Q. You knew what the blocks were for?

A. Yes, sir; I knew what for, to keep cars from going over the hill.

Q. You knew if the blocks were not closed the cars would go over the hill and into the tipple?

A. Go over the hill somewhere, I knew that.

Much stress is laid on the last answer, as evincing lack of capacity to appreciate the dangers resulting from negligence. We are unable to concur in this view. We do not see anything in the nature of the testimony to evince lack of competence, or want of appreciation of the dangers incident to neglect. The last answer was guarded; it evinces rather a sense of discrimination than otherwise. When the witness said the cars would "go over the hill somewhere," he meant that if they kept the track they would go to the tipple of course, but if they jumped the track, as the empty cars had done before the accident, they might go elsewhere and never reach the tipple. Clearly this evidence did not show incompetence on the part of the witness to perform his duties.

We think, therefore, that instructions 1, 5, 7, and 8 should have been given. The first, that the evidence was insufficient to support a verdict for the plaintiff and that the jury should find for the defendant, if given, however, would have rendered the others unnecessary.

As to the other group of instructions refused, Nos. 10 and 11, we do not think they are pertinent, and they were properly rejected. They are based on the theory that the drum runner was foreman and Lloyd and the other men employed at the drum house were under him. No. 10 tells the jury, on this theory, that, although they might find Lloyd incompetent and unfit for his position, and that he negligently left the blocks open on the occasion of the accident, yet, if they find that the drum runner was skilled, experienced, and competent; and it was his duty to see that Lloyd performed his duties, and could have seen that Lloyd had left the blocks open before starting to run the loaded cars, and, if he had so seen, could have prevented the loaded cars from going over the knuckle but failed therein,—then they must find for the defendant; No. 11 tells the jury, on the same theory, that, if they believe that the accident would not have happened except for the negligence, subsequent to the negligence of Lloyd, of another employee or employees skilled, experienced, and incompetent, they must find for the defendant. These 20 L.R.A. (N.S.)

instructions were not justified by the facts proven. It is clearly shown that, although Lloyd was employed at the same place with the drum runner and the other persons referred to, yet he was employed for the distinct purpose of operating the chock blocks, and charged with responsibility thereof; and it cannot be said the other employees had any duty to perform in reference to the blocks, except of a negative character,—that is, not to heedlessly run cars over the knuckle when the blocks were open. Nor do we think the defendant could have been excused for incompetence in Lloyd because of any superior authority over him of the drum runner.

For the reasons assigned, the judgment is reversed, the verdict set aside, and the defendant awarded a new trial.

Petition for rehearing denied June 10, 1908.

CALIFORNIA SUPREME COURT.

RE FRANK KELLY.

(— Cal. —, 99 Pac. 368.)

Pardon — condition — breach — termination of sentence.

The expiration of the term for which a convict was sentenced does not make inoperative a provision in a conditional pardon that, if he is subsequently convicted of crime, he shall serve the unexpired time in addition to that imposed by the new sentence; but he may be compelled to serve out such unexpired term, although his subsequent conviction does not occur until after the expiration of the term of the original sentence.

(December 30, 1908.)

Note.—The few authorities upon the question decided in the foregoing case are collated in *Ex parte Prout*, 5 L.R.A. (N.S.) 1064, and the case note appended thereto. Since that decision was rendered but one other case involving this question has been reported. That case is *State v. Horne*, 52 Fla. 125, 7 L.R.A. (N.S.) 719, 42 So. 388, in which it was held that a provision in a conditional pardon, that, upon a breach of the condition upon which the pardon was granted, it should be the duty of any sheriff immediately to arrest the person pardoned and return him to the penitentiary, to serve out the remainder of his term, referred to the length of imprisonment fixed by the sentence, and not to the particular period of time mentioned in the sentence during which it was to be executed; the latter not being a material or effective part of the sentence.

APPPLICATION for a writ of habeas corpus to secure the release of petitioner from the custody of the warden of Folsom prison, by whom he was held in confinement for the alleged violation of a conditional pardon. Denied.

The facts are stated in the opinion.

Beatty, Ch. J., delivered the opinion of the court:

In April, 1897, the petitioner was sentenced to a term of fifteen years' imprisonment in the Folsom state prison for the crime of burglary. Under the law allowing credits for good conduct,—all of which he earned during the period of his confinement,—his term would have expired on the 14th day of September, 1906. He was, however, discharged from the prison on May 15, 1905, in obedience to a conditional pardon or commutation of his sentence by Governor Pardee. The condition of his release was stated in the proviso: "That if, after said day of discharge, said Frank Kelly shall be convicted of any felony, this commutation of sentence shall become void, and, in addition to the penalty which may be imposed for said felony, he shall be compelled to serve so much of the sentence upon his aforesaid original conviction as he had not served at the time of his discharge under these presents." In January, 1907, the petitioner was again convicted of a felony upon which he was sentenced to a new term of two years' imprisonment at Folsom. This term, less the credits earned and allowed under the statute, had fully expired, but the petitioner was still detained by the warden of the prison, when he commenced this proceeding. The return to the writ shows that there is no warrant for his further detention except the enforcement of the condition stated in the above-quoted proviso of the governor's commutation.

The prisoner was not represented by counsel at the hearing, but contended in his own behalf that the condition annexed to the commutation of his first sentence became inoperative from and after the 14th day of September, 1906, the date when that sentence expired by law, and when, in fact, its expiration was regularly entered in the records of the prison. He does not, as I understand his argument, question the power of the governor, in granting a commutation of a sentence of imprisonment, to annex a condition subsequent, violation of which within the unsatisfied portion of his term will work a forfeiture; but he insists that, after the full term has expired, such a condition is also at an end.

This question, so far as I am advised, is entirely new. No authorities are cited, and I know of none. Regarded as an original
:20 L.R.A. (N.S.)

proposition, it seems reasonable to say that, since the power of the governor to grant pardons and commutations is absolute under the Constitution, except in cases of prior conviction, the power to annex to a pardon or commutation any reasonable condition, prior or subsequent, is implied upon the principle that the greater includes the less. No consideration of public policy stands in the way of this conclusion, for such action by the governor is in perfect harmony with the policy of the parole system in force in this state, and is a useful and beneficial application of that policy to the class of cases in which the governor would be willing to exercise clemency if he could exact some security for the future good behavior of the prisoner.

I think the present detention of petitioner is not unlawful, and he is therefore remanded to the custody of the warden at Folsom.

CALIFORNIA SUPREME COURT.

(Department No. 2.)

GOTFRED HANSON, Resp.,

v.

E. R. FOX, Appt.

(— Cal. —, 99 Pac. 489.)

Land contract — tender — default — rescission.

1. One entitled to a deed of land upon payment of instalments covering several months cannot put the vendor in default so as to effect a rescission of the contract by making a present tender of the full amount due.

Same — imperfect title.

2. That the title of one who has contracted to convey real estate at a future time is not perfect is no ground for the rescission of the contract until the time for performance arrives.

(January 5, 1909.)

Case Note. — Effect of tender by vendee of purchase price before due, to put other party in default.

This note is limited strictly to those cases passing on the question whether a vendee has the right to tender the purchase price before it is due, and whether such a tender is sufficient to put the vendor in default. It should therefore be noted that, although there may be many other cases dealing with the question of premature tender as connected with bonds, redeeming of mortgages, etc., they have been expressly excluded from this note.

In accordance with *HANSON v. Fox*, it seems to have been almost uniformly held

APP^{EAL} by defendant from a judgment of the Superior Court for Los Angeles County in plaintiff's favor in an action brought to rescind certain land contracts and to recover moneys paid thereon. Reversed.

The facts are stated in the opinion.

Mr. Lucius M. Fall, for appellant:

The tax deed conveyed to defendant an absolute title in fee; and, until that deed had been declared void by a final decree of the court, his title was good and his contract unbreached.

Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Shively v. Semi-Tropic Land & Water Co. 99 Cal. 259, 33 Pac. 348; Garberino v. Roberts, 109 Cal. 126, 41 Pac. 857.

Messrs. Conkling & Bretherton, for respondent:

The law implies as one of the conditions and considerations of a contract for the sale of land that the vendor owns the property in question, and that his title thereto be marketable.

that a vendee, whether of realty or personalty, has no more right to tender the payment of the purchase price before due than has the vendor the right to demand it before due. And, if he does so, the vendor loses no rights, nor does the vendee gain any.

In Parbour v. Hickey, 2 App. D. C. 207, 24 L.R.A. 763, it was held, in an action for specific performance of a contract to convey real estate, that the tender of the whole amount of the purchase money before it was due, when the contract provided that part was to be paid in interest-bearing notes, is not a proper tender of the performance of the contract. The court said: "The tender of the whole amount of the purchase money within the twenty days was not what was contemplated by the contract. By the terms of the contract, the defendant Hickey was entitled to receive in cash \$2,500 of the purchase money, and the balance in three notes, at one, two, and three years, to bear interest at the rate of 6 per cent. This investment of a portion of the purchase money may have been a very material consideration with the defendant Hickey, inducing him to enter into the contract of sale. Clearly, the plaintiff had no right to require the defendant to forego his right to receive the notes, according to the terms of the agreement."

To the same effect is Burns v. True, 5 Tex. Civ. App. 74, 24 S. W. 338, where a person made a premature tender of the whole amount due, represented by several notes for the purchase price of horses.

In Reed v. Rudman, 5 Ind. 409, it was held that a premature tender of land warrants which, on a day certain, were to be exchanged for a tract of land, was unavailing, and therefore did not put the other party in default.

In Morgan v. East, 126 Ind. 42, 9 L.R.A. 20 L.R.A. (N.S.)

Wilcox v. Lattin, 93 Cal. 588, 29 Pac. 226; Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280.

The right to title does not depend on contract, but is given by law.

Ludlow v. O'Neil, 29 Ohio St. 182; Richmond v. Gray, 3 Allen, 27.

Henshaw, J., delivered the opinion of the court:

Defendant entered into separate contracts for the sale of two lots of land. The contracts were similar in terms. One was made with plaintiff, the other with plaintiff's assignor. In each case a part of the purchase price was paid at the execution of the contract, and the remainder of the purchase price was to be paid at the rate of \$10 per month. The unpaid part of the purchase price was evidenced by 35 promissory notes, each for \$10, bearing interest at 7 per cent after the dates when respectively they became due. Plaintiff made a tender of the total sum due under these contracts,

558, 25 N. E. 867, it was held that a tender of money in satisfaction of the amount of his bid, by one who, acting as clerk at a public sale, bid off property sold thereat, will not vest the title to the property in him, so as to enable him to recover it from the possession of the seller, where the terms of sale provided for payment in interest-bearing notes, with surety. The court said: "A seller may prefer interest-bearing promissory notes to money, for he may regard it as beneficial to him to secure such notes as an investment, and it is not for the buyer to make an election for the seller. But it is immaterial whether the provision for an interest-bearing note was beneficial or was not, for a party who sells property may stand upon his contract whether it is beneficial to him or not; and it is the duty of the buyer to perform his part of the contract as it is written. A tender required by a contract is insufficient unless it is such as corresponds with the provisions of the contract."

In Abshire v. Corey, 113 Ind. 484, 15 N. E. 685, it was held that tender of payment of a note before due was of no effect.

A case closely related to the above is Schultz v. O'Rourke, 18 Mont. 418, 48 Pac. 634, where it was held that a tender of stock representing an interest in property purchased under a contract reserving to the purchaser the right to rescind at the expiration of one year is premature if made before the expiration of the year.

However, in Eaton v. Emerson, 14 Me. 335, a tender of a note given as the purchase price for land, two days before due, but with the full amount of interest, was held good; and especially so where the vendor admitted the tender and made no objection on account of the time.

and, upon defendant's refusal to accept the tender, he brought this action, treating the refusal as a breach and asking for a rescission. In addition to the matters above set forth, he charged that defendant does not and never has owned the lots which he contracted to sell, and has no title to them other than that evidenced by a tax title, which he charges to be void. The findings of the trial court adopted plaintiff's view, and gave judgment accordingly, from which judgment and from the order denying his motion for a new trial, defendant appeals.

It is shown by the contracts that plaintiff was not entitled to demand his deed until final payment. In other words, defendant had contracted to convey title to plaintiff thirty-five months after the execution of the contract. The plaintiff's offer of a lump sum, under conditions at variance with the terms of the contract, was not a legal tender under the contract, and could not operate to place defendant in default. In strictness plaintiff had no more right to offer the total sum, and claim rescission because of defendant's refusal to accept it, than defendant would have had to have demanded the lump sum and claim a rescission because of plaintiff's refusal to pay it. The rights of each are prescribed by the contract, and neither party can be put in default by insisting upon a compliance with the terms of the contract, or by refusing to accede to a demand not contemplated by those terms.

Nor does the fact which the court found, namely, that defendant had no title to the lots, afford any reason for the interposition of equity. In a case such as this it is perfectly legal for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. Such is, and always has been, the settled rule in this state. Thus, in *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, the vendors, under contract of sale, had actually conveyed the land to a third person, and rescission was sought. This court said: "The conveyance by the vendors was not a breach of the contract. One may sell land which he does not own, and yet be able when the time of performance arrives to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title."

So, in *Shively v. Semi-Tropic Land & Water Co.* 99 Cal. 259, 33 Pac. 848, this court, 20 L.R.A. (N.S.)

declaring that a transfer of land to third parties during the existence of an executory contract of sale does not constitute abandonment or rescission of the executory contract, said: "Defendant as yet has not defaulted, and might not suffer default when the balance of the purchase price was tendered and a deed demanded; and the plaintiff is not entitled to recover the money paid until he shows the default of the defendant." The same principle is announced and rule laid down in *Garberino v. Roberts*, 109 Cal. 126, 41 Pac. 857; and it is further said: "In order to put defendant [vendor] in the wrong, it was incumbent upon him [the vendee] to await the time of performance provided in his contract, and thereupon make his tender of performance and demand his deed." So here, whatever may have been the condition of defendant's title, under the contract, he had thirty-five months in which to perfect it, and could not be placed in default until at the expiration of thirty-five months, payments having been duly made by the vendee and demand by the vendee made for the deed, defendant was unable to comply with such demand. The effort to place defendant in default by a tender made in advance of the time, and under circumstances not contemplated by the contract, and to claim the right of rescission because then the vendor could not convey merchantable title, was unavailing and nugatory.

The judgment and order appealed from are reversed and the cause remanded.

We concur: **Lorigan, J.; Melvin, J.**

COLORADO SUPREME COURT.

JOHN T. DUNCAN

v.

NATIONAL MUTUAL FIRE INSURANCE COMPANY.

(— Colo. —, 98 Pac. 634.)

Insurance — warranty — dimensions.

1. A statement regarding the dimensions of a building, in an application for insurance, is not warranted correct by a warranty that the description and statement of

Case Note. — Insurance; misrepresentation as to dimensions of insured building.

Garrison v. Farmers' Mut. F. Ins. Co. 56 N. J. L. 235, 28 Atl. 8, is the only other case which has been found presenting a question as to the effect of a misdescription of the dimensions of a building insured against fire. In that case one of the conditions of the policy was that, if the insured should

the condition, situation, value, occupancy, and title of the property are true.

Same — representation — materiality.

2. A statement of the dimensions of the building in an application for insurance is not within a provision of the policy that it shall be void for misrepresentation of any material fact, if it does not appear that the insured was influenced in issuing the policy because of the statement regarding the dimensions of the building.

Same — value — substantial accuracy.

3. A substantially true statement of the value of a building, in an application of insurance, is a compliance with the warranty of the statement of value.

Same — gross inaccuracy.

4. The valuation at \$1,500, in an application for insurance of a building which is worth only \$200, cannot be regarded as so approximately correct as to comply with a warranty of the statement of value.

Same — estimation of value.

5. Statements in an application for insurance that the value of the property is estimated by applicant does not prevent a gross overvaluation from avoiding the policy, where the statement of value is warranted.

Pleading — defense — sufficiency — insurance policy — representation.

6. A statement in a paragraph of defense to an action on an insurance policy that applicant represented the value of the property to be a certain amount, is not insufficient to raise the question of breach of warranty if, from the defense as a whole, it appears that the statement of value was warranted to be true.

Insurance — fraud — return of premium.

7. To entitle an insurance company to defeat liability on a policy because of fraud, it is not required to tender back the premium received.

Same — additional insurance — absence of risk.

8. An application for additional insurance will not avoid a policy under a provision therein that it shall be void if assured shall procure any other contract of insurance, whether valid or not, on the property, if both the owner and the company to which the application for additional insurance is made understand that no risk is assumed under it.

Same — vacancy — report.

9. A provision in an insurance policy

cause the subject insured to be described "otherwise than it really is, so that the same will be charged at lower premium than otherwise proposed, or such description be false or fraudulent, such insurance will be void and of no effect." By some inadvertence the building was described in the application as 29 by 48 feet, when its dimensions were really 43 by 48 feet. It was said by the court that the question would have to be answered by an appeal to 20 L.R.A. (N.S.)

which is to become void if the building becomes and remains vacant for five days, unless continued by consent of the insurer, that it shall be the duty of the owner to report a vacancy within five days of such occurrence and as often as every ten days thereafter, applies only when no permit for vacancy has been issued.

Appeal — insurance — vacancy — permit.

10. The question of the effect of vacancy of a building without knowledge of the insurer, prior to the issuance of a vacancy permit, upon the validity of the policy, cannot be raised for the first time on appeal.

Insurance — vacancy — waiver.

11. Issuance by an insurer of a vacancy permit with knowledge that the building has been vacant, waives a forfeiture because of such vacancy.

Trial — absence of instruction — request.

12. Mere failure to instruct the jury on a particular issue is not reversible error, unless a specific instruction, good in point of law, covering the omission, is requested.

Insurance — misstatement of title — waiver.

13. Breach of warranty of a statement of title in an application for insurance is waived if the facts are presented to the agent, and he concludes that the facts establish the title stated, upon which conclusion the statement is inserted in the application.

Same — leasehold — requirement of fee.

14. A policy issued upon an application stating the title to the land on which the building is situated to be a lease is not avoided by a provision in the policy that it shall be void if the land is not owned by the insured in fee simple.

(November 11, 1908.)

CROSS APPEALS from a judgment of the District Court for Boulder County in plaintiff's favor in an action brought to recover the amount alleged to be due on a policy of fire insurance; plaintiff assigning cross errors on the sustaining of certain defenses presented by the insurer. Reversed on defendant's appeal.

The facts are stated in the opinion.

Mr. Guy D. Duncan, for plaintiff:

The inaccuracy in stating the dimensions was not a breach of warranty.

the terms of the condition set out, and the holding was that, if the misdescription caused the insurance to be charged at a lower premium than would have been charged if the building had been properly described, it avoided the policy; otherwise not. Cases involving misdescription as to the number of stories, or other details that affect the character of the structure, present a somewhat different question.

Wilkins v. Germania F. Ins. Co. 57 Iowa, 529, 10 N. W. 916; *Martin v. State*, 44 N. J. L. 485, 43 Am. Rep. 397; *May, Ins.* §§ 198, 199; *Travelers' Ins. Co. v. Lampkin*, 5 Colo. App. 177, 38 Pac. 335.

The error was not shown to have been prejudicial to the parties seeking to take advantage of it.

Dillon v. Russell, 5 Neb. 484; *De Lappe v. Sullivan*, 7 Colo. 182, 2 Pac. 926; *Schoolfield v. Houle*, 13 Colo. 394, 22 Pac. 781; *Andrews v. Carlile*, 20 Colo. 370, 38 Pac. 465; *May, Ins.* § 158.

The risk was not in any way increased or made more hazardous by the change of title.

Wich v. Equitable F. & M. Ins. Co. 2 Colo. App. 484, 31 Pac. 389.

Messrs. *Clay B. Whitford and Henry E. May* for defendant.

Gabbert, J., delivered the opinion of the court:

The appellant, the National Mutual Fire Insurance Company, issued a policy of insurance to Duncan, the appellee, whereby it insured a building of the latter, located at Camp Francis, against loss by fire, in the sum of \$1,000. Subsequent to the issuance of the policy the building was burned. The company refused to pay the loss, and Duncan brought suit to recover on his policy. There was a verdict and judgment for the plaintiff, from which the insurance company prosecutes this appeal.

As a defense to the action, the defendant interposed seven separate defenses. Each of these defenses was challenged by a general demurrer, which was sustained as to the fifth and sixth. The company elected to stand on these defenses. The fifth is as follows: "(5) For a further and fifth defense, this defendant says: That the policy of insurance so issued to the plaintiff by the defendant, as in the plaintiff's complaint set forth, contained the following provision: 'This policy is made and accepted subject to the foregoing stipulations, conditions, and by-laws of the National Mutual Fire Insurance company.' That article 32 of the by-laws of the defendant company is as follows: 'The application, by-laws and policy constitute the entire contract between this company and the insured, and no officer, agent, or representative of the company is authorized, empowered, or permitted to make any other verbal or written agreement in reference to any matter pertaining thereto.' That article 15 of the by-laws of the defendant company is as follows: 'All applications for insurance must be in writing according to the printed forms prepared by the company. The description of the property and its location must be minute and particular, and the applicant must be re-

sponsible for the correctness of the application; and any misrepresentation in reference to said property shall void such policy, and no agreement or representation other than expressed in said application shall be binding upon the company.' That an application to the defendant by the plaintiff was made in writing for the issuance of the policy mentioned in the complaint, which said application was duly signed by the plaintiff. That said application contained the following provisions: 'The above statements, notes and by-laws, as printed, shall be the sole basis of this contract for insurance between said company and the insured, and are hereby made a part of this policy, if issued. Having read or heard read the foregoing application, and fully understanding its contents, I warrant it to contain a full and true description and statement of the condition, situation as per diagram, value, occupation, and title of the property to be insured in said company; and I warrant the answers to each of the foregoing to be true.' That said policy of insurance contained the following provision, to wit: 'This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof.' And the defendant further says that, in the plaintiff's application for said policy of insurance, the plaintiff falsely stated and represented that the building to be insured was 20 by 30 feet in dimensions; whereas, in truth and in fact, said building was only 16 by 24 feet in dimensions." The sixth defense contains the same averments as the fifth, (so it is claimed by counsel for defendant, and not denied by counsel for appellee), except that, in place of the last paragraph relating to the dimensions of the insured building, it is charged: "And the defendant further says that in the plaintiff's application for said policy of insurance the plaintiff falsely stated and represented that the cash value of the insured building was \$1,500; whereas, in truth and in fact, the cash value of said building at the time of said application, and at all times thereafter, did not exceed the sum of \$200."

In support of error assigned on the ruling of the court sustaining the demurrer to the fifth defense, it is urged: (1) That the averments relating to the dimensions of the building state a violation of the warranty by the defendant, that his representation regarding the insured property was true; and (2) state in effect that his representation regarding its size was a material misrepresentation, which, by reason of the terms of the policy, voids it. There is certainly no merit in the claim that, according

to the averments of the defense under consideration, plaintiff warranted that his statement regarding the dimensions of the building was true. He warranted that his answers touching the description and statement of the condition, situation, value, occupancy, and title of the property were true; but none of these matters referred to the dimensions of the property involved. The provision of the policy with respect to misrepresentations only goes to those representations made by the insured which are material to the risk. In some instances, perhaps, the mere statement of the misrepresentations alleged to have been made by the insured would be sufficient from which to deduce the legal conclusion that they were material to the risk; but, when that is not the case, the insured must state the facts from which it is made to appear that the misrepresentation was material. In order that the falsity of a representation in an application for insurance may be a defense to an action on the policy, its subject-matter must be something which the insurer was entitled to know, and which probably influenced it in determining whether it would enter into the contract. *Travelers' Ins. Co. v. Lampkin*, 5 Colo. App. 177, 38 Pac. 335; *Dingle v. Trask*, 7 Colo. App. 16, 42 Pac. 186; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827; *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21; *May, Ins.* §§ 181-184. Where a party seeks to avoid a transaction upon the ground that misrepresentations were made to him, it must be made to appear that such misrepresentations were a factor which induced and influenced him to act, so that in defenses of this character it must at least appear, in connection with other essential averments, that the insurer, relying upon the truth of the representations made by the insured, was induced to, and did, enter into a contract of insurance to its injury. The defense under consideration lacks these essential requisites, for the obvious reason that it does not appear from its averments, or from any conclusion which can be logically deduced therefrom, that the insured was influenced in the slightest degree to issue the policy of insurance to the plaintiff, because of his statements regarding the dimensions of the building, or that it has been injured because of the alleged misrepresentations of the insured in this respect. The court did not err in sustaining the demurrer to the fifth defense.

According to the averments of the sixth defense, the plaintiff warranted that his answer respecting the value of the property insured was true. It is charged that he falsely stated the cash value of the insured building to be \$1,500, when, in truth and in fact, such value did not exceed the sum of 20 L.R.A. (N.S.)

\$200. The statement of value was contained in the application,—at least, it is so stated in the defense under consideration,—and, by the averments of that defense, it appears that the application is a part of the contract of insurance. Where a statement in an application for insurance is a warranty, and the application is made a part of the contract, the question of the materiality of such statement does not arise, and no recovery on the policy can be had when it appears that the statement warranted to be true is not true. *Travelers' Ins. Co. v. Lampkin*, supra; *Bennett v. Agricultural Ins. Co.* 50 Conn. 420; *School Dist. No. 4 v. State Ins. Co.* 61 Mo. App. 597; *Prudential Ins. Co. v. Hummer*, 36 Colo. 208, 84 Pac. 61; *Webb v. Bankers' L. Ins. Co.* 19 Colo. App. 456, 76 Pac. 738. In cases of this character some facts warranted to be true must be literally so, while with respect to others there is no breach of the warranty if they are substantially true. This case belongs to the latter class. There is often a marked difference of opinion regarding values of property, and therefore all that can be required, when the issue of the correctness of the statements of the owner of the value of the property insured is involved, is that it appears to be a fair and reasonably truthful valuation, in so far as overvaluation is concerned. Applying this rule to the present case, it is apparent, from the averments of the defense under consideration, that the valuation of plaintiff was so many times greater than that charged as the true value that it cannot be regarded as approximately correct, or accounted for upon the theory that he would naturally value the property for all it was worth.

Counsel for plaintiff calls our attention to the fact that from the record it appears the application contains the following language, "The value of the property being estimated by the applicant." and, because of this statement, urges that plaintiff was only asked for, and merely gave, his opinion of the value. It is doubtful, to say the least, if we would be justified in looking elsewhere than to the defense itself for the purpose of determining its sufficiency; but, in waiving this question, we do not think the language upon which counsel relies relieves plaintiff from the charge of overvaluation. "Estimate," as defined by Webster, is to "judge and form an opinion of the value of from imperfect data; . . . to fix the worth of roughly or in a general way,"—and, while it is true that, where a party merely estimates the value of an article, considerable latitude must be allowed for discrepancies between his estimate and the real value, nevertheless, where an applicant for insurance estimates the value of the prop-

erty to be insured; and warrants his statements to be true, he is required to state the value with a reasonable degree of accuracy, when the question of overvaluation is involved. A company about to issue a policy of insurance upon a building has the right to be fairly informed by the owner, when requested, as to what the reasonable value of the property is, so that it may be protected from assuming a risk so nearly equal to the actual value of the property insured that the effect might be to cause the owner not to exercise care in protecting his property. If we were justified in looking outside of the defense itself for the purpose of determining its sufficiency, or if we should consider extrinsic facts for the purpose of ascertaining whether or not the error committed in sustaining the demurrer was prejudicial, we might call attention to the fact that, although the policy was for \$1,000, the jury only returned a verdict for the sum of \$725 as the loss sustained by the plaintiff by the total destruction of the building insured. Counsel for plaintiff urges that the defense does not allege that the plaintiff warranted the value of the building to be \$1,500, but merely represented it was of that value. This contention is based upon the statement of the last paragraph, which is to the effect that plaintiff falsely stated and represented the cash value of the insured premises to be \$1,500. In construing an affirmative defense, the ultimate facts alleged must be determined from the entire defense, and not merely from one or more of the paragraphs thereof. From the other averments of the defense, which we have assumed to be as counsel for defendant claims, it appears that the application was made a part of the policy, and that in such application the plaintiff warranted that his answer touching the value of the property was true, so that, construing this defense as a whole, it appears that there was a breach of the warranty in this respect, because it is charged that in the application the plaintiff falsely stated and represented the cash value of the insured building was \$1,500, when, in truth and in fact, it did not exceed the sum of \$200.

Counsel for plaintiff also contends that the defense under consideration is insufficient because it does not allege that the company has repaid the premium or any part thereof to the insured. The company is not seeking to rescind its contract of insurance, but to avoid liability thereon because of the fraud of the insured. Where a policy, by its terms, is void by reason of fraud on the part of the insured, the premium cannot be recovered back. *Ætna L. Ins. Co. v. Paul*, 10 Ill. App. 431; *Friesmuth v. Agawam Mut. F. Ins. Co.* 10 Cush. 588. 20 L.R.A. (N.S.)

The demurrer to the sixth defense should not have been sustained.

By the third defense it was alleged that the policy contained the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy." It is then charged that at no time was any agreement whatsoever respecting other insurance indorsed on or added to the policy. It is further alleged, in substance, that plaintiff, since the issuance of the policy by defendant, procured another contract of insurance in the sum of \$500 on the same property, and that he had not given it any notice whatsoever that he had procured such contract of insurance. Plaintiff has assigned as cross error the action of the court in overruling the demurrer to this defense, and further contends the evidence discloses that the policy issued, which the defendant claims voided the policy issued by it, never took effect. Counsel for defendant insists that this contention is immaterial, because the provision in the policy upon which it relies specially provides that procuring any other contract of insurance on the property covered by its policy renders it void. The crucial question is whether there was an assumption of risk by the company which it is claimed issued the second policy, and what insured understood regarding such risk. According to the testimony, plaintiff applied to Mr. Coon for additional insurance in the Mercantile Fire & Marine Insurance Company of Boston. This application was made subsequent to the issuance of the policy by defendant. Mr. Coon testifies, in substance: That plaintiff applied to him for additional insurance; that he did not remember definitely what was said as to when the policy representing such insurance should go into effect; that he thought it was his intention that it should not take effect until he heard from the company; that his recollection was that he said he did not know whether the company would accept the risk, and he would send on the policy for its approval; that he did not extend any credit to Mr. Duncan for the premium, and Duncan did not pay the premium at that time; and that he kept the policy in his office, and sent the report to the company at St. Louis, and in due course of business an order was received canceling it. Plaintiff testified, in substance. That he applied to Coon for a \$500 risk in the Mercantile company; that Coon filled out the policy and placed it in his desk, and said it would not go into effect until he was so advised by the company;

that he did not pay any premium to Mr. Coon, the latter saying that it was not necessary, as there would be no risk until he was advised by the company that the risk was accepted. From these statements it clearly appears that no risk was assumed by the Mercantile Fire & Marine Insurance Company, that there was no attempt on the part of the agent to make any arrangement which would bind the company until he had advised with those in authority over him, and that the plaintiff understood that the policy written by the agent should not take effect until approved by the company. The requirement in a policy that other insurance covering the same property must be assented to in writing and indorsed on the policy is valid; but that provision is not violated when it appears that the company to which application for additional insurance was made, as well as the owner, understood that no risk was ever assumed by the former.

The seventh defense appears to be based upon a violation of the vacancy-permit clause contained in the policy. This clause is as follows: "If any building becomes and remains vacant for five days the policy thereupon shall become void, unless continued by consent of the company. It shall be the duty of any owner of any building or buildings insured by this company, in case such building shall become vacant, to report the same to the secretary at the home office within five days of such occurrence, and as often as every ten days thereafter during said vacancy. Any failure to make such report shall render his policy void." It is also alleged, in effect: That, on the 12th day of September, 1903, the company issued the plaintiff a permit that the building insured might remain vacant for a period of thirty days from that date; that, on the 27th day of October, following, a second vacancy permit was issued allowing the building to remain vacant for the period of sixty days from that date; and that at no time during the period the building was vacant did plaintiff make any report thereof to the company. It is further alleged that the building was vacant from June 1, 1903, until September 12th, following, and that no reports of such vacancy were made to the company during that period. The evidence discloses that the building was vacant from June 1st, as alleged, that no permit for such vacancy was issued by the company, that the plaintiff at no time reported to the company that the building was vacant, and that from October 12th to the 27th it was vacant without any permit. It also appears from the testimony, which is undisputed, that a representative of plaintiff called on Mr. Coon, the agent of the defend-

ant, and directed his attention to the fact that the vacancy permit issued on September 12th had expired, and requested that a permit be issued allowing the premises to remain vacant for the period of sixty days. Evidently this conversation with Mr. Coon took place after the September 12th permit had expired. As a result of the request then made, the permit dated October 27th was issued. The evidence discloses that the company was not aware of the vacancy of the building from June 1st to September 12th until after the loss occurred. On this record counsel for the company contend that the vacancy of the building from June 1st to September 12th, and the failure of the plaintiff to notify the company each ten days of such vacancy, as well as the failure to notify the company that the building was vacant during the period for which vacancy permits had been granted, rendered the policy void.

When a clause in a contract of insurance is susceptible of two constructions, that one will be adopted which is most favorable to the assured. *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; *Strauss v. Phenix Ins. Co.* 9 Colo. App. 386, 48 Pac. 822. The clause in the policy regarding vacancies is somewhat ambiguous, but we think a fair construction of it is that notice to the company of vacancy of the insured building is only to be given when no permit for vacancy has been issued by the company. The clause under consideration recites, in effect, that, if the building insured remains vacant for five days, the policy shall become void, unless continued by consent of the company; and, in case such building becomes vacant, the duty is imposed upon the insured to report the same to the company within five days of such occurrence, and as often as every ten days thereafter during such vacancy. The evident purpose of this provision is to advise the company that the building is vacant; but, where a permit has been issued by the company, allowing the building to remain vacant for a specified period, no such notice is required, because the company is advised of the vacancy and has assented that it may remain vacant for the period for which a permit has been granted. We think that the language of the permits issued by the company in this case, and incorporated in the defense under consideration, clearly indicates such to have been the construction given the clause relating to vacancies. They recite, in effect, that permission is granted the assured that the building may remain vacant for the respective periods specified, without prejudice to the insured, except that during the vacancies the amount of insurance is reduced one third. Nothing

is said therein that notice each ten days during the period for which the permits were issued must be given the company. Our conclusion regarding the construction of the provision under consideration is further strengthened by the fact that, according to the averments of the defense, no reports were made by the insured relative to the building being vacant for the period covered by the permit issued September 12th, and yet, without objection, the company issued a further vacancy permit on October 27th. So far as the argument of counsel for defendant is concerned, we are unable to find that any question regarding the effect of the premises being vacant from June 1st to September 12th following was submitted to the trial judge for determination. The province of this court is to review the action of the trial court, and not its non-action.

An instruction was asked by defendant to the effect that, if the jury found from the evidence that the plaintiff did not, during the period for which a permit for the insured premises to remain vacant had been issued, report such vacancy to the company every ten days, the premises remained vacant after the issuance of such permit, the verdict should be for the defendant, was refused. There was no error in this refusal, for the reasons already given.

An instruction on behalf of the defendant was requested, to the effect that, if it appeared the insured premises were vacant and unoccupied for five consecutive days between October 12th and the 27th, without the consent of the company, the policy was void. This was refused. The refusal was not error. It appears that the company, with full knowledge that the building had been vacant during the period covered by the instruction, issued a further permit. Such action was a waiver of whatever rights it might have had under the clause of the policy above quoted, for the vacancy between October 12th and October 27th.

Error is also assigned upon the action of the court in not instructing the jury on the question of vacancy. Mere nondirection is not reversible error, unless a specific instruction, good in point of law, covering the omission, was requested and refused. No correct request covering the alleged omission was made of the trial court.

The substance of the fourth defense is that in the written application of plaintiff it was stated that he had a ninety-nine-year lease on the ground on which the insured building was located, which statement, it is alleged, was not true, in that plaintiff did not have a lease upon such ground for any period of time at all. The proof shows that the ground upon which the

building was situated belonged to the Adit Mining Company, and that he would be compelled to remove it at the pleasure of the company, but that this right of the company would not be exercised unless the ground was needed for mining purposes, and that the necessity for such use was exceedingly remote. According to the further averments of the defense under consideration, it appears that appellant warranted the title to the property insured to be as represented in his application, and the company therefore claims that, under the proofs, the policy was void, because of its provisions that misrepresentation regarding the title would have this effect. The evidence discloses practically without dispute that plaintiff talked with Mr. Coon, the representative of the defendant company, regarding his title to the insured premises, and informed him that he had no written lease; but, under his arrangement with the company owning the ground upon which the building was situated, he had a right to such ground so long as the company did not desire to use it for mining purposes, and that from this information he and the agent concluded that his title was the equivalent of a ninety-nine year lease. It thus appears that the agent of the company had full knowledge of the condition of the title to the ground, and, having issued the policy with such knowledge, the condition therein avoiding the policy, if the title to the property insured was not as represented, was waived. *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. 249; *State Ins. Co. v. DuBois*, 7 Colo. App. 214, 44 Pac. 756; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; *Eames v. Home Ins. Co.* 94 U. S. 621, 24 L. ed. 298.

Knowledge of the status of title to property insured and the statements of the assured regarding the title are necessary for the protection of insurance companies, so that they may reduce the temptation to incendiarism to a minimum, and also prevent the owner from being careless with respect to losses occasioned by fire; but where, as in this instance, the company, through its agent, has full knowledge relating to the title of the insured premises, and concludes from the information obtained from the owner, which is correct, that his title is equivalent to a ninety-nine-year lease, and so writes it in the application, the company will not be permitted to say that such statements were false. The policy contained the following clause: "This entire policy, unless otherwise provided by agreement indorsed hereon or added thereto, shall be void . . . if the subject of insurance be a building on ground not owned by the insured in fee simple." The second defense interposed by the

defendant was based upon this clause. An instruction on behalf of the defendant, to the effect that, if it appeared from the testimony that, at the time of the issuance of the policy in suit, the ground upon which the insured building was situate was not owned by the plaintiff in fee simple, the verdict must be for the defendant, was refused. There was no error in this refusal. The company was as much bound by the provision in the by-laws that the application, by-laws, and policy should constitute the entire contract between it and the insured, as was the latter. The application stated that the title of plaintiff was a ninety-nine-year lease, and the company was bound to take notice of what this application disclosed regarding plaintiff's title; and it is therefore estopped from claiming the benefit of any clause in the policy regarding the title of plaintiff which provided that it was to be different from that which he had stated in his application.

We do not deem it necessary to notice in detail other errors assigned by appellant; nor do we regard it as necessary to consider further than we have the cross errors assigned on behalf of the appellee.

For the error of the court in sustaining the demurrer to the sixth defense, the judgment of the District Court is reversed, and the cause remanded for a new trial.

Campbell and Bailey, JJ., concur.

Petition for rehearing overruled December 15, 1908.

DISTRICT OF COLUMBIA COURT OF APPEALS.

PERCY WADE, Appt.,
v.

UNITED STATES OF AMERICA.

(— App. D. C. —)

Gaming — bucket shop.

The keeping of a bucket shop is within the provisions of a statute providing for the punishment of one who shall keep any place for the purpose of gaming.

(March 2, 1909.)

A PPEAL by defendant from a judgment of the Supreme Court convicting him of violating the law against gaming. Affirmed.

The facts are stated in the opinion.

Messrs. Henry E. Davis, Richard O. Thompson, and John E. Laskey, for appellant:

A "bucket shop" is not a gaming room, within the statute.

People v. Todd, 51 Hun, 446, 4 N. Y. Supp. 20 L.R.A. (N.S.)

25; 14 Am. & Eng. Enc. Law, 2d ed. p. 686; Connor v. Black, 132 Mo. 150, 33 S. W. 783; Sondheim v. Gilbert, 117 Ind. 79, 5 L.R.A. 432, 10 Am. St. Rep. 23, 18 N. E. 687; Boyce v. O'Dell Commission Co. 109 Fed. 760; Shaw v. Clark, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786; Bryant v. Western U. Teleg. Co. 17 Fed. 828; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37.

Messrs. Daniel W. Baker, Stuart McNamara, and F. Sprigg Perry, for appellee:

A "bucket shop" is a place for the purpose of gaming.

Gatewood v. North Carolina, 203 U. S. 531-536, 51 L. ed. 305-308, 27 Sup. Ct. Rep. 167; Embrey v. Jemison, 131 U. S. 336, 343, 33 L. ed. 172, 175, 9 Sup. Ct. Rep. 776; Bryant v. Western U. Teleg. Co. 17 Fed. 825; Smith v. Western U. Teleg. Co. 84 Ky. 608, 2 S. W. 483; Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845; Pickering v. Cease, 79 Ill. 328; Pearce v. Rice, 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. Rep. 130; Cover v. Smith, 82 Md. 586, 34 Atl. 465; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 244, 249, 49 L. ed. 1031, 1038, 25 Sup. Ct. Rep. 637; Bibb

Case Note. — Bucket shop as "place for gaming."

The question whether a place in which the business of dealing in futures on margins, without intent to make an actual delivery of the property traded in, but with the intention to receive or pay the difference between the agreed price and the market price at the time of settlement, is carried on, is within a statutory provision against gaming houses, was also under consideration in *Anderson v. State*, 2 Ga. App. 1, 58 S. E. 401, where it is said: "We do not think that at common law such an office would have been a gaming house. We also recognize the distinction between the meaning of the words 'betting,' 'wagering,' 'gaming,' and 'gambling.' Yet we are constrained to hold that, by judicial evolution and legislative enactment the common-law offense of keeping a gaming house has been so broadened in its scope as to include any place wherein persons are allowed to assemble for the purpose of betting, wagering, gaming, or gambling, and especially where such practices are encouraged by the proprietor."

In *Kneffler v. Com.* 94 Ky. 359, 22 S. W. 446, it was held that a place where persons habitually assembled to engage in betting, winning, and losing money and property, on the prospective rise and fall in stocks, bonds, grains, and other produce, is in law a common gambling house, although there is no penal statute applicable to that particular species of gambling; and the person owning and controlling it is guilty of the offense of keeping a disorderly house.

And in *Arenz v. Com.* 31 Ky. L. Rep. 321,

v. Allen, 149 U. S. 489-492, 37 L. ed. 823, 824, 13 Sup. Ct. Rep. 950; White v. Barber, 123 U. S. 392, 31 L. ed. 243, 8 Sup. Ct. Rep. 221; Higgins v. McCrea, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; Board of Trade v. L. A. Kinsey Co. 125 Fed. 72; Boyle v. Henning, 121 Fed. 376; Metropolitan Nat. Bank v. Jansen, 47 C. C. A. 497, 108 Fed. 572; Waldron v. Johnston, 86 Fed. 757; Mutual L. Ins. Co. v. Watson, 30 Fed. 653; Lulley v. Morgan, 21 D. C. 91; Justh v. Holliday, 2 Mackey, 346; Thrower v. State, 117 Ga. 773, 45 S. E. 126; Miller v. United States, 6 App. D. C. 12.

Shepard, Ch. J., delivered the opinion of the court:

This is an appeal from a conviction under an indictment charging a violation of the laws to prevent gaming. The indictment is in two counts. The first is substantially set out in appellant's brief as follows:

"The first count of the indictment, upon which conviction was had, charges that the appellant and said Hedges did set up and keep in the District of Columbia a place for the purpose of gaming, between August 20, 1906, and August 20, 1907, that is, an office

in the Ouray building in said District, and, for such purpose of gaming, did engage in and conduct a pretended brokerage business under the name of Wade & Hedges for the making of contracts between them and other persons for the pretended buying on commission for such other persons, as brokers, of shares of the stocks of railroads and other corporations at prices to be agreed upon between them, being the market prices of such shares of stock on the New York Stock Exchange at the time of such transactions as such prices were reported by telegraph to said Wade & Hedges, with no intention on the part of said Wade & Hedges and the pretended buyers in such transactions to deliver the property so dealt in, or that the same should be paid for and received, but with the understanding on the part of both that such transactions should be merely betting and wagering contracts upon the fluctuations in the market prices of the shares of stock so contracted for, and under such bets and wagers, in case there was a rise such buyers should win, and in case there was such fall said Wade & Hedges should win, and that the sums to be paid by the one party to the other in the settlement of such bets and wagers

102 S. D. 238, a conviction for keeping a disorderly house was sustained upon evidence showing the maintenance of an establishment where persons assembled and put up money on futures.

On the other hand, in *People v. Todd*, 51 Hun, 446, 4 N. Y. Supp. 25, it was held that keeping a room where contracts, in effect wagers upon the fluctuation in the price of stocks, were made, did not violate § 343 of the Penal Code, which provides that "a person who keeps a room . . . to be used for gambling, or for any purpose, or in any manner, forbidden by this chapter, . . . is guilty of a misdemeanor;" the word "gambling" being evidently intended to relate to the games prohibited in the preceding sections, and to embrace them only, which games are those of absolute hazard, not dependent upon legitimate fluctuations in legal business modes. The court said: "The result of the examination of the statute under which the appellant was convicted is that it was aimed at all games of chance, and lotteries, and betting on horse racing and elections, but not against the transactions which distinguish the appellant's as one in the field of strategy, if not in games. If the question were only whether the contracts made by the appellant were gambling transactions, there could be no doubt of the propriety of the judgment rendered herein, inasmuch as the evidence warrants the finding that they were mere disguises for gambling. . . . And the appellant's place of business would be one kept for that purpose; but the appellant was indicted under one of a series of sections relating to the subject of gam-

ing, and designed to cover the methods devices, and hazards then in the legislative mind, and of which the transactions of the appellant form, it would seem, no part."

The statute in question has, however, been amended by chapter 428, Laws 1889, so as to include establishments of the class known as bucket shops. See *People v. Wade*, 13 N. Y. Crim. Rep. 428, 59 N. Y. Supp. 846.

The keeping of bucket shops is in some states expressly prohibited by law. For cases arising under such statutes, see: *Soby v. People*, 134 Ill. 66, 25 N. E. 109; *Weare Commission Co. v. People*, 209 Ill. 528, 70 N. E. 1076; *People v. Wirsching* (Ill.) 88 N. E. 169; *Caldwell v. People*, 67 Ill. App. 367; *State v. Kentner*, 178 Mo. 487, 77 S. W. 522; *State v. Logan*, 84 Mo. App. 584; *People v. Wade*, supra; *Gill v. State*, 10 Ohio C. C. N. S. 345; *State v. McMillan*, 69 Vt. 105, 37 Atl. 278; *State v. Corcoran*, 73 Vt. 404, 50 Atl. 1110.

In other states the dealing in futures on margins has been declared to be unlawful. *Fortenbury v. State*, 47 Ark. 188, 1 S. W. 58; *Barnes v. State*, 77 Ark. 124, 91 S. W. 10; *Anderson v. State*, supra; *State v. Gritznier*, 134 Mo. 512, 36 S. W. 39; *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Clayton*, 138 N. C. 732, 50 S. E. 866; *State v. Gatewood*, 138 N. C. 749, 51 S. E. 53; *State v. Duncan*, 16 Lea, 79; *Cothran v. State*, 36 Tex. Crim. Rep. 106, 36 S. W. 273; *Fullerton v. State* (Tex. Crim. App.) 75 S. W. 534; *Scales v. State*, 46 Tex. Crim. Rep. 296, 66 L.R.A. 730, 108 Am. St. Rep. 1014, 81 S. W. 947; *De Lam v. State*, 50 Tex. Crim. Rep. 4, 95 S. W. 532.

20 L.R.A. (N.S.)

should be the difference between the prices of the property as fixed by such pretended contracts of purchase and the market prices thereof at the time of such settlement. Said count then sets up the reverse of the above transaction, wherein the customers are the pretended sellers of stocks, and said Wade & Hedges the pretended buyers thereof, with a like absence of intention on the part of both to deliver, and with the intention on the part of both to settle on differences. And further charges that, for such purpose of gaming by means of said pretended business, said Wade & Hedges maintained at said place and office a blackboard and telegraph instrument, called a ticker, from and through which ticker were received the market prices of shares of stock dealt in and recorded on said blackboard and exhibited to their said customers."

The second count charges the defendants with setting up and keeping a game, device, and contrivance for gaming known as a bucket shop the nature of which is charged as in the first count. A severance was granted and Wade only was tried. The jury returned a verdict of guilty under the first count. Defendant then moved in arrest of judgment on the ground that the indictment charged no offense under the laws of the District. This was overruled, and the single assignment of error is founded thereon.

Section 865 of the Code, which defines the offense, reads as follows:

"Gaming.—Whoever shall, in the District, set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years."

Section 868, which relates to the construction of § 865 and others reads as follows:

"What is gaming table.—All games, devices, or contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming table within the meaning of these sections; and the courts shall construe the preceding sections liberally so as to prevent the mischief intended to be guarded against."

Two offenses are created by § 865. One is the setting up or keeping of a gaming table or device, the other is the keeping of a house, vessel, or place for the purpose of gaming. 20 L.R.A. (N.S.)

The contention on behalf of the appellant is that transactions of the character charged do not constitute gaming within the letter of the Code, and cannot be converted into gaming because, in the opinion of the court, they may come within its reason and mischief. It is true, as a general principle, that criminal statutes which specifically enumerate acts, or places in which they shall be committed, and make them punishable as offenses, cannot be made to embrace other acts or places merely because they may be said to be within the reason and policy of the law, for the reason that they are of equal atrocity, and of a kindred character. *United States v. Wiltberger*, 5 Wheat. 76, 93, 5 L. ed. 37, 42. That case, which is relied on by the appellant in support of his contention, differs widely from this in respect to the question for decision. In declaring the principle above stated, it also affirms the familiar principle that the intention of the law maker must govern in the construction of penal as well as other statutes; and that, while penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. See *Miller v. United States*, 6 App. D. C. 6, 12. In that case the indictment was for keeping a gaming table, and a place for the purpose of gaming. The specific act charged was what is called "bookmaking" on races—that is, taking bets on the result of races about to be run. "Bookmaking" is not specifically named in the statute. The contention of the appellant was the same as in this case. Chief Justice Alvey, who delivered the opinion of the court affirming the conviction, said: "The definition of a gaming table under the statute does not involve the ordinary mechanical definition of a table, but depends for its statutory meaning upon the means or contrivances adopted for playing the game. If any doubt could arise upon the construction of the terms of the first section of the act of 1883 [which is now § 685, Code], that doubt would seem to be entirely and completely removed by the very explicit terms of the 4th section of the act [now § 868], which was inserted *ex industria* for the manifest purpose of repelling ingenious attempts to evade the real scope and policy of the act, by subtle and refined distinctions and definitions. . . . This statute . . . was not aimed exclusively at any particular game or species of device for gaming, but was intended, as its title and its broad, comprehensive provisions declare, more effectively to suppress gaming in this District. The reason and policy of the law, as well as its comprehensive language, apply as well to all games and devices then existing, as to all that might be subsequently

devised and practised. That being the object to be accomplished, what could be more grossly obnoxious to the provisions of the statute, or more demoralizing to the community, than the existence of places for the making and selling of books and pools upon horse races, baseball games, foot races, dog fights, cock fights, and all other conceivable contests upon which money may be bet or wagered. The great evil and vice of the thing is not in the horse race, foot race, or the baseball game, but in the seductive allurements held out to people, young and old, to frequent the gaming table, or the gambling device, and to indulge in excessive betting, and thereby become the victims of the wily and scheming professional gambler. Whether the game or contest upon which the wager is made be a horse race, foot race, baseball game, or what else, it is quite immaterial, if the thing or contest upon which the bet or wager is made be a game of chance."

With the end in view to prohibit all gaming, the legislature found it impracticable to enumerate each and every kind then practised, and much less so to anticipate the ingenuity of the gambler in devising new schemes for gaming when driven from old and well-known ones. For this reason, evidently, § 868 declared "all games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of these sections;" and then, further, that "the courts shall construe the preceding sections liberally so as to prevent the mischief intended to be guarded against."

If "bookmaking" on the result of races, which, when the statutes was enacted, was as well known a form of taking bets and wages as were "bucket shop" transactions, is a contrivance for gaming, then there is no reason why the latter should be excepted from the operation of the statute intended to prevent gaming generally.

However, we are not required, by the demands of the present case, to determine whether one conducting a "bucket shop" sets up or keeps a gaming table within the definition of the statute. This is not the offense on which the conviction arises. Assuming, for the purpose of the argument only, that the ticker and blackboard, as used, do not constitute a gaming table, yet, if the transactions of the bucket shop constitute gaming, one who keeps a place where such transactions are carried on is punishable by the terms of the statute. The scheme is nothing less than the receipt and making of bets on an uncertain event, namely, the probable rise or fall of the market prices of the things pretended to be bought or sold. Betting and wagering of this kind 20 L.R.A. (N.S.)

constitutes gaming in the ordinary sense of the word, notwithstanding it may be carried on under the guise of trade contracts. The law looks to the substance, and not the form, in determining the true character of such transactions. The alleged contracts made in the conduct of such transactions have uniformly been denied obligation in civil actions on the ground that they are not contracts in fact, but wagering and gambling schemes, and therefore illegal and void as against public policy. *Irwin v. Williar*, 110 U. S. 499, 511, 28 L. ed. 225, 230, 4 Sup. Ct. Rep. 160; *Embrey v. Jemison*, 131 U. S. 336, 345, 33 L. ed. 172, 176, 9 Sup. Ct. Rep. 776; *Pearce v. Rice*, 142 U. S. 28, 40, 35 L. ed. 925, 930, 12 Sup. Ct. Rep. 130; *Clews v. Jamieson*, 182 U. S. 461, 489, 45 L. ed. 1183, 1196, 21 Sup. Ct. Rep. 845. In the case first cited it was said: "It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade."

Entertaining no doubt that the transactions of the appellant, as charged in the indictment, constitute gaming, it follows that, by keeping a place where such gaming was conducted, the defendant brought himself within the letter of the statute. The court did not err in denying the motion in arrest of judgment. The judgment will, therefore, be affirmed.

FLORIDA SUPREME COURT.

MARY L. MOSES, Plff. in Err.,

v.

V. M. AUTUONO.

(— Fla. —, 47 So. 925.)

Damages — determination — breach of contract.

1. Where a contract expressly provides stipulated or liquidated damages for a particular breach of the contract, and the breach alleged is not the one provided for or contemplated in fixing the measure of damages, the loss, if any, sustained by the

Headnotes by WHITFIELD, J.

Case Note. — *Applicability of provision for stipulated damages or penalty for delay in the completion of a contract, where the entire contract is abandoned or repudiated.*

It seems to be generally held that, where a contract provides for the payment of stipulated damages for a particular breach, such stipulation is applicable only to the breach provided for; and, upon the abandonment or repudiation of the entire contract, the injured party, if his actual damages are the

plaintiff because of the alleged breach of the contract, should be determined, not by the stipulation contained in the contract, but by the law.

Same — general — specific.

2. Under a general allegation of damages in an action on a contract, such damages as the law holds to be the direct, natural, and necessary result of the breach complained of may be recovered. Special damages are those that do not necessarily, but do directly, naturally, and proximately result from the breach; and they may be recovered in proper cases on sufficient allegations and proofs.

Contract — lease — breach — damages.

3. For a breach of a contract to lease lands and tenements, the law contemplates compensation for losses that are the natural and proximate result of the breach. In general the measure of damages is the difference between the stipulated rent and the value of the use of the premises.

Same — damages recoverable.

4. In an action for a breach of a contract for the lease of lands and tenements, under special circumstances warranting it, damages may be recovered for losses that are the natural, direct, and necessary consequences of the breach, when such damages

greater, is not limited to the stipulated damages, or, *vice versa*, if the latter are the greater, he is limited to the actual damages.

In *Murphy v. United States Fidelity & G. Co.* 100 App. Div. 93, 91 N. Y. Supp. 582, affirmed without opinion in 184 N. Y. 543, 76 N. E. 1101, it was held that a stipulation in a contract providing for the payment of a certain sum per day "for each and every day thereafter that such work shall remain incomplete," contemplated merely a delay in full performance of the contract, and, upon the contract being abandoned and afterwards completed by another company, the injured party was not limited to the amount stipulated, but was entitled to recover the actual damages. The court said: "No provision had been made to meet the unlooked-for contingency of total abandonment. - The bed rock of the stipulated sum 'by way of liquidated damages' was the ultimate fulfillment of the contract, so that the rights of the parties could be gauged by that instrument with the work completed. The language employed is, 'Should the contractor fail to finish the work at or before the time agreed upon,' the *per diem* allowance is to be paid 'for each and every day hereafter the said work shall remain incomplete,' unless 'delayed,' etc. The only reasonable interpretation which can be given to this provision is the one suggested, that the liability for the stipulated sum did not accrue until the contractor had fulfilled his agreement, and consequently it cannot be available to bar the plaintiff recovering the damages actually sustained by him on account of the renunciation of the agreement. The *per diem* allowance was not to be paid in lieu of per-20 L.R.A. (N.S.)

are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties.

Same — preventable damages.

5. When an action for breach of a contract to lease lands and tenements is brought, if the plaintiff, by reasonable exertions or care, could have prevented damages resulting to him by reason of the defendant's breach of the contract, he cannot recover therefor.

Contract — construction — breach — liquidated damages.

6. Where liquidated damages are stipulated for to compensate for failure to complete a contract, such liquidated damages may not be applicable where there is a refusal to perform any part of the contract, when it is apparent that the parties, in stipulating for liquidated damages, did not contemplate such refusal, but only a failure to complete the contract within a specified time.

(December 8, 1908.)

ERROR to the Circuit Court for Hillsborough County to review a judgment in plaintiff's favor in an action brought to recover for breach of a contract to erect a

formance, but upon performance after the time fixed in the agreement."

In *Light, Heat & Water Co. v. Jackson*, 73 Miss. 598, 19 So. 771, it was held that a stipulation in a contract for supplying a city with water, providing that, in case a hydrant remains out of order for six days after notice to the company, the company shall forfeit \$10 per week to the city for each week such hydrant is permitted to be out of repair, is in the nature of a penalty for the occasional neglect of the company, and not liquidated damages for an entire breach of the contract.

In *Watson v. De Witt County*, 19 Tex. Civ. App. 150, 46 S. W. 1061 the plaintiff was permitted, besides the stipulated damages for failure to complete a building within a certain time, to recover, also, the actual damages resulting from the abandonment of the contract.

In *Curnan v. Delaware & O. R. Co.* 138 N. Y. 480, 34 N. E. 201, a stipulation in a contract for the construction of a railroad, reserving to the company the right to terminate the contract at any time by formal notice in writing, and upon payment to the contractor for all labor performed, and a certain sum as liquidated damages, was held to be applicable only in case the contract was terminated as above stated; and therefore, when the contract was suspended at the instance of the company and never resumed, thus forming a breach of the contract, he was not entitled to recover the stipulated damages.

In *National Contracting Co. v. Hudson River Water Power Co.* 118 App. Div. 665, 103 N. Y. Supp. 641, reversed in other points in 192 N. Y. 209, 84 N. E. 965, it was held

building upon and lease certain lands to plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. **E. R. Gunby and Glen & Himes**, for plaintiff in error:

The writing imports no obligation sufficiently definite to create a contract.

Pollock, Contr. p. 42; 1 Page, Contr. § 27; Hart v. Georgia R. Co. 101 Ga. 188, 28 S. E. 637; Cole v. Clark, 3 Pinney (Wis.) 303; Butler v. Kemmerer, 218 Pa. 242, 67 Atl. 332; Thomas v. Thomasville Shooting Club, 123 N. C. 285, 31 S. E. 654; Dayton v. Stone, 111 Mich. 196, 69 N. W. 515; Gates v. Gamble, 53 Mich. 181, 18 N. W. 631; Taylor v. Portington, 7 De G. M. & G. 328, 9 Cyc. Law & Proc. p. 248; Bumpus v. Bumpus, 53 Mich. 346, 19 N. W. 29; 7 Am. & Eng. Enc. Law, 2d ed. p. 116; Almini Co. v. King, 92 Ill. App. 276.

The stipulation for the payment of \$10 per day was inapplicable in case of a total abandonment and repudiation of the entire contract.

that a stipulation in a contract for the construction of a dam and power plant on a river, providing, in effect, that the contractor agrees that, if the work shall be abandoned, or if the work be delayed or is unsatisfactory, the company shall have the power to notify him to discontinue all work, whereupon he promises to make good what it would cost over the contract price to have the work completed, is not applicable where the contractor totally abandons the contract and takes away his tools, without having been ordered to quit on notice, and the owner himself completes the work. The court said: "It will be noticed that that is an agreement on the part of the contractor. The contractor agrees that, if it 'is wilfully violating any of the conditions or agreements of this contract, or is not executing said contract in good faith,' etc., the company shall have power to notify it to discontinue all work, and, at its discretion, contract with other parties for the delivery or the completion of all or any part of the work left uncompleted by said contractor. The paragraph, it seems to me, conferred a power upon the defendant which it could exercise if it wished, and the provisions of the paragraph became operative only upon the exercise of that power. It meant that if, upon the report of the engineer in charge, the water company was so dissatisfied with the manner in which the contracting company was performing its contract that it notified it to cease work, and then make a new contract with another contractor, in the event that the new contract turned out to be more advantageous to the company than the old, the original contractor was to receive the difference; and if, on the other hand, it turned out less advantageous, the original contractor was to pay the difference up to \$25,000. . . . But it was not 20 L.R.A. (N.S.)

Fidelity & D. Co. v. Robertson, 136 Ala. 379, 34 So. 933; Murphy v. United States Fidelity & G. Co. 100 App. Div. 93, 91 N. Y. Supp. 582, affirmed in 184 N. Y. 543, 76 N. E. 1101; 1 Sedgw. Damages, 8th ed. ¶ 419; Williams v. Vance, 9 S. C. 344, 20 Am. Rep. 26.

Although a building contract may provide for a penalty of a certain sum per day for every day's delay in completing a house, still, in the absence of proof that the owner is damaged by the delay, nominal damages only can be recovered.

Wilcus v. Kling, 87 Ill. 107; Smith v. Newell, 37 Fla. 147, 20 So. 249; Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158; 13 Cyc. Law & Proc. p. 60; 19 Am. & Eng. Enc. Law, p. 398; 1 Sutherland, Damages, 284; Van Buren v. Digges, 11 How. 461, 13 L. ed. 771.

The stipulations prescribe penalties, and are not agreements for liquidated damages.

Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Wheedon v. American Bonding & T. Co.

in consequence of any notice to the contractor by the company to cease work that the plaintiff abandoned the job, and the defendant did not exercise its discretion to make a new contract after such notice to the plaintiff to cease work. There was a total abandonment by the National Contracting Company. It quit the works. It took away its tools. It breached the contract. It was not ordered off the premises. No notice was given it to cease work. It walked out, as has been found, unreasonably and wrongfully. The water power company proceeded to do the work itself; and it distinctly notified the plaintiff that, inasmuch as it had abandoned the work, the defendant considered the abandonment and refusal to proceed a breach of contract; and it proposed at once proceeding with the work, and would hold the plaintiff responsible for all damages which it would sustain from such breach of the contract by it. To that measure of damages the plaintiff entered no protest or objection. It therefore seems to me that the provisions of paragraph 'O' of the contract can in no way be applied to the situation as it now exists before this court."

Cases which, although the provision for liquidated damages was only for a particular breach of the contract, and the entire contract was abandoned, were decided on the question whether such liquidated damages were not in fact a penalty, without being in any way related to the question here annotated, have been expressly excluded from this note.

Effect of provision for forfeiture of sums paid or retained under executory contract to prevent recovery of any other damages after breach of contract, see case note to K. P. Min. Co. v. Jacobson, 4 L.R.A. (N.S.) 755.

128 N. C. 69, 38 S. E. 255; *Wilcus v. Kling*, supra; *Iroquois Furnace Co. v. Wilkin Mfg. Co.* 181 Ill. 582, 54 N. E. 987; *Cochran v. People's R. Co.* 113 Mo. 359, 21 S. W. 6; *Zimmerman v. Conrad* (Mo. App.) 74 S. W. 139; *George B. Swift Co. v. Dolle*, 39 Ind. App. 653, 80 N. E. 678; *Lee v. Carroll Normal School Co.* 1 Neb. (Unof.) 681, 96 N. W. 65; *Coen v. Birchard*, 124 Iowa, 394, 100 N. W. 48.

Messrs. **Sparkman & Carter** and **George P. Raney, Jr.**, for defendant in error.

Whitfield, J., delivered the opinion of the court:

The defendant in error, on January 7, 1907, brought an action in the circuit court for Hillsborough county against the plaintiff in error to recover damages for the breach of a contract dated April 9, 1906, whereby the defendant here agreed to "at once commence the construction, and to complete with reasonable time and despatch, a three-story brick building," equipped in a specified manner, on certain lots in the city of Tampa, and to lease the same to the plaintiff for five years beginning October 1, 1906, at a monthly rental of \$200 in advance, with the privilege of renewing the lease for another five years at a rental to be agreed on. The contract made a part of the declaration contains the following provision: "It is further agreed that, if the said party of the first part shall not complete and turn over to the party of the second part said three-story brick building by the first day of October, A. D. 1906, then the said party of the first part shall pay to the party of the second part the sum of ten (\$10.00) dollars for each day thereafter until said building is completed, and turned over to the said party of the second part," provided general strikes did not interfere.

The declaration alleges "that the defendant, regardless of her duty and legal obligation to the plaintiff, has failed wholly to keep said agreement, and has not even commenced the construction of said building, and, on May 9, 1906, duly notified the plaintiff that it would be impossible for him to build and complete said building, and that he (meaning the plaintiff) could govern himself accordingly." Plaintiff claims \$20,000 damages.

A demurrer to the declaration was overruled. Pleas tendering issues as to the damages sustained by the plaintiff were stricken or demurrers thereto sustained, and the court entered the following judgment: "It is considered by the court that the contract between the plaintiff and the defendant was one for the breach of which the 20 L.R.A. (N.S.)

damages were, by agreement, liquidated; and, second, that the contract was an entire one, and that, upon an entire breach of it, the plaintiff was entitled to recover both past and prospective damages in this suit. It is thereupon ordered and adjudged that the demurrer to said pleas be and the same is hereby sustained; and, the defendant having announced in open court that she did not desire to further plead, final judgment is entered in favor of the plaintiff and against the defendant for the amount of liquidated damages set out in the declaration, to wit, eighteen thousand (\$18,000) dollars, which judgment is based solely upon the contract annexed to the declaration, and without the introduction of evidence except the written pleadings. It is thereupon considered by the court that the plaintiff do have and recover of and from the defendant his damages of eighteen thousand (\$18,000) dollars and the costs of this suit, to be taxed by the clerk."

A writ of error from this court was taken by the defendant.

The stipulation contained in the contract as to the measure of damages does not cover any and all breaches of the contract, but specifically refers to a breach in failing to "complete and turn over to the party of the first part said three-story brick building by the 1st day of October, A. D. 1906." This provision contemplates only a breach in delaying the completion of the building which the defendant agreed to build and lease to the plaintiff. It does not contemplate, or provide the measure of damages for the breach of the contract alleged, that the defendant "failed wholly to keep said agreement and has not even commenced the construction of said building, and on May 9, 1906, duly notified the plaintiff that it would be impossible for her to build and complete said building, and that plaintiff could govern himself accordingly." Such a breach is a total failure to perform any part of the contract,—not a failure to complete it.

Where a contract expressly provides stipulated or liquidated damages for a particular breach, and the breach alleged is not the one provided for or contemplated in fixing the measure of damages, the loss, if any, sustained by the plaintiff because of the alleged breach of the contract, should be determined, not by the stipulation contained in the contract, but by the law. See *Williams v. Vance*, 9 S. C. 344, 30 Am. Rep. 26; *National Contracting Co. v. Hudson River Water Power Co.* 118 App. Div. 665, 103 N. Y. Supp. 641; *Fidelity & D. Co. v. Robertson*, 136 Ala. 379, 34 So. 933; *Murphy v. United*

States Fidelity & G. Co. 100 App. Div. 93, 91 N. Y. Supp. 582; Curnan v. Delaware & O. R. Co. 138 N. Y. 480, 34 N. E. 201; 1 Sedgw. Damages, 8th ed. § 419.

This action is for damages for a breach of the contract by failing or refusing to perform any part of it; and, as the measure of damages for such a breach is not provided for in the contract, the orders and judgment of the court expressly awarding damages under the terms of the contract relating to a breach of a different character are not in accordance with the requirements of the law.

The measure of damages for the breach alleged is to be determined by the application of proper rules of law, and not by the terms of the contract.

Under a general allegation of damages in an action on a contract, such damages as the law holds to be the direct, natural, and necessary result of the breach complained of may be recovered. Special damages are those that do not necessarily, but do directly, naturally, and proximately, result from the breach; and they may be recovered in proper cases on sufficient allegations and proofs. See Jacksonville Electric Co. v. Batchis, 54 Fla. 192, 44 So. 933; 5 Enc. Pl. & Pr. p. 739; 13 Cyc. Law & Proc. p. 175; 2 Sutherland Damages, §§ 418, 419; Benedict Pineapple Co. v. Atlantic Coast Line R. Co. 55 Fla. 514, 46 So. 732.

For a breach of contract to lease lands and tenements, the law contemplates compensation for losses that are the natural and proximate result of the breach. A party is in law held to have contemplated the natural and proximate results of his acts. In general, the measure of damages is the difference between the stipulated rent and the value of the use of the premises. Under special circumstances warranting it, damages may also be recovered for losses that are the natural, direct, and necessary consequences of the breach when they are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties. If the plaintiff, by reasonable exertions or care, could have prevented damages resulting to him by reason of the defendant's breach of the contract, it was his duty to do so, and, so far as he could have prevented losses to himself, he cannot recover damages therefor. See Hodges v. Fries, 34 Fla. 63, 15 So. 682; Western U. Teleg. Co. v. Milton, 53 Fla. 484, 11 L.R.A. (N.S.) 560, 43 So. 495; Brigham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28. See also Smith v. Newell, 37 Fla. 147, 20 So. 249.

The judgment is reversed.
20 L.R.A. (N.S.)

Shackleford, Ch. J., and Cockrell, J., concur.

Taylor, P. J., and Hocker and Parkhill, JJ., concur in the opinion.

GEORGIA SUPREME COURT.

JOSEPH ROLAND

v.

H. H. TIFT.

(— Ga. —, 63 S. E. 133.)

Fellow servants — common service.

1. Where the owner of a sawmill operates in connection therewith a private railroad for the purpose of transporting his employees from the sawmill to their work in the woods, and of hauling logs from the woods to the mill, the servants engaged in operating the log train and the servants riding thereon from the mill to their work are fellow servants; and the owner of the mill is not liable to one of the servants injured in the operation of the train by the negligence of his coservants.

Injury to servant — petition — sufficiency.

2. A petition by a servant against his master for personal injuries sustained in his service alleged that the master operated a sawmill, and, in connection therewith, a private railroad for the purpose of transporting his employees from the mill to their work in the woods, and hauling logs to

Headnotes by EVANS, P. J.

Case Note. — *Operatives employed in industrial plant as fellow servants of employees engaged in operation of private railroad conducted in connection therewith.*

Upon the general question of what servants are to be deemed in the same common employment apart from statute, where no questions as to vice principalship arise, see note to Sofield v. Guggenheim Smelting Co. 50 L.R.A. 417.

As is indicated in the general note, the decisions upon the question, for the most part, may be referred to two general theories: First, that common employment in the sense used in this note depends solely upon whether the delinquent servant's negligence was a risk contemplated by the injured servant; and, second, that common employment depends on identity of departments of work.

The greater number of the cases upon the subject under consideration follow the first theory, and hold that the operatives in the industrial plant are to be considered the fellow servants of the employees operating the private railroad, although in some of the cases the court does not specifically refer to the theory, or base its decision in terms

the mill; and that, while being transported on a log train to his work, he was injured in the wreck of the train caused by its collision with a tree which had fallen on the track; and that the negligence of the master consisted in knowingly permitting the tree, which was dead and in such a bad and defective condition that it was liable at any time to fall upon the track, to remain in such close proximity that it might and did fall on the track. The petition was defective because of the failure to allege that the servant did not know of the location of the tree and its defective condition, or could not have known thereof by the exercise of ordinary care.

(December 16, 1908.)

CROSS WRITS of error to the Superior Court for Tift County to review a judgment sustaining a demurrer to a complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence; plaintiff com-

upon the ground that the risk was assumed by the injured servant.

Thus, in *Schwind v. Floriston Pulp & Paper Co.* 5 Cal. App. 197, 89 Pac. 1066, it was held that the fact that one who had charge of the tracks and cars of defendant's private railroad to and from defendant's factory, and one who was employed in its electrical department, were in different departments of the business, did not prevent them from being fellow servants.

So, a foreman of a lumber camp, whose duty, in the interest of a common employer, required him to ride on a log train to and from the camp to the mill, was held, in *Sanderson v. Panther Lumber Co.* 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368, to be a fellow servant with the employees of the same employer, engaged in operating such train, and to have assumed the risk of accident occasioned by the negligence of his fellow servants.

And in *Railey v. Garbutt*, 112 Ga. 288, 37 S. E. 360, a woodcutter and a locomotive engineer in charge of a train used for the purpose of hauling timber to a sawmill and of transporting employees of their common master from the mill to their respective places of work were fellow servants; and the master was not liable to the woodcutter for the negligent act of an engineer, as the former would be presumed to have assumed all of the usual and ordinary hazards of the business in which he was engaged.

So, in *Georgia Coal & I. Co. v. Bradford* (Ga.) 62 S. E. 193, it was held that a teamster employed by a coal and iron company to assist in hauling a boiler from the furnace plant of the company to its coal mines for use therein in getting out coal for consumption in the furnace and locomotives of the company was a fellow servant with the engineer and fireman of a locomotive operated in the yards of and in connection with such furnace plant. and therefore not 20 L.R.A. (N.S.)

plaining of the dismissal of his case, and defendant complaining of the allowance of an amendment. Affirmed.

The facts are stated in the opinion.

Messrs. M. Felton Hatcher, Buie & Knight, J. J. Murray, and Richard Card for plaintiff in error.

Messrs. Fulwood & Murray, for defendant in error:

The plaintiff and the defendant's engineer in charge of the engine and log train were fellow servants.

Ingram v. Hilton & D. Lumber Co. 108 Ga. 196, 33 S. E. 961; *Railey v. Garbutt*, 112 Ga. 288, 37 S. E. 360.

Evans, P. J., delivered the opinion of the court:

This case comes before us on an exception to the dismissal of the plaintiff's case on general demurrer. The petition was brought by Joseph Roland against H. H. Tift to recover damages for a personal injury, and

entitled to recover damages from the master for injuries attributable to their negligence. The court said that, under the "consociation or department rule" there could be no hesitancy in holding that the employees mentioned were not fellow servants, but that such rule did not prevail in Georgia.

So, a founder in a blast furnace, although he had nothing to do with the outside work at all, was held, in *Adams v. Iron Cliffs Co.* 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270, to be the fellow servant of a locomotive engineer whose duty it was to move cars back and forth upon the furnace track as desired in the business.

And in *Buck v. New Jersey Zinc Co.* 204 Pa. 132, 60 L.R.A. 453, 53 Atl. 740, it was held that one whose duty it was to do the blacksmith work necessary upon the instruments used in the construction of a manufacturing plant, in making a link for the chain used to hold in position the box of a dump car, was a fellow servant of one engaged in operating the car. The court said: "We cannot avoid the conclusion, therefore, that the blacksmith and the plaintiff were coemployees. Both were employed by the same master; were engaged in the same circle of employment; each was helping to carry forward in his own way a definite portion of the work directed to a common end."

An employee in an extensive lumber mill, who, to save time, rode upon a tram car propelled by steam and used by the mill owner to carry lumber from one portion of the mill to another, was held in *McFarlane v. Gilmour*, 5 Ont. Rep. 302, to be a fellow servant of the man whose duty it was to keep the track in repair.

In a few cases the court has adopted the second of the theories indicated above.

Thus, in *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186, where a common laborer in a mill was injured by

contained the following allegations in substance: In February, 1902, Tift owned and was operating a sawmill. In connection therewith he operated a railroad (not chartered) for the purpose of hauling logs to the mill, to be manufactured into lumber, and transporting his employees to and from their work at the mill and in the woods. Early in the morning, and before day, petitioner, who was an employee, with other employees, was being transported on a log train from the mill to the woods to begin work, and while on the way the log train ran against a tree which had fallen on the track, and was wrecked. In the collision of the log train with the obstruction on the track petitioner sustained injuries specifically described. It was not a part of the duty of petitioner to run the train, nor to look after or keep the track in order. The plaintiff, at the time of the injury, was riding on one of the cars of the train, being carried to his work. He was on the train by authority of the defendant, to be transported to his work, and was neither a trespasser nor a coemployee of the servants engaged in running the train. The negligence of the defendant consisted in running the train backwards, in a careless and reckless manner, without proper lights on the forward end of the train, without keeping a lookout for obstructions, and in the recklessness of the

servants in charge of the train, who, upon discovery of the log on the track, attempted to break the log or throw it from the track by greatly increasing the speed of the train. It was also alleged that the defendant knew, or could have known, that the tree was dangerously near the railroad track and liable to fall on the same. This latter allegation was amplified by an amendment alleging that the defendant was negligent in permitting the tree to stand in dangerous proximity to the railroad track, and in not removing the tree from a place where it could and did fall on the track; that the tree was in a bad and defective condition, being a dead tree and liable to fall on the track at any time, all of which was known to the defendant, or could have been known by the exercise of ordinary care. It is also alleged that petitioner could not have avoided the consequences of the defendant's negligence by the exercise of proper care.

The relation of master and servant existed between the plaintiff and defendant at the time of the former's injury. The plaintiff predicates the defendant's liability (1) upon the negligence of the servants in the operation of the train; and (2) upon the negligence of the master in permitting a dead tree which was liable to fall at any time to stand in dangerous proximity to the railroad track. As to the first ground of

the negligence of those in charge of a train running upon the defendant's private road, the court, after speaking of the ruling of several cases upon the general subject, said: "That ruling requires that the servants of the same master, to be coemployees, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business.—i. e., the same line of employment,—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences; and, of course, where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application. How can the laborer be profited by a knowledge of the usual manner of doing work in another department, if he is unable, in any reasonable way, while engaged in the proper discharge of his duties, and without disobedience to his immediate superiors, to influence the 20 L.R.A. (N.S.)

conduct of the laborers in that department? The instruction was properly refused."

And in *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. 1108, the *Johnson Case* was followed; and it was held that the foreman of a gang of men engaged in keeping defendant's private railroad in repair was not the fellow servant of men engaged in handling the iron within the mill. In speaking of who were fellow servants in the sense used in this note, the court said: "One person may be employed to transact one department of business, and another may be employed by the same master to transact a different and distinct branch of business; but, if their usual duties bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, such persons might be regarded as fellow servants."

In *Keystone Mills Co. v. Chambers* (Tex. Civ. App.) 118 S. W. 178, the facts were very similar to those in *ROLAND v. TIFT*, and the court held that the injured employee was not a fellow servant of the employees in charge of the train, inasmuch as he did not come within the terms of the statute providing which of the servants of those operating a railroad are fellow servants with each other. But this note was not intended to include cases involving statutes which expressly declare who are fellow servants.

liability: It does not appear what was the exact character of the plaintiff's work; but, as it is alleged that he was being transported to his work in the woods at the time he sustained his injuries, and that the train on which he was riding was a log train, employed in hauling logs to the mill, he was probably a woodcutter, whether employed as a woodcutter or performing other work in the woods; and it clearly appears that the plaintiff's employment was connected with the operation of the sawmill. There is an averment that the plaintiff was not a coemployee of the servants engaged in operating the train. This allegation, however, is but the statement of the legal conclusion that the relation of fellow servant did not exist between the plaintiff and the servants in charge of the train from the facts alleged. This conclusion is unwarranted. The petition discloses that the master was engaged in operating a sawmill, and, in the conduct of its business, used various instrumentalities, and assigned his servants to the discharge of duties in the different departments of his enterprise. One set of servants managed the train which conveyed other servants to and from their work in the woods, and hauled the logs cut by them to the mill. Another set of servants cut the trees into logs ready to be manufactured into lumber. Others loaded them on the train to be conveyed to the mill, and still other servants operated the mill. All of those servants were engaged in labor for the furtherance of the general purpose of the business in which they had contracted to serve, and were fellow servants within the purview of Civil Code 1895, § 2610, which provides that, "except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business." *Georgia Coal & I. Co. v. Bradford*, 131 Ga. 289, 62 S. E. 193; *White v. Kennon*, 83 Ga. 343, 9 S. E. 1082; *Ellington v. Beaver Dam Lumber Co.* 93 Ga. 53, 19 S. E. 21; *Railey v. Garbutt*, 112 Ga. 288, 37 S. E. 360. Whether the transportation of the plaintiff was gratuitous, or whether it was included in the contract of service, in either case (there being no special payment for the transportation) the plaintiff's transportation to the woods was incident to the service which the plaintiff was to perform, and closely connected with it. *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 288; *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; 2 Labatt, Mast. & S. § 624. So that the alleged acts of negligence of the defendant's servants in the operation of the log train afford no basis for an action against the defendant. They and petitioner were fellow servants, and the de-

fendant is not liable for any injury occasioned to the plaintiff by the negligence of his coservant in operating the train.

It is alleged, secondly, that the master was negligent in knowingly permitting a dead tree to remain so near the track that from its defective condition it was liable at any time to fall upon the track. While the servant was riding to his work in the course of his employment, the reciprocal obligations of himself and the master were not different from those in which they stood after the servant had reached his destination and commenced work in his particular department. The master owes a duty to furnish his servant a reasonably safe place in which to work; and, if there are dangers incident to an employment, unknown to the servant, of which the master knows, or ought to know, he must give the servant warning in respect thereto. But the servant assumes the ordinary risks of his employment, and is bound to exercise his own diligence to protect himself. In suits for injuries arising from the negligence of the master, where the dereliction of duty consists in a failure to provide a safe place for work or a failure to warn the servant of an unknown danger, the servant must not only make it appear that the master failed to perform his duty in furnishing a safe place to work, or to warn him of unknown dangers, but also that the servant injured did not know, and had not equal means of knowing, the defective condition of the instrumentality employed or of the danger, and, by the exercise of ordinary care, could not have known thereof. Civil Code 1895, §§ 2611, 2612; *Turner v. Seville Gin & Warehouse Co.* 127 Ga. 555, 56 S. E. 739. The duty of the master who transports his servants to their work, in providing safe carriages for their use, where separate compensation for the transportation is not charged, is somewhat analogous to the duty to provide a safe place to work. The fundamental basis of liability of a master to a servant injured in his employment is the master's violation of duty. The servant's assumption of risk becomes, by force of the cited Code sections, a term of the contract of employment by which the servant impliedly agrees that dangers of injury which are incident to the discharge of the servant's duty shall be at the servant's risk. No right of action arises in favor of the servant at all until it is made to appear that the master has violated his duty, and the servant cannot recover of the master damages for an injury resulting from a risk he has legally assumed. It is therefore essential that the servant, in formulating his cause of action against the master, shall allege facts from which the master's dereliction of duty is made to appear. He must allege either in so many

words, or in the statement of facts from which the implication may be drawn, that the injury was not the resultant of a risk of danger assumed by him. See *Allen v. Augusta Factory*, 82 Ga. 79, 8 S. E. 68; *Worlds v. Georgia R. Co.* 99 Ga. 283, 25 S. E. 646. In describing the tree and its location, the plaintiff states that it was a dead tree, that it was near the track, and, because of its defective condition, it was liable at any moment to fall upon the track. The condition of the tree was patent; and, from the plaintiff's failure to otherwise aver, we must assume that he knew, or at least had equal means with the master of knowing, the defective condition of the tree. The provisions of the Code section previously cited require that a servant, when he sues for an injury caused by the master's failure to provide for him a safe place to work, or to give him warning of a danger incident to his work, must allege and prove that he did not know of the defective condition or of the danger, and could not have known thereof by the exercise of ordinary care. The petition is defective in failing to allege that the plaintiff neither knew, nor could have known, of the defective condition of the tree which fell across the track, derailing the train and resulting in his injury.

Counsel for the plaintiff in error rely strongly on the case of *Corley v. Coleman*, 113 Ga. 994, 39 S. E. 558. In many respects that case on its facts is very similar to the case in hand. But in that case the plaintiff distinctly alleged that, while the condition of the tree which fell upon the track was such as to imperil the lives and safety of the employees upon passing trains, the fact that it was in such condition was not known to the injured servant, and could not have been discovered by him by merely passing the tree. There is no such averment in the petition in this case, and the failure to allege lack of knowledge of the danger or defective condition of the tree by the servant distinguishes this case from *Corley's Case*.

Judgment affirmed upon the main bill of exceptions. Cross bill dismissed.

All the Justices concur.

KANSAS SUPREME COURT.

SCHOOL DISTRICT NUMBER 116. OF
SEDGWICK COUNTY, et al., Pliffs. in
Err.,

v.

WILLIAM WOLF et al.

(— Kan. —, 98 Pac. 237.)

School district — boundaries — petition
to change.

1. Although the statute contemplates the
20 L.R.A. (N.S.)

filing of a petition with a county superintendent for the change of boundaries of a school district as a basis for the issuance by him of a notice setting a time for a hearing upon the requested change, yet, where a verbal request is made for the change, and proper notice is given, the interested parties appear, the order is made, appeal is taken to the board of county commissioners, and the order is affirmed, the proceeding is only irregular, but is not void.

Same — change — collateral attack.

2. Such an order so made and affirmed is final, and is not subject to collateral attack in an action for injunction.

Same — officers — detachment of territory.

3. Upon the detachment of the territory within which a school-district officer resides from the school district of which he is an officer, his office immediately becomes vacant *ipso facto*, and may be filled by appointment.

Quo warranto — public office — illegal holding.

4. Quo warranto, and not injunction, is the proper remedy for an illegal holding of a public office.

(November 7, 1908.)

Headnotes by SMITH, J.

Case Note. — Effect of detachment from a political division, of territory in which an officer resides, upon his tenure of the office.

Where a county is divided by act of legislature for the purpose of forming a new county; and it so happens that a county judge of the original county resides in that portion set off as a new county,—his office as county judge ceases; and he is no longer competent to act under his commission. *People v. Morrell*, 21 Wend. 563; *State ex rel. Ives v. Choate*, 11 Ohio, 511.

It was held in *Mauck v. Lock*, 70 Iowa, 266, 30 N. W. 566, that, where a road supervisor, by reason of the restricting of a township, ceases to be a resident of the district for which he was elected, he ceases to be a supervisor. This case distinguishes *State ex rel. Gill v. Milwaukee County*, infra, on the ground that, although the boundaries of the district from which the county supervisor in the latter case was elected were changed, the decision turned upon the fact that his duties were not local; and that, on the other hand, he was essentially a county officer.

And in *State ex rel. Hartshorn v. Walker*, 17 Ohio, 135, it was held that, upon the formation of a new county from part of the territory of another, county commissioners whose residence was thereby changed to the new county ceased to hold office in the event of their failure immediately to remove within the new limits of the old county.

A justice of the peace commissioned for

ERROR from the District Court for Sedgwick County to review a judgment denying relief in an action brought to enjoin certain actions of the school board for District No. 116 in that county. Affirmed.

Statement by Smith, J.:

This action was brought August 7, 1906, for the purpose of having the order of A. D. Taylor, county superintendent of public instruction of Sedgwick county, which purports to detach a portion of the territory of school district No. 116 in that county therefrom and attach it to school district No. 141, declared invalid, and to enjoin the individual defendants from exercising the duties of the several offices of director, treasurer, and clerk of school district No. 116, and from exercising the duties of the official school board of said district. The action was brought in the name of school district No. 116, and H. Schirenbeck, H. R. Goodman, and Alice Yoder, who claimed to hold the respective offices and to constitute the school board of the district. On April 13, 1906, the county superintendent of public instruction, at the request and suggestion of residents of the school district, issued a notice of a hearing on the application to change the boundaries of the school district.

The notice of such hearing was duly posted, and, on the ensuing May 12th, the hearing was duly had. All of the individual plaintiffs in error were residents of the territory proposed to be detached, and they, with a number of other residents of such territory, appeared at the hearing, and opposed the allowance of the application. The application, however, was allowed, and they appealed from the decision of the superintendent to the board of county commissioners, and the board of county commissioners affirmed the decision in June, 1906. Thereupon the county superintendent appointed a director and clerk of the school district, evidently assuming that, by the detaching of the territory in which each of the old members of the school board resided, a vacancy occurred in each of said offices. It appears that two school-district meetings were held on July 19, 1906, at one of which Alice Yoder claims to have been re-elected clerk and Schirenbeck and Goodman claim to have continued in office by reason of the nonexpiration of the respective terms for which they had theretofore been elected. At the other annual school meeting of school district No. 116 on the same date the defendants claim, respectively, to have been elected director, treasurer, and clerk of the

a certain county ceases to be a justice of that county upon a division thereof for the purpose of forming a new county, in case his place of residence is in the territory taken from the original county. *Respublica v. McClean*, 4 Yeates, 399.

Where the result of the creation of a new judicial circuit is to make a judge of the original circuit a nonresident thereof, his office does not become vacant on account of the nonresidence until he has been allowed a reasonable time for removing to the circuit for which he was appointed. *State ex rel. Atty. Gen. v. Messmore*, 14 Wis. 177.

Although an office becomes vacant by statute upon an officer ceasing to be an inhabitant of the district for which he was elected, a duly elected road overseer does not lose his office because of a change in the district from which he was elected, which placed his residence outside thereof, such change being prospective in its operation. *State ex rel. O'Connell v. Nelson*, 7 Wash. 114, 34 Pac. 562.

In *Re Wood*, 34 Kan. 645, 9 Pac. 758, it appeared that a portion of a township had been transferred by act of legislature from one county into the boundaries of a newly formed county, and a justice of the peace residing in that part of the township detached assumed to act in that capacity for the new county. It was held that he was without authority to do so because the action of the legislature in detaching the part of the township in which the justice resided ousted him from office.

20 L.R.A. (N.S.)

And see *Frazer v. Miller*, 12 Kan. 459, where it was said that, where a township was divided, and one of its two justices was thrown into the new township, a vacancy in his office occurred, as upon a voluntary removal from the original township.

But *State ex rel. Gill v. Milwaukee County*, 21 Wis. 449, holds that, although the boundaries of a district from which a supervisor had been elected were so changed that he ceased to be a resident of his district yet he did not thereby cease to be a supervisor. The decision is upon the ground that the office in this case was not local or strictly representative as to the election district, but that such divisions were for convenience merely in providing for the continuance of the body corporate.

In *State v. Hixon*, 27 Ark. 398, on a demurrer to an information filed in quo warrant proceedings for the removal of a sheriff from office, it was held that an act of the legislature in creating a new county, and thereby changing the sheriff's place of residence so as to constitute him a nonresident of the county for which he was elected, did not of itself cause a forfeiture of his office. It is suggested in this case that a person who persists in exercising the duties of a sheriff of a county for an unreasonable time, while he remains a nonresident of it, may perhaps be found guilty of a misdemeanor in office; but it is not until conviction thereof before a competent tribunal that he can be removed from his office.

school district. The probate court issued a temporary injunction in the absence of the district judge, and, on the trial of the case in the district court, the court found the issues in favor of the defendants, and denied a permanent injunction.

Mr. John W. Adams, for plaintiffs in error:

The act detaching the territory was void as requisite written notice of the proposed change was not made.

State v. Secrest, 60 Kan. 641, 57 Pac. 500; *Salamanca Twp. v. Wilson*, 109 U. S. 627, 27 L. ed. 1055, 3 Sup. Ct. Rep. 344.

Messrs. D. M. Dale and S. B. Amidon, for defendants in error:

The action of the county superintendent altering the boundaries cannot be attacked in a collateral proceeding.

School Dist. No. 8 v. Gibbs, 52 Kan. 564, 35 Pac. 222; 25 Am. & Eng. Enc. Law, 2d ed. p. 37; *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, 3 A. & E. Ann. Cas. 239; *Atchison, T. & S. F. R. Co. v. Lyon County*, 72 Kan. 16, 82 Pac. 519, 84 Pac. 1031; *Levitt v. Wilson*, 72 Kan. 160, 83 Pac. 397; *Chaves v. Atchison*, 77 Kan. 176, 93 Pac. 624.

Smith, J., delivered the opinion of the court:

The principal questions presented in this case are: (1) Was the order of the county superintendent affirmed by the board of county commissioners detaching the territory from school district No. 116 and attaching it to another school district valid? (2) If this order was valid, it being conceded that each member of the school board at the time the order was made and thereafter was a resident of the detached territory, did this *ipso facto* create a vacancy in each of the offices of said school board?

1. The plaintiffs in error contend that the county superintendent had no authority to issue the notice of the hearing on the application for a change of boundaries of the school district, for the reason that no written petition had been presented to him requesting the same. It is said in *State v. Secrest*, 60 Kan. 641, 645, 57 Pac. 500, 502: "No express provision is made for a petition to the county superintendent, but written notice of the proposed change of districts is specifically required, and therefore the statute plainly contemplates that a petition shall be made for the proposed change; and this is the basis of the notice given by the county superintendent." Assuming that the word "petition" as used in that case means a written petition, the county superintendent in this case acted irregularly in issuing

the notice upon a verbal request only. The record, however, discloses that a proper notice was issued and properly posted; also, that a large number of the residents of the territory proposed to be detached appeared at the hearing, and, upon receiving an adverse decision, appealed from the action of the county superintendent to the board of county commissioners, which board affirmed the decision of the county superintendent. There is no question but that all the parties concerned fully understood the issue involved, and had a full and fair opportunity to be heard; that, after a full hearing was had, the order was made, was appealed from, and affirmed. The proceeding was irregular in its inception, but is not void.

A portion of § 6121, Gen. Stat. 1901, reads: "If in the formation or alteration of, or refusal to form or alter, school districts, any person or persons shall feel aggrieved, such person or persons may appeal to the board of county commissioners, who shall confer with the county superintendent, and their action shall be final. . . ." Great precision and formality, especially in the absence of an express requirement of statute, should not be held imperative in quasi judicial proceedings of this character. The order of the county superintendent as affirmed is valid, and is final. Neither can the plaintiffs in error interfere by injunction with the management and control of the school affairs of school district No. 116 in which they no longer have an interest. *School Dist. No. 8 v. Gibbs*, 52 Kan. 564, 35 Pac. 222.

2. As to whether the removal of a school-district officer by a detachment from the district of the territory in which he resides creates a vacancy in the office, the authorities are not uniform. See 23 Am. & Eng. Enc. Law, p. 426. In the early case of *Williams v. School Dist. No. 1*, 21 Pick. 75, 32 Am. Dec. 243, it was held that a clerk of the school district "is competent to act as such, although he has removed into an adjoining district in the same town, and another has been chosen in his stead, but not sworn." The reason for the decision is set forth in the following excerpt from the opinion: "The Revised Statutes (chap. 23, § 27) provide that the district shall choose a clerk to be sworn, etc., and who shall hold his office until another shall be chosen and sworn in his stead. The manifest intent seems to have been that there should at all times be a recording officer charged with the duty of keeping a record of the proceedings and votes of the district. In this case the district had proceeded to choose another, but, until he was qualified, we think by force of the statute, the former clerk

was competent to act." In *Salamanca Twp. v. Wilson*, 109 U. S. 627, 27 L. ed. 1055, 3 Sup. Ct. Rep. 344, it is decided that "the removal of a treasurer of a township in the state of Kansas from the limits of the township into the limits of an adjoining township, without resigning his office, does not vacate the office so as to invalidate service of summons upon him in his official capacity for the purpose of commencing an action against the township." In the opinion it is said: "There is nothing in the Constitution or laws of Kansas which requires a township treasurer to be a resident of or voter in the township when elected or qualified; neither is there anything which vacates the office if the officer removes from the township during the term for which he was elected. Justices of the peace are township officers, and as to them it is expressly provided that they 'shall reside and hold their office in the township for which they shall have been elected.' Dassler's Comp. Laws 1879, chap. 110, p. 978 (5970) § 4. As no similar provision is made in respect to any other township officer, the implication necessarily is that actual residence in the township is not required of them. *Expressio unius est exclusio alterius*." This decision is based expressly upon the absence of any requirement in the statute that the treasurer of a township should be a resident of the township when elected and qualified. Also it expressly implies that, if there were such a requirement in the statute, the rule would be different. In passing, it may be said that, soon after the publication of this decision, the statute of Kansas was amended in the respect suggested. The school laws of Kansas (§§ 6125, 6127, Gen. Stat. 1901), in effect, limit the choice of director, clerk, and treasurer of a school district to such electors thereof as shall have been in good faith residents of the district for thirty days next prior to the election. As to whether the detachment of the territory in which an officer lives constitutes a removal of residence, this court, in *Frazer v. Miller*, 12 Kan. 460, has settled the policy of this state. In the syllabus it is said: "Where, by the division of a township, one of its two justices is thrown into a new township, there is created a vacancy in the office of justice of the original township which may be filled by appointment." In the opinion by Mr. Justice Brewer it is said: "He was removed from the township, not by his own volition, but by the act of partition. The result is the same, though the manner of accomplishment is different."

We conclude that, when the detachment of the territory in which all the members of the old school board resided became final by 20 L.R.A. (N.S.)

the affirmation of the decision of the county superintendent by the board of county commissioners, the offices of the director, treasurer, and clerk of the school district No. 116 immediately became vacant *ipso facto*. The incongruity of a contrary holding is apparent when it is considered that the entire business management of the school district would thereby be turned over to officers who derive no emoluments from their offices, and who have no interest in the affairs of the district. Making the school district a party plaintiff to this action, in which it could in no event thereof derive a benefit, is a more specific illustration. Were the contrary view the law, however, this action could not be maintained by the plaintiffs. Quo warranto, and not injunction, is the proper remedy for the illegal usurpation of an office.

Much is said in the briefs of the violation or ignoring of the temporary injunction issued in the case by the probate judge. Even if the probate judge had jurisdiction to issue a temporary injunction which this writ purports to be (*State ex rel. Bender v. Johnston* [Kan.] 97 Pac. 790), the question of a contempt thereof is not involved in this action.

The District Court determined the issues in this case in favor of the defendants in error, and the judgment is affirmed. The costs in this court will be taxed to the plaintiffs in error other than School District No. 116.

KANSAS SUPREME COURT.

C. C. COLEMAN, Plff. in Err.,

v.
F. P. MACLENNAN.

(— Kan. —, 98 Pac. 281.)

Libel — privileged communications — candidate — character.

1. If the publisher of a newspaper circulated throughout the state publish an ar-

Headnotes by BURCH, J.

Case Note. — Libel and slander; privilege as affected by extent of publication.

It is intended to include herein only cases which have considered the question of privilege as affected by excessive publicity. Cases passing on the question as to whether or not the doctrine of privilege applies, and also cases considering the question of privilege as affected by the character of the publication, are excluded.

General doctrine.

The general rule is that the publication of defamatory matter, false in fact, is in

ticle reciting facts, and making comment relating to the official conduct and character of a state officer, who is a candidate for re-election, for the sole purpose of giving to the people of the state what he honestly believes to be true information, and for the sole purpose of enabling the voters to cast their ballots more intelligently; and the whole thing is done in good faith,—the publication is privileged, although the matters contained in the article may be untrue in fact, and derogatory to the character of the candidate.

Same — newspaper — limitations.

2. Generally publication should be no wider than the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But, if a state newspaper published pri-

law malicious; and the injured party has an action for damages therefor. The exception to this rule is when the cause or occasion of a publication is such as to render it properly necessary for common convenience and the general welfare of society that the party making it should be protected from liability. This circumstance rebuts the inference of malice otherwise arising from the publication, and the publisher is liable only on proof that in making the publication he was actuated by a malicious motive. One way of proving malice in such cases is to show that the publication or communication was not primarily confined to persons having a corresponding interest in the subject-matter of the publication or communication.

While it is a question for the court in the first instance to determine whether a defamatory statement, if made in good faith and without malice, is privileged, yet the injured party has the right, notwithstanding the privileged character of the communication, to go to the jury if there is evidence tending to show actual malice, as when the occasion of their utterance is such as to indicate by its unnecessary publicity, or otherwise, a purpose wrongfully to defame the injured person. *Dale v. Harris*, 109 Mass. 193; *Brow v. Hathaway*, 13 Allen, 239.

But privilege is not defeated by the mere fact that the alleged libelous statements were made in the presence of others than the parties immediately interested. If, however, given unnecessary publicity, this circumstance is material to show malice in fact, and that the occasion was improperly sought or used to utter defamatory words. The conclusion to be drawn from such circumstances, however, is one of fact, to be drawn by the jury, and not by the court. *Brow v. Hathaway*, *supra*.

The leading case on this subject is *Too-good v. Spyring*, 1 Crompt. M. & R. 181, wherein it was held error for the trial court to have decided, as a matter of law, that a communication otherwise privileged lost its privileged character because made in the presence of a third person not interested in the subject-matter thereof. In reaching this 20 L.R.A. (N.S.)

marily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of subjects of state-wide concern because of that fact.

Appeal — findings — instructions.

3. If, on the trial of a suit for libel, the jury should find specially from the evidence that the plaintiff suffered no damages from the publication complained of, it will not be presumed that the finding was induced by instructions regarding particular questions in the case not related to that of damages; and the question whether such instructions misstate the law becomes immaterial because they could not affect the plaintiff's substantial rights.

(November 7, 1908.)

conclusion, the court enunciated the principles applying to the question of privilege, which have been quoted from with approval in a great majority of the cases in this country and England, which have had occasion to consider the subject. The court said: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. . . . I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose, to a party who has any interest in the inquiry (and that has been very liberally construed, [a]), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another does, by no means of necessity, take away from it the

ERROR to the District Court for Shawnee County to review a judgment in defendant's favor in an action brought to recover damages for libel. Affirmed.

The facts are stated in the opinion.

Messrs. Frank L. Williams, Charles Blood Smith, and John E. Hesslin, for plaintiff in error:

False charges concerning a public officer or candidate for public office, imputing to him corrupt or criminal conduct, are not privileged, although they are published without malice.

Hallam v. Post Pub. Co. 55 Fed. 456, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530; Seymour v. Butterworth, 3 Fost. & F. 377; Davis v. Shepstone, L. R. 11 App. Cas. 187; Smith v. Tribune Co. 4 Biss. 477, Fed.

Cas. No. 13,118; Snyder v. Fulton, 34 Md. 128, 6 Am. Rep. 314; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605; Curtis v. Mussey, 6 Gray, 273; Hamilton v. Eno, 81 N. Y. 126; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; Wheaton v. Beecher, 66 Mich. 307, 33 N. W. 503; Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; Lewis v. Few, 5 Johns. 1; Root v. King, 7 Cow. 613; Seely v. Blair, Wright (Ohio) 358, 683; Brewer v. Weakley, 2 Overt. 99, 5 Am. Dec. 656; Barr v. Moore, 87 Pa. 385, 30 Am. Rep. 367; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; Bailey v. Kalamazoo Pub. Co. 40 Mich. 257; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Buckstaff v. Vaill, 84 Wis. 129, 54 N. W. 111; Bee Pub. Co. v. Shields, 68 Neb. 750, 94 N. W. 1029, 99

protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge, or been influenced by malicious motives."

In Chaffin v. Lynch, 84 Va. 884, 6 S. E. 474, although not within the scope of this note as to facts, the doctrine was enunciated that, if the communication complained of went beyond the occasion and was unnecessarily defamatory, or was more extensively published than the circumstances of the case reasonably required, it would not be protected although the defendant honestly believed that in all he did he was discharging his duty.

In Morton v. Knipe, 128 App. Div. 94, 112 N. Y. Supp. 451, the court also expressed the opinion that mere privilege of occasion did not protect a libelous communication made knowingly, or carelessly, in the hearing of those not concerned.

The existence of a malicious motive may be legitimately gathered from the circumstances under which the communication was made, as where an opportunity was sought to make it before third persons not legally interested in hearing it, rather than to those interested. Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 261.

What is excessive publication.

The following cases illustrate the extent to which defamatory matter may be published without losing the right of conditional or qualified privilege because of unnecessary or extensive publicity; also restrictions on the extent of the publication: 20 L.R.A. (N.S.)

—publications in newspapers.

In Mertens v. Bee Pub. Co. 5 Neb. (Unof.) 592, 99 N. W. 847, the court expressed the opinion that a libelous publication relating to a candidate for public office, otherwise privileged, was not affected by the mere fact that the newspaper containing the publication was incidentally brought to the attention of others than those for whom it was intended.

A libelous publication made by church officials in good faith, defamatory of the pastor of their church, confined to church papers of the same faith, is privileged, even though such papers are also incidentally circulated outside the church members. Redgate v. Roush, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050 (cited and commented upon in COLEMAN v. MACLENNAN).

The fact that an otherwise privileged libel relating to the conduct of a minister of the gospel is published in church papers which, while generally circulating among the membership of the faith of such minister, also circulate outside the membership, does not remove the privilege. Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698.

But in the foregoing case, the court expressed the opinion that without doubt a publication might be so made as of itself to bear palpable evidence of malice, as where made in an unusual number of papers having circulation outside the circle of readers who would be legitimately interested in the facts.

A notice by a tradesman to his customers not to pay their accounts to a former employee does not lose its privileged character by the mere fact that it was published in a newspaper which circulated outside the routes of the publisher's business; nor does that fact necessarily prove malice. It is, however, evidence of express malice to be considered by the jury. Hatch v. Lane, 105 Mass. 394.

In Buckstaff v. Hicks, 94 Wis. 34, 59 Am. St. Rep. 853, 68 N. W. 403, although doubt was expressed by the court as to whether or not the publication complained of came within the doctrine of privilege, the question was considered as to the loss of privilege by the

N. W. 822; *Martin v. Paine*, 69 Minn. 482, 72 N. W. 450; *Augusta Evening News v. Radford*, 91 Ga. 494, 20 L.R.A. 533, 44 Am. St. Rep. 53, 17 S. E. 612; *Wood v. Boyle*, 177 Pa. 620, 52 Am. St. Rep. 747, 35 Atl. 853; *Wofford v. Meeks*, 129 Ala. 349, 55 L.R.A. 214, 87 Am. St. Rep. 66, 30 So. 625; *Belknap v. Ball*, 83 Mich. 583, 11 L.R.A. 72, 21 Am. St. Rep. 622, 47 N. W. 674; *Eikhoff v. Gilbert*, 124 Mich. 353, 51 L.R.A. 451, 83 N. W. 110; *Upton v. Hume*, 24 Or. 420, 21 L.R.A. 493, 41 Am. St. Rep. 863, 33 Pac. 810; *Holmes v. Clisby*, 104 Am. St. Rep. 135, note; *Star Pub. Co. v. Donahoe* (Del.) 65 L.R.A. 980, 58 Atl. 513.

The circulation without the state deprived the publisher of privilege.

Buckstaff v. Hicks 94 Wis. 34, 59 Am. St. Rep. 853, 68 N. W. 403; *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555; *State v. Haskins*, 109 Iowa, 656, 47 L.R.A. 223, 77 Am. St. Rep. 560, 80 N. W.

publication in a newspaper having a circulation outside a senatorial district of a senator, with reference to whose character the publication in question contained libelous statements. Under these circumstances, the court said that the claim that there was any duty, public or private, resting on the defendant to publish such a charge against the plaintiff in localities outside his senatorial district, wherein the paper circulated, was to demonstrate the absurdity of the claim; and added that there was not only no duty, but that there was certainly no tangible interest in the subject-matter, on the part of people outside the district. From this fact the court said it was plainly to be seen that the publication, even if it could be considered as privileged and made to the citizens of that senatorial district who might be said to be interested in the subject-matter, could not be made broadcast to the world and preserve its privileged character; that, in order to be privileged, it must have been confined to the people to whom the defendant owed a duty to speak, or who had an interest with the defendant in the subject-matter.

An open letter, containing false defamatory matter relating to an applicant for appointment to a public office by the common council of a municipality, is not privileged, where published in a newspaper of wide circulation, although, in the absence of express malice, it would have been privileged if confined to the appointing power. *Hunt v. Bennett*, 19 N. Y. 173.

Effect of casual presence of third persons.

The mere fact that casual bystanders, not legally interested in the communication complained of, are present and hear it, is not of itself sufficient to remove the privilege. *Fahr v. Hayes*, supra.

The casual presence of bystanders or other servants at a time when a master accuses his servant of a theft will not of itself de-

1063; *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *Hunt v. Bennett*, 19 N. Y. 173.

Messrs. W. P. Hackney, Waters & Waters, and B. P. Waggener, for defendant in error:

The charges having been shown to be true, the errors complained of are not material, and did not affect plaintiff's substantial rights.

State v. Balch, 31 Kan. 465, 2 Pac. 609; *State v. Wait*, 44 Kan. 315, 24 Pac. 354; *Castle v. Houston*, 19 Kan. 419, 27 Am. Rep. 127; *Mundy v. Wight*, 26 Kan. 173.

The article was privileged even if the charges were untrue.

Castle v. Houston, 19 Kan. 417, 27 Am. Rep. 127.

Burch, J., delivered the opinion of the court:

In August, 1904, the plaintiff held the office of attorney general of the state, and

prive the words of their privileged character. *Gildner v. Busse*, 3 Ont. L. Rep. 561.

A bulletin by officers of a corporation, containing libelous charges against a former employee, posted in different offices of the company, otherwise privileged, does not lose that character by the mere fact that persons not interested therein, in casually passing, through the office, have seen it. *Sheftall v. Central R. Co.* 123 Ga. 589, 51 S. E. 646.

The privilege which would attach to statements by one of the guardians at a meeting of poor-law guardians as to a clerk's accounts, if made in the presence of the guardians only, is not lost by the presence at the meeting of third persons. *Pittard v. Oliver*, [1891] 1 Q. B. 474.

The mere presence of an attorney at a shareholders' meeting will not deprive statements by a shareholder as to the competency of an employee of their privileged character. *Broughton v. McGrew*, 5 L.R.A. 406, 39 Fed. 672.

The fact that an imputation of felony was made in the presence of a third person not legitimately interested therein does not *per se* remove the privilege; but the circumstances and occasion should be submitted to the jury to determine the motive of the defendant. *Padmore v. Lawrence*, 11 Ad. & El. 380.

So, where the jury, by its finding, negatives express malice in the utterance of an otherwise privileged slander, the fact that third persons were present and heard the communication is unimportant. *Davies v. Sneed*, L. R. 5 Q. B. 608.

Charging another with theft is privileged if made in good faith, in the belief that it was true, and without express malice, although made in the presence of others, where made in answer to a question by an interested party, to which such charge was a pertinent answer. *Brow v. Hathaway*, 13 Allen, 239.

But a statement by an employer in good

was a candidate for re-election at the general election, which occurred in the following November. By virtue of his office, he was a member of the commission charged with the management and control of the state school fund. The defendant was the owner and publisher of the Topeka State Journal, a newspaper published at Topeka, and circulated both within and without the state. In the issue of the date mentioned appeared an article purporting to state facts relating to the plaintiff's official conduct in connection with a school-fund transaction, making comment upon them and drawing inferences from them. Deeming the article to be libelous, the plaintiff brought an action for damages against the defendant, alleging that the matter published concerning him was false and defamatory, and that its publication was the fruit of malice. Among other defenses, the defendant pleaded facts which he

claimed rendered the article and its publication privileged.

At the trial instructions presenting the plaintiff's view of the law of privilege were refused, and the following instruction was given to the jury instead: "As you have already observed from the statement of the case, defendant claims, as his first defense, that the publication is what is known in law as 'privileged.' A communication made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. And, where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office, and for the purpose of enabling such voters to cast their ballot more intelligently,

faith, and with the belief that it is true, made to a third person to whom a servant has applied for a position, to the effect that he believes him to have committed larceny while in his employ, while privileged if made privately to such third person, is not privileged if made in the presence of others. *Dale v. Harris*, 109 Mass. 193.

At first glance it would seem that the last two cases are in conflict. Although decided by the same court, without drawing any distinction, a distinction suggests itself by which they are easily reconciled. In the *Brow Case* the charge was made in answer to a question put by an interested party to which it was pertinent. The utterer, therefore, could not be said to have the option to choose a time and place. In other words, it was an involuntary statement. In the *Dale Case* on the other hand, the statement was a voluntary one. On the ground of duty, if made in good faith, such a statement was entitled to protection, but, in making it, it certainly would be the duty of the utterer to do so without unnecessary publicity. It being voluntary, it would be his duty to choose such a time and place as would insure privacy. If he neglected this duty, and made the statement in the presence of disinterested persons, such fact should at least be evidence of express malice.

Webber v. Vincent, 29 N. Y. S. R. 603, 9 N. Y. Supp. 101, held that a statement reflecting upon the chastity of a woman, although a pertinent answer to a question by an interested person, was not privileged where made in the presence of others casually present. The court said that the rule in such cases was that, to be privileged, such a communication must be made only to those interested therein.

Intentional publication to third person.

A communication privileged if made by letter loses its privilege if sent through a telegraph office, where it is necessarily com-
20 L.R.A. (N.S.)

municated to all the clerks through whose hands it passes. *Williamson v. Freer*, L. R. 9 C. P. 393.

Although otherwise libelous, a publication to the corporation of the result of an investigation as to the competency of an employee of the company is excused by the relations of the president and directors as an investigating committee from their board; yet the privilege of the officers of the corporation as individuals, or as a corporate body, does not extend to the preservation of the report in evidence in the form of a book for distribution among the stockholders of the corporation, or members of the community. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73.

An employer about to dismiss a servant, who calls in a third person and in his presence charges the servant with having committed embezzlement, loses the right to claim the protection of privilege. *Taylor v. Hawkins*, 16 Q. B. 308.

Where the publication by a corporation of a bulletin containing libelous charges against a former employee is not limited to the employees interested in the subject-matter of the publication, but is posted in various places in the office of the company, where it is not only the right of all its employees, but the duty of a large number of them other than those interested therein, to read it, the communication is not privileged. *Sheftall v. Central R. Co.* supra.

Under such circumstances, however, it is a question for the jury whether the business of the company, at the place where the bulletin was posted, was carried on in such a way that the company must have known at the time it was posted that the persons not interested therein would probably read it. *Ibid.*

Although disposed of on other grounds, in *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 3 L.R.A. (N.S.) 690, 114 Am. St. Rep. 171, 83 Pac. 131, 7 A. & E. Ann.

and the whole thing is done in good faith, and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article. If you believe from the evidence in this case that on August 20, 1904, plaintiff was a candidate for re-election to the office of attorney general, and that defendant published said article for the sole purpose of giving to the voters of Kansas what he believed to be truthful information concerning the acts of the attorney general, and only for the purpose of enabling such voters to cast their ballots more intelligently, and that the defendant made all reasonable effort to ascertain the facts before publishing the same, and that the whole thing was done in good faith, and without malice toward plaintiff; and if you believe that the bulk of the circulation of the said paper was within the state of Kansas, and that its circulation outside of the state of Kansas was only incidental,—then I instruct you that your verdict must be for the defendant, although you may believe that the principal matters contained in said article are untrue in fact and derogatory to the character of the plaintiff; but, on the contrary, if you should find from the evidence that said article was published with a malicious intent to wilfully wrong and injure plaintiff, then the fact that the article is a privileged one would constitute no defense to this action, and the plaintiff would be entitled to recover such damages as the evidence shows him to have sustained by reason of said publication." In the course of the trial it became material whether the purchasable quality of county bonds offered to the school fund may be predicated upon the equalized valuation of property instead of

its assessed valuation, and whether certain manipulations of the public funds in the state treasury were contrary to law. It likewise became necessary for the court to give the jury a definition of a "conspiracy" and to apply the definition to the facts of the case. Instructions tendered by the plaintiff upon these subjects were refused, and exceptions were saved to those given. The following instruction asked by the plaintiff was refused, and an exception noted: "The court instructs you that even though you should believe from all the evidence in this case, if you do so believe it, that the publication of the article as alleged in plaintiff's petition was privileged and justifiable within the limits of the state of Kansas, yet I instruct you that, under the evidence and the pleadings in this case, the publication of such article outside of and beyond the limits of the state of Kansas is neither privileged nor justifiable; and, if you believe from the evidence that publication of said article was made outside of and beyond the limits of the state of Kansas by the circulation of any number of copies of the Topeka State Journal containing said article, the plaintiff in this action is entitled to recover damages for such publication beyond the boundaries and limits of the state of Kansas." No exception was taken to the following instruction, relating to the subject of damages: "In case you find for the plaintiff, the next question for you to determine is the amount of recovery. In this there is no mathematical rule that the court can give you as a guide. You will assess his damages in such sum as will compensate him for all damages he has sustained as a necessary and natural result of the publication of the article charged; and in arriving at this you should consider the injury, if any, to his feelings, and his reputation, and the humiliation, if any, caused by such

Cas. 840, the court said that, if the officers of a corporation, in publishing defamatory matter relating to an employee, exceed the just limits necessary to accomplish the legitimate purpose of protecting the corporation and the employees, such fact may go to the jury as evidence of malice; but the privilege is not lost unless malice in fact existed.

Reports of mercantile agencies.

A mercantile agency may not communicate to all its subscribers libelous statements as to the business or character of some individual engaged in business without reference to whether the persons to whom such statements are sent have an interest in receiving them. *Taylor v. Church*, 8 N. Y. 452; *Sunderlin v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322; *Com. v. Stacey*, 8 Phila. 617; *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705. To same effect, 20 L.R.A. (N.S.)

although question of privilege because published to persons not legitimately interested was not specifically considered, are *Bradstreet Co. v. Gill*, 72 Tex. 115, 2 L.R.A. 405, 13 Am. St. Rep. 768, 9 S. W. 753; *Polasky v. Minchener*, 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N. W. 5; *Mitchell v. Bradstreet*, 116 Mo. 226, 20 L.R.A. 138, 38 Am. St. Rep. 592, 22 S. W. 358, 724; *Muetze v. Tuteur*, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123 (collection agency).

A much stricter rule of privilege was applied in *Beardsley v. Tappan*, 5 Blatchf. 497, Fed. Cas. No. 1,189 [reversed on other grounds in 10 Wall. 427, 19 L. ed. 974], holding that the publicity given a false report by a reporting agency as to a tradesman's solvency, by reporting it in a book to which clerks of the agency had access, deprived the report of its otherwise privileged character.

publication, and the injury, if any, to his business and profession. If you find that the article was published maliciously, as hereinbefore defined, you may then, if you see fit, assess damages, called 'punitive damages,' in addition, by way of smart money or punishment to the defendant for having published the article in question, and for the purpose of setting a wholesome example to others. I further instruct you that punitive damages may not be recovered by the plaintiff, nor allowed by you in your verdict, unless you shall first find the plaintiff is entitled to recover actual damages in some amount."

Many special questions were submitted to the jury, among which were the following; the answers returned being appended:

"(1) Does the testimony show that the plaintiff sustained any actual damage by the publication of this article mentioned in his petition? Ans. It does not.

"(2) If you answer the foregoing question in the affirmative, then state in detail of what such actual damage consists? Ans. _____."

"(52) On the 20th day of August, 1904, when said article complained of was published, did said defendant, or any of his employees, have any actual malice of or against the said plaintiff? Ans. No."

The jury found generally for the defendant. A motion for a new trial was overruled and the plaintiff prosecutes error.

The plaintiff claims that the court committed grievous error in its instructions to the jury and by refusing to instruct according to the plaintiff's requests: the instruction upon the subject of privilege being attacked with especial fervency. To this claim the defendant makes two answers: First, that the instructions given state the law; and, second, that, even if error was committed in giving and refusing instructions, it has become inconsequential in view of the special finding that the plaintiff suffered no damages from the publication of the article which occasioned the suit. The plaintiff replies that the finding referred to was induced by the instructions assailed, although they relate to other branches of the controversy. Beyond their importance to the immediate parties, the questions raised are of the utmost concern to all the people of the state. What are the limitations upon the right of a newspaper to discuss the official character and conduct of a public official who is a candidate for re-election by popular vote to the office which he holds? What are the limitations upon the authority of this court to overturn a verdict and judgment, and to remand a case for retrial, upon a claim that an error of the district

court respecting a particular feature of the litigation has tainted the whole result? The Constitution contains a provision which reads as follows: "The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right: and in all civil or criminal actions for libel the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." Bill of Rights, § 11. The Constitution supplies no definition of the term "liberty of the press." A right existing at the time the Constitution was adopted is guaranteed, the nature and extent of which must be ascertained by looking elsewhere. Frequently it is said that the expression was used in the sense it bears in the common law. If so, the question arises: The common law at what stage of its development? Certainly not the common law of England as it existed when first transplanted to this country by our forefathers in the fourth year of the reign of King James I. (1607). All printing was then subservient to royal proclamations and prohibitions, charters of privilege, license and monopoly, and decrees of the Court of Star Chamber. The newspaper proper did not appear until 1622, and the beginnings of the modern law of libel find their source in the Star Chamber decision *De Libellis Famosus*, rendered in 1609. Nothing like a definition could be framed from the law of England at any subsequent period. When the Court of Star Chamber was abolished in 1641, Parliament assumed the prerogative respecting the licensing of publications which it had held, and the press did not become free from this restraint until 1694. Its liberty was then more theoretical than actual on account of the harshness of the law of libel, and the manner in which that law was administered in the courts. The long struggle against the courts, culminating in the passage of the libel law of 1792, with which the names of Fox, Erskine, and Camden are so honorably and brilliantly associated, is familiar history. The statutes *de scandalis magnatum* were not formally repealed until 1887, although prosecutions under them ceased long before. A species of censorship survives in the act of 1843 requiring new plays to be submitted to the Lord Chamberlain for examination and approval, and the present state of the law of England on the subject of defamation is described in an essay, "History and Theory of the Law of Defamation," in 3 *Columbia Law Review*, 546, as follows: "Unfortunately the English law of defamation is not the

deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation."

Little aid is supplied by a consideration of our own colonial history and the early history of our separate national existence. The colonies followed closely the practice of the mother country. Even the publication of general laws was forbidden by the magistrates, who yielded only after long and bitter struggles. Royal governors were instructed to prohibit printing, books were burned as offenders against the public welfare, and the school histories all tell about Governor Berkley's boast that free schools and printing presses were not allowed in Virginia. The proceedings of the convention which framed the Constitution of the United States were conducted in secret. The provision forbidding Congress to pass any law abridging the freedom of speech or of the press came into the Constitution by way of an amendment. The debates of the Senate did not become open to the public until 1793, and the incident of the ill-starred sedition law in our constitutional history shows how far ideas relating to the protection of personal character and governmental institutions were then unreconciled in legal theory with freedom of thought and expression upon public questions. At the time the Constitution of this state was adopted some progress had been made, and some clarification had taken place. But statutory improvement had been halting and inefficient, judicial decisions had often been narrow, illiberal, and confusing, and the main principles of the law of libel remained substantially the same as they were when Blackstone wrote. The result is that "liberty of the press" is still an undefined term, and, like some other familiar phrases of constitutional law, must remain undefined. Certain boundaries are fairly discernible within which the liberty must be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions. In the decision of controversies the character, the organization, the needs, and the will of society at the present time must be given due consideration. The press as we know it to-day is almost as modern as the telephone and the phonograph. The functions which it performs at the present stage of our social development, if not substantially different in kind from what they

have been, are magnified many fold, and the opportunities for its influence are multiplied many times. Judicial interpretation must take cognizance of these facts. As Chief Justice Cockburn said in deciding a famous libel suit: "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage: That its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." *Wason v. Walter* (1868) L. R. 4 Q. B. 73, 93. The constitutional guaranty clearly means that the press shall be free from previous government license, and the decisions are quite uniform, but not unanimous, that it shall be free from court censorship through injunctions against publication. Early writers on constitutional law and early cases say that it means no more, but later commentators and later decisions maintain that it does mean more. Thus, Judge Cooley has said: "But, while we concede that liberty of speech and of the press does not imply complete exemption from responsibility for everything a citizen may say or publish, and complete immunity to ruin the reputation or business of others so far as falsehood and detraction may be able to accomplish that end, it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of in-

dividuals." Cooley, Const. Lim. 7th ed. 603, 604.

This doctrine was recently authoritatively stated by the supreme court of North Carolina as follows: "In its broadest sense, freedom of the press includes not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purposes of stifling just criticism or muzzling public opinion." *Cowan v. Fairbrother*, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep. 733, 24 S. E. 212. Such, also, is the opinion of the supreme court of Texas. Whatever more than freedom from previous license the constitutional guaranty may include, it is clear that it does not grant immunity for the publication of articles which imperil the public peace by advocating the murder of governmental officers and the destruction of organized society. Constitutional government may at least protect its own life, and Johann Most was properly convicted under a statute designed to secure the public peace, because of an article appearing in his newspaper, the "Freiheit," instigating revolution and murder, suggesting the persons to be murdered through the positions occupied and the duties performed by them, advising all persons to discharge their duty to the human race by murdering those who enforce law, denouncing those who would spare ministers of justice as guilty of a crime against humanity, and naming poison and dynamite as agencies to be employed in murder and destruction. *People v. Most*, 171 N. Y. 423, 58 L.R.A. 509, 64 N. E. 175. Constitutional government may also, under its police power, take reasonable steps to protect the morals of the people for whom and by whom it is instituted, and to this end may suppress the circulation of newspapers which, like the *Kansas City Sunday Sun* of infamous memory, are devoted largely to the publication of scandals, lechery, assignations, intrigues of men and women, and other immoral conduct. *Re Banks*, 56 Kan. 242, 42 Pac. 693; *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938; *Strohm v. People*, 160 Ill. 582, 43 N. E. 622. Likewise, newspapers may be suppressed which are made up principally of criminal news, police reports, and pictures and stories of bloodshed, lust, and crime. *State v. McKee*, 73 Conn. 18, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409. Newspapers like those just described display the licentiousness, and not the liberty, of the press. Here, as elsewhere in our political system, just rules and regulations are not badges of oppression, but are the necessary conditions of true liberty, and the constitutional guaranty under discussion is not opposed to penal and remedial laws upon the 20 L.R.A. (N.S.)

subject of libel and the regulation of procedure in the conduct of libel cases. Even in these days when the amassing of wealth absorbs so much of the energy of the race, it may still be said that a good name is rather to be chosen than great riches. Among sovereign states that "decent respect to the opinions of mankind" which prompted the appeal to public opinion made in our own Declaration of Independence is the chief sanction for the great body of rules known and observed as international law. The terror of social reprobation and public disgrace induces observance of the criminal law more than fear of fine and imprisonment. The desire to meet social standards of virtue contributes to business integrity. While the approval of conscience is a strong force and may righteously isolate the martyr and the reformer for a time, the love of deserved social esteem, the innate craving for the social crown of "well done," is a most powerful motive to good conduct with the great mass of mankind. Without doubt it is responsible for a large share of our mental, moral, and material progress. A good reputation honestly earned is not only one of the most satisfying sources of a man's own contentment, but from a commercial standpoint it is one of the most productive kinds of capital he can possess. Therefore, it ought to find guaranties of protection in the fundamental law along with those which guard liberty of the press, and such is indeed the case. The provision of the Bill of Rights quoted takes for granted a law of libel, and § 18 of that document places injury to reputation on the same plane with injury to person and property. It reads as follows: "All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay." Gen. Stat. 1901, § 100. It is very clear that these words cannot, however, be given unlimited signification and force in all cases. Where the public welfare is concerned, the individual must frequently endure injury to his reputation without remedy.

In some situations an overmastering duty obliges a person to speak, although his words bring another into disrepute. Such is the case of a witness testifying to relevant facts in court. Reasons of public policy forbid that the question of malice in his mind should be investigated, and the communication he makes, although damaging in the extreme, is absolutely privileged. He may be prosecuted for perjury, but a civil action based upon his statements is not permitted. "A man may be defamed by an unjust removal from office on unfounded charges, by injurious testimony given in courts of justice, by the unwarranted deductions of coun-

sel in presenting his case adversely to the jury, and in many other ways where notwithstanding the agent in the injury was wholly free from legal fault. Thus a great public character may perhaps suffer in reputation all his lifetime from an impeachment for an offense never in fact committed; yet, if the impeachment was instituted in good faith, and on grounds apparently sufficient, those concerned in it only performed a public duty. We unhesitatingly recognize the fact that in many cases, however damaging it may be to individuals, there should and must be legal immunity for free speaking; and that justice and the cause of good government would suffer if it were otherwise. With duty often comes a responsibility to speak openly and act fearlessly, let the consequences be what they may; and the party upon whom the duty was imposed must be left accountable to conscience alone, or perhaps to a supervising public sentiment, but not to the courts." Cooley, Torts, 2d ed. 246. In other situations there may be an obligation to speak, which, although not so imperative, will, under certain conditions, prevent the recovery of damages by a party suffering injury from the statements made. There are social and moral duties of less perfect obligation than legal duties, which may require an interested person to make a communication to another having a corresponding interest. In such a case the occasion gives rise to a privilege qualified to this extent. Anyone claiming to be defamed by the communication must show actual malice, or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office. Under a form of government like our own, there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and, by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled.

In the case of *Wason v. Walker*, L. R. 4 Q. B. 73, already cited, the question for decision was whether a report of a debate in Parliament containing matter disparaging to the character of an individual, spoken in the course of debate, furnished ground for an action of libel by the party whose character was called in question. The court held that it was not, and in the opinion of Chief Justice Cockburn it is said: "The other and the broader principle on which this exception to the general law of libel is founded is that the advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occa-

sional inconvenience to individuals, arising from it, must yield to the general good. It is true that, with a view to distinguish the publication of proceedings in Parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of Parliament are not; as also that, by the publication of the proceedings of the courts, the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *R. v. Wright*, 8 T. R. 298, namely, that, 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' In *Davidson v. Duncan*, 7 El. & Bl. 231, Lord Campbell says: 'A fair account of what takes place in a court of justice is privileged. The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character, is infinitesimally small as compared to the convenience of publicity.' And Wightman, J., says: 'The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great.'" Paraphrasing this language, it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.

The law of libel which the Constitution takes for granted gives expression to and room for the operation of these fundamental principles of public policy, and the Bill of Rights must be interpreted accordingly. Section 11 of the Bill of Rights sets off the in-

violability of liberty of the press from the right of all persons freely to speak, write, or publish their sentiments on all subjects; and this fact has given rise to claims on the part of newspaper publishers of special privileges not enjoyed in common by all. Whether such claims are just need not be decided in order to determine the rights of the parties to this litigation. So far they have been rejected by the courts, and the present consensus of judicial opinion is that the press has the same rights as an individual, and no more. The basis of the contention for a more liberal indulgence lies in the modern conditions which govern the collection of news items and the insistent popular expectation that newspapers will expose, and the popular demand that they shall expose, actual and suspected fraud, graft, greed, malfeasance, and corruption in public affairs and questionable conduct on the part of public men and candidates for office without stint, leaving to the people themselves the final verdict as to whether charges made or opinions expressed were justified.

Neither is it necessary in this case to define the word "sentiments," used in § 11 of the Bill of Rights. If that word means no more than thoughts, judgments, opinions, or notions, and the section does not protect freedom to make assertions of fact, still a more liberal libel law would not violate it. The Constitution guarantees to the individual a minimum of liberty. Other law is not forbidden to secure a larger measure. There is great diversity of opinion regarding the extent to which discussions of the fitness of candidates for office may go. In England and Canada the limit is fixed at criticism and comment, which, however, may be severe, if fair, and may include the inferring of motives for conduct in fact exhibited if there be foundation for the inference. In some of our own states the rule is more liberal, while in others it is more narrow. According to the greater number of authorities, the occasion giving rise to conditional privilege does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true. A minority allows the privilege under such circumstances. The district court instructed the jury according to the latter view, and the instruction given has the sanction of previous decisions of this court.

In the case of *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 384, 40 Am. Rep. 316, a report was made to a grand lodge of Odd Fellows by a special committee to which was referred a petition respecting the expulsion of a member of the order, stating that the officers of a subordinate lodge to which the petition had been presented were of the opinion

that the sworn statements of the petition were infamously untrue. This report was received, adopted, published in the grand lodge journal, and distributed among the members of the order for whom it was intended. The court held that the occasion for the publication prevented the inference of malice, and afforded a qualified defense depending upon the absence of actual malice. The opinion distinguishes between absolute and qualified privilege, and says: "Under this classification which is fully sustained by the authorities, the publication complained of is only conditionally privileged, and, as the averments in the petition are that the injurious publication is false and malicious, and that the defendants, well knowing its falsity, maliciously published it for the purpose of bringing the plaintiff into public scandal, infamy, and disgrace, the petition states a cause of action; but no recovery can be had thereon without proof of express malice on the part of the defendants, though the charge imputed in the publication be without foundation." In the case of *Redgate v. Roush*, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050, two paragraphs of the syllabus read as follows: "Where the officers of a church, upon inquiry, find that their pastor is unworthy and unfit for his office, and thereupon, in the performance of what they honestly believe to be their duty toward other members and churches of the same denomination, publish in good faith in the church papers the result of their inquiry, and there is a reasonable occasion for such publication, it will be deemed to be privileged, and protected under the law. . . . In such case, and where the plaintiff seeks damage, it devolves on him to establish actual malice; and, where his own testimony disproves malice, the court is justified in taking the case from the jury upon a demurrer to the evidence." In the course of the argument of the opinion it is said: "The publication is defamatory in character, and naturally would largely deprive the plaintiff of the confidence of the members of his church organization throughout the country. If it was false in fact and maliciously made, the plaintiff is entitled to recover to the extent of the injury suffered, unless the relations of the parties and the circumstances of the case justified the publication and brought the defendants within the privilege and protection of the law. The defamatory statement was not absolutely privileged, as words spoken or written by judges, jurors, or witnesses in the course of judicial proceedings, or as in legislative debates; but it was, at most, a case of qualified privilege. Whether it was so privileged must be determined by the position occupied by the defendants, their relations to the plaintiff and to other members of the same denomination, and the

circumstances under which the publication was made. If the statements were published in good faith, and in the performance of what was honestly deemed to be an official or moral duty toward other church members, and for the benefit and protection of the church organization at large, and there was a reasonable occasion for the publication, it was privileged and protected. . . . If the plaintiff was unworthy or unfit to discharge the sacred functions of his high calling, the defendants, interested in the welfare of the denomination throughout the land, would appear to have been justified in warning other members and congregations of that organization to whom the plaintiff might offer his services as pastor. If the publication was *prima facie* privileged, it devolved on the plaintiff to allege and prove that it was both false in fact and malicious in purpose." The moral and social duty of members of a great fraternity or of a great church organization to inform their brothers of the scandalous conduct of a fellow member or one of their leaders is no higher or stronger than that of electors to keep the public administration pure by warnings respecting the character and conduct of a candidate for office; and, if false words are not actionable in one case unless published with actual malice, they are privileged to the same extent in the other. Such is the clear declaration of the court in the case of *State v. Balch*, 31 Kan. 465, 2 Pac. 609. True, that was a criminal case; but the rule of privilege is the same in both civil and criminal actions. It is the occasion which gives rise to privilege, and this is unaffected by the character of subsequent proceedings in which it may be pleaded. In *Balch's Case* a printed article making grave charges against the character of a candidate for county attorney was circulated among the voters of the county previous to the election. In the opinion holding the occasion to be privileged the court said: "If the supposed libelous article was circulated only among the voters of Chase county, and only for the purpose of giving what the defendants believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently: and the whole thing was done in good faith,—we think the article was privileged, and the defendants should have been acquitted, although the principal matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness. . . . Generally we think a person may in good faith publish whatever he may honestly believe to be true, and essential to the protection of his own interests or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true, 20 L.R.A. (N.S.)

and may be injurious to the character of others. And we further think that every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office. This applies with great force to the election of county attorneys." Substantially the same doctrine is the basis of the following decisions: *Mott v. Dawson*, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Carpenter v. Bailey*, 53 N. H. 590; *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513; *Press Co. v. Stewart*, 119 Pa. 584, 14 Atl. 51; *Jackson v. Pittsburgh Times*, 152 Pa. 406, 34 Am. St. Rep. 659, 25 Atl. 613; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Express Printing Co. v. Copeland*, 64 Tex. 354; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698; *Posnett v. Marble*, 62 Vt. 481, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813; *O'Rourke v. Lewiston Daily Sun Pub. Co.* 89 Me. 310, 36 Atl. 398; *Crane v. Waters (C. C.)* 10 Fed. 619. The plaintiff asks that the decisions of this court quoted above be overruled, and that they be supplanted by one which shall express the narrow conception of the law of privilege held by the majority of the courts. *Kirkpatrick's Case* was decided in 1881 and *Balch's Case* in 1884. The *Redgate* decision is almost ten years old. A quarter of a century has elapsed since the doctrine of those cases was promulgated, and the legislature, coming directly from the people year after year, has not seen fit to make any modification of it. Surely in that length of time, and in view of the repetition of the error, if any were committed, some legislative action would have been taken to safeguard the reputations of our citizens if they were unduly imperiled by those decisions. The fact that so many courts of this country, all of high character, of great learning and ability, and all equally interested in correctly solving the problems of free government, differ from us, makes us pause; but a reversal of policy and the overturning of what has been so long accepted as settled law would be tantamount under the circumstances to legislation. Such a step ought not to be urged upon the court except for conclusive reasons. What are the reasons supporting the majority rule?

The decision most freely quoted since it was rendered in 1893 and chiefly relied upon by the plaintiff here is that of the United States circuit court of appeals for the sixth circuit in the case of *Post Pub. Co. v. Hallam*, 8 C. A. 201, 16 U. S. App. 613, 59 Fed. 530. Counsel in the case had argued from the duty of newspapers to keep the public informed concerning those who are

seeking their suffrages and confidence, and had asked, if it were possible, that the privilege allowed in discussing the character of public servants should be less than that which protects defamatory statements made concerning a private servant. The opinion states this argument, and then proceeds as follows: "The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement on reasonable ground to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt when it is impossible to make legal proof thereof, and, of course, it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men and charges against them are unduly guarded or restricted; and yet the rule complained of is the law in many of the states of the Union and in England." Here the rule by which privilege is to be

measured is correctly stated, as in *Wason v. Walter*, the balance of public good against private hurt. The argument of counsel is, then answered, and the statement is made that a candidate ought not to suffer a loss in reputation with the whole public for the public good. That is the question to be decided, and not a reason why it should be so decided. Then the sole reason for the decision is stated,—that honorable and worthy men will be driven from politics. Then the consequences of the decision are commented upon: Freedom of the press will not be endangered,—an assertion, as shown by the manner in which public men are handled by the press at the present time, an appeal to experience for proof.

The single reason upon which the Hallam decision is based is also in the nature of a prediction, and is not new. It was advanced in this country in 1808 by Chief Justice Parsons (*Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212) and by Lord Chancellor Walworth in 1829 in the case of *King v. Root*, 4 Wend. 114, 21 Am. Dec. 102. Speaking in opposition to the liberal doctrine, the chancellor said: "It is, however, insisted that this libel was a privileged communication. If so, the defendants were under no obligation to prove the truth of the charge; and the party libeled had no right to recover unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such doctrine would be deplorable. Instead of protecting, it would destroy, the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office, without being answerable for the truth of such publications. No honest man could afford to be an editor, and no man who had any character to lose would be a candidate for office under such a construction of the law of libel. The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish." These predictions call to mind that of Lord Thurlow, who, when protesting against the passage of the Fox libel act, said it would result in "the confusion and destruction of the law of England." 2 May, Constitutional History of England, p. 122. The actual results of the struggle ending in the enactment of that law are stated by the author cited as follows: ". . . The press was brought into closer relations with the state. Its functions were elevated, and its responsibilities increased. Statesmen now had audience of the people. They could justify their own acts to the world. The falsehoods and misrepresentations of the press were exposed. Rulers and their critics were

brought face to face, before the tribunal of public opinion. The sphere of the press was widely extended. Not writers only, but the first minds of the age, men ablest in council and debate, were daily contributing to the instruction of their countrymen. Newspapers promptly met the new requirements of their position. Several were established during this period whose high reputation and influence have survived to our own time, and, by fullness and rapidity of intelligence, frequency of publication, and literary ability, proved themselves worthy of their honorable mission to instruct the people." In opposition to the high authority of *King v. Root* and the *Hallam Case* may be placed *Thomas M. Cooley*, who, must be reckoned with in the discussion of any question upon which he has deliberately expressed himself. Commenting on the foregoing quotation from *King v. Root*, he says: "Notwithstanding the deplorable consequences here predicted from too great license to the press, it is matter of daily observation that the press in its comments upon public events and public men proceeds in all respects as though it were privileged. Public opinion would not sanction prosecutions by candidates for office for publications amounting to technical libels, but which were nevertheless published without malice in fact; and the man who has a 'character to lose' presents himself for the suffrages of his fellow citizens in the full reliance that detraction by the public press will be corrected through the same instrumentality, and that unmerited abuse will react on the public opinion in his favor. Meantime the press is gradually becoming more just, liberal, and dignified in its dealings with political opponents, and vituperation is much less common, reckless, and bitter now than it was at the beginning of the century, when repression was more often resorted to as a remedy." *Const. Lim.* 7th ed. 644n. This statement of the results of Judge Cooley's observation is in full accord with our own local experience. Without speaking for other states in which the liberal rule applied in *Balch's Case* prevails, it may be said that here at least men of unimpeachable character from all political parties continually present themselves as candidates in sufficient numbers to fill the public offices and manage the public institutions, and the conduct of the press is as honest, clean, and free from abuse as it is in states where the narrow view of privilege obtains. The fact that the public welfare has been promoted in England by liberalizing the law of libel is freely acknowledged in *Wason v. Walter*. "Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the

conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries are now made every day which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"

Since the only reason given for the rejection of the liberal rule fails, it is pertinent to inquire if the consequences of the narrow rule are so innocuous as the *Hallam Case* asserts; and in doing so it must be borne in mind that the correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government, municipal, state, and national; to the management of all public institutions, educational, charitable, and penal; to the conduct of all corporate enterprises affected with a public interest, transportation, banking, insurance; and to innumerable other subjects involving the public welfare. Will the liberty of the press be endangered if the discussion of such matters must be confined to statements of demonstrable truth, and to what a jury may *ex post facto* say is "fair" criticism and comment? Will free discussion of the subjects indicated be smothered if the newspapers understand that they must respond in damages for deducing and stating a wrong conclusion of fact from strong circumstantial evidence indicating fraud, corruption, or other conduct injurious to the public welfare? The case of *Atkinson v. Detroit Free Press Co.* 46 Mich. 341, 9 N. W. 501, was decided upon a question of pleading and a question of evidence. The opinion of the court did not treat the subject of privilege. Judge Cooley, however, took occasion to express himself upon the point now under consideration as follows: "The beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference. . . . If such a discussion of a matter of public interest were *prima facie* an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of

public discussion would be unworthy of being named as a privilege of value. It would be better to restore the censorship of a despotism than to assume to give a liberty which can only be accepted under a responsibility that is always threatening, and may at any time be ruinous. A caution in advance after despotic methods would be less objectionable than a caution in damages after in good faith the privilege had been exercised. No public discussion of important matters involving the conduct and motives of individuals could possibly be at the same time valuable and safe under the rules for which the plaintiff contends. It is a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man of common discernment who observes what is taking place around him, and what influences control public opinion, cannot fail to know that reputation is best protected when the press is free. Impose shackles upon it, and the protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty, also, that is least liable to suffer serious injury when the discussion incidentally affects it unjustly. . . . In what I say in this case I advance no new doctrines, but justify every statement of principle on approved authorities. It will be freely admitted that there are decided cases from which a different argument may be constructed; but it is affirmed that they are no longer deserving of credit if they ever were. The gradual and beneficial modification of the law of libel is shown in *Wason v. Walker*, L. R. 4 Q. B. 73, and, in so far as it has been modified, it has been made more consistent with just reason. While it is admitted that the public press is often corrupt and often reckless in dealing with private reputations, it is at the same time affirmed that the duty of its conductors to abstain from such misconduct is no plainer than is the obligation of the authorities to refuse to impose penalties when in the exercise of a just independence they make use of their columns for the exposure of public wrongdoers to public condemnation. The law, justly interpreted, is not chargeable with the inconsistency of tempting conductors of the press with a deceptive pretense of liberty, and then punishing them in damages

if they act upon the assumption that the liberty is genuine." If it be said that this argument contains an element of prophecy, it may be replied that it will support the liberal rule, as well as the same kind of prophecy in the *Hallam Case* supports the narrow rule. The *Hallam Case* quotes the following discrimination of the two rules made by Lord Chancellor Herschell in *Davis v. Shephstone*, L. R. 11 App. Cas. 187: "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or approved acts of a public man, and quite another that he has been guilty of particular acts of misconduct." This statement is one of elucidation merely, and furnishes no reason for a choice between the rules. It may be observed, however, that the decisions in England are in great conflict upon the question whether fair comment is a branch of the law of privilege. Only last year a writer in 23 *Law Quarterly Review*, p. 97, called attention to this fact, and expressed the hope that the case of *Thomas v. Bradbury, A. & Co.* [1906] 2 K. B. 627, 6 A. & E. Ann. Cas. 135, might be taken to the House of Lords, so that the defense of fair comment might be reviewed, and placed upon some logical basis. It may be observed, further, that the distinction between comment and statements of fact cannot always be clear to the mind. Expression of opinion and judgment frequently have all the force of statements of fact and pass by insensible gradations into declarations of fact. In England fair comment includes the inference of motives if there be foundation for the inference. *Hunter v. Sharpe*, 4 Fost. & F. 983; *Campbell v. Spottiswoode*, 3 Best & S. 769. In the latter case *Cockburn, Ch. J.*, said: "I think the fair position in which the law may be settled is this: That, where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." This doctrine is repudiated in *Hamilton v. Eno*, 81 N. Y. 116, and *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715, both cited in support of the *Hallam* decision. What is a charge of intoxication,—an inference from conduct and appearances and therefore fair comment or the

statement of a fact? What is the difference between a charge of intoxication and the following: "Having appearances which were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates. Their condition in the chapel also led one to such a conclusion?" In England this statement is fair comment. *Davis v. Duncan*, L. R. 9 C. P. 396. In New York, no matter how strongly appearances and conduct may justify the inference, a charge of intoxication, made against a public officer, must be fully proved. *King v. Root*, 4 Wend. 114, 21 Am. Dec. 102. In keeping plain the distinction between comment and statements of fact, the courts of some of the states leave the law very much in the attitude of saying to the newspaper: "You have full liberty of free discussion, provided, however, you say nothing that counts." The Hallam Case quotes the Supreme Court of Ohio (*Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921) in opposition to the liberal doctrine, as follows: "We do not think the doctrine either sound or wholesome. In our opinion a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law for injury to each is secured by the same constitutional guaranty, and the one is no less inviolable than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it." Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But, in measuring the extent of a candidate's profert of character, it should always be remembered that the people have good authority for believing that grapes do not grow on thorns, nor figs on thistles. The other arguments furnished by the Ohio quotation have already been considered. The Hallam Case contains nothing further worthy of note.

Another decision much approved, frequently quoted, and confidently proposed for consideration by the plaintiff here is that in the case of *Upton v. Hume*, 24 Or. 420, 21 L.R.A. 493, 41 Am. St. Rep. 863, 33 Pac. 810. The narrow rule is stated clearly and authorities for it are cited. The only reasons urged against the rival rule are the old ones—sensitive and honorable men would eschew politics, yellow journalism would run riot, candidates would be exposed to the malignity of party strife—and this new one:

"The only safe evidence of a man's intentions are his facts, and, if he accuses another of a crime, he must conclusively be presumed to have intended to injure him." The doctrines of the common law relating to malice seem to the Delaware court, also, to be of the utmost importance in finding out what the true rule of privilege ought to be. *Star Pub. Co. v. Donahoe* (Del.) 65 L.R.A. 980, 58 Atl. 513. With all due deference to *Upton v. Hume*, the remarks quoted read as if they had been written in the midst of the fog of fictions, inferences, and presumptions which enshroud the law of libel. Facts and the truth never have been much in favor in that branch of the law. Its early use as a weapon and shield of caste and arbitrary power would have been impaired. Suppose a serious charge to be made. By a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are assumed as the consequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacrilegious insult to this beautiful and symmetrical fabric of fiction. Then a defendant was made to suffer additional smart for venturing to obtrude the truth as a defense, if, although his proof were abundant, he barely failed in the opinion of the jury to make out a preponderance. It is however, in the field of malice, where the rule stated in the quotation lies, that truth and fact are most superfluous. In the first place, it is said that malice is the gist of the action for libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently libels are published with the best of motives, or perhaps mistakenly or inadvertently, but with an utter absence of malice. The plaintiff recovers just the same. Therefore "the gist of the action" must be taken out of the case. This is done by another fiction. It is said that, of course, malice does not mean the one thing known to fact or experience to which the term may apply, but it is just a legal expression to denote want of legal excuse. In this state a statutory definition of libel making malice an essential ingredient as at the common law compels this court to say that the intentional publication of libelous matter implies "malice" whatever the motive in fact may be. *State v. Clyne*, 53 Kan. 8, 35 Pac. 789. So a fiction was invented to meet an unnecessary fiction which became troublesome; and the courts go on gravely ascending the hill for the purpose of

descending, meanwhile filling the books with scholastic disquisitions, verbal subtleties, and refined distinctions about malice in law, malice in fact, express malice, implied malice, etc. Now what is the fact? Instead of malice being the gist of the action, it may come into a libel case and be of importance in two events only,—to affect damages and to overcome a defense of privilege. If the occasion be absolutely privileged, there can be no recovery. If it be conditionally privileged, the plaintiff must prove malice, actual evil-mindedness, or fail. When it comes to this proof, there is no presumption, absolute or otherwise, attaching to a charge of crime. The proof is made from an interpretation of the writing, its malignity, or intemperance by showing recklessness in making the charge, pernicious activity in circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motives as in other cases. Nothing else in *Upton v. Hume* requires comment, and no decisions more persuasive than those discussed have been cited or have fallen under the observation of the court.

Speaking generally, it may be said that the narrow rule leaves no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual. It is a matter of common experience that, whatever the instructions to juries may be, they do not, and the people do not, hold a newspaper publisher guilty and brand him a calumniator if in an effort in good faith to discharge his moral duty to the public he oversteps that rule. In a political libel suit, if a nonpolitical jury be secured, the newspaper usually gets a verdict if, in the language of *Balch's Case*, "the whole thing was done in good faith." Otherwise damages are assessed. Although he adhered to the narrow rule, Sir Frederick Pollock, when Chief Baron of the Exchequer, came near stating its rival when he said: "I think it quite right that all matters that are entirely of a public nature—conduct of ministers, conduct of judges, the proceedings of all persons who are responsible to the public at large—are deemed to be public property; and that all bona fide and honest remarks upon such persons and their conduct may be made with perfect freedom, and without being questioned too nicely for either truth or justice." *Gathercole v. Miall*, 15 Mees. & W. 318. The liberal rule offers no protection to the unscrupulous defamer and traducer of private character. The fulminations in many of the decisions about a *Telemanian* shield of privilege from beneath 20 L.R.A. (N.S.)

which scurrilous newspapers may hurl the javelins of false and malicious slander against private character with impunity are beside the question. Good faith and bad faith are as easily proved in a libel case as in other branches of the law, and it is an every day issue in all of them. The history of all liberty, religious, political, and economic, teaches that undue restrictions merely excite and inflame, and that social progress is best facilitated, the social welfare is best preserved, and social justice is best promoted in presence of the least necessary restraint. Aside from other reasons for adhering to it, the court is of the opinion that the rule in *Balch's Case* accords with the best practical results obtainable through the law of libel under existing conditions, that it holds the balance fair between public need and private right, and that it is well adapted to subserve all the high interests at stake,—those of the individual, the press, and the public.

The plaintiff argues that the defense, of privilege was destroyed by the fact that copies of the defendant's newspaper circulated in other states, complains of the instructions given upon the subject, and insists that the instruction offered by him should have been given. The instruction given was correct and follows the rule announced by this court in *Redgate v. Roush*, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050. There a matter of interest to communicants of a church was published in the church papers in Indiana, Ohio, Texas, and Nebraska. It was inevitable that they should be read by people of other denominations. The syllabus reads: "Where the publication appears to have been made in good faith and for the members of the denomination alone, the fact that it incidentally may have been brought to the attention of others than members of the church will not take away its privileged character." This accords with the general rule stated in 25 Cyc. Law & Proc. p. 387. See also *Hatch v. Lane*, 105 Mass. 394; *Menters v. Bee* Pub. Co. 5 Neb. (Unof.) 592, 99 N. W. 847. In the cases of *State v. Haskins*, 109 Iowa. 656, 47 L.R.A. 223, 77 Am. St. Rep. 560, 80 N. W. 1063, *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 853, 68 N. W. 403, and *Sheftall v. Central R. Co.* 123 Ga. 589, 51 S. E. 646, language is used from which it might be inferred that privilege will be destroyed if the communication should reach the eyes of others than persons interested. This would be the end of privilege for all newspapers having circulation and influence. Generally the publication must be no wider than will meet the requirements of the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privi-

lege is lost. But, if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of matters of state-wide concern because of that fact.

The second subject propounded for consideration at the beginning of this opinion is one of practice which goes to the efficiency of the administration of the law as a means of justice. Did the special finding of the jury that the evidence does not show that the plaintiff suffered any damage from the article in the defendant's newspaper render errors regarding instructions upon other matters immaterial? Under the Constitution, the appellate jurisdiction of this court is limited to the review of errors committed by the trial court from which the record comes. It cannot consider cases *de novo* and decide them according to its own notions of the law and evidence. It cannot take new evidence or pronounce any judgment, except that the trial court did right or wrong in whole or in part. It cannot direct what judgment the trial court shall enter unless the facts be found or agreed to. It does not have the constitutional power to do generally what ought to have been done by judge and jury at the trial, and so end the litigation; and the legislature cannot, under the Constitution, confer such power upon it. *Re Burnette*, 73 Kan. 609, 85 Pac. 575. However, before the territory of Kansas became a state, the territorial legislature enacted the following statute: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Code Civ. Proc. § 148 (Laws 1859, chap. 25, p. 102). Before the territory became a state the territorial supreme court adopted the rule that error will not be presumed, but must be affirmatively shown. *Otis v. Jenkins*, 1 Kan. Dasser's ed. 87 Appx. That statute and that rule have been in force ever since. They are still in force, and have been applied in multitudes of decisions. It would be too much to say that the spirit of the statute and of the rule has always been observed. It has been lost sight of often enough. Sometimes technicality may have been utilized in an effort to right palpable wrong. Very often it is most perplexing to determine what is substantial. But it is the constant purpose and endeavor of the court to obey the statute and to observe the rule. It must do so in this case precisely the same as if it were one small enough to have originated before a justice of the peace. "If it be conceded that the rules of procedure have been violated

in this case, the judgment cannot for that reason alone be overturned. The legislature has enjoined upon this court the duty of looking beyond defects and errors in pleadings and proceedings to ascertain if they did, in fact, affect the substantial rights of the party complaining of them. Fixed rules are to be observed and enforced, but not merely for the purpose of vindicating them. Harm must result from a wrong decision or it cannot be reversed." *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549.

For obvious reasons, the instruction relating to privilege required consideration on its merits. It would be pure speculation to say that other instructions given, which do not relate to damages, led the jury to make the special finding. Damages was treated independently of all other issues, and stood out as a separate and distinct branch of the case; and the court would be obliged to enter upon a "quest for error,"—indeed, to be able to discover that the jury did not understand the question, and by its answer merely meant to say that, under the instructions, the plaintiff had no cause of action for damages. Error must be made to appear in some affirmative way. It cannot be presumed. If the plaintiff suffered no damage, manifestly it is of no consequence whatever what valuation should be used in the purchase of bonds for the school fund, what treasury transactions are illegal, or what the law of conspiracy may be. The substantial rights of the plaintiff could not be affected by erroneous statements of the law upon those questions.

The judgment of the District Court is affirmed.

KANSAS SUPREME COURT.

CHARLES E. GIBSON, Plff. in Err.,

v.

JOHN R. FIELDS.

(— Kan. —, 98 Pac. 1112.)

Wild lands — reduction to cultivation — "permanent improvement."

1. While it is recognized as the general rule that the plowing and cultivation of land theretofore under cultivation does not constitute a "permanent improvement," the

Headnotes by SMITH, J.

Case Note. — Plowing and cultivating land as an "improvement."

The conclusion arrived at in the above case upon this question seems to be well sustained by the authorities. Thus, in *Simpson v. Robinson*, 37 Ark. 132, it was said that all works which were substantial steps towards bringing land into cultiva-

breaking and reducing of wild lands to cultivation does constitute such improvement.

Same — ejectment — improvements — set-off for rent.

2. Upon the adjudication of the counter-claims, where one in possession of lands under a tax deed has been defeated of the possession by the holder of the legal title, and claims compensation for permanent improvements and taxes paid, reasonable rent of the premises without the improvements should be offset, but not rent as increased by the improvements.

Same — rent — determination.

3. In such case the rent is to be determined from the cash price usually paid for the use of like premises during the same time and in the same locality.

(December 12, 1908.)

ERROR to the District Court for Rawlins County to review a judgment in plaintiff's favor in an action brought to re-

tion had in their result the special character of "improvements."

And in *Johnson v. Gresham*, 5 Dana, 542, it was said that "improvement" was a comprehensive term, and meant any melioration whereby land was converted from its natural state to a state and condition for the use and enjoyment of man, and might consist in clearing and other ways of converting the soil to the use of man by bettering its condition.

So, in *Barton v. National Land Co.* 27 Kan. 635, cited in *GIBSON v. FIELDS*, it was held that the breaking of land was such a lasting and valuable improvement as to entitle one to the benefit of the occupying claimants' acts.

And in *Devine v. Charles*, 71 Mo. App. 210, the clearing of brush from land so as to fit it for cultivation, the cutting of a ditch so as to prevent the land from overflowing, and the removing of dead trees and old stumps, with other work, were held to be permanent improvements.

And in *Muskogee Development Co. v. Green* (Okla.) 97 Pac. 619, the breaking of unproductive prairie land, and its metamorphosis into a crop-yielding farm, were held to be an improvement.

And in *Pearce v. Prantum*, 16 La. 414, and in *Beard v. Morancy*, 2 La. Ann. 347, it was held to be an improvement to clear land and fit it for the purposes of agriculture; while in *Wilson v. Benjamin*, 26 La. Ann. 587, clearing of land and putting of the same in a state for cultivation was held to be an improvement.

So, in *Jones v. Jones*, 4 Gill, 87, the ditching and grubbing of meadow land was held to be such a valuable and lasting improvement as to entitle the party who did them to a fair and equivalent allowance.

And in *Croskery v. Busch*, 116 Mich. 288, 74 N. W. 464, it was held that the clearing

cover possession of certain real estate and for the rents and profits thereof; the plaintiff complaining of so much of the judgment as allowed defendant for taxes, interest, and improvements. Affirmed.

Statement by Smith, J.:

This is an action in ejectment brought in the district court of Rawlins county to recover the possession of 160 acres of land in that county and for the rents and profits of the land. The plaintiff proved a chain of title from the government. The defendant claimed under a tax deed which was intended to convey this and several other tracts of land. It was held void as to this land for defective description. Of this no complaint is made. The court allowed the defendant for taxes and interest and for improvements, and offset what it found to be the value of the rent of the land. The plaintiff below appealed.

of an unimproved parcel of land, and surrounding it with a brush fence, and the raising of one or more crops on it, were such improvements as to entitle one dispossessed by the true owner to compensation therefor.

And in *Sires v. Clark*, 132 Mo. App. 537, 112 S. W. 526, the clearing of land of trees and brush, and the grubbing thereof, whereby the land was brought into a productive state, were held to be improvements.

Upon the same principle, in *Donehoo v. Johnson*, 113 Ala. 126, 21 So. 70, the planting of an apple orchard was held to constitute "permanent improvements" upon land, within the meaning of the statute in relation to allowance in ejectment for permanent improvements.

So, in *Thompson v. Buckner*, 19 Ky. L. Rep. 431, 40 S. W. 915, in which it appeared that, upon exceptions to the confirmation of a judicial sale of land, the purchaser, who had already been put in possession and had pitched his crops, was permitted to retain possession as tenant for a year, he was held to be entitled to credit upon the rental value of the land for the amount expended by him in sowing clover and orchard grass seed, upon the ground that he was entitled to be reimbursed for the value of any improvements placed by him upon the land.

But the ordinary cultivation or reduction of soil by use is not an "improvement." *Hawkins v. King*, 1 T. B. Mon. 161. And therefore the mere sowing of grass and clearing of land for cultivation cannot be classed as improvements (*Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611); nor will the mere fertilizing of land be regarded as a permanent improvement (*Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765; *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742; *Wright v. Johnson*, 108 Vt. 855, 62 S. E. 948).

Mr. S. N. Hawkes for plaintiff in error.
Mr. Dempster Scott for defendant in error.

Smith, J., delivered the opinion of the court:

The only questions presented here arise out of the adjustment of the rights of the plaintiff for rent and the claims of the defendant for taxes and improvements.

The deed in question was evidently intended to convey a large number of tracts of land, which were properly described in the recitals relating to the sale of the lands; but in the granting clause the only description of the property conveyed was "the real property last hereinbefore described." The court properly held that this description was too indefinite to constitute a good conveyance of the land in question, as it was not the last tract before described in the deed. The plaintiff in error, however, contends that, because the deed was not a sufficient deed, it was no deed at all of the land in question; that consequently defendant's lien for taxes expired in four years after the date of the sale, under the provisions of § 7714, Gen. Stat. 1901; and, further, as this real estate was not deeded for delinquent taxes, the provisions of § 7717, Gen. Stat. 1901, do not apply. This is untenable. The argument is that, if a tax deed is not a good and sufficient deed, it is no deed at all. On the other hand, if it were a good and sufficient deed, the plaintiff's title would be completely defeated. Section 7717 is a saving clause for just this kind of a case.

Again, the plaintiff contends that the plowing and cultivation of land for crops is not an improvement within the meaning of the statute. This is undoubtedly true as to land already under cultivation; but it is evidently not true, and is expressly decided not to be true, as to the breaking of uncultivated prairie, in *Barton v. National Land Co.* 27 Kan. 635.

Further, the plaintiff contends that, if he has to pay for the breaking of the land, he should receive rent thereon from the time it was broken, at the rate for which cultivated land was renting in the locality; and that the holding of the court that he was only entitled to rent the land in an entirely uncultivated condition was erroneous. The breaking was done several years before the bringing of the action, and was done at the expense or by the labor of the defendant, and the defendant was not, and could not be, allowed any interest on his investment therein, and it is inequitable that he should pay additional rent for improvements so made by himself. *Deitzler v. Wilhite*, 55 Kan. 200, 40 Pac. 272; *Hentig v. Redden*, 1 Kan. App. 163, 41 Pac. 1054; *Hentig v.* 20 L.R.A. (N.S.)

Collins, 1 Kan. App. 173, 41 Pac. 1057. The plaintiff offered evidence tending to show that it was the custom in the locality where the land in question is situated for landowners to contract with tenants to break up the prairie, and to receive in compensation therefore the use of the land broken for two years thereafter; and that, as the defendant had the use of the land broken much longer than two years, he was more than compensated for the breaking in the use of the land broken. There was no relation of contract between the plaintiff and the defendant in regard to the breaking of the land. Neither can evidence of a local custom, contrary to the established principles of law, be received. *Clark v. Allaman*, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571.

The judgment of the court was sustained by the evidence, and is in accord with the well-established principles of law and equity.

The judgment is affirmed.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,
v.

F. P. JAMES, Admr., etc., of John E. Trower, Deceased.

(— Ky. —, 115 S. W. 719.)

Railroad — collision — proximate cause.

The act of one desiring to meet an approaching train at a station, in attempting to cross the track in front of it, which resulted in his being hit by the train, and not the negligence of the railroad company in running a special at great speed past the station on the time of the regular train, which was to stop, was the cause of the accident, where the train is visible and its speed obvious, although he may have been misled as to the character of the train, and relied on the supposed fact that it was going to stop according to schedule.

(January 26, 1909.)

Case Note. — *Right of one crossing railway tracks to assume that approaching train will stop at intervening station.*

Cases where a passenger, or one approaching a station to become a passenger, is struck by an approaching train he assumes will stop at such station, are excluded herefrom.

One is not relieved of the duty of looking and listening at a highway crossing by a belief that all trains stop at a near-by station, where such inference is not warranted by its importance or the population of the town, it not being a matter of common

APEAL by defendant from a judgment of the Circuit Court for Boyle County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. **Benjamin D. Warfield** and **Charles H. Rodes**, with Mr. **Charles R. McDowell**, for appellant:

No duty required the defendant's employees to slacken the speed of the train at the place where Trower was killed.

Galveston, H. & S. A. R. Co. v. Wink (Tex. Civ. App.) 31 S. W. 326; *Louisville & N. R. Co. v. Taaffe*, 106 Ky. 535, 50 S. W. 850; *Hummer v. Louisville & N. R. Co.* 32 Ky. L. Rep. 1317, 108 S. W. 885; *Louisville & N. R. Co. v. Cummins*, 111 Ky. 339, 63 S. W. 594;

knowledge that all trains stop at passenger depots in city or town; and, even though such belief is reasonable, it would not justify one in relying thereon and recklessly omitting to use his senses of sight and hearing. *Smith v. Wabash R. Co.* 141 Ind. 92, 40 N. E. 270.

And this doctrine was applied in *Rich v. Evansville & T. H. R. Co.* 31 Ind. App. 10, 66 N. E. 1028, where one attempted to cross a railway track near a station, relying upon a custom of an approaching train to take a siding in order to permit the passing of another train, which, however, on this occasion, it did not do, but ran past the station at 60 miles an hour without giving any crossing signals.

One believing an approaching train to be one that regularly stopped at an adjacent station, which was then due, and on which he expected a friend to arrive, who climbed over freight cars standing on an intersecting track and was struck and killed by the approaching train, which was running at a high rate of speed upon the time of the train that regularly stopped at the station, was guilty of contributory negligence, notwithstanding the speed thereof was in excess of that permitted by ordinance. *Gris-kell v. Southern R. Co.* 81 S. C. 193, 62 S. E. 205.

Where a postoffice was located on the opposite side of a railway track from the station; and it was the postmaster's habit to wait until the last moment before the arrival of a mail train before starting with the mail for the station,—for which he had been rebuked by the railway officials,—he was guilty of contributory negligence, as a matter of law, where, in crossing the intervening track, he was struck by a freight train running at a high rate of speed upon the time of the regular mail train, for which he mistook it. *Moody v. Pacific R. Co.* 68 Mo. 470.

And, upon almost identical facts, the doctrine of the last case was applied in *Boyd v. Wabash Western R. Co.* 105 Mo. 371, 16 S. W. 909.

And the deceased is not relieved of his 20 L.R.A. (N.S.)

Parkerson v. Louisville & N. R. Co. 25 Ky. L. Rep. 2261, 80 S. W. 468.

Deceased's own negligence was the proximate cause of his death.

Gresham v. Louisville & N. R. Co. 15 Ky. L. Rep. 599, 24 S. W. 869; *Ilelm v. Louisville & N. R. Co.* 17 Ky. L. Rep. 1004, 33 S. W. 396; *Illinois C. R. Co. v. Willis*, 123 Ky. 636, 97 S. W. 23; *Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 688; *Louisville & N. R. Co. v. Gilmore*, 33 Ky. L. Rep. 76, 109 S. W. 321; *Royster v. Southern R. Co.* 147 N. C. 347, 61 S. E. 179; *Storrs v. Grand Trunk Western R. Co.* 142 Mich. 375, 105 N. W. 764; 7 Thomp. Neg. p. 27, § 186; *Louisville & N. R. Co. v. Armstrong*, 32 Ky. L. Rep. 256, 105 S. W. 473; 2 Thomp. Neg. § 1786; *Moody v. Pacific R. Co.* 68 Mo. 470;

negligence by reason of the fact that the approaching train was being run at a careless and unusual rate of speed, and the bell was not rung or the whistle sounded. *Moody v. Pacific R. Co.* supra.

And, where the engineer saw the deceased when he started for the station, he might assume he would not place himself in a perilous position; and therefore he was not bound to slacken the speed of his train until the deceased was upon the track, when it was too late to avoid striking him. *Boyd v. Wabash Western R. Co.* supra. To the same effect, see *Craddock v. Louisville & N. R. Co.* infra.

Freedom from contributory negligence is not shown by a mail carrier, who, upon a stormy day, upon the whistle of an approaching train being heard, was told by the station agent, "Here comes your train," and, while going to meet it with the mail, was struck by a projecting snowplow, running at a high rate of speed, and which he could have recognized as such had he looked. *White v. New York C. & H. R. R. Co.* 68 App. Div. 561, 73 N. Y. Supp. 827, affirmed without opinion in 174 N. Y. 543, 67 N. E. 1091. The court observed that while, perhaps, the chances were that the approaching train would be the mail for which he was waiting, yet it did not think that he had a right absolutely to assume or rely upon this assumption.

It is contributory negligence for one to cross a railway track at a point other than a public crossing, in the face of an approaching train, in reliance upon a supposition that it will stop at a near-by station, where it does not appear that trains such as that which strikes him always stop at such station. *Craddock v. Louisville & N. R. Co.* 13 Ky. L. Rep. 18, 16 S. W. 905.

It was contributory negligence, which will prevent a recovery, for one who saw an electric car approaching a public crossing, although his view was obstructed by freight cars, to drive thereon, without stopping to look and listen, relying upon a supposition that it was a local which would stop at an adjacent station, when in fact it was a

Holland v. Missouri P. R. Co. 210 Mo. 338, 109 S. W. 20.

Messrs. E. M. Hardin, Robert Harding, E. V. Puryear, and John A. Rawlings for appellee.

O'Rear, J., delivered the opinion of the court:

The intestate, John E. Trower, was struck and killed by a train on appellant's road at Mitchellsburg under these circumstances: He, as a volunteer, was carrying the mail bag for the postmaster to put it on the local mail train, known as No. 23, which was due to pass that station about 11:30 A. M. on a day in August. The postoffice was about 60 yards from the station. Mitchellsburg is an unincorporated hamlet, and the station is a flag station only, without telegraph facilities. The station and the postoffice were on the same side of the railroad track. Between the station and the main track was a siding. Passengers and others having business with the train crossed from the depot of the opposite side of the main track, where a walk of screenings or broken rock was provided. On the morning in question there was another train, called "first No. 23," which was running on the

time of the regular 23; the first being a special train which had no occasion to stop at Mitchellsburg. There were passengers for the local, and a flag had been put out to signal it to stop. It was running as second No. 23, and was some distance behind the first. When decedent heard a train whistle for the station, the signal being given some 500 or 600 yards before the station was reached, he started in a run, or trot, for the station so as to get there before the train did, and to be in position, presumably, to deliver the mail bag. He did not know, we may assume, that No. 23 was being run in two sections. Instead of passing to the west of the depot, which was the public highway crossing, and which would have kept the approaching train in his view (it was going east), he passed on the east side of the station, which was not a public crossing, but which was used sometimes for passage by persons having occasion to cross the track. As he got to the edge of the side track, or upon it, according to some of the evidence, which in either event gave him a clear, unobstructed view of the tracks looking west for perhaps half a mile, he paused, looked toward the approaching train,

fast limited train which he supposed had passed some time before. *Cable v. Spokane & I. E. R. Co.* 50 Wash. 619, 97 Pac. 744.

But, as the question of one's contributory negligence is for the jury, it was held in *Cobleigh v. Grand Trunk R. Co.* 75 Fed. 247, that a verdict for the plaintiff would not be disturbed where it appeared that he heard a train approaching beyond a station, but, by reason of a snowstorm, could not see it, and, after stopping and listening, concluded it had stopped at the station, and that he had time to cross, and, relying upon the usual crossing signals being given, drove upon the track and was struck by a rapidly moving train, which did not stop at the station, or give the required crossing signals.

The question of contributory negligence is for the jury where one accustomed to draw milk to a station was struck and killed by a freight train he saw approaching about the time the milk train was due, and which, although running 50 miles an hour in violation of a rule of the carrier, did not give the customary signal indicating it would not stop at the station; there being evidence from which it might be assumed that the deceased thought it was the milk train, which would stop at the station, and there being no evidence tending to show that an ordinary man would not have acted as he did. *Stearns v. Boston & M. R. Co.* 75 N. H. 40, 71 Atl. 21.

And the doctrine of the last case was applied in *McNeal v. Pittsburg & W. R. Co.* 131 Pa. 184, 18 Atl. 1026, where it was held that the deceased, upon hearing the whistle of a train, might have assumed it would stop

at an intervening station, when, his view of the track being obscured, he drove close to the track, and, apparently just before reaching it stopped, or attempted to stop, and, one of his horses being young and excitable, he either drove or was carried by it onto the track, where he was struck and killed by the train, which did not stop at the station, nor give any crossing signal.

Where a carrier of mail and express, who was familiar with a railway custom for trains upon a parallel track to stop before reaching a station where another train was receiving and discharging passengers, was struck and injured by a train running in violation of such custom, it is for the jury to determine whether he was guilty of contributory negligence in going on the track without looking for approaching trains, in order to deliver mail to a train standing on another track; and this is true notwithstanding the latter train had not come to a full stop when he went upon the track. *Tubbs v. Michigan C. R. Co.* 107 Mich. 108, 61 Am. St. Rep. 320, 64 N. W. 1061.

So, it was held in *Chicago & A. R. Co. v. Kelly*, 182 Ill. 267, 54 N. E. 979, affirming 80 Ill. App. 675, s. c. 75 Ill. App. 490, that the exercise of due care would be inferred from a mail transfer clerk who, while delivering mail to a train, was killed by a train on a parallel track, which violated a rule of the company, with which he was familiar, requiring trains upon parallel tracks to stop before reaching trains discharging and receiving passengers at a station, as he had the right to rely upon the observance of such rule.

which was running very fast, and making considerable noise, the exhaust of the applied steam, and other noises such as a heavy rapidly moving train gives forth, he paused an instant, gathered himself together, as some of the witnesses put it, sprang or hastened his speed so as to get across before the train should arrive. At that moment the train was about 200 to 225 feet from him. The width of the side track was about 5 feet, and the distance between the two tracks about 9 feet. Just as he got to the edge of the main track, the end of the pilot of the engine struck him, and he was killed. The speed of the train was from 20 to 40 miles an hour; the evidence varying between those figures.

Appellee based this suit to recover for the death of his intestate upon the negligence of the railroad company in running the special train upon the time of a regular train at a dangerously high rate of speed by the station; and upon that theory he recovered a verdict and judgment. Appellant's main defense was, as it is the principal ground urged for a reversal of the judgment, that the intestate was himself guilty of such negligence as that his estate ought not to recover damages for his death; and that is the only question which we find it necessary to examine. For the purpose of this case, it may be conceded that first No. 23 was running by Mitchellsburg station at a speed, considered with reference to the rights of passengers and licensees at the station, that was negligent. It may also be conceded that the intestate was a licensee at the station on that occasion, and even in the use of the way of crossing which he used. It is also conceded that nothing could have been done by those in charge of the train to stop it after the intestate was discovered to be in peril. There is no conflict in the evidence, except as to the speed of the train, and that in testing whether the peremptory instruction should have been given we assume to be as stated by appellee's witnesses. There were at least four eyewitnesses to the accident. They all agree in their statements in all material points. They were people who were sitting or standing about in the vicinity of the station. They heard the train give the customary signals. They heard it coming, and those who noticed the fact (and at least two or three did) say it was making the noise of a train running very fast. They saw the intestate start with the mail pouch, were aware by his movements of his intention to cross the track ahead of the train, and were interested in watching to see whether he made it. They all saw him pause and look as he emerged from behind the depot, and

then gather himself as for a spring or sudden movement, and some of them saw him accelerate his speed till he was struck by the train, while others, when they saw his movement indicating he was going to try to cross the track; glanced back towards the approaching train to see what his chances were. It was from the testimony of these latter that we are enabled to locate the distance of the train from the point of contact at the moment the intestate saw it and determined to make the dash to beat it. He had about 20 to 25 feet to go, while the train had about 225 feet.

It is argued for appellee that the intestate mistook the train he saw for the regular mail train No. 23, and, thinking it was that train, and knowing that it customarily stopped at the station, thought that it would slow up enough before getting to the station to allow him to pass in safety. The argument is not an unreasonable conjecture; but it is only a conjecture. This train was carrying green signals on the engine pilot, indicating that it was a special. Whether the intestate knew what those flags signified is not shown. The train was running so fast that everybody who saw it and testified, some with the same, and none with better, facilities than the intestate for judging of that fact, said that it was evident that it was not going to stop. No trains stopped at that station except such as were flagged,—that is, signaled by the station flag,—and only certain ones were allowed to be flagged. While it may be that the intestate was mistaken as to the character of the train, and was misled into believing it would stop, it may be, on the contrary, that he discovered its true character, and that it would not stop, but thought that he could get across the track before it came by. The latter inference is logically deducible from these circumstances: Everyone who saw it saw that it was not going to stop. All who heard it formed the same conclusion, and they were all correct. If it had been regular 23, and had been going to stop, it would not at 225 feet distance been coming at such high speed, nor emitting steam from the exhaust, as it was slightly downgrade from the west; nor, if it had been apparently going to stop at 225 feet distance, would it have been necessary for intestate to have sprung forward on a run to cross ahead of it, as its speed in that event would not have been more than twice or three times his speed in a rapid walk, and he would have had ample time to have cleared the track without a sudden and unusual spurt of speed. It may be doubted whether there was evidence that the intestate thought the train was regular 23; but, whether regular

23 or not, it was evident to all observers that it was not going to stop at that station.

Appellee relies on two opinions of this court as supporting the verdict. One is *Illinois C. R. Co. v. Murphy*, 123 Ky. 787, 11 L.R.A. (N.S.) 352, 97 S. W. 729. *Murphy's Case* is unlike this. *Murphy* was unaware of the approaching train that struck him, while those on the train for quite a distance saw him, but did not slacken speed. We held that running the train at high rate of speed through a populous community—a city of more than 2,000 people, the railroad track being along or upon a street—was negligence as to licensees or even trespassers whose presence was known, or should, from the circumstances of constant use, have been anticipated. If *Murphy* had seen the approaching train, and continued upon the track, his case would have been more like this one than it is. The other case cited is *Nichols v. Chesapeake, O. & S. W. R. Co.* 8 Ky. L. Rep. 519, 2 S. W. 181. It is very near like the case at bar. The similar features are these: *Nichols* was crossing the main track at a station in a hamlet, when a regular passenger train was due there, and had been flagged to stop for passengers. The location of the depot buildings and tracks were substantially the same as in this case. A special came along on the time of the regular train, but without stopping. It was running very fast. As *Nichols* attempted to cross the track ahead of it it struck and killed him. *Nichols* was entitled to the care due a passenger. The points of dissimilarity are these: In *Nichols Case* the approaching train did not whistle, or give other warning of its coming. *Nichols* did not see it, or know of its coming. At least, there was some evidence that he did not, while other evidence was that he did. The question was therefore one for the jury. There may be other differences between the facts of that case and this one; but we think the real question presented by and decided in the *Nichols Case* is necessarily dependent upon the fact that he was ignorant of the approach of the special train and of its character. In *Nichols Case* the court used this language: "In this instance those in charge of the front engine knew, or the law required them to know, that they were running on the time of the passenger train, or nearly so; that passengers were likely to be at this station and crossing the track; and that the train was likely to stop for them. Under these circumstances, the law declared that a known duty existed which required of those in charge of the engine which killed the deceased to so run it as to avoid danger to human life." It was held to be wilful negligence under such circumstances to run the special train at a high

rate of speed by the station without warning or signal of its coming. As to whether *Nichols* saw the engine approaching, the court observed: "The testimony is conflicting as to whether the deceased saw the engine coming or not. If he did, it is probable that he did not notice but what it was the passenger train, which was just behind it, and mistook the one for the other." As we have said, those facts made *Nichols Case* one for the jury, and, if those were the facts here, we would say the same of this case. The misunderstanding due to the opinion in *Nichols Case* grows out of the remark of the court last quoted. It was assumed as the law in this case that, if one saw a train coming, which was on the time of a regular train, and due to stop at that station, that he might as a matter of law rely upon its stopping and govern his movements by that assumption, although it was erroneous in fact. Whether he did or did not see the train is a question of fact, which, upon the conflicting evidence, it was the sole province of the jury to decide. What its appearance was and what impression on his mind it was calculated to make would in that event have been also for the jury under the court's instructions as to what constituted contributory negligence. Under our practice, the court instructs the jury in general terms, leaving them to apply the facts. Our practice gives the jury great latitude in applying the facts to the law as contained in the instructions,—so much so that it is not infrequent that the jury's finding is wholly at variance with the court's instructions, if they find that the facts exist upon which the instruction covering contributory negligence was based. But we have no way of certainly knowing whether the jury found the facts to be so, as their verdict is general. If they find for the plaintiff, no one can say whether they did not find as a fact that the injured person did not see the approaching train at all, whereas, in truth, they may have believed that he did see it, but that, under the circumstances, it was not negligence on his part; that is, not such absence of the care "an ordinarily prudent person would have exercised for his own safety under similar circumstances." The courts have no way, under the present practice of giving instructions in the most general terms, carefully avoiding details, of regulating the application of the law of contributory negligence. It may be, and there is a noticeable tendency in that direction, that more stress should be laid in the instructions upon the particular facts constituting such negligence.

But, where there is no dispute as to the facts upon which contributory negligence is based, there is nothing to be submitted to the jury. If the facts relied on as being

contributory negligence are not such, under the most favorable aspect for the defendant, to constitute such negligence in law, then the trial court decides that they do not, and refuses to instruct upon that point, which eliminates it from the case as a defense. But, where the facts are not disputed, and where they do not constitute contributory negligence, the court must also decide that matter, and instruct accordingly. It is always for the court to say what is the law, and the jury to find the fact if the fact is disputed. But, the fact being undisputed, the question is wholly one of law, in which case it was not a question of law as to what he might have thought from the appearances surrounding him. What he had the right to think might have been a question of law; but what he actually thought, never. The remark quoted from *Nichols Case* was in the nature of argument to show the probable nonexistence of the fact relied on in defense as contributory negligence. It was not intended to state it as a proposition of law. If it should be the law that, when one sees a train coming on the time of the regular train, he may, without further investigations, and can in spite of contrary appearances, rely upon the assumption that it is the regular train, and that it will stop where the regular train usually stops, and, under those assumptions, put himself ahead of it upon its track, in spite of the intelligence necessarily conveyed by his senses, then the verdict in this case must stand; otherwise not.

Let us review the decisions declaring the law upon that point and points so analogous in principle as to justify the application of the same rules.

In *Gresham v. Louisville & N. R. Co.* 15 Ky. L. Rep. 599, 24 S. W. 869, a boy was run over and killed at Junction City, where two railroads cross. The boy saw the train approaching. It was 70 yards away. It was a regulation by statute that all trains should stop before crossing another railroad. But this train did not stop. The boy, in attempting to cross the track in front of it, just beyond the intersection, tripped and fell. Before he could get up, the train had run over him. Had it stopped, as the law required it should, he would not have been hurt by it. The court seems to have laid some stress on the fact that the boy was a trespasser, and that the statutory duty of stopping the train at the crossing was not owing him. But the court used this language as to the right of the boy to rely upon appearances: "Gresham evidently saw the train coming at a rapid rate of speed and close at hand, and, believing that he could make the crossing in safety, made the venture, and he would doubtless have succeeded

but for the fact that he fell, which caused him to be overtaken and killed."

In *Helm v. Louisville & N. R. Co.* 17 Ky. L. Rep. 1004, 33 S. W. 396, the injured person was a volunteer assisting the station agent. The station was a flag station. There were passengers to take the train at that station. The train failed to sound the whistle announcing its approach in time for the agent, or the one acting for him, to get across the track in time to display the signal for it to stop for the passengers. Nevertheless he attempted it, and was struck and injured. The court said: "The appellant discovered the train was coming, and he negligently attempted to cross the track in front of it." No doubt he believed he could succeed. He misjudged the train's distance or speed. The verdict was for the defendant. It was affirmed. But there was an error which would have reversed the judgment but for the fact that this court found from the facts, admitting all that appellant claimed as true, that he could not recover on account of his own negligence.

In *Illinois C. R. Co. v. Willis*, 123 Ky. 636, 97 S. W. 23, Willis, a licensee, was upon a siding on the appellant's road. He saw or heard a train approaching, and, fearing it would frighten his horses, which he had left on the opposite side of the main track in charge of his little son, he hastened to cross in front of the rapidly moving train. It struck and killed him. This court said of his conduct: "Deceased evidently saw the train approaching. He thought he could cross over the track before it reached him. He made the venture, miscalculated the speed at which the train was approaching, and was killed." A peremptory instruction was ordered on the ground that his death was due to his own negligence.

In *Louisville & N. R. Co. v. Taaffe*, 106 Ky. 535, 50 S. W. 850, it was said: "It was also the duty of the decedent, if he had notice of the approach of the train to the station, to exercise reasonable care to ascertain the proximity of the train to the station, and to be careful not to expose himself to any danger by walking upon or near the track upon which the train was approaching; and it was his duty, if he heard the train whistle, indicating its approach to the station, to be on the lookout for the same, and to keep himself out of danger."

The case of *Craddock v. Louisville & N. R. Co.* 13 Ky. L. Rep. 18, 16 S. W. 125, is very much like this case. Craddock was on the platform of the passenger depot. He heard a train whistle for the station, and saw it coming. He started to cross the track in front of it, but at a point where he, a licensee, had the right to cross, or at

least where the railroad company was bound to anticipate his presence. That train did not stop at that station. Some trains stopped there and some did not. Craddock testified that he thought it was going to stop. It was running at a negligent rate of speed,—negligent as to Craddock, so held by this court; and it was added: "Yet this did not authorize the appellant to negligently throw himself in the way of it when he had ample warning of its approach, and then claim damages for any resulting injury." As to what would constitute "negligently throwing himself in the way" of the train, the court cited: "He knew the train was approaching, and very near at hand. He had been warned of its approach by repeated blasts of the whistle, and it was in plain sight. He saw it coming, and yet, when within from 16 to 60 feet of him, he attempted to cross the track."

In *Royster v. Southern R. Co.* 147 N. C. 347, 61 S. E. 179, one who knew a train was coming and only a short distance away stepped onto the track in front of it after he had passed around a car without looking to see where it was. In the opinion it was said: "If, with an approaching train in view, a person undertakes to cross the track in advance of the train, he cannot recover for injury sustained [citing authorities]. Nor does the fact that the train is running unusually fast make any difference, if the injured party knew it was approaching."

In *Thompson on Negligence*, vol. 7, p. 27, § 186, it is stated: "One who recklessly encounters a known danger, and thereby directly contributes to his injury, cannot escape the effect of his negligence because the unknown negligence of the defendant, which concurred to produce the injury, made the danger greater than he supposed it to be. So one who recklessly encounters a known danger cannot escape the effect of this rule on the ground that his action was the result of an error of judgment."

So long as we have the rule of law which makes contributory negligence a defense, instead of measuring the results of the negligence of the defendant and that of the injured party, and fixing liability in proportion of one to the other, the rule must be applied that he whose negligence is the proximate cause of the injury is the one at fault in law, and is the loser. Appellant's negligence in running its train too fast by the station was not the proximate cause of the intestate's death. His own negligence in going upon the track with knowledge of the defendant's negligence, or rashly or recklessly ignoring its negligence and "taking chances," was the proximate cause of his injury; for, but for it, appellant's negligence would have been harmless, as to him. In 20 L.R.A. (N.S.)

all the cases cited where the fact was undisputed that the injured party knew of the train's approach, and heedless of it, or miscalculating the results, went upon the tracks just in front of the train, a recovery was denied. From these authorities we gather the principle of law to be that it is such negligence for one to go upon the railroad track just in front of a rapidly approaching train, which he sees or knows to be then coming in, that for his injuries inflicted by it, he cannot recover from the railroad company, not because it was free from negligence, but because his own negligence was the immediate and nearest cause of his injury. We think the undisputed facts of this case bring it within that principle, and the peremptory instruction should have been granted.

The other questions discussed are not decided.

Judgment reversed, and cause remanded for a new trial under proceedings consistent with this opinion.

KENTUCKY COURT OF APPEALS.

HORATIO S. BRIGHT et al., Appts.,

v.

J. BACON & SONS et al.

(— Ky. —, 116 S. W. 268.)

Party wall — creation — contract.

1. The right to maintain a wall resting on each side of a boundary line as a party wall can never rest upon prescription, but must always be founded in contract, express or implied.

Same — use — additions.

2. Every joint owner of a party wall standing across a boundary line, and which has stood so long that the original agreement under which it was erected cannot be established, has a right to add to its height to its whole width for the benefit of additions to the building on his property, so long as it does not unnecessarily interfere with the other's use as it was begun or has developed.

Same — prescription.

3. A wall is not made a party wall by a trespasser obtaining in it an easement by long-continued use, except to the extent that the use of the encroacher has become a right.

(February 9, 1909.)

Case Note. — Right of one party to raise height of party wall.

There seems to be no doubt of the proposition—at least in American law—that, in the absence of any agreement, express or implied, regulating the respective rights of the owners of a party wall, either one may increase its height if the wall is of sufficient

APPEAL by complainants from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County dismissing the petition in an action brought to restrain defendants from building a certain party wall above the original height. Affirmed.

The facts are stated in the opinion.

Mr. Albert S. Brandeis, with Mr. Helm Bruce, for appellants:

Where a right is created in a party wall by prescription, the character of the use which has existed measures the extent of the right which is thereby acquired.

Welford v. Gerard, 108 Ky. 322, 56 S. W. 416; Mann v. Reigler, 33 Ky. L. Rep. 774, 18 L.R.A.(N.S.) 131, 111 S. W. 300; 3 Kent, Com. 13th ed. 437; Putzel v. Drov-

ers & M. Nat. Bank, 78 Md. 349, 22 L.R.A. 632, 44 Am. St. Rep. 298, 28 Atl. 276; Barry v. Edlavitch, 84 Md. 95, 33 L.R.A. 294, 35 Atl. 170; McLaughlin v. Cecconi, 141 Mass. 252, 5 N. E. 261; Calmelet v. Sichel, 48 Neb. 505, 58 Am. St. Rep. 700, 67 N. W. 467; Lewis v. New York & H. R. Co. 162 N. Y. 225, 56 N. E. 540; Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437; Mississippi Mills Co. v. Smith, 69 Miss. 299, 30 Am. St. Rep. 546, 11 So. 26.

strength and can be raised without injury to the adjoining building, and without impairing the cross easement to which the other owner is entitled. No American authority can be found which disputes this proposition, while all of the following decisions support it; Graves v. Smith, 87 Ala. 450, 5 L.R.A. 298, 13 Am. St. Rep. 60, 6 So. 308; Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061; Frowenfeld v. Casey, 139 Cal. 421, 73 Pac. 152; Field v. Leiter, 118 Ill. 17, 6 N. E. 877, reversing 18 Ill. App. 155; Fidelity Lodge No. 59, 1 O. O. F. v. Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; Howell v. Goss, 128 Iowa, 569, 105 N. W. 61; Pierce v. Musson, 17 La. 389; Heine v. Merrick, 41 La. Ann. 194, 5 So. 700, 6 So. 637; Dorsey v. Habersack, 84 Md. 117, 35 Atl. 96; Matthews v. Dixey, 149 Mass. 595, 5 L.R.A. 102, 22 N. E. 61; Carlton v. Blake, 152 Mass. 176, 23 Am. St. Rep. 818, 25 N. E. 83; Walker v. Stetson, 162 Mass. 86, 44 Am. St. Rep. 350, 38 N. E. 18; Fleming v. Cohen, 186 Mass. 323, 104 Am. St. Rep. 572, 71 N. E. 563; Brooks v. Curtis, 50 N. Y. 639, 10 Am. St. Rep. 545, affirming 4 Lans. 283; Musgrave v. Sherwood, 23 Hun, 609, 60 How. Pr. 339; Mittnacht v. Slevin, 67 Hun, 315, 22 N. Y. Supp. 131, affirmed without opinion in 142 N. Y. 683, 37 N. E. 825; Berry v. Todd, 14 Daly, 450; Dauenhauer v. Devine, 51 Tex. 480, 32 Am. St. Rep. 627; Belletot v. Laube, 40 Va. 842, 52 S. E. 698; Demers v. Lemieux, Rap. Jud. Quebec, 21 C. S. 26.

And the mere fact that in carrying up a party wall a building act is violated will not render the owner doing it liable to his co-owner, where the latter has suffered no injury. Everett v. Edwards, 149 Mass. 588, 5 L.R.A. 110, 14 Am. St. Rep. 462, 22 N. E. 52.

A fortiori, then, the owner on one side of a party wall would have the right, within the limits of his own lot, to increase the height of the party wall if it could be done without injury to building on the adjoining lot. Eno v. Del Vecchio, 4 Duer, 53; Andrae v. Hazeltime, 58 Wis. 395, 46 Am. St. Rep. 635, 17 N. W. 18.

Upon the same principle, where one has acquired the use of his neighbor's wall as

26.
Where a party wall stands partly upon the land of one and partly upon the land of another, each man owns his land in fee simple and in severalty up to the dividing line between the two lots, and owns in fee simple and in severalty so much of the

a support for his building by adverse use, the owner of the wall may add to its height without the consent of the other party, if it does no injury to the other party's right in the wall. Barry v. Edlavitch, 84 Md. 95, 33 L.R.A. 294, 35 Atl. 170.

But, where a lot owner erects a building and, to support it, uses a wall which is entirely upon the property of an adjoining lot owner, and the former in time acquires by adverse use an easement in the wall for the support of such building, he will have no right to place a further burden on the wall by increasing its height. McLaughlin v. Cecconi, 141 Mass. 252, 5 N. E. 261; Bright v. Morgan, 218 Pa. 178, 67 Atl. 58, 11 A. & E. Ann. Cas. 626.

Of course, an agreement between the owners that the party wall shall be a certain height does not give the right by implication to either one of the co-owners to build it higher. Frowenfeld v. Casey, 139 Cal. 421, 73 Pac. 152; Henne v. Lankershim, 146 Cal. 70, 79 Pac. 591; Calmelet v. Sichel, 48 Neb. 505, 58 Am. St. Rep. 700, 67 N. W. 407.

So, in Miller v. Stuart, 107 Md. 23, 68 Atl. 273, it was held that the grant of the right to use a wall standing entirely upon the grantor's lot, which grant specifically permitted the grantee to insert girders into the wall and to use it as the westernmost inclosure of a building to be erected on the grantee's lot, did not, by implication, confer the right to increase the height of such wall.

The rule that one owner of a party wall may increase its height, if it can be done without injury to the rights of the other owner does not seem to prevail in England. Thus, in the earliest case which the writer has been able to find involving this question, *Matts v. Hawkins*, 5 Taunt. 20, it was held that, if one proprietor of a party wall increased its height, and the other pulled down the addition, the first might maintain trespass for pulling down only so much of it as stood on the half of the wall which was erected on the plaintiff's soil, upon the ground that they were not tenants in common of the wall or of the land on which it stood, though the wall was erected at their

wall as stands upon his land, having an easement of support in so much of the wall as stands upon his neighbor's land, and in the land upon which that part of the wall stands.

1 Washb. Real Prop. 5th ed. 385; Tiedeman, Real Prop. § 620; Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Gibson v. Holden, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282; Bloch v. Isham, 28 Ind. 37, 92 Am. Dec. 287; Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627; Hoffman v. Kuhn, 57 Miss. 750, 34 Am. Rep. 491; Burton v. Moffitt, 3 Or. 29; Barr v. Lamaster, 48 Neb. 114, 32 L.R.A. 451, 66 N. W. 1110; Dunscomb v. Randolph, 107 Tenn. 89, 89 Am. St. Rep. 915, 64 S. W. 21; Bishop, Non-Contract Law, § 914; Henry v. Koch, 80 Ky. 391, 44 Am. Rep. 484.

Mr. Robert C. Kinkead, for appellees:

A party wall used as such, in the absence of proof to the contrary, will be presumed to have been erected under an agreement between the adjoining owners for their common use, or under an express grant.

Lloyd, Building & Buildings, § 182; Schile v. Brokhahus, 80 N. Y. 614; Brown v. Werner, 40 Md. 15; Fleming v. Cohen, 186 Mass. 323, 104 Am. St. Rep. 572, 71 N. E. 563; Bellenot v. Laube, 104 Va. 842, 52 S. E. 698.

One of the incidents of a party wall is the right of either party to heighten or lengthen it to meet the requirements of his building operations, if he can do so without injury to the other owner.

Putzel v. Drovers & M. Nat. Bank, 78 Md. 349, 22 L.R.A. 632, 44 Am. St. Rep.

joint expense. And the judges were also of the opinion that no trespass would lie if the parties were tenants in common of the wall, which would seem to leave the cotenant of a wall, who raised its height, remediless if his fellow tenant tore down the addition.

But in the next case in point of time, Curbitt v. Porter, 8 Barn. & C. 257, in which it appeared that one of two tenants in common of an old wall pulled it down with the intention of rebuilding it, and erected a new wall of a greater height than the old wall, it was held that this was not such a total destruction of the wall as would make him liable in trespass to his cotenant.

On the other hand, in the next case, Stedman v. Smith, 8 El. & Bl. 1, in which it appeared that one of the tenants in common of a wall took the coping stones off its top, heightened the wall, and replaced the coping stones on the addition, it was held that there was such an actual ouster of the other tenant from the possession of the wall as would sustain an action of trespass by the latter. Judge Crompton, in the course of the argument, said that the plaintiff had no longer the use of the same wall; that he "could not put flower pots on it, for in-

298, 28 Atl. 276; Everett v. Edwards, 149 Mass. 588, 5 L.R.A. 110, 14 Am. St. Rep. 462, 22 N. E. 52; Matthews v. Dixey, 149 Mass. 595, 5 L.R.A. 102, 22 N. E. 61; Negus v. Becker, 143 N. Y. 307, 25 L.R.A. 607, 42 Am. St. Rep. 724, 38 N. E. 290; Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061; Fidelity Lodge No. 59, I. O. O. F. v. Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Carlton v. Blake, 152 Mass. 176, 23 Am. St. Rep. 818, 25 N. E. 83; Jones, Easements, §§ 696, 697; Lloyd, Building & Buildings, §§ 185, 186; Washburn, Easements, p. 568.

Before the rights of one owner of a party wall can be curtailed as to his use of the wall, the objecting party must allege and prove that the agreement or grant creates a limitation in the right to its use.

Everett v. Edwards; Matthews v. Dixey; Bellenot v. Laube; Fleming v. Cohen; Brown v. Werner; and Schile v. Brokhahus,—supra.

O'Rear, Ch. J., delivered the opinion of the court:

The question for decision in this case is the right of one of the owners of a party wall to build upon it, so as to raise his house above the original height, without the consent of the other party. On the two lots owned, respectively, by Mrs. Bright and Miss Judge on Fourth street, in Louisville, were two houses, fronting upon the street. There was a wall between the houses, which stood equally upon the two lots 6½ inches upon each. This wall supported each of the houses on that side, and was a party wall. The buildings were each three stories high.

stance." And, in delivering judgment for the plaintiff, he stated that the plaintiff was excluded from the top of the wall, adding that "he might have wished to train fruit trees there, or to amuse himself by running along the top of the wall."

The foregoing language of Judge Crompton was quoted with approval in Watson v. Gray, L. R. 14 Ch. Div. 192, in which it was held that, where one tenant in common of a wall increased its height for the purpose of supporting a building he was about to erect, and his co-owner knocked down the new piece, the former was not entitled to any damages for the throwing down of the wall, or to an injunction to restrain the latter from interfering with the rebuilding of it.

Various building acts have wholly superseded, as to London, the common law with reference to building on party walls, the present provisions on the subject being contained in part VIII. of the London building act of 1894, 57 & 58 Vict. chap. 213. See 10 Enc. Laws of England, 561. By these statutory provisions either owner of a party wall may heighten it upon complying with certain conditions.

Miss Judge desired to build an additional story to her house, and to remodel it by building a practically new house. Negotiations for an agreement between the owners of the lots having failed, Miss Judge and her tenants tore down her old house, except they left the party wall intact, and built an additional 9-inch wall on her side against and tied it to the party wall till the top of the latter was reached, making a 22½-inch wall, and then extended the party wall the full thickness up another story. In doing the work no damage was done to Mrs. Bright's building. Nor was her use of it disturbed. Mrs. Bright sought an injunction restraining Miss Judge and Bacon & Sons, her tenants, from building the additional story so that any part of it would rest on her side of the party wall. The injunction was denied, and she has appealed.

The two houses were old buildings. There is no record of an agreement between the owners of the lots respecting the party wall. Nor is there anyone who knows when the houses were built, or knows of any express agreement between the owners when they were built. All that is known is that the party wall stands equally upon the two lots, and that it has been so used by the respective owners and their grantors for time out of mind. Nor was it shown whether the two houses were built by the same person owning both lots. There is thus presented the naked question as to the legal rights of such owners in the common or party wall between their houses. There is no statute in this state regulating the rights of owners of adjoining urban lots who build adjoining houses upon them. Whatever rights the parties have in such walls depend upon the common law. Of course if there had been an express agreement embodied in a grant, the matter would be one of construction only; for the parties could limit or extend their rights in whatsoever way they could agree upon. In this state, under the common law, the right to use and the manner of use of a party wall depends upon one of two propositions: Either an agreement between adjoining owners, or by prescription. The adjudged cases throughout the country, which are very numerous, are not uniform in their declaration of the common law upon this subject. It would be useless, if not an endless task, to attempt to analyze and harmonize them. We apprehend that not a little of the confusion arises out of the constricted announcement of the controlling principle in the earlier cases, and the efforts of the later courts to keep within the strict rule stated as a principle, while working out differentiations in its application upon the varying facts of the cases, or resting the judgments 20 L.R.A. (N.S.)

upon certain fictions, in the absence of anything better for support. We think the cases are really divisible into two great bodies: One where the right is purely prescriptive; the other where it is clearly the subject of agreement, express or implied. If two owners build a party wall for their common use, it is not accurate to say ever that their rights in the wall depend in any sense upon prescription. It is then a matter of agreement solely,—agreement expressed or implied. We can lay to one side the subject of express agreement, as that is not here. It is not to be presumed that men build party walls, or that either one of them would build one half, or any part, upon the adjoining lots, the walls designed to be used, and actually used, by each adjoining owner, without some kind of an understanding between them as to their respective rights in the wall. Without some understanding, if one alone so built the wall, he would be a trespasser to the extent that he encroached upon his neighbor's lot. If he was suffered to maintain his wall there for the period which sets up the statutes of limitation, his use and occupancy being hostile and exclusive, he would acquire title to the part of the other lot occupied by his wall, and the owner of such part would be barred of all his former title and the rights he had under it. But that would not be a party wall. It would be an individual wall. However, if the adjoining owner immediately or directly attached his house to the dividing wall, making it a part of his house, then the statutes of limitation would stop running, if they had begun, and the wall would become a party wall. The last owner, by his act in adopting it as a party wall, waived his right to sue in ejectment, and elected to treat the use and occupancy of his neighbor as amicable. In the latter event he would be, because he ought to be, estopped to deny that the wall thereafter stood as a party wall erected by agreement, just as if the agreement had been entered into before a brick was laid in it. One may adopt a situation so as to make himself a party to it as efficaciously as if he had entered at the beginning. There is no state of case that we can imagine where one owner builds a wall astraddle of the dividing line between his and his neighbor's lot, designed to be a party wall for the buildings upon each lot, and which is accepted and adopted by the other party thereafter, where the doctrine of prescription can logically enter into the case. The matter then becomes always a question of agreement, express or implied. If express, its terms control. If not express, then it must be implied, like all other implied agreements, that the parties mutually understood and as

sented that a fair equivalent was to be rendered by the one for the benefit conferred upon him by the other. What, then, is the implied agreement? It is, we think, that the wall shall be and remain a party wall for each of the lots; that its use shall be as a wall to each of the buildings, constituting a part of each building (*Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279), and to act as a support to each building (*Fleming v. Cohen*, 186 Mass. 323, 104 Am. St. Rep. 572, 71 N. E. 563) and, in the event either building falls into disrepair, or it is deemed expedient by its owners to remodel it (*Heine v. Merrick*, 41 La. Ann. 194, 5 So. 760, 6 So. 637), or reconstruct it (*Beidler v. King*, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763), he may do so, being careful not to injure the other building (*Fleming v. Cohen*, supra; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545), nor unnecessarily to interfere with its use (*Clemens v. Speed*, 93 Ky. 284, 19 L.R.A. 240, 19 S. W. 660; *Negus v. Becker*, 143 N. Y. 303, 25 L.R.A. 667, 42 Am. St. Rep. 724, 38 N. E. 290). That much seems to be well settled.

The question of compensation to the one building the wall need not be noticed here, except incidentally. The apparent divergence in the authorities is as to the right of either, without the consent of the other, to add to the original use of the party wall. It must be remembered that we are dealing alone with what was the implied agreement originally. Now, as neither party to such an arrangement, after it was executed, could withdraw from it without the consent of the other (*Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484), as to do so would be to annul an executed contract, he would be bound to let the other use the exact wall, if it was sufficient and safe for the purpose, to support the latter's building and constitute a wall to it. But it could not be presumed that the parties to the original convention ever contemplated yielding complete or qualified dominion over any part of their lots except as to the strip on which the party wall stood. It is not the manner of men to do so. The law will not presume a thing contrary to the custom of men. Then each party reserved, it must be presumed, the right to do with his lot, and the building on it, anything that would not impair the other's free use of the party wall as a party wall. Included in such reservation, or, rather, excluded from the implied agreement of the parties, was the right of each to alter or reconstruct his building in any way he chose, so long as the other's use of the party wall was not impaired. If he had only a one-story house on his lot to begin with, he could later build on it a two-story

house, or a ten-story house for that matter. He still owned his own lot, with all the rights of proprietorship. And he owned it up to his line, which is the middle of the dividing wall in this case. *Ingals v. Plamondon*, 75 Ill. 118. His neighbor, however, had an easement in so much of the former lots as was occupied by the party wall. What is that easement? It is to have the party wall maintained, with all its uses as a party wall, and no more. And the easement of each in the wall on the other lot is precisely the same. When the owner of one determined to build a new house, or alter the old by adding a story or more to it, he did not abandon his easement in the other man's share in the wall, nor the title to his own. It cannot be assumed that such was the original conception of the parties. On the contrary, it must have been foreseen that in time not only repairs must be made in each building, and alterations, too, perhaps, but that it would be desirable for the owner to enlarge his building by running it higher, or digging his cellar deeper. *Putzel v. Drovers & M. Nat. Bank*, 78 Md. 349, 22 L.R.A. 632, 44 Am. St. Rep. 298, 28 Atl. 276. As nothing was said between the parties, so far as known, restricting either owner as to such use of his property, it must be assumed that no such restriction was contemplated or included in their agreement. When one owner comes to enlarge his building, what, then, are his rights? As to all his property not covered by the party wall, it must be conceded it is unaffected by the agreement. And, as he evidently did not intend to have a less title in that part of his lot occupied by the party wall, save only as the easement was granted to his neighbor, he could use it precisely as he might the remainder of the lot, provided that in doing so his neighbor's easement was not disturbed. So far there would probably be no dispute as to the effect of their agreement. But, when it comes to using the party wall for its whole width and depth for the purpose of the additional story, there is the rub. The other man objects to using any part of his side of the wall for the extension. We must again have recourse to what was probably in the minds of the contracting parties in the original agreement. If, as suggested, each reserved the right to build his house higher, and neither contemplated yielding dominion over any part of his lot except an easement in the party wall, then it must have been in their thought, and within the terms of their grant, that each should have the right to use the common wall for all the purposes to which it could be put as a party wall to divide and support the two adjoining buildings; and, when either chose to add to his

building, he could carry up the party wall in its entire width, so as to make it a party wall for any building either might maintain on his lot. There is this limitation: Neither shall use any more of the other lot than is already set apart for the party wall,—for that is the limitation set upon the use by the act of the parties at the time,—and neither shall so use even that part as to unnecessarily interfere with the other's use, as it was begun, or as the former uses it.

In the case at bar appellees have built the additional story on their house, and have used the party wall in doing so. This we think was within the intendment of the parties who originally established the party wall, and dedicated each a part of his lot to its use. But, argue appellants, suppose we should want presently to build a ten-story house on our lot, then what is our situation as to the party wall? It must follow that appellants have that right, including the right to use the party wall for the purpose, if it is strong enough to support the additional weight. Or they can add to it on their side, as appellees did in this case, till the top of appellees' building was reached, then go on, using the entire width of the wall, so long as they do not impair its stability as a wall for the other house. They would, when they came to use the wall of the additional story put on by appellees, be compelled to compensate appellees for one half of its then value (*Spaulding v. Grundy*, 31 Ky. L. Rep. 951, 13 L.R.A. (N.S.) 149, 104 S. W. 293), and, if appellees or their vendees ever use the wall so built by appellants, then they would have to pay as outlined in the above-cited case. But, appellees urge, they may desire, and likely will, to build a steel structure, as is becoming the modern way of building very tall houses, and in that event the brick wall now there, as added to by appellees, would be entirely useless for their purpose, indeed, would be in the way. We have no doubt appellants have the right to build a steel structure on their lot, and many stories higher than appellees' building. But suppose appellees had done nothing toward adding their additional story. The old party wall would have been in the way just the same, and have been as useless for appellants' purposes. Appellees would have been entitled to have it maintained for the use of their building.

But, while the law does not make contracts for parties, even when they are in a bad pickle, it attempts to put a reasonable and workable construction on such contracts as they may have made, because the law presumes that it is what they intended. The argument advanced by appellants, and the conjectural responses made by the court, as

to the situation if changed, go to illustrate the impracticability of the rule of construction contended for by appellants. For if they could not agree further, both would be bound down to the maintenance of the old-fashioned houses, not rentable in competition with more modern buildings, leaving them helpless, or one of them in a situation which well could have been foreseen. That construction does injustice to their foresight and good sense, as well as sense of right, not to say enterprise. The other rule, the one which supposes that the parties intended their agreement to be not only continuing (as its nature clearly indicates), but a practical one, seems to us to be the better. It is that, in the absence of the proof of an express agreement, the implication is that the parties have set aside for their common use as a party wall between the houses built on their adjoining lots, including repairs, remodeling, and renewals and extensions thereof, so much of their lots as is occupied by the existing party wall; that if, in order to execute the plan of the remodeled building, it is necessary for the party so intending to remove the party wall and put in one commensurate to the additional weight of the two buildings, he may do so at his own expense, doing no injury to the other building, and not unnecessarily interfering with its use by its occupant or owner. *Putzel v. Drovers & M. Nat. Bank*, supra.

The other line of cases, that where the right is one created by prescription, need not be noticed here further than to indicate the difference between it and this case. Where one has built a wall on his own lot, but adjoining or near another lot, and the owner of the latter, without express agreement, joins his building to the wall, and maintains it for a period sufficient to constitute a bar under the statutes of limitation, then the latter has a right, established by prescription, to maintain the exact house he has built, and, in the manner and to the extent of his use, he cannot be interfered with by the former. It is sometimes said this is because the law presumes the execution of a grant and its loss from the lapse of time. But this ancient fiction is not now needed to support the prescription under the modern statute of limitation, which are not only statutes of repose, but operate so as to create right where none existed before. It is now the continued adverse use that creates the right of easement, not the fictitious lost grant. As it is the use that creates the right, the right must necessarily be measured by that use. It would be illogical to reason that one could obtain a right from a long-continued use different from that very use. Hence it is, in those cases

where the right is one created by prescription, it is limited, from its very nature and origin, to the particular use which gave it being. So, when an easement in another man's wall has been obtained by long use, which is to say by prescription, it does not make the wall a party wall, except to the extent that the use of the encroacher has become a right; and, as nothing ought to be presumed in favor of a wrongdoer, it will not be presumed that, because the owner suffered a trespasser to use the former's wall for say fifteen years for a particular purpose, he thereby assented to its further use for all purposes. To this class of cases belong *Welford v. Gerard*, 108 Ky. 322, 56 S. W. 416, and *Mann v. Reigler*, 33 Ky. L. Rep. 774, 111 S. W. 300, cited and relied upon by appellant.

In the case at bar, and others of its class, the right does not rest at all on prescription; for in this class so soon as the agreement is executed, either by writing or performance, it establishes the right of the parties to the dividing wall as a party wall, with all the incidental rights that pertain to it. Time has no part in the shaping of the rights of these parties. Their rights were as ample the first day the wall was built as forty years later. In the other class there is no right at all in one of the parties until the lapse of the period of the statutory bar. One grows out of contract; the other out of a long-continued trespass. To measure one, the terms of the contract must be sought for; to measure the other, the exact use which created it may alone be looked to, as there is nothing else to which resort can be made to find the rights of the parties. In the first the contract may be implied. Under the situation we have in hand here, from the very necessity of the situation, there must have been some agreement. Houses do not grow by chance. The partition wall between them being partly on each lot, and each using the wall in common as a party wall, the inference of a pre-existing agreement is irresistible. The arrangement could not have been accidental. Nor could it well have been trespass, as each, by using the common wall with knowledge of the other's use, assents to the situation,—and there cannot be a permitted trespass. While it might be better if such agreements were in writing, and recorded as deeds are, still the agreement is not strictly in derogation of title, but on the whole is beneficial to the title (*Harber v. Evans*, 101 Mo. 661, 10 L.R.A. 41, 20 Am. St. Rep. 646, 14 S. W. 750); and, when executed, it is not within the inhibition of the statutes of frauds and perjuries (*Walker v. Shackelford*, 49 Ark. 503, 4 Am. St. Rep. 61, 5 S. W. 887; *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475; 20 L.R.A. (N.S.)

Pireaux v. Simon, 79 Wis. 392, 48 N. W. 674). Whatever may have been the thought of the early English judges as to the scope of this doctrine, it is much obscured by the paucity of precedents. The growth of large cities in modern times, and cities and towns in great number, where party walls are not only highly desirable as an economical matter to the parties, but well-nigh necessary, has shown the wisdom and necessity of the rule which we have stated, and which we believe is the trend of the authorities, and is, to say the least of it, the American common law on the subject.

The decree of the chancellor is therefore affirmed.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

v.

ARMAS WOOD, Appt.

(122 La. 1014, 48 So. 438.)

Criminal law — confession — indictment.

Where a sheriff having the custody of accused obtained a confession from him by promises of assistance, and statements that he would do all he could to save accused from being hung, other confessions, subsequently made to different persons, but in the presence of such sheriff, would be regarded as tainted with the same improper influence; and were inadmissible against accused, though he was warned before making them.

(February 1. 1909.)

APPEAL by defendant from a judgment of the District Court for the Parish of Acadia convicting him of murder. Reversed.

The facts are stated in the opinion.

Messrs. Howard E. Bruner and James A. Gremillion, for appellant:

When once a confession under improper influence is obtained, the presumption arises that a subsequent confession flows from the like influence, and this though the subsequent confession was made to a different person from the one holding out the inducement.

6 Am. & Eng. Enc. Law, 2d ed. p. 542; Greenl. Ev. 1st ed. p. 221; Marr's Crim. Jur. p. 655; *State v. Berry*, 50 La. Ann. 1310, 24 So. 329.

Messrs. John J. Robjra and R. G. Pleasant, with Messrs. Walter Gulon,

Headnote by PROVOST, J.

Note. — As to when confession is deemed voluntary, see subject note to *Ammons v. State*, 18 L.R.A. (N.S.) 768. Google

Attorney General, and William Campbell, for the State:

Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted if the court believes from the length of time intervening, of proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained were entirely dispelled.

Marr's Crim. Jur. § 395, p. 654.

Provosty, J., delivered the opinion of the court:

Defendant, a negro, was convicted of murder, and sentenced to be hanged. Defendant was arrested on suspicion. While he was in jail, the sheriff told him that "the court would be lenient on him if he made a confession. I told him if he would make a man out of himself, and make a confession, that I thought I would be able to help him out; that the probabilities were his neck might be saved if he made a confession; that I would do all I could to save his neck."

Q. Did you not tell him not to mention anything about your having made that promise to him?

A. Probably I might have told him that.

Q. Did you not tell him, if asked if any promise was made or any inducement held out to him, to answer "No,"—that no promise had been made to him for the purpose of obtaining this confession? Try to refresh your memory.

A. I may have told him so. I would not say for sure whether I did or not. The probabilities are I did.

These promises failed to elicit a confession. But a week later, on October 15, 1908, the defendant having in the meantime been transferred from the jail of the parish of Acadia, where the crime was committed and where he was arrested, to the jail of the parish of Calcasieu for safekeeping, and there lodged in the "death chamber" or cell for prisoners condemned to die, he asked to see the sheriff, and made a confession to him in the presence of several persons, including the sheriff of Acadia, who had made him the promises and warned him against letting the fact be known. This officer, about twenty minutes before the confession was made, visited defendant in his cell and told him to remember the promises which he had made him. Not knowing of these promises, the sheriff of Calcasieu, Mr. Reid, warned the defendant that any confession he might make would be used against him on the trial, and to take notice that he made no promises in that connection. Afterwards, 20 L.R.A. (N.S.)

on November 8, 1908, in the parish jail of Acadia, the defendant repeated to the sheriff of Acadia the confession he had made in the jail of Calcasieu, and on November 11th, a few days before the trial, he repeated this confession to the district attorney without that officer having made him any promises, in the presence, however, of the sheriff of Acadia who had made him the promises. It nowhere appears that the latter officer at any time revoked the promises he had thus made. The first confession—that made to sheriff Reid and others in the jail of Calcasieu—was excluded as having been induced by promises, but the other two were admitted. We think the latter two were just as objectionable as the first.

"When once a confession under improper influence is obtained, the presumption arises that a subsequent confession of the same nature flows from the like influence; and this though the subsequent confession was made to a different person from the one holding out the inducement." 6 Am. & Eng. Enc. Law, 2d ed. p. 542.

Judgment set aside, and case remanded for further trial.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

STANDARD SAVINGS & LOAN ASSOCIATION, Appt.,

v.

RALPH L. ALDRICH, Receiver of Michigan Savings & Loan Association.

(89 C. C. A. 646, 163 Fed. 216.)

Interlocutory decree — setting aside — close of term.

1. A decree fixing the amount of indebtedness of a loan association in the hands of a receiver to a claimant is merely interlocutory, and, upon good cause shown, may be set aside at any time before the close

Case Note.—*Power of building and loan association to borrow money to pay withdrawing members.*

So few cases have considered this question, and there is such a decided conflict of opinion among the few that have, that it would not be practicable to formulate any general principles from them.

The doctrine of STANDARD SAV. & L. ASSO. v. ALDRICH, finds support in Blackburn Bldg. Soc. v. Cunliffe, B. & Co. L. R. 22 Ch. Div. 61 (affirmed on other grounds as Cunliffe Brooks & Co. v. Blackburn & Dist. Ben. Bldg. Soc. L. R. 9 App. Cas. 857), which held that a loan by a building and loan association from a bank for the purpose of paying withdrawing members was *ultra vires* and void in the absence of an express borrowing power in the association. An inquiry was,

of the trial at which the final decree in the cause is enrolled, although it is subsequent to the term at which the interlocutory decree is passed.

Building and loan association — borrowing money.

2. A building and loan association has no implied power to borrow money to pay a withdrawing stockholder.

Same — ultra vires — estoppel.

3. One lending money to a building association with knowledge that it was borrowed for the purpose of paying withdrawing members cannot compel a repayment on the ground of estoppel to deny the power to borrow.

Same — insolvency — withdrawal.

4. The insolvency of a building and loan association suspends the power of the directors to apply funds to the payment of withdrawing shareholders.

Corporation — knowledge of agent — director of other corporation.

5. A corporation which places one of its directors upon the board of directors of another corporation for the purpose of ascer-

taining its financial condition is chargeable with knowledge which he could not escape without wilfully shutting his eyes.

Same — notice.

6. One loaning money to a building association with knowledge that it was borrowing money and assigning securities for an illegal purpose cannot claim the standing of an innocent party.

Same — equitable rights.

7. One loaning money for an illegal purpose, to an insolvent building association, may recover what remains in its hands, and what it has expended for legitimate purposes, on the theory that *ex æquo et bono* it ought not to retain it.

Same — holding securities.

8. One loaning money to a building association to satisfy the claims of withdrawing members, taking an assignment of mortgages of borrowing members as security, cannot hold the mortgages against the claims of a receiver of the association, since he is charged with knowledge of the want of power of the association to make the assignment.

however, ordered to ascertain the amount, if any, of the claim in question that was used for the legitimate benefit of the association; the court holding that moneys so used would be a valid claim. In reaching the conclusion that obligations given for money borrowed to pay withdrawing members were *ultra vires* and void, the court reasoned that, where there was an express prohibition against borrowing, it must be obeyed, that, in the absence of such an express prohibition in case of a company or society constituted for especial purposes, no borrowing could be permitted without express authority, unless properly incident to the course and conduct of the business and for proper purposes. Hence, where there was no express borrowing power, and no necessity, for the general purposes of the business of the society, that a loan should be had, nothing could be allowed upon the theory of an incidental or implied power.

This doctrine was also applied in *Re National Permanent Ben. Bldg. Soc.* L. R. 5 Ch. 309, as to loans contracted by a society for the purpose of advancing the proceeds to its members on the security of their shares. In holding such loans to be *ultra vires* and void, the court said that the society was without any power to borrow; that the rules and very nature of the society show that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company liable; that the whole constitution of the society was that the members would make certain monthly payments, and, in consideration of such payments, and the fines provided by the rules, they were to receive certain loans.

This doctrine also finds support in *Re Powell*, 93 Mo. App. 296, which held that a building and loan association had no power to

borrow money other than for temporary purposes, and that the giving of notes to stockholders for the retirement of their stock was not a temporary purpose; and, hence, such notes were *ultra vires* and void. A statute which contained a provision authorizing building and loan associations to retire stock out of a portion of their current receipts was held not to confer any power upon the association to retire stock by giving the notes of the association.

But *North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank*, 79 Wis. 31, 11 L.R.A. 845, 47 N. W. 300, holds that, in the absence of a statutory provision to the contrary, a building association has the power to borrow money to pay its stockholders when their stock reaches its par value. So much of this opinion is not necessarily in conflict with the foregoing cases. But it was also held that, as against a bank, bona fide loaning money to the association to pay its stockholders, evidence was inadmissible (to show) that the stock of such stockholders had not become of its par value at the time of the loan; the court saying that, if the board had the power to borrow the money for a legitimate purpose, the corporation could not defeat recovery on the ground that the board applied the money borrowed for an unauthorized purpose, unless it was also shown that the lender knew the purpose for which the money was borrowed was unauthorized. Even to this extent, as to the facts, the case is not necessarily in conflict with *STANDARD SAV. & L. ASSO. v. ALDRICH*, as in that case the lender knew that the loan was to be used for an illegal purpose. The two cases were, however, decided on opposing theories. The theory of the *Hudson* case, to a certain extent at least, supports the doctrine of cases hereinafter considered that, where such an association has either an ex-

Same — benefit.

9. One lending money to a building association with knowledge of its intention to use it for an illegal purpose can recover the money only to the extent that he shows that the association has been benefited by it.

(July 23, 1908.)

A PPEAL by intervener from a decree of the Circuit Court of the United States for the Eastern District of Michigan dismissing its petition to establish a right to securities in a creditor's bill against an insolvent savings and loan association. Affirmed.

Statement by Lurton, Circuit Judge:

This is an appeal from a decree dismissing a petition filed by an intervener in a creditor's suit pending in the circuit court. The Standard Savings & Loan Association and the Michigan Savings & Loan Association are two corporations organized under the general law of Michigan providing

for the creation of building and loan companies. The Michigan association became insolvent. Under a general creditors' bill filed in the circuit court, diversity of citizenship existing, a receiver was appointed, its assets impounded, and the creditors who desired to share in the distribution of assets required to file their claims. Among the creditors who came in by intervention to assert a claim was the Standard Savings & Loan Association. The claim, as stated in the petition, was for money loaned, originally aggregating \$65,000, which, by credits, had been reduced on April 1, 1901, to \$46,103. 67. To secure this indebtedness it was averred that the Michigan association had assigned certain real-estate mortgages made to it by borrowing members. These securities, the petitioner consenting, were turned over to the receiver; the order providing that such lien as the Standard association had against them should be transferred to the fund which should be realized from their collection by the receiver. A decree, by consent of the receiver, was entered July, 1901,

press or implied power to borrow money for any purpose, and the money is borrowed by the proper officers, the association is estopped from questioning its authority, although a portion of the money borrowed may not have been used for the benefit of the stockholders and of the association; while the reasoning in *STANDARD SAV. & L. ASSO. v. ALDRICH*, also the *Powell Case*, would seem to support the doctrine that an estoppel cannot be predicated on a contract by such an association, which is beyond the scope of its power. The same may also be said of the *Cunliffe Case* and *Re National Permanent Ben. Bldg. Soc.* In all of these cases, however, and especially in the *Powell Case*, it appeared that the holder of the obligations against the association knew of the illegality of the consideration, although in the *Cunliffe Case* and in *Re National Permanent Ben. Bldg. Soc.* this knowledge was chargeable to the lender or holder of the obligation, on the theory that the obligation, or the agreement out of which it grew, contemplated a course of dealing not authorized by the rules or constitution of the society, thus apparently charging him with knowledge as to limitations on the authority of the society to borrow; and it is not entirely clear that these cases did not also charge the lender with knowledge as to the purpose of the loan,—at least no point was made as to the good faith or bad faith of the lender.

The doctrine of the *Hudson Case* finds support in *Bohn v. Boone Bldg. & L. Asso.* 135 Iowa, 140, 124 Am. St. Rep. 263, 112 N. W. 199, which goes to the extent of sustaining a claim in the hands of an original stockholder for the par value of his stock, surrendered by him, although at the time of the transaction the association was insolvent. On this point the court said: "When, therefore, 20 L.R.A. (N.S.)

plaintiff's shares matured, and his right to withdraw the value thereof became fixed, it was perfectly competent for him to leave the money as a loan in the hands of the company, unless such transaction was so clearly in excess of the corporate power of the association as to be *ultra vires* and void. There is no statute of this state denying to building and loan associations the power to borrow money; and, in the absence of such restrictions, we think the power is implied from the general nature of the business they are organized to carry on." The court added that the fact that the association had become insolvent since executing a note to the stockholder in question to secure the withdrawal of his stock, or the fact that the association was insolvent at the time the note in question was given, was immaterial; that the association could not be heard to plead, in avoidance of the action, that it was in fact insolvent at a time long prior to the date when it actually ceased to do business.

Marion Trust Co. v. Crescent Loan & Invest. Co. 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688, also held that a note given by an association for money borrowed to pay withdrawing stockholders was valid and enforceable, although the association was insolvent at the time, and such stockholders were not entitled to receive the full amounts paid them, of which facts the lender had notice. This conclusion was based on the theory that the lender of money to a corporation is not affected by the wrongful application of the moneys loaned, and that his right to recover will not be defeated by his knowledge that it was devoted to an illegal use, unless such use was made a condition of the lending, or the lender actually participated therein. On this point the court said that the lender knew that the money was

fixing the amount of the indebtedness of the Michigan association to the Standard association on account of the transaction referred to at \$44,240.33, but reserving any question of the "status" of the claim or interest. In July, 1904, this order was vacated so far as it determined any indebtedness, and the receiver allowed to withdraw his answer and to file defenses to the claim. Upon a final hearing, the judge denied all relief and dismissed the intervening petition.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Mr. Dwight C. Rexford, for appellant:

The *ultra vires* contracts being void, the lender is entitled to recover the money independently of contract.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 59, 35 L. ed. 68, 11 Sup. Ct. Rep. 478; Miller v. American Mut. Acci. Ins. Co. 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39; Buckeye Marble & F. Co. v. Harvey, 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 389, 33 L. ed. 163, 9 Sup. Ct. Rep. 770; Eastern Bldg. & L. Asso. v. Williamson, 189 U. S. 129, 47 L. ed. 740, 23 Sup. Ct. Rep. 527; McCracken v. Halsey Fire Engine Co. 57 Mich. 361, 24 N. W. 104; Thomp. Bldg. & L. Asso. 2d ed. pp. 354, 370, 557-583; Kadish v. Garden City Equitable Loan & Bldg. Asso. 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; Vought v. Eastern Bldg. & L. Asso. 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496; Parish v. Wheeler, 22 N. Y. 494; Milbank v. New York, L. E. & W. R. Co. 64 How. Pr. 20; Holmes & G. Mfg. Co. v. Holmes & W. Metal Co. 127 N. Y. 252, 21 Am. St. Rep. 448, 27 N. E. 831; Manchester & L. R. Co. v. Concord R. Corp. 66 N. H. 100, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383; Morawetz, Priv. Corp. § 721; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; Union Nat. Bank v. Matthews, 98 U. S. 629, 25 L. ed. 190; Bowditch v. New England Mut. L. Ins. Co. 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798; White v. Franklin Bank, 22 Pick. 181; Poock v. Lafayette Bldg. Asso. 71 Ind. 357.

It is immaterial whether the lender, at the time the loans were made, had notice, or

knew, of the purpose to which the borrower intended to apply the money.

Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso. 148 N. Y. 281, 35 L.R.A. 289, 42 N. E. 710; Aldrich v. Gray, 77 C. C. A. 597, 147 Fed. 453, 8 A. & E. Ann. Cas. 832; Cook, Corp. § 727; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Darst v. Gale, 83 Ill. 137; 27 Am. & Eng. Enc. Law, p. 389; Thompson v. Lambert, 44 Iowa, 239; 2 Cook, Corp. 4th ed. p. 1702, § 766; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; Farmers' Loan & T. Co. v. New York & N. R. Co. 78 Hun, 213, 28 N. Y. Supp. 933; Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439; Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5,755; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

The lender should not be deprived of the benefit of the securities held by it.

Burton v. Schilbach, 45 Mich. 504, 8 N. W. 497; American U. Tele. Co. v. Union P. R. Co. 1 McCrary, 188, 1 Fed. 745.

Mr. De Forest Paine, for appellee:

Money cannot lawfully be borrowed to pay withdrawing stockholders.

Goss v. Peters, 98 Mich. 112, 57 N. W. 28; Thomas v. Richmond, 12 Wall. 349, 20 L. ed. 453; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953; Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439; Cannan v. Bryce, 3 Barn. & Ald. 179; M'Kinnell v. Robinson, 3 Mees. & W. 434; Brown v. Tarkington, 3 Wall. 377, 18 L. ed. 255; Higgins v. McCrea, 116 U. S. 684, 29 L. ed. 769, 6 Sup. Ct. Rep. 557.

One may disaffirm a contract forbidden by law, and recover the money paid on it, only while the contract remains executory; but after it is executed he cannot recover the money in any form of action.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; Thomas v. Richmond, *supra*; Morgan v. Groff, 4 Barb. 524; Merritt v. Millard, 4 Keyes, 209; White v. Franklin Bank, 22 Pick. 181; Todd v. Caplinger, 4 Bush, 139; Ashbrook v. Dale, 27 Mo. App. 649; American Strawboard Co. v. Peoria Strawboard Co. 65 Ill. App. 502; Gleason v. Chicago, M. & St. P. R. Co. (Iowa) 43 N. W. 517; Bowman v. Phillips, 41 Kan. 364, 3 L.R.A. 631, 13 Am. St. Rep. 292, 21 Pac. 230; Lowry v. Bourdieu, 2 Dougl. K. B. 408; Tappenden v. Randall,

borrowed for a purpose not in itself immoral or wrong, but illegal because not within the corporate power of the borrower, and added: "The validity of a contract depends upon its terms and the consideration upon which it is executed. The contract of appellee was to loan the money, and of the appellant to pay it back. Such contract is 20 L.R.A. (N.S.)

a legal one. The mere knowledge of appellee of the illegal use to which it was intended to apply the money, or the purposes of the appellant, do not form a part of the consideration. The consideration is the cause of the contract, and is distinct from the motive to it."

2 Bos. & P. 467; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Bone v. Eckless*, 5 Hurlst. & N. 925.

Lurton, Circuit Judge, delivered the opinion of the court:

1. There was no error in vacating the order determining the indebtedness of the Michigan association to the Standard association. Although the order was made at a subsequent term, yet the order set aside was not final, but interlocutory, and, upon good cause shown, might be set aside at any time before the close of the term at which the final decree was enrolled. *Loeser v. Savings Deposit Bank & T. Co.* 163 Fed. 212. The facts upon which the court acted in setting aside that order and allowing defense to be made to the claim amply justified the action of the court.

2. The origin of the debt in question was this: In November, 1897, the Michigan association, though still a going concern, was in fact insolvent, and much in need of money to satisfy demands of withdrawing shareholders. In this emergency it applied to the Standard association for assistance. The negotiations were carried on by their respective secretaries, Galvin for the Standard association and Wemple for the Michigan association. These secretaries were the real managers of these associations and, to quote counsel, "were the whole thing." The evidence makes it plain that the purpose of the Michigan association in borrowing was to pay off importunate withdrawing shareholders, and this purpose was as well known to the lender as the borrower. Indeed, Mr. Galvin, the man of all work for the Standard association, and the negotiator of the loans, admits that the original plan was that the money loaned should be paid direct to such withdrawing shareholders, and that he therefore paid to himself, in his character of withdrawing shareholder, \$3,500, but did not carry out the scheme of direct payments further because of book-keeping complications. To carry out the arrangement the Michigan association subscribed to the requisite number of shares in the Standard association, and, upon the footing of a shareholder, applied for and obtained the loans in question, using same as stated above. That the Michigan association had no power to become a shareholder in the Standard association is not disputed. The enabling act under which both associations were organized provides that such companies may be created "for the purpose of building and improving homesteads and lending money to the members only." *Michigan Comp. Laws 1897, §§ 7554, 7581.* The investment of funds in the shares of a company organized for a like purpose is 20 L.R.A. (N.S.)

beyond the scope of the most liberal view of the incidental or implied powers of such companies. The objects of such associations being only to lend the funds contributed by members for the purpose of building and improving homesteads, one such association could not become a member of another, nor could it lend its own funds except to its own members for the purpose indicated. The concession, therefore, that the Michigan association could not legally become a member of the Standard association, and that the latter could not legally lend its money to an association which was not and could not lawfully become a member, has not been inadvertently made. *Thomps. Bldg. & L. Asso.* 2d ed. p. 215, § 114; 4 Am. & Eng. Enc. Law, 2d ed. p. 1028; *Kadish v. Garden City Equitable Loan & Bldg. Asso.* 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *North America Bldg. Asso. v. Sutton*, 35 Pa. 463, 78 Am. Dec. 349; *Mechanics' & W. Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co.* 24 Conn. 159.

The question as to whether, in the absence of statutory authority, such an association has the power to borrow money for the legitimate purposes of the association, such as to pay maturing shares and thereby avoid recalling or assigning profitable investments, has not often arisen and need not be here decided. The English authorities need to be distinguished, for they turn, in the main, upon whether the loans were made in accordance with rules adopted by the association made by authority of the general enabling acts. In *Murray v. Scott*, L. R. 9 App. Cas. 519, 538, it was held that the incorporating act having given power to the members to make rules and regulations for the conduct of the business, not in conflict with the objects and purposes of the society or the terms of the act, was broad enough to sustain a rule allowing the managers to borrow for the legitimate purposes of the business; but such a power, resting upon implication, is not an unlimited power to borrow. In the case just cited, the Earl of Selborne very well said: "The only real and true limit of the rule-making power, as to a matter not governed by the general law of the realm or by any express prohibition in the statute, must be that pointed out by Giffard, L. J. The power cannot be so exercised as to make the society a thing different from a benefit-building society formed for the purpose and in the manner defined by the act."

In *Cunliffe Brooks & Co. v. Blackburn & Dist. Ben. Bldg. Soc.* L. R. 9 App. Cas. 857, it was held, upon full consideration, that, when no rule allowing borrowing had been adopted, overdrafts were borrowings and *ultra vires*. The matter is generally regu-

lated by statute in the United States, and in *Wilson v. Parvin*, 56 C. C. A. 268, 119 Fed. 652, we held that, under the Tennessee incorporating act, such associations had power to borrow for the legitimate purpose of their business. The Michigan statute providing for such associations confers no power to borrow, but does not in terms prohibit such transactions. If the Michigan association had any such power, it arises by necessary implication, and must therefore be limited to the necessary and legitimate purpose of the organization, as defined in the enabling act. *Goss v. Peters*, 98 Mich. 112, 57 N. W. 28, construing an act defining the powers of mutual fire insurance companies, points clearly to a very narrow power of borrowing by such associations as those here involved, if any such power exists under any circumstances. 4 Am. & Eng. Enc. Law, p. 1023; *North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank*, 79 Wis. 31, 11 L.R.A. 845, 47 N. W. 300; *Blackburn Bldg. Soc. v. Cunliffe, B. & Co.* L. R. 22 Ch. Div. 61, 70. The members of the Michigan association had adopted no rules authorizing the managers to borrow money for any purpose; but, assuming that the corporation had an implied power through its directors and managers to borrow money, it was a power limited to the necessary and legal purposes and objects of the business. The known and assumed purpose for which this money was borrowed was to pay off withdrawing members. Of this purpose the lending association had full notice through its secretary, by whom the whole matter was arranged and negotiated. The evidence makes this clear, and we so find the fact to be. The power to borrow money to pay off withdrawing stockholders cannot be legitimately inferred or implied. The scheme of the enabling act, as indicated by the general purpose of such associations as well as by the terms and conditions under which shareholders are allowed to withdraw dues paid in and a proportionate share of the profits earned, is that only current income shall be so applied. The withdrawal of a shareholder is the withdrawal of capital pledged primarily to creditors and to carry on the business for which the association was organized. The funds applicable, therefore, to the payment of withdrawing shareholders, is the fund arising from the current contributions of a solvent and going association; and no other funds can be legitimately so applied. This we think plain from the relation of shareholders to such associations and is plainly indicated by the proviso of the 6th section of the enabling statute: "That not more than one half of the funds received by the association in any one

month shall be applicable to the payment of withdrawing shareholders unless otherwise ordered by the directors; and, when the demands of withdrawing shareholders exceed the funds applicable to their payment, they shall be paid in the order in which their notice of withdrawal has been given."

We conclude, therefore, that no authority existed, express or implied, to borrow money to meet the claims of withdrawing shareholders. Such a borrowing would not be for the purpose of paying debts and liabilities in due course of business. *Blackburn Bldg. Soc. v. Cunliffe, B. Co.* L. R. 22 Ch. Div. 61, affirmed in L. R. 9 App. Cas. 857. Appellants, as we have before stated, had notice that the borrowing was for the payment of withdrawing shareholders, and are constructively charged with knowledge that the managers were acting without power in so doing and in assigning the mortgages of borrowing shareholders to secure the loan. A contract beyond the scope of the power of the Michigan association, express or implied, cannot be enforced by an appeal to the rules of estoppel. Any such application of the doctrine would be, in effect, to enlarge the power of the corporation in accordance with the discretion of its managers, violating thereby the rights of innocent shareholders and a sound public policy. *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 60, 35 L. ed. 68, 11 Sup. Ct. Rep. 478; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 389, 33 L. ed. 157, 163, 9 Sup. Ct. Rep. 770; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167, 176, 20 L.R.A. 765, 21 S. W. 39; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 549, 41 L. ed. 817, 821, 17 Sup. Ct. Rep. 433; *Re National Permanent Ben. Bldg. Soc. L. R. 5 Ch. 309*; *California Nat. Bank v. Kennedy*, 167 U. S. 363, 368, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831.

In *McCormick v. Market Nat. Bank*, cited above, the court said: "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce v. Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 384, 33 L. ed. 157, 161, 9 Sup.

Ct. Rep. 770; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 48, 35 L. ed. 55, 64, 11 Sup. Ct. Rep. 478."

More than this, the Michigan association was insolvent at the time. This fact, without more, suspended the power and right of the directors to apply any funds to the payment of withdrawing shareholders. This we held in regard to this very association in *Aldrich v. Gray*, 77 C. C. A. 597, 147 Fed. 453, 8 A. & E. Ann. Cas. 832, where we held that the receiver might recover the funds so illegally paid out to such shareholders. That it is not shown that the appellant company knew that insolvency existed when the first loan was made in November, 1897, may, for the purpose of this case, be conceded; but, when the last \$40,000 was paid over, it had constructive knowledge, for it had caused its own treasurer, Mr. Wilson, to be placed in the board of directors of the borrowing company for the purpose of discovering whether the condition of the Michigan association was such as to justify further effort to save it. Going into the board as the representative of the Standard association, it was charged with the knowledge which he could not escape without wilfully shutting his eyes; but, irrespective of notice of insolvency, the Standard association knew that the managers were borrowing money and assigning securities for an illegal purpose. They are therefore in no sense entitled to the footing of an innocent party.

Conceding the utter illegality of the contract, the appellants in the court below and here say that they abandon and repudiate the contract and sue only to recover money which the appellee association received and which *ex æquo et bono* it ought not to retain. The principle to which the appellants appeal is perfectly plain and well settled. Although the managers of the Michigan association had no power to borrow money for such purposes, yet, to the extent that the money has not been expended or has been paid out in discharge of legitimate obligations of the association, it would be unjust and inequitable that it should not be held accountable. *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 628-636, 44 L. ed. 611, 615-618, 20 Sup. Ct. Rep. 498; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *Re Cork & Y. R. Co. L. R. 4 Ch. 748*, 760; *Travelers' Ins. Co. v. Johnson City*, 49 L.R.A. 123, 40 C. C. A. 58, 99 Fed. 663, 666; *Perkins v. Boothby*, 71 Me. 91, 97; 20 L.R.A. (N.S.)

Ditty v. Dominion Nat. Bank, 22 C. C. A. 376, 43 U. S. App. 613, 75 Fed. 769; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Hedges v. Dixon County*, 150 U. S. 182, 186, 37 L. ed. 1044, 1046, 14 Sup. Ct. Rep. 71; *Re National Permanent Ben. Bldg. Soc. L. R. 5 Ch. 309, 313*; *Cunliffe Brooks & Co. v. Blackburn & Dist. Ben. Bldg. Soc. L. R. 9 App. Cas. 857*; *Blackburn Bldg. Soc. v. Cunliffe, B. & Co. L. R. 22 Ch. Div. 61, 71*. This right of recovery is based upon an implied promise to return the money or property so received or to make compensation to the extent that it has actually benefited by its application to the discharge of actual liabilities incurred in the legitimate course of business. In *Travelers' Ins. Co. v. Johnson City*, supra, this court had occasion to deal with the question as to whether there was any liability in consequence of an issue of railroad bonds by a municipal corporation in aid of a railroad company. The bonds having been held void (*Johnson City v. Charleston, C. & C. R. Co.* 100 Tenn. 138, 44 S. W. 670), an action was brought by a holder of bonds against the city for money had and received to its use. Speaking for this court, Taft, Circuit Judge, said: "Such an action is based, not on an express or implied contract, but upon an obligation which the law supplies from the circumstances, because, *ex æquo et bono*, the defendant should pay for the benefit which he has derived at the expense of the plaintiff. It is an obligation which the law supplies, because, otherwise, it would result in the unjust enrichment of the defendant at the cost of the plaintiff. It is an obligation which arises only when the defendant has received money or property from the plaintiff and appropriated the same to his own use, either when he might have elected not to take it, or, having the power to do so, might return the benefit thus conferred to the plaintiff, and fails to do so."

In that case the city had received the shares for which the bonds had been issued to the railway company, but, having no power to make the subscription, it had none to receive or hold the share. The construction of a railway station was held not to inure to the benefit of the city because it had been erected on the railway's property and was not the property of the city. No direct benefit having been received, relief was denied. In *Parkersburg v. Brown* the holders of the void obligations were permitted to follow the property acquired by their use. In *Louisiana v. Wood* cited above, a recovery was allowed for the money received upon the void obligations; the proceeds having been applied by the

city for the very purpose, a lawful one, for which they were issued. In *Hedges v. Dixon County*, relief was denied. Referring to *Read v. Plattsburgh*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208, and *Louisiana v. Wood*, cited above, the court said: "In this case, as in *Louisiana v. Wood*, the city got the full pecuniary consideration for the bonds, and applied the money to the very purpose for which they were issued; and, upon well-settled principles, if the securities given for the money so obtained proved invalid or defective for any reason, there was a clear legal, as well as moral, obligation to refund the money which had been so advanced to and received by the city. The circumstances and conditions which gave the holders an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

Re *National Permanent Ben. Bldg. Soc.* supra, was a case in which a building and loan society had borrowed money, having no power to borrow. It was held that the lender had no legal debt and no equitable claim for a recovery. In respect to the claim for equitable relief, *Giffard, L. J.*, said: "A class of cases has been referred to on that subject, the principal of which are *Re German Min. Co.* 4 De G. M. & G. 19, and *Re Cork & Y. R. Co.* L. R. 4 Ch. 748, the latter of which was before the Lord Chancellor and myself a short time ago. I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow v. Pitfield*, 1 P. Wms. 558, where there was a loan to an infant, and the money was spent in paying for necessaries, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held that, although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid. That is the 20 L.R.A. (N.S.)

principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from. Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company."

In *Cunliffe Brooks Co. v. Blackburn & Dist. Ben. Bldg. Soc.* cited above, it appeared that the association had no power to borrow, but that it had made large overdrafts at its bankers, and had assigned mortgages of borrowing members as security for any balance. It was held that such overdrafts were borrowings and *ultra vires*, and that the bankers were not creditors, and were only entitled to hold the securities as a security for repayment of so much money as should be shown to have been applied to the legitimate debts and liabilities of the association.

The facts that appellants hold certain mortgages made by borrowing shareholders of the Michigan association as security for the money loaned to the Michigan association does not materially improve its situation. The managers assigned these securities illegally, and appellants are constructively charged with knowledge of their want of power. Their utmost right to hold on to them is to retain them as security for so much of the loan as shall appear to have gone to the benefit of the Michigan association by discharging legal debts and liabilities which would otherwise be valid claims against that company. This was the rule applied in *Blackburn Bldg. Soc. v. Cunliffe, B. & Co.* supra, where it was said by Lord Selborne that "the burden of showing that they are entitled to anything lies upon them (the lender) and not upon the other side." To same effect is *Re National Permanent Ben. Bldg. Soc.* supra. If this money was applied to pay off withdrawing stockholders, the association has not been benefited. To quote from the opinion of Judge Swan upon this point: "The claim that petitioner can recover for money had and received on the ground that the Michigan association has had the benefit of the money and *ex æquo et bono* should repay it cannot be maintained upon these facts. The only persons who received benefits were the withdrawing members of the Michigan, who were not entitled to it. Such payments, instead of being beneficial to the association, hastened its failure and diminished its resources by reducing its membership and giving withdrawing members what

they had no right to receive when there were no funds in the treasury. This was the first necessary effect of such payments. Its second was the wrong done to the remaining members whose share in its assets is by so much the less because of what was paid to withdrawing members. The third and necessary effect, and that scarcely the less injurious than the first, is that, if the claim of petitioner is sustained, and it is given the status of a creditor, the members' rights in the assets of the Michigan association are subordinated to petitioner, and they can share only in the assets, if any there be remaining after petitioner's claim is paid."

The burden of showing that the association has been benefited by the use of this money, and to what extent, is upon the lending association. The appellants have not met this burden. It is a possible thing that some part of the money loaned went to the payment of legitimate obligations; but, if so, this has not been pointed out in such a definite way as to justify any modification of the decree of the circuit court. The very purpose of the loan was to pay off withdrawing shareholders, and the original agreement that the funds should be paid by the Standard association direct upon such claims was only abandoned after some claims had been so paid, on account of bookkeeping difficulties. Wemple, the secretary of the Michigan association, says that the money was all so paid out. The inferences from the book entries found in the evidence of Aldrich that possibly some other obligations were also paid in part from that source are too vague to enable us to say that a single dollar is shown to have been paid upon legitimate debts.

The suggestion that, because moneys paid to withdrawing shareholders may be recovered by the receiver, we should treat the money so supplied as though it had not been dissipated at all, would be to throw the whole chance of loss upon shareholders who did not withdraw and are not responsible for the precarious condition of the association or of the claim which the appellants assert. The burden was upon complainant to show to what extent the money borrowed had benefited the lending association. It has not shown that any part of the money paid out to withdrawing shareholders has or can be collected.

This is fatal to any relief, and the decree of the court below must be affirmed, with costs.

20 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

FRANCIS E. JENKINS, Appt.,

v.

ST. PAUL CITY RAILWAY COMPANY,
Resp't.

(105 Minn. 504, 117 N. W. 928.)

Servant — injury — *res ipsa loquitur*.

1. The application of the maxim *Res ipsa loquitur* does not ordinarily depend upon the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. Under certain circumstances, it may apply in an action brought by a servant against a master for injury caused by an agency of the master.

Same — when applicable.

2. *Quare*,—whether it would so apply where the dangerous agency was in the actual physical control of the experienced servant, and in operation by him.

Same — negligence — presumption.

3. The maxim, at most, raises a *prima facie* case of negligence, which is rebuttable. No presumption of negligence necessarily follows the plaintiff through the case, so as to compel the submission of the question of fact to the jury.

Master — injury to servant — electric car — inspection — duty.

4. An electric passenger carrier fulfils its duty, so far as the controller of an electric car is concerned, if the controller is shown to have been of standard character, made by a reputable manufacturer, in good condition, and to have been subjected to such inspection as is reasonable and practicable. The carrier is required to inspect with adequate care, but not to dismantle complicated machinery for purposes of inspection.

Same — evidence — sufficiency.

5. Here plaintiff, a man of at least ordinary intelligence, an instructed and experienced motorman, was injured while operating an electric car for the defendant at a terminal where the cars turned round a loop. The car ran upon the curve of the loop at full speed, and was derailed and capsized. Thereby plaintiff received the injuries here complained of. The issue was whether a shock of electricity, passing through him from his left hand, on the handle of the controller, and through his foot, resting upon a metallic part of the car, produced temporary paralysis, by reason of which he was deprived of control of his car. It is held: That the presumption

Headnotes by JAGGARD, J.

Note.—As to whether the doctrine of *res ipsa loquitur* is applicable between master and servant, see case notes to *Fitzgerald v. Southern R. Co.* 6 L.R.A. (N.S.) 337, and *Byers v. Carnegie Steel Co.* 16 L.R.A. (N.S.) 214; and see, also, the case of *La Bee v. Sultan Logging Co.* post, 405.

of negligence conceded was rebutted by affirmative testimony, *inter alia*, as to the safe use of the car for twenty days before and months after the occurrence of the accident, during which the car was shown to have been in the same condition as at the time of the accident, and by the facts shown as to its purchase and inspection.

(October 9, 1908.)

APPEAL by plaintiff from an order of the District Court for Ramsey County directing a verdict for defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. P. D. Scannell and Morton Barrows for appellant.

Messrs. N. M. Thygeson and W. H. Bennett for respondent.

Jaggard, J., delivered the opinion of the court:

Plaintiff and appellant, a motorman, was operating for the defendant and respondent an electric car at a terminal where the car was turned around by means of a loop. A man of at least ordinary intelligence, he received the instruction usually given by defendant to its trainmen, and had been in its service for more than a year. The car ran upon the curve of the loop at full speed, and was derailed and capsized. Thereby plaintiff received the injuries here complained of. Plaintiff's contention was as follows: He was seated upon his stool, and was grasping with his left hand the handle of the controller; his hand being in contact partially with the brass and partially with the wood. His right hand was grasping the metal handle of the brake. His right foot was resting upon the dog of the hand brake, which may or may not have been in contact with the ratchet. He had upon his hands a pair of cotton gloves, being very much soiled, and the palms being impregnated with dirt, oil, and sweat. He wore cotton stockings and leather shoes. His current was nearly at the maximum, if not quite. He received a shock of electricity which froze his hands to the handles. By reason of the temporary paralysis of his arms he was deprived of control of his car and prevented from shutting off the current and applying the brakes so as to reduce the speed. Defendant was charged with negligence in failing to properly furnish and maintain reasonably safe appliances and instrumentalities with which to perform his work, and in failing to caution and warn the plaintiff of the hazards to which the performance of his duties exposed him and which were unknown to him. The defendant 20 L.R.A. (N.S.)

contends that it was not negligent in these respects, and that plaintiff did not in fact receive the shock of electricity at or immediately prior to the accident, but was asleep at his post, and negligently ran his car at full speed upon the curve.

The controller was the apparatus which governed the current from the trolley wire overhead used in operating the car. It consisted of a central, movable part, known as a "barrel," upon which were little copper blades, called "conductors," which, as the barrel revolved, made contact with stationary "fingers" and sent the current through the parts in various combinations. It was surrounded by a casing or frame made of sheet iron. This was lined with a nonconducting material—*asbestos*— $\frac{3}{8}$ of an inch thick. For purposes of this appeal, it will be assumed that this metal controller casing or frame was liable to become charged with electricity; that such charge of the controller casing endangered the motorman, unless it was kept sufficiently grounded; that, if the grounding of the controller casing was sufficiently interrupted, the motorman could receive a shock in the manner testified to by plaintiff at the trial. The function of the ground wire was (1) to act as a means of escape—as a waste pipe, as it were—for discharging into the earth the surplus or waste current from the interior of the controller, and also (2) to discharge into the earth any current which might have leaked into the frame of the controller. A further device for grounding, put in by the defendant company, was a metallic brace attached to the back of the controller and passed to the metallic air-brake controller frame, to which it was attached. It was fastened by a steel screw to the casing. If for any reason the contact with the frame by the strap became inadequate to ground the surplus electric current, danger would not be avoided by the fact that it was subsequently attached to the brake. The case was twice tried in the district court. At the first trial the jury disagreed. On the second trial, at the close of all the testimony, the court directed a verdict for the defendant. The propriety of that order is the question on this appeal.

1. The plaintiff himself testified to the fact that his hands were frozen to the handles, and as to the places on his hands and feet where he had been burned by the current. The gloves he wore were produced in court. His testimony and that of other witnesses further tended to show that he had obeyed signals to stop for passengers at points so near the place of injury as to tend to negative the defendant's contention that he was asleep. It is true that plaintiff's

testimony as to the stopping was controverted by witnesses for the defendant. If this were all there were to the case, the issue should clearly have been submitted to the jury.

2. Plaintiff also introduced expert evidence which, he argues, showed the insufficiency of the grounding of the casing. Two experiments were made on the car, which had been brought in front of the trial courthouse for the purpose. Of these, the first was the "bell test." The expert placed one wire from a dry battery with a voltage of 1 or 1½ on the controller; placed another wire at different times on the brass part of the air brake, not the handle, on the handle of the air brake, on the hand-brake staff, on its support, and on the dog used to set the hand brake. The current was communicated, but the bell connected by a wire to the frame did not ring. The second experiment was a "magneto" test. It was made by means of a small dynamo discharging a current of "anywheres between 300 and 500" volts. When the connection was made between the points stated, and the current turned on, "the bell barely tinkled." These experiments were adduced to show that there was not sufficient "contact" between the casing and the brake frame through the metallic strap or brace previously described. Plaintiff's own experts so testified. They testified, also, that it was thus proved that the ground wire designed to ground the controller casing was "either absent or a very poor one." For many reasons, some of which only will be presently set forth, we are at a loss to comprehend what strength this testimony adds to plaintiff's case. It is true the controller was in the same condition at the time of the beginning of plaintiff's experiments as it was at the first trial and as at the time of the accident. Upon critical examination of the record, it appears that the admission of counsel for plaintiff that this was the case was not clear, although the trial court evidently regarded it as sufficient. If it be disregarded, we are of the opinion that unimpeached testimony affirmatively showed such to be the fact. None the less the experiments were not performed upon the car in the condition it was at the time of the accident; for plaintiff's expert, finding the strap screwed up "fairly tight," or so that he "could loosen it with a small wrench," testified that before the first electrical test was made "I loosened the bolt probably a turn and a half or two turns, and as the strap didn't come off the casing, and the washer stuck out, I left it that way, and screwed the bolt back, and then subjected that first test. . . ."

20 L.R.A. (N.S.)

Q. You made no test of this car 980 as it came there to Wabasha street until you had unbolted—

A. Until I had loosened the bolt.

Therefore the experiments were inconclusive as to the strap or brace.

Moreover, the general conclusions of the experts were weak and uncertain. One of them was asked: "Now, will you state once more, in your own way, what the result of your experiments or tests showed with reference to the grounding of that casing at that time. A. Well, as far as I could see, the only indication was that the strap partially grounded the casing."

One expert testified the bell test "did show a slight connection."

Q. Enough to be of a practical use or benefit in the protection of the motorman?

A. I couldn't say.

Q. You could not tell about that?

A. Not at that time; no.

So, afterwards, when asked if the condition he found by his test was of such a character or condition as to render the happening of an injury as plaintiff described "reasonably possible," an expert answered: "I should say the possibility existed." Finally, it is to be noted that at the time of the experiments the car, which, we repeat, had been brought down by its own power to the tracks in front of the courthouse for these experiments, was in the condition of ordinary operation. The fundamental weakness in plaintiff's test is that the ground wire screwed into the casing had not been disconnected. One part of its admitted function was to ground the electricity which might have leaked into the casing. That it was insufficient to accomplish this was the basis of the negligence charged. If it availed to ground the current in the casing, the motorman in plaintiff's position was admittedly safe. The natural inference from plaintiff's experiments is that, when the current from either the dry battery or the magneto apparatus was connected with the casing, the current tended to pass instantly to the earth through the ground wire. If the metallic strap was loosened, the fact that the bell did not ring tended to show that this wire had performed its function and grounded the current. When the strap was tightened, apparently, the current divided, and a small part passed through the brace to the earth, and the balance through the ground wire. We are unable to avoid the conclusion that plaintiff's own experiment tended to show that the means for grounding in fact provided were not negligent.

The analogy to the Morse telegraph sys-

tem suggested by plaintiff fails to diminish the force of this reasoning. If the sending instrument start a message over a wire supported by insulated poles, it would operate the receiving instrument and pass thence through the ground, wire to the earth. If the poles should not be insulated, and be good conductors, the current would tend to pass through them to the ground, and either no, or a diminished, current would go to the receiver. If it should receive no message, the indication would be that the current had been grounded. Here the controller, itself exclusive of grounding devices, corresponds to one telegraph pole not insulated, the brake frame (speaking generally), itself exclusive of grounding devices, to the other, also not insulated, the battery or magnet apparatus to the sending instrument, the brace or strap to part of the wire, the wire from the frame to the bell to the rest of the wire, and the bell to the receiving instrument. The current sent into the controller would tend to go into the earth through its ground wire. If the brace should be disconnected from the casing, it would be like a parted wire, and, in the absence of an arc through the air (not here involved), naturally would not cause the bell to ring. If connected from the casing, and the current communicated, it did not ring the bell, the inference would be that the ground wire had fully functionated. If the bell should ring but faintly, it would indicate a divided current, part passing through the ground wire and part through the brace.

On the other hand, defendant's experts performed four different experiments, which were in their nature calculated to elicit the truth, and are subject to no reasonable criticism, except that they were performed on the day after the plaintiff's, and after the plaintiff's expert had altered the connection between the brace and the casing. Defendant's tests were made between the top of the casing and the track and wheels of the car. It is to be noted that, unlike defendant's experiments, the plaintiff's tests were not between the controller itself and the ground. Moreover, defendant used a current from the trolley wire with a current of about 600 volts, while the plaintiff's current was of less voltage. Defendant's expert testimony was positively to the effect that the occurrence of a shock to the plaintiff in the way in which he contended to have received it was impossible, and that his position was "absolutely safe." The two classes of experiments, however, appear to have been largely consistent with each other, and to have indicated a proper grounding of the casing by means of a ground wire. The al-

teration by plaintiff in the strap in connection with the casing tends to deprive both of significance as to the ability of the strap and brace to ground the current. Taking all the experiments together, they incline to weaken, and not to strengthen, plaintiff's case.

3. Plaintiff's case may properly have been regarded by the trial court as resting substantially on plaintiff's own testimony and on the doctrine of *res ipsa loquitur*. Defendant insists, however, that this maxim does not apply as between master and servant. As a universal principle, this is not the law in this and a number of other states. Ordinarily the application of the principle does not depend upon the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. *Griffen v. Manice*, 160 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925. There have been cases in which the servant has successfully invoked it against his master. There is more force to defendant's further contention that the doctrine should not be applied where, as here, the dangerous agency is under the immediate physical control of, and in actual use by, an experienced servant, who complains of the injury. In the case at bar, however, it is not necessary to determine this controversy, nor to inquire into the exact nature of the so-called presumption, for the prima facie case of negligence arising from the application of the maxim is rebuttable. From its application the court or jury may infer negligence, but neither is bound to do so. *Carmody v. Boston Gaslight Co.* 182 Mass. 539, at page 542, 39 N. E. 184. The presumption of negligence in current phrase, whose precision is not here material, is purely one of fact, and may not survive sufficient proof of due care by the person sought to be charged. It does not necessarily follow the plaintiff through the case, so as to compel the submission of the question of fact to the jury, as, for example, does the presumption of innocence accused in a criminal trial.

4. The trial court, giving to the plaintiff the benefit of the presumption, held that it was rebutted by the testimony as a whole, and that, taking the testimony as a whole, plaintiff had not borne the burden of proof resting upon him of showing negligence on the part of the defendant. In this view, we think, he must be affirmed. In addition to the inference of the proper condition of the controller, and especially of its grounding, from the experiments which have been described, and from the absence of perforation of the asbestos lining, and from other significant circumstances not necessary to be

detailed here, the case is controlled primarily by two facts,—the use of the car, and the facts attending its purchase and inspection. The car had been operated daily from November 8th to the time of the accident by various motormen, including the plaintiff, and reported "O. K." each time returned to the station. On the day of the accident three motormen operated it without trouble before it was turned over to plaintiff at 5:35 P. M. He then made several uneventful trips between that time and the time of the accident, about midnight. It has been operated since the accident without trouble of any kind. It was brought to the scene of the experiments by the safe operation of this identical controller. The continual use of the car in the condition it was from the time of the accident to the time of the trial without accident is a demonstration of the practical sufficiency of the grounding of the controller.

No testimony was adduced to show that the car was old or outworn. It appears, however, to have been used for some time. Its controller and the grounding of the controller were naturally subject to deterioration. The controller was of standard type and made by a reputable manufacturer. It was shown to have been inspected frequently, searchingly, and in a reasonable, practicable, and usual manner. To have visually examined the ground wire inclosed in insulating material would have involved the dismantling of the machine. The case is within the principle that "the law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him, which seem right, are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers." Campbell, Ch. J., in *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 547, 31 Am. Rep. 321. And see *Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 30 N. E. 750; *Flood v. Western U. Teleg. Co.* 131 N. Y. 603, 30 N. E. 196; *Reynolds v. Merchants' Woolen Co.* 168 20 L.R.A. (N.S.)

Mass. 501, 47 N. E. 406; *Westinghouse Electric & Mfg. Co. v. Heimlich*, 62 C. C. A. 92, 127 Fed. 92. That a company is not responsible when an accident occurs, because of a defect which might have been discovered by minute examination, but which was not discovered in fact by such an examination as was customary and reasonably practicable, see *Richardson v. Great Eastern R. Co.* L. R. 1 C. P. Div. 342 (court of appeals). The company was required to inspect with adequate care, but not to dismantle complicated machinery for purposes of inspection. *Clyde v. Richmond & D. R. Co.* (C. C.) 65 Fed. 482. In the language of the trial court, the conclusion is inevitable that, if this accident to the plaintiff was really by a shock of electricity from this controller, it came suddenly and from a hidden cause, which no care or foresight could guard against, and for which the defendant is not liable.

This reasoning determines other questions raised on appeal. If the condition of the controller was consistent with the exercise of due care, it is immaterial that to have used solder, instead of screws, might have secured a more permanent and a safer grounding, or that paint, a nonconductor, was used on the inside of the brace where it was attached to the casing of the controller, or that the court excluded testimony as to the liability of the brass screw connecting the controller with the ground wire to become corroded, or that here the motor-man would be subject to additional danger if described insulating devices were omitted, or if other motormen using similar controllers received shocks, or the like.

Affirmed.

Elliott, J., took no part.

WASHINGTON SUPREME COURT.

W. C. LA BEE, Respt.,
v.

SULTAN LOGGING COMPANY, Appt.

(47 Wash. 57, 91 Pac. 560.)

Evidence — negligence.

1. Evidence that an appliance furnished by a master for a particular purpose breaks while being used in a proper manner for that purpose is sufficient to establish a prima facie case of negligence against the master.

Pleading — negligence — scope.

2. An allegation in a complaint by a

Note. — For application of doctrine of *res ipsa loquitur* as between master and servant, see reference note to preceding case.

servant against his master for personal injuries, of failure to provide a safe place in which to work, which is a mere deduction from specific acts of negligence alleged, does not widen the scope of the inquiry so as to admit evidence of negligence not covered in the specific allegations.

On Petition for Rehearing.

Negligence — *res ipsa loquitur*.

3. The doctrine of *res ipsa loquitur* applies in case of injury to a servant through the alleged negligence of the master, where the facts eliminate blame on the part of the servant or his fellow servants, but show *prima facie* negligence on the part of someone.

(Root, J., dissents from propositions 1 and 2.)

(September 5, 1907.)

APPEAL by defendant from an order of the Superior Court for Snohomish County granting a new trial after the allowance of a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. C. H. Winders, with Messrs. Graves, Palmer, & Murphy, for appellant:

In order that a servant may recover for his injury, it is necessary for him to show not only that the master has been guilty of negligence, but that such negligence was the cause of the injury.

Hansen v. Seattle Lumber Co. 31 Wash. 604, 72 Pac. 457; Armstrong v. Cosmopolis, 32 Wash. 110, 72 Pac. 1038; Reidhead v. Skagit County, 33 Wash. 174, 73 Pac. 1118; Stratton v. C. H. Nichols Lumber Co. 39 Wash. 323, 109 Am. St. Rep. 881, 81 Pac. 831.

That an accident or injury complained of may have been occasioned by reason of the master's negligence in particulars different from those alleged in the complaint, or from other characters of negligence, is inadmissible.

6 Thomp. Neg. §§ 7452, 7527; DeLaVergne Refrigerating Machinery Co. v. Stahl (Tex. Civ. App.) 54 S. W. 40; Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329; Shanke v. United States Heater Co. 125 Mich. 346, 84 N. W. 283; Redford v. Spokane Street R. Co. 9 Wash. 55, 36 Pac. 1085; Imhoof v. Northwestern Lumber Co. 43 Wash. 387, 86 Pac. 650; Henne v. J. T. Steeb Shipping Co. 37 Wash. 331, 79 Pac. 938; Arcade File Works v. Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326; Cherokee & P. Coal & Min. Co. v. Wilson, 47 Kan. 20 L.R.A. (N.S.)

460, 28 Pac. 178; Santa Fe, P. & P. R. Co. v. Hurley, 4 Ariz. 258, 36 Pac. 216; Pennington v. Detroit, G. H. & M. R. Co. 90 Mich. 505, 51 N. W. 634; Clark v. Missouri P. R. Co. 48 Kan. 654, 29 Pac. 1138; Greer v. Louisville & N. R. Co. 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. 649; Robinson v. Taku Fishing Co. 42 Or. 537, 71 Pac. 790; Ohlenkamp v. Union P. R. Co. 24 Utah, 232, 67 Pac. 411; Pacheco v. Judson Mfg. Co. 113 Cal. 541, 45 Pac. 833; Carey v. Boston & M. R. Co. 158 Mass. 228, 33 N. E. 512; Batterson v. Chicago & G. T. R. Co. 49 Mich. 184, 13 N. W. 508; Conrad v. Gray, 109 Ala. 130, 19 So. 398; San Antonio & A. P. R. Co. v. DeHam, 93 Tex. 74, 53 S. W. 375; Harty v. St. Louis, I. M. & S. R. Co. 95 Mo. 368, 8 S. W. 562.

The mere breaking of a cable or rope and the consequent injury of an employee, without further evidence, are not sufficient upon which to base a verdict.

Breckenridge v. American Eagle Consol. Min. Co. 42 Wash. 279, 84 Pac. 858; Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737; Looney v. Metropolitan R. Co. 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303; Huff v. Austin, 46 Ohio St. 380, 15 Am. St. Rep. 613, 21 N. E. 864; Pierce v. Kile, 26 C. C. A. 201, 53 U. S. App. 291, 80 Fed. 865; Brownfield v. Chicago, R. I. & P. R. Co. 107 Iowa, 254, 77 N. W. 1038; Hofnauer v. R. H. White Co. 186 Mass. 47, 70 N. E. 1038; Drum v. New England Cotton Yarn Co. 180 Mass. 113, 61 N. E. 812; Duntley v. Inman, P. & Co. 42 Or. 334, 59 L.R.A. 785, 70 Pac. 529; Hansen v. Seattle Lumber Co. supra.

Messrs. Roney & Loveless and Hathaway & Alston, for respondent:

A presumption of negligence on the part of a master is raised where an appliance furnished by him breaks while being used by a servant in the usual and ordinary manner.

Madden v. Occidental & O. S. S. Co. 86 Cal. 445, 25 Pac. 5; Griffin v. Boston & A. R. Co. 148 Mass. 143, 1 L.R.A. 698, 12 Am. St. Rep. 526, 19 N. E. 166; Cincinnati, I. St. L. & C. R. Co. v. Roesch, 126 Ind. 445, 26 N. E. 171; Rushville v. Adams, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292.

Fullerton, J., delivered the opinion of the court:

This is an action for personal injuries. At the time he received the injury for which he sues, the respondent was in the employ of the appellant, working with a gang of men engaged in loading saw logs onto railroad cars. In loading the logs the men had the assistance of mechanical appliances.

These consisted of a large heavy pole, some 40 feet in length, known in the vernacular as a "gin pole," set with the heavy end in the ground by the side of the railroad track, and slanted over the track, so that the upper end reached a point immediately above its center. The pole was stayed with three steel cables; one end of each of them being fastened to the top of the pole and the other carried back and made fast to a tree or stump or some other fixed object sufficiently secured in the ground to withstand a strain. Fastened to the top of the gin pole, so as to swing immediately under it was a heavy pulley. Some distance back from the track a donkey engine was stationed, from which another wire cable was run through the pulley fastened to the gin pole. It was by means of this cable that the logs were rolled and lifted onto the cars. The cable was also used for another purpose. Cars were brought to the loading station a number at a time. As they could be loaded only from a place on the track immediately under the gin pole, it was necessary, after loading a car, to move it forward on the track so that another might be brought in its place; and the practice was to leave the cars coupled together and move the entire train. This moving was done by hitching the cable used to load the logs onto the farther end of the car desired to be brought into position, and bringing it into place by a pull on the cable from the donkey engine. At the time of the accident the men had for loading a group of five cars. Four of these had been loaded, and preparations were made for bringing the fifth one into place. The track at this point was somewhat steep, and the cars were held in place by their brakes, which had to be loosened before the cars could be moved. Preparatory to loosening the brakes, the cable was hitched to the lower end of the empty car and made tight by a pull from the donkey engine. The respondent then mounted the cars, and proceeded to loosen the brakes with a short piece of gas pipe which he used as a lever. He was just loosening the last one when a pull was made in an attempt to move the cars. This pull caused one of the stay cables fastened to the gin pole to give way, letting the pole fall. In falling the pole struck the respondent on the back, bearing him down upon the piece of gas pipe which he happened to be holding in an upright position, forcing the pipe entirely through his body, and causing the injury for which he sues. It appears from the record, also, that the appliances described were furnished by the appellant; that they were being used at the time of the accident for the purposes for which they were intended, and

were so used under the direction of the appellant's foreman.

In his complaint the respondent charged that the accident was caused by the defective and dangerous condition of the stay cable, which gave way and let the gin pole fall, alleging that it was carelessly and negligently fastened to the gin pole, and had become old, worn, weakened, and rusted, and in need of repair, all of which was known to the appellant, or by reasonable diligence ought to have been known by it, but which was unknown to the respondent; further alleging that, "by reason of the negligence of the defendant in failing to provide the plaintiff with a safe place in which to work, and by reason of the negligence of the defendant in failing to provide a sufficient and suitable guy rope or cable to sustain the gin pole and perform the service required of the same, and by reason of the negligence of the defendant in failing to properly secure the said guy rope or cable," the gin pole fell, etc. The only evidence offered at the trial in support of these allegations was that above outlined, and the further fact that the cable gave way at the point where it was spliced to the gin pole, three of the strands of the splice breaking, and three pulling out. On the trial at the conclusion of the respondent's case, the court granted a nonsuit and discharged the jury, and later, on respondent's motion for a new trial, set the nonsuit aside and granted a new trial. This appeal is from the last-mentioned order. The trial judge based its ruling on two grounds: First, that he had erred in holding that the respondent had failed to show any negligence on the part of the appellant; and, second, that he had erred in excluding certain evidence offered by the respondent; and, as these propositions involve matters of law in which the question of discretion does not enter, they are reviewable on appeal to this court.

On the question of the sufficiency of the evidence, the appellant contends that the respondent has shown nothing more than that the cable broke and that he was injured thereby, and argues that this is not sufficient to charge the respondent with negligence; that, in order to make a *prima facie* case, he was required to go further, and show that the breaking was caused by some defect of construction or material; and that the respondent knew, or by reasonable diligence could have known, of such defect. But it seems to us that the appellant has placed a too narrow construction upon the respondent's evidence. The evidence, in addition to showing that the cable broke and caused an injury to the respondent, showed that it was furnished to the respondent by

the appellant for a particular purpose, and that it broke while being used in a proper manner for the purpose for which it was intended. This is some evidence of negligence on the part of the appellant. Instrumentalities intended for a particular purpose, and suitable and proper for that purpose, do not break when put to the use for which they are designed, when used in a proper manner. So, the converse of this proposition must be true. If the instrumentality does break when put to the use for which it is designed and used in a proper manner, it is evident that it was either defective in material or construction in the first instance, or has become so since it was put to use. Therefore, when the servant shows that the master furnished him an instrumentality to be used for a particular purpose, that he used it for the purpose intended in the manner intended, and that it broke when being so used, and injured him, he makes out a *prima facie* case of negligence against the master. *Coleman v. Mechanics Iron Foundry Co.* 168 Mass. 254, 46 N. E. 1065; *Moynihan v. Hills Co.* 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574; *Tennessee Coal, Iron & R. Co. v. Hayes*, 97 Ala. 201, 12 So. 98; *Armour v. Golkowska*, 95 Ill. App. 492; *Soiarz v. Manhattan R. Co.* 31 Abb. N. C. 426, 29 N. Y. Supp. 1123; *Highland Boy Gold Min. Co. v. Pouch*, 61 C. C. A. 40, 124 Fed. 148; *Cincinnati, I. St. L. & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171.

With reference to the second question, we think the evidence offered was properly excluded under the issues as made. The allegation to the effect that the appellant failed to provide the respondent with a safe place in which to work was rather a deduction from the specific acts of negligence theretofore alleged than a general allegation of negligence. As such it did not widen the scope of the inquiry so as to admit evidence of negligence not covered by the specific allegations. *Henne v. J. T. Steeb Shipping Co.* 37 Wash. 331, 79 Pac. 938; *Redford v. Spokane Street R. Co.* 9 Wash. 55, 36 Pac. 1085.

In so far, therefore, as the order for a new trial was based on the latter ground, it was erroneous, but, since it is sustained by the first ground stated, it must be affirmed. It is so ordered.

Hadley, Ch. J., and Crow and Rudkin, JJ., concur.

Root, J., dissents.

A petition for rehearing having been filed, *Fullerton, J.*, on November 14, 1908, 20 L.R.A. (N.S.)

handed down the following additional opinion:

This case is before us on rehearing. For the former opinion, see *La Bee v. Sultan Logging Co.* 47 Wash. 57, 91 Pac. 560, where will be found a statement of the issues involved. In the petition for rehearing, as well as in the oral argument made at bar, it is insisted that the court erred in applying the doctrine of *res ipsa loquitur* to a case between master and servant. It is contended that this doctrine is applicable only "to cases between carrier and passenger, and other cases wherein the person sought to be held occupies the relation of insurer," but is never applied to a case where the servant sues the master for negligence causing personal injuries. The weight of authority seems to support counsel's contention in so far as they contend that the doctrine is not applicable to cases between master and servant. The Federal cases uniformly so hold, and in the majority of the states the same rule obtains. See *Northern P. R. Co. v. Dixon*, 71 C. C. A. 555, 139 Fed. 737, and the cases there collected. But, the question being a new one in this state, we have felt ourselves at liberty to inquire into the reason for the rule, and to discard it if we found the reasons given to maintain it unsatisfactory. These reasons are perhaps as well stated in the case cited as in any other. It is there said that the doctrine is inapplicable to cases between master and servant, brought to recover damages for negligence, "because there are many possible causes of accidents during service, the risk of some of which, such as the negligence . . . and the other ordinary dangers of the work, the servant assumes, while for the risk of others, such as the lack of ordinary care to construct or keep in repair the machinery or place or work, the master is responsible. The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter." In other words, the reason is that, because in some instances it is difficult to determine from the facts shown whether the blame is the master's or the servant's, the master shall have the benefit of the presumption in all cases and the servant in none. It has seemed to us that this reasoning is not only unsound, but is grossly unfair to the servant. Where the facts of the case are such as to eliminate blame on the part of the servant or his fellow servants, but show *prima facie* neglect on the part of someone, we think the master should.

be put to his proofs to show that the blame is not his, just the same as he would be were the injury to a stranger. Such a rule casts the burden upon the person who is in a position to know the facts, and who can make the proofs by direct and positive evidence, while the rule contended for by the appellant compels the resort to indirect and circumstantial evidence. In this case the servant made proofs to the effect that the master furnished him with an instrument with which to do his work and directed him to do it in a particular manner, that he took the instrument and proceeded to perform the work in the manner directed, when the instrument gave way and injured him; and we think it no hardship to cast on the master the burden of showing that the instrument was suitable for the purposes for which it was intended, and that any defect therein was unknown to the master, and, by reasonable diligence, could not have been discovered by him.

This is not holding, as the appellant seems to argue, that a presumption of negligence arises from the mere fact of injury. The injury itself proves nothing. It may have been the fault of the servant. But, in a case where the servant eliminates any fault on his part by showing that the injury was caused by the giving way of an instrumentality furnished him with which to work while he was using it for the purposes intended and in the manner directed, he shows that the fault is in the instrumentality itself for which the master is *prima facie* responsible. The case differs from an ordinary case of injury only in the manner of proof. In each case, of course, a *prima facie* case of negligence against the master must be made out, but in the one it is made out by showing the injury, and eliminating negligence on the part of the servant and his fellow servants, while in the other it is made out by direct evidence of negligence on the part of the master.

Counsel make another contention it may be well to notice. The paragraph we have quoted in our statement of the contentions made by counsel is from their petition for rehearing. In it, it will be observed, counsel assume that the doctrine of *res ipsa loquitur* is applied only in those cases where the person sought to be held occupies the relation of insurer to the person injured. The illustration given is that of carrier and passenger. But counsel must know that the assumption that a carrier is an insurer of the safety of its passengers is against the great weight of authority, even if it is now the rule in any jurisdiction. Certainly this court has never so held. On the contrary, in our own reports, and the reports generally, can be found cases where the carrier

has successfully defended against its liability for injuries suffered by its passengers. If it was an insurer, its defense would have been confined to the amount of damages to be awarded. It would not have extended to the liability itself. Nor is the doctrine confined in other instances to the case where the person sought to be held is an insurer of the safety of the person injured. This court, in the case of *Anderson v. McCarthy Dry Goods Co.* 49 Wash. 398, 16 L.R.A. (N.S.) 931, 95 Pac. 325, applied the doctrine to a case where a person was injured while in a dry goods store by the fall of a basket from an overhead carrier system; citing authority to show that the holding was sustained by the great weight of authority. Surely it will not be contended that the proprietor of a merchandise store is an insurer of the safety of every person who enters it. But these latter inquiries are not material to the question in hand. They are cited to show that the holding that denies to a servant, simply because he is a servant, the benefit of the rule of *res ipsa loquitur* in a proper case, is unreasonable and unjust, and is required by no rule of public policy.

We see no reason to change our former holding, and the judgment appealed from will be affirmed.

Hadley, Ch. J., and Dunbar, Rudkin, Mount, and Crow, JJ., concur.

MISSISSIPPI SUPREME COURT.

BUD BAILEY, Appt.,

v.

STATE OF MISSISSIPPI.

(— Miss. —, 48 So. 227.)

New trial — newly discovered evidence — impeaching witness.

1. A new trial will not be granted on the ground of newly discovered evidence in a criminal case, the only effect of which is to impeach the credibility of a witness for the state.

Evidence — criminal — failure to escape.

2. Evidence that one on trial for crime refused to embrace an opportunity to escape

Case Note. — Admissibility of evidence of defendant's voluntary surrender or refusal to embrace an opportunity to escape.

The authorities are almost unanimous in supporting the proposition that the defendant in a criminal case cannot, for the purpose of showing a consciousness of innocence, be allowed to prove that he voluntarily surrendered himself when informed of the charge against him, or refused to take to flight before arrest, or to escape from jail

from prison is not admissible in his favor, although the state has proved his flight immediately after the crime was committed, where the two occurrences are entirely distinct and independent.

(Whitfield, Ch. J., dissents from proposition 2.)

(February 1, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Monroe County convicting him of manslaughter. Affirmed.

The facts are stated in the opinion.

Messrs. Leftwich & Tubbs, for appellant:

Any exculpatory facts are admissible to show consciousness of innocence.

1 Wigmore, Ev. §§ 276, 293; 3 Wigmore, Ev. § 1747.

after arrest though offered an opportunity so to do.

Thus, in *People v. Montgomery*, 53 Cal. 576, it was held that there was no error in excluding evidence offered by the defendant that, while confined in jail, he had an opportunity to escape, but declined to avail himself of it. The court said that the flight of a person suspected of having committed a crime, was a circumstance which, if unexplained, tended more or less strongly to establish his guilt, but that it by no means followed that his failure to flee, having an opportunity to do so, tended to prove his innocence, since he might naturally have been deterred in making an effort to escape from the fear that he would be recaptured, and his fruitless attempt be used as evidence of guilt; or that he might have been so confident of his acquittal for want of proof of his guilt, that he deemed it unnecessary to flee.

And in *Thomas v. State*, 47 Fla. 99, 36 So. 161, it was said that the fact that the accused made no attempt to escape, and that he readily and willingly surrendered himself, did not, in law, constitute a circumstance in his favor, which the jury should consider in arriving at a verdict, since it might be concluded that the conduct of defendant in this respect was not actuated by a consciousness of innocence, but proceeded from the purpose of a consciously guilty man to make it appear that he was innocent.

And in *Kennedy v. State*, 101 Ga. 559, 28 S. E. 979, it was held that evidence that the accused had not availed himself of an opportunity to escape from jail was not admissible under the rule which admitted evidence of the state to prove defendant's flight following immediately upon the commission of a crime. The court said that not availing himself of an opportunity to escape from lawful custody was in the nature of a declaration of innocence, and that the rule was well-settled that, in criminal trials, declarations of the accused in his own favor were not admissible.

20 L.R.A. (N.S.)

The evidence tending to impeach the state witness was admissible.

Bates v. State (Miss.) 32 So. 915.

Mr. George Butler, for the State:

The court properly excluded the proffered testimony of defendant's opportunity and failure to escape jail after it had been shown that he evaded arrest and finally surrendered to the officers.

Lohrey v. State, 91 Miss. 853, 45 So. 145; *Dickey v. State*, 86 Miss. 525, 38 So. 776; *King v. State*, 65 Miss. 576, 7 Am. St. Rep. 681, 5 So. 97.

Fletcher, J., delivered the opinion of the court:

We cannot reverse this case on account of the court's action in refusing to set aside the verdict on the ground of newly discovered evidence. Such evidence tended

And in *People v. Rathbun*, 21 Wend. 509, evidence was held to be inadmissible that an accused person refused to escape and go beyond reach of process after being apprised of the charge against him, although he was advised so to do, and it was entirely practicable for him to have made his escape. The court said that the difference between an attempt to escape and refusal to escape was quite obvious when they were offered as legal evidence; that an attempt to escape implied guilt, and operated against the party like a confession, while a refusal to escape was an act and confession in the party's own favor; and that false declarations of innocence, or subsequent acts appearing to indicate it, were too common to be regarded as admissible.

And in *People v. Curtiss*, 118 App. Div. 259, 103 N. Y. Supp. 395, it was held that a defendant, "except under peculiar circumstances," could not be permitted to show that he did not become a fugitive from justice when accused or suspected of having committed a crime, as such evidence was a self-serving declaration not connected with the *res gestæ*. The court added that there was a clear distinction between evidence of flight which tended to show consciousness of guilt, and contrary evidence which might show a clever attempt to evade the consequences of the crime by assuming the appearance of innocence. As to the peculiar circumstances under which such evidence might be admissible, the opinion is silent.

And this proposition that an accused person will not, for the purpose of showing a consciousness of innocence, be permitted to prove that he voluntarily surrendered himself or refused to escape when given an opportunity, finds support, also, in the following cases: *Chamblee v. State*, 78 Ala. 466; *Jordan v. State*, 81 Ala. 20, 1 So. 577; *Johnson v. State*, 94 Ala. 35, 10 So. 667; *Dorsey v. State*, 110 Ala. 38, 20 So. 450; *Walker v. State*, 139 Ala. 56, 35 So. 1011; *Pate v. State*, 150 Ala. 10, 43 So. 343; *Crawford v. United States*, 30 App. D. C. 1; *Lingerfelt*

only to impeach the evidence of the witness McLendon, by no means the only, or indeed the strongest, witness for the state. The rule is well established that a new trial will not be granted on the ground of newly discovered evidence, the only effect of which is to impeach the credibility of a witness. *Moore v. Chicago, St. L. & N. O. R. Co.* 59 Miss. 243.

The only other question seriously pressed is that the court erred in refusing to admit evidence to show that the defendant had an opportunity to escape from prison, and not only declined to do so, but actually warned the sheriff of the escape of a fellow prisoner. This testimony was offered after the state had proven the flight of the prisoner immediately following the homicide. It should be stated that the defendant was permitted to explain this flight fully, and that the evi-

dence excluded related to a matter which transpired some time after the defendant had surrendered, and was entirely distinct and independent of the first occurrence. It is argued, and the argument is sustained by the great authority of Professor Wigmore, that, since the state is permitted to prove flight as showing a "consciousness of guilt," the defendant should be permitted to prove a refusal to escape when opportunity offers as showing a "consciousness of innocence." 1 Wigmore, Ev. 293. The learned text writer, however, concedes that this view is opposed to the great weight of authority, and, with that candor which is one of the chief qualities of his great intellect, appends in the note a list of cases which utterly repudiate and reject his conclusion.

In this instance the majority of the court prefers the reasoning and conclusions of

v. State, 125 Ga. 4, 53 S. E. 803, 5 A. & E. Ann. Cas. 310; *State v. Musick*, 101 Mo. 260, 14 S. W. 212; *State v. Smith*, 114 Mo. 406, 21 S. W. 827; *State v. Jackson*, 126 Mo. 521, 29 S. W. 601; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *Gardner v. People*, 6 Park. Crim. Rep. 155; *State v. Taylor*, 61 N. C. 508; *Walker v. State*, 13 Tex. App. 618; *State v. Bickle*, 53 W. Va. 597, 45 S. E. 917.

Upon the same principle, it was held in *Oliver v. State*, 17 Ala. 587, that one charged with murder could not show that he went to a certain place with a view of surrendering himself, and that he communicated this intention to others, who advised him not to do so until he had procured bail.

It would seem, however, that evidence that the defendant voluntarily surrendered himself will be admitted to rebut evidence by the state that the defendant fled after the commission of the crime. Thus, in *Cole v. State*, 45 Tex. Crim. Rep. 225, 75 S. W. 527, it was held that, on a trial for murder, where the state relied upon certain testimony to show flight and evasion of arrest by defendant, he should be permitted to prove in rebuttal that he was endeavoring to go to the county seat to surrender himself, and was arrested at a point on the road where he had stopped on account of high water not permitting him to go further.

Such would also seem to be the ground of the conclusion reached in *White v. State*, 111 Ala. 92, 21 So. 330, in which it was held that, where the evidence showed that the defendant, after committing a homicide, had fled from the place, but went directly to police headquarters about 2 miles distant, and surrendered himself, the jury should have been instructed to look to the fact of his voluntary surrender.

Such, too, would seem to be the implication in the following cases, in all of which it was held that, where the state introduced no evidence of flight on the part of the defendant after the alleged commission of the offense, it was incompetent for the defendant 20 L.R.A. (N.S.)

to prove either that he refused to flee, or that he surrendered himself: *Pate v. State*, 94 Ala. 14, 10 So. 665; *Vaughn v. State*, 130 Ala. 18, 30 So. 669; *Delaney v. State*, 148 Ala. 586, 42 So. 815; *Brown v. State*, 150 Ala. 25, 43 So. 194; *People v. Shaw*, 111 Cal. 171, 43 Pac. 593; *Thomas v. State*, supra; *McDuffie v. State*, 121 Ga. 580, 49 S. E. 708; *Sneed v. Territory*, 16 Okla. 641, 86 Pac. 70, 8 A. & E. Ann. Cas. 354.

On the other hand, in *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216, evidence that the defendant, after having escaped from jail, voluntarily surrendered himself, was held to be inadmissible to remove the inference of guilt arising from his escape.

And in *State v. Moncla*, 39 La. Ann. 868, 2 So. 814, it was held that the accused's voluntary return and submission to arrest after he had once escaped from the custody of the sheriff were not circumstances tending to show the motives which prompted his flight, and, even if not absolutely irrelevant, were of too little weight to justify disturbance of the verdict of guilty. It appeared also, however, that the accused was allowed to prove all the circumstances attending and surrounding his flight.

There are some cases, however, that would seem to be opposed to the rule of law here discussed. Thus, in *United States v. Crow*, 1 Bond, 51, Fed. Cas. No. 14,895, it was held that, where it was made known to the defendant while in Missouri that he was suspected of having stolen from the mail in Ohio, the fact that he immediately returned to Ohio and courted a full investigation of the charge was, with proof of his good character, entitled to the consideration of the jury, unless the evidence was so clear as to leave no reasonable doubt of guilt in their minds.

So, in *Boston v. State*, 94 Ga. 500, 20 S. E. 98, 21 S. E. 603 (a memorandum decision), it was held to be competent for the defendant, who claimed to have shot his wife by accident, to prove that he acted consistently with this theory by going in search

these cases, rather than the conclusion reached by the author. This is not wholly because of the number and distinction of the courts so holding, but because we think the rule rejecting such testimony is correct on principle. If a declaration against interest is admitted, while a self-serving declaration is rejected, why should it not be true that conduct showing guilt is admissible, while conduct alleged to show the opposite is rejected? Nothing can be better settled than that a litigant cannot manufacture testimony in his own behalf. This is but a form of this familiar principle. If the rule announced by Wigmore is correct, a prisoner who deliberately refuses to escape is but availing himself of the opportunity to manufacture testimony for himself—a thing which can never be permitted. Testimony as to a damaging admission made by

a prisoner on trial is admitted manifestly because it shows a consciousness of guilt; but it will never be contended that the same prisoner can proclaim his innocence and have the benefit of such declaration on the trial as showing a "consciousness of innocence." And yet in the opinion of the majority of the court there can be no logical distinction between acts and words in this connection.

Chief Justice Whitfield, while differing from the majority on this point, and agreeing with Wigmore's announcement of the rule, does not regard such evidence as of high value one way or the other, and therefore concurs in the result, since, as he thinks, the guilt of the defendant is manifest, and the result could not possibly have been affected by this error of the court.

Affirmed.

of an officer, overtaking him, and surrendering himself.

And in *People v. Childs*, 90 App. Div. 58, 85 N. Y. Supp. 627, it was held to be a significant fact, to which he was entitled to have the attention of the jury drawn by the court, that the defendant remained at the scene of the homicide with which he was charged and did not run away; upon the ground that it tended to show that the shooting was done in self-defense and without criminal intent.

And in *Harvey v. State*, 35 Tex. Crim. Rep. 545, 34 S. W. 623, a murder trial, in which it was held that, where there was no evidence that the defendant fled, and his testimony showed a voluntary surrender on his part, it was error to refuse to permit him to prove that, at the time of his arrest, he made no effort to run away.—The court used the following language: "The appellant himself showed a voluntary surrender. This was affirmative, and which he was entitled to show."

And in *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625, though the court adhered to the rule that evidence that a prisoner did not escape from jail, he having had an opportunity to do so, was not competent, Judge Connor said that, speaking for himself, he was impressed with the argument in favor of admitting such evidence "subject to well-defined limitations, as, for instance, that the defendant was, without any agency on his part, given an opportunity to escape and refused to accept," adding that he was inclined to the opinion that the defendant's conduct was competent to go to the jury to be given such weight as, under the circumstances, it was entitled to.

And in *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323, in which it was held that the facts that the defendant had been arrested and was out on bail, and did not run away were inadmissible in his favor as tending to show innocence, since he was in the custody of the law, the court went on to say that it had sometimes been held that, when a person accused of a crime had an opportunity to es-

cape, and declined to avail himself of it, the fact might be admitted in evidence in his favor; but no authority is cited. Further reasons for not admitting the evidence in this particular case were that the defendant, when admitted to bail, had not been accused of the crime for which he was finally tried, and it was not offered in evidence that his bailor gave him an opportunity to escape.

Attention should here be called to *Green's Trial*, reported in 7 How. St. Tr. 159, which seems to be relied upon by Professor Wigmore as authority for the position he has taken upon this question as shown in *BAILEY v. STATE*. In that case the only reference to this question was made by a witness, who used the following language (page 207): "It was a good evidence of his innocency that when he had notice of it he did not fly. . . . If flight be a sign of guilt, as no doubt it is, Adam, *ubi es?* and courageness is a sign of innocency, then this man is innocent." No objection seems to have been made to the statement of the witness, though at the end of his testimony the attorney general asked: "What is all this to the purpose?" and the Lord Chief Justice said: "All this is nothing."

In *Com. v. Hersey*, 2 Allen, 173, in which a verdict of guilty was sustained, there is a headnote to the effect that evidence that a defendant under indictment refused to fly after suspicions against him were excited, was inadmissible; but there is nothing in the opinion upon the question, though in the statement of the facts it appears that the evidence was excluded in the trial court.

In *Lewis v. State*, 4 Kan. 309, the testimony of a witness for the defendant that the latter had refused to flee from jail at the time other prisoners escaped was admitted in the trial court; but no objection seems to have been made in that regard, the question before the supreme court being whether it was competent for the sheriff to testify that such witness stated to him that the defendant was sick and could not get out with the other prisoners.

NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA EX REL.
THOMAS H. POOLE

v.

S. L. NUCHOLS et al.

(— N. D. —, 119 N. W. 632.)

Supreme court — jurisdiction.

1. Sections 86 and 87 of the Constitution of North Dakota constitute a grant of power to the supreme court, and, the language thereof being restricted in its terms, this court has such jurisdiction, and only such, as is expressly, or by necessary implication, therein granted.

Same — writ of prohibition.

2. By § 86 the supreme court is granted appellate jurisdiction only, "except as other-

Headnotes by FISK, J.

Case Note. — Superintending control of civil courts over courts-martial.

The scope of this note is limited to the question whether the power of supervision, revision, and control exercised by courts succeeding to that power or function of the court of King's bench commonly termed the power of "general superintendency," or "supervising control," may be exercised over courts-martial; and does not extend to the power of the civil courts to relieve against the consequences of a usurped jurisdiction, by writ of habeas corpus where a person has been deprived of his liberty, or by action at law where property rights are involved.

The authorities seem to agree that courts-martial, while courts in one sense of the term, are, nevertheless, not parts of the judicial system; thus supporting the conclusion reached in *STATE EX REL. POOLE v. NUCHOLS* that, not being "inferior courts" within the meaning of the constitutional grant of the power of general superintending control over inferior courts, such power could not be exercised over them. But in jurisdictions where the power is not thus circumscribed it seems that it may be exercised to keep courts-martial from proceeding beyond the bounds of their jurisdiction, although the decisions unfortunately are of such a character as to leave the question considerably involved in doubt.

The decisions which hold that courts-martial are no part of the judicial system will be first considered.

In *United States ex rel. Smith v. Whitney*, 4 Mackey, 535, in denying an application for a writ of prohibition to arrest the proceedings of a naval court-martial on the ground of want of jurisdiction in that tribunal, it was said: "We have no jurisdiction over these naval tribunals, although we have jurisdiction over the consequences that they entail. They do not sit for this jurisdiction; they are not in the roll of judicial bodies for this jurisdiction." 20 L.R.A. (N.S.)

wise provided in this Constitution," together with "a general superintending control over all inferior courts. . . ." Section 87 is the only place in the Constitution where it is otherwise provided. This section grants power to the supreme court "to issue writs of habeas corpus, mandamus, quo warrant, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction." Held, that, the writ of prohibition not being one of the enumerated writs, this court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending cause, or to effectuate this court's general superintending control over inferior courts.

Same — appellate jurisdiction — court-martial.

3. A court-martial is not an inferior court within the meaning of § 86 of the

Constitution; they sit for the United States wherever the Secretary of the Navy ordains."

In *State ex rel. Madigan v. Wagener*, 74 Minn. 522, 42 L.R.A. 751, 73 Am. St. Rep. 369, 77 N. W. 424, it is said that courts-martial are an executive agency, and belong to the executive, and not the judicial, branch of the government,—citing *Winthrop, Military Law*, pp. 52, 53.

So, also, in *People ex rel. Smith v. Doyle*, 28 Misc. 416, 59 N. Y. Supp. 959, it is said that military courts are not embraced within the judicial system of the state, but rather appertain to the executive department, to which is confided the administration of the military law of the state.

However, in *People ex rel. Garling v. Van Allen*, 55 N. Y. 31, it was held that a court-martial is a court within the meaning of the constitutional provision that "in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions." This conclusion is based upon the fact that the language used is comprehensive enough to embrace such tribunals; that the context (which excepts from the provision against the detention of any person unless on presentment or indictment of a grand jury cases of militia when in actual service, and land and naval forces in time of war), shows that the provision for benefit of counsel was intended to apply to courts-martial; and upon the further fact that such constitutional provision was offered, as an amendment, for the express purpose.

The cases generally cited by courts and text writers as authority for the proposition that courts-martial belong to the executive rather than the judicial branch of the government are those decided by the United States Supreme Court. The earliest of these is *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838, in which it is said: "Among the powers conferred upon Congress by the 8th section of the 1st article of the Constitution, are the following: 'To provide and main-

Constitution; it not belonging to the judicial, but to the executive, department of the government. The inferior courts referred to in § 86 are the courts enumerated in § 85, which belong to the judicial department.

(Ellsworth, J., dissents from proposition 3.)

(February 11, 1909.)

APPPLICATION for a writ of prohibition to restrain defendants, who are members of a court-martial, from proceeding with the trial of relator upon certain designated charges. Denied.

The facts are stated in the opinion.

Messrs. Engerud, Holt, & Frame for plaintiff.

Mr. M. A. Hildreth, for defendants:

A writ of prohibition will not lie to a general court-martial.

1 Winthrop, Military Law & Precedents, pp. 53, 61; Smith v. Whitney, 116 U. S. 168,

tain a navy;' 'to make rules for the government of the land and naval forces.' And the 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And, by the 2d section of the 2d article of the Constitution, it is declared that 'the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States.' These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practised by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

In Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148, it was again said: "Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts."

The court, in STATE EX REL. POOLE v. NICHOLS, in saying: "Whether, in a proper case the writ of prohibition may be employed, by a court having power in the exercise of its original jurisdiction to issue the same, to enjoin and prohibit a court-martial from exceeding its jurisdiction or from acting in a case without jurisdiction, we are not here required to decide,"—seems to suggest that there is no inherent and fundamental difficulty in such an exercise of the power. At bottom the question seems to be as to the extent to which the court whose interposition is sought has fallen heir to

29 L. ed. 601, 6 Sup. Ct. Rep. 570; United States v. Maney, 61 Fed. 140; Re McVey, 23 Fed. 879; Ex parte Reed, 100 U. S. 13, 25 L. ed. 538; Re Davison, 21 Fed. 620; Dynes v. Hoover, 20 How. 83, 15 L. ed. 845; People ex rel. Garling v. Van Allen, 55 N. Y. 36; State ex rel. Martindale v. Stevens, 2 M'Cord L. 38.

Mr. Andrew Miller, Attorney General, also for defendants.

Flask, J., delivered the opinion of the court:

Relator makes application to this court for the issuance of a writ of prohibition to enjoin and prohibit defendants, who are members of a court-martial, from further proceeding with the trial of relator upon certain designated charges and specifications, a copy of which was made a part of the application. Elaborate arguments were presented on behalf of relator, and also against his contention, and numerous reasons were

the extraordinary and sovereign power originally reposing in the court of the King's bench.

The following cases appear to recognize the existence of a power of superintending control over courts-martial:

In Loomis v. Simons, 2 Root, 454, an action of trespass and false imprisonment against the captain of a militia company, it is said: "As all maritime causes are determinable in the admiralty courts; all chancery matters in the courts of chancery; all spiritual causes in the court of ecclesiastical jurisdiction; and all military questions and matters by the officers and courts established from among the militia. And the courts of common law take cognizance of all civil causes, and crimes committed against the peace and laws of the state. And the jurisdiction of the superior court spreads over the state and over all other courts of peculiar jurisdiction, to superintend them, and to keep them within their proper limits and bounds, to prevent their interfering with one another or their encroaching upon the common-law courts. But hath no right to interfere in any causes or questions proper for the other courts to determine."

In Washburn v. Phillips, 2 Met. 296, the court entertained a petition for a writ of prohibition to a court-martial; but, considering that it did not appear that the court-martial was exceeding its jurisdiction, refused the writ.

And in Connecticut River R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 338, it is said: "There is no class of cases in which the authority to issue writs of prohibition is better established than in those of courts-martial, ecclesiastical courts, or inferior courts of common-law, assuming to take cognizance, in excess of their jurisdiction, of criminal prosecutions."

In People ex rel. Smith v. Doyle, 28 Misc.

urged both in favor of and against the issuance of such writ, but they all relate to the merits, being based upon the apparent assumption, which we deem erroneous, that this court possesses jurisdiction to issue such writ. A majority of the court are agreed that no such jurisdiction has been conferred by the Constitution, and hence the relator's application must be denied. This is not a case, such as has frequently arisen in this state, where the exercise of original jurisdiction is discretionary, and dependent upon whether the subject-matter is *publici juris* and affects the "sovereignty of the state, its franchises and prerogatives, or the liberties of the people;" but it is one in which we are asked to exercise a jurisdiction not conferred at all by the Constitution. It is a case of a total want of jurisdiction. This is clearly apparent by the language employed in the Constitution with reference to the powers conferred upon the supreme court. Section 86 provides: "The

supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." It is entirely clear from the above language that the chief function of this tribunal is the exercise of appellate jurisdiction only, and incidentally it is given a general superintending control over all inferior courts under such regulations as may be prescribed by law. It is also equally plain that, aside from the jurisdiction thus conferred, this court has no jurisdiction except such as the next section grants to it. Section 87 is as follows: "It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction. . . ." These sections constitute a grant of

416, 59 N. Y. Supp. 959, upon application for a writ of prohibition to a military court, although it was held that no case was made for the issuance of such writ, the court, after reviewing a number of English and American cases, expressed the opinion that a writ of prohibition might be issued to a military court within the proper limits which the nature of its office imposes.

An intimation that the civil courts will interpose to prevent courts-martial from exceeding their jurisdiction is also contained in *State ex rel. Martindale v. Stevens*, 2 M'Cord. L. 32, where, in holding that cases of a military nature ought to be submitted to and determined by the military tribunals only, it was said that the court of common pleas ought not to sustain any cognizance of them unless in cases where the courts-martial step out of their jurisdiction, and take cognizance of cases which are not within the meaning or purview of the militia act.

In *Durham v. United States*, 4 Hayw. 54, in quashing upon certiorari, for want of jurisdiction, the proceedings of a court-martial held under the laws of the state, it was said that, if the court-martial had power to act, then it was subject to the superintendence of the tribunals of the state.

The leading English case upon the subject is *Grant v. Gould*, 2 H. Bl. 69, in which it is said of a court-martial established by virtue of the provisions of the mutiny act: "This court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts of Westminster Hall, must depend upon the same rules, with all other courts, which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the courts of Westminster Hall, for a prohibition. Naval courts-martial, military courts-martial, courts of admiralty, courts of prize, are all liable to the controlling

authority, which the courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them.—the general ground of prohibition being an access of jurisdiction, when they assume a power to act in matters not within their cognizance."

The force of this decision in the United States has however, sometimes been denied upon the ground of the inherent differences in our system of government.

The view that the power of superintending control cannot be exercised in advance to prevent a court-martial from exceeding its jurisdiction is supported chiefly by the following *dicta* of the United States Supreme Court:

In *Wales v. Whitney*, 114 U. S. 564, 29 L. ed. 277, 5 Sup. Ct. Rep. 1050, it is said: "Neither the supreme court of the District, nor this court, has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by way of a writ of prohibition or any order of that nature." See also *Kurtz v. Moffitt*, *supra*.

In *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570, it is said: "Whether the supreme court of the District of Columbia has power in any case to issue a writ of prohibition to a court-martial is a question of great importance not heretofore adjudged by this court; and we are not inclined, in the present case, either to assert or to deny the existence of the power, because upon settled principles, assuming the power to exist, no case is shown for the exercise of it. . . . A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari, to

power and are restrictive in their terms. Hence this court possesses such jurisdiction and only such as is either expressly or by necessary implication granted to it by said sections. As stated: "The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only." The only place where it is otherwise provided is in § 87, and it is a significant fact that the writ of prohibition is not one of the writs therein enumerated, which this court has power to issue. It therefore inevitably follows that, if this court has jurisdiction to issue such writ, it must be by virtue of its superintending control over inferior courts, as its issuance is not "necessary to the proper exercise of its jurisdiction" within the meaning of such clause in

§ 87. The writ is not asked for the latter purpose, and the court is not exercising or attempting to exercise any jurisdiction, for the proper exercise of which such writ is necessary.

If authorities are required in support of the foregoing views, we call attention to the following cases in addition to our own decisions: *People ex rel. Earle v. Circuit Ct.* 169 Ill. 201, 48 N. E. 717; *Wheeler v. Northern Colorado Irrig. Co.* 9 Colo. 249, 11 Pac. 103; *People v. Richmond*, 16 Colo. 274, 26 Pac. 929. On account of the similarity of the Constitutions of Illinois and Colorado with that of this state relative to the grant of power to the supreme court, the foregoing authorities are peculiarly in point. The Illinois court, in the foregoing case in

correct mistakes of that court in deciding any question of law or fact within its jurisdiction. These rules have been always adhered to by this court, in the exercise of the power expressly conferred upon it by Congress to issue writs of prohibition to the district courts sitting as courts of admiralty (*United States v. Peters*, 3 Dall. 121, 1 L. ed. 535; *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Ex parte Detroit River Ferry Co.* 104 U. S. 519, 26 L. ed. 815; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 894, 3 Sup. Ct. Rep. 84), as well as by the courts of England and of the several states, in the exercise of their inherent jurisdiction to issue writs of prohibition to courts-martial (*Grant v. Gould*, 2 H. Bl. 69; *State v. Wakely*, 2 Nott & M' Cord, 410; *State ex rel. Martindale v. Stevens*, 2 M' Cord, L. 32; *Washburn v. Phillips*, 2 Met. 296). And this court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has repeatedly recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise."

In *United States v. Maney*, 61 Fed. 140, the power to issue a writ of prohibition to restrain a court-martial from proceeding with a trial was said to be a very doubtful question.

In *United States ex rel. Smith v. Whitney*, 4 Mackey, 535, the *dictum* of the United States Supreme Court in the case of *Wales v. Whitney*, *supra*, was regarded as warranting a decision that the correlation of the supreme court of the District of Columbia and courts-martial is such that the former has no power to arrest the proceedings of a court-martial on the ground of want of jurisdiction; although it can deal with the consequences of a usurped jurisdiction on the part of a military tribunal, and enlarge a prisoner suffering from its extra-judicial power.

Although not usually recognized as an exercise of the power of superintending con-

trol, the description in 3 Bl. Com. 42 of the jurisdiction of the court of King's bench seems to afford some ground for the supposition that, when used to examine into the detention of a person held for trial, it originally was such, afterward, like the writ of error (see *Carnall v. Crawford County*, 11 Ark. 604), coming to be regarded as distinctive in character. The use of the writ of habeas corpus to examine into the jurisdiction of, or legality of a sentence pronounced by, a court-martial will not here be discussed. Under this head, reference will simply be made to the case of *Ex parte Henderson*, Fed. Cas. No. 6,349, in which it was held that, where the charges brought before a court-martial were found wholly insufficient to show jurisdiction in the court-martial, a discharge would be granted upon habeas corpus pending trial.

As the writ of certiorari seems sometimes to have been employed in the exercise of a superintending control over courts-martial, it seems proper in this connection briefly to review cases on this phase of the question.

The New York courts appear to be the principal exponents of the power of the civil courts to review the decisions of military tribunals by means of the common-law writ of certiorari; and the question is discussed at some length, and the earlier cases reviewed, in the case of *People ex rel. Smith v. Hoffman*, 166 N. Y. 642, 54 L.R.A. 597, 60 N. E. 187, where it is said: "It is well established that the judicial determinations of inferior tribunals and of officers acting judicially under the authority of a statute may be reviewed under a common-law writ of certiorari, which is issued to correct errors of law affecting the property or rights of the parties, and to test the validity of official action judicial or quasi judicial in character. . . . Unless military tribunals are excepted from the general rule, their judicial determinations are subject to review by means of this ancient and important writ. They are not expressly excepted either by the military Code or the Code of Civil Procedure. . . . It may be claimed, however, that the determination of military tribunals, although not expressly excepted from the provisions of the

an able opinion, construed the Constitution of that state, and reached the conclusion that it had no original jurisdiction to issue a writ of prohibition. We quote: "The Constitution is a limitation upon the powers of the legislature; but it is regarded as a grant of power to the executive and judicial departments of the government. Hence the executive and judiciary can only exercise such powers as are granted by the Constitution. *Field v. People*, 3 Ill. 79. The Constitution only specifies three cases in which this court can exercise original jurisdiction, and the issuance of writs of prohibition is not one of them. Original jurisdiction being thus conferred upon the supreme court in certain specified cases, it cannot exercise original jurisdiction in cases not specified.

In all other cases than those named its jurisdiction is appellate only. *Campbell v. Campbell*, 22 Ill. 664. A prohibition is an original remedial writ, as old as the common law itself. *Thomas v. Mead*, 36 Mo. 232; *McConiha v. Guthrie*, 21 W. Va. 134; *High, Extr. Legal Rem.* § 762. It would seem, therefore, to be clear that this court has no original jurisdiction to issue a writ of prohibition. There are cases in many of the states where courts of last resort are held to have original jurisdiction to issue such writs; but it will be found upon examination that in states where such decisions have been made the Constitution of the state in express terms confers either the power to award writs of prohibition, as in Virginia and West Virginia (*James v.*

Code relating to the right of certiorari, are impliedly excepted, because, if civil courts were permitted to interfere with the judgments of military courts, the discipline of the National Guard might be injured. There is force in this argument, which is confirmed to a certain extent by the decisions of the Federal courts relating to the regular Army, and by some, but not by all, writers of military law. The subject, however, is treated with reference to a standing army, rather than the militia of the various states. *Dynes v. Hoover*, 20 How. 65, 81, 15 L. ed. 838, 844; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773; 1 *Winthrop, Military Law*, 55; *De Hart, Militia Law*, 226; *Maltby, Courts-Martial*, 151, 158; *O'Brien, Military Law*, 222; *Davis, Military Laws*, 6. There is a conflict of authority between the courts of the different states as to the right of the civil courts to review the judgments of military tribunals. *Durham v. United States*, 4 Hayw. 54; *State v. Davis*, 4 N. J. L. 311; *Ex parte Dunbar*, 14 Mass. 393; *Re Contested Election*, 1 Strobb. L. 190; 4 *Enc. Pl. & Pr.* p. 40. The courts of England review such judgments, but cautiously, as the subject requires. *Grant v. Gould*, *supra*; *Re Mansergh*, 1 Best & S. 400; 1 *Winthrop, Military Law*, 57; *Re Poe*, 5 Barn. & Ad. 681. Confining the discussion to times of peace, as in time of war military necessity may sanction the temporary exercise of almost any power to save the state, there is a wide distinction between the regular Army of the nation and the militia of a state when not in the service of the nation; for discipline which is ample for the latter will not answer for the former. A member of the state militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States Army, on the other hand, has no employment except that of a soldier, and arms constitute the business of his life. Hence, more rigid rules and a higher state of discipline are required in the one case than in the other. Moreover, the state militia is organized by statutes of the state, 20 L.R.A. (N.S.)

and the legislature, under the limitations of the Constitution, has power to regulate the entire subject, to invest boards of examination with such authority, and to give the civil courts such power to review as it sees fit. When, therefore, the legislature issued a general command upon the subject of reviewing the action of inferior judicial tribunals and officers acting judicially, and made certain exceptions thereto, the matter was exhausted, and the courts have no power to add an exception relating to any tribunal which the legislature is presumed to have had in mind. The part of the Code of Civil Procedure under consideration went into effect on the 1st of September, 1880, and nearly fifty years before the judgment of a court-martial was reviewed and affirmed under a writ of certiorari. *Rathbun v. Sawyer*, 15 Wend. 451. By one of the early decisions of the court of appeals after its reorganization in 1870 the same power was exercised without question. *People ex rel. Underwood v. Daniell*, 50 N. Y. 274. The strongest case upon the subject, however, occurred a year later, when this court not only reviewed, but reversed, the proceedings of a court-martial of the National Guard. *People ex rel. Garling v. Van Allen*, 55 N. Y. 31. In that case the relator, upon his trial before a court-martial, was virtually, though not absolutely, denied the right to defend by counsel; and its judgment was reversed by this court, upon certiorari, because the right to defend by counsel before a military court in this state is guaranteed by the Bill of Rights, as embodied in the Constitution of 1846, although not in that of 1821. *Id.* 37. These decisions had been made before either the Code of Procedure or the Military Code was passed, and others of like character were made after the former, but before the latter, was enacted. *People ex rel. Spahn v. Townsend*, 10 Abb. N. C. 169; *Re Bracket*, 27 Hun, 605; *People ex rel. Skinnell v. Rand*, 41 Hun, 529. Those statutes, therefore, must be read in the light of the common law as it existed at the date of their passage, which authorized a writ of certiorari to issue to military tribunals organ-

Stokes, 77 Va. 225; *McConiha v. Guthrie*, supra, or the power to award 'original remedial writs' as in *Missouri* (Thomas v. Mead, supra), or the power to issue any remedial writs necessary to give the court of last resort general supervision and control over the inferior courts as in *North Carolina* (Perry v. Shepherd, 78 N. C. 83)."

Is the court-martial such an inferior court as this court has superintending control over

within the meaning of § 86, supra? We think not. While treated and often referred to by the authorities as an inferior court of peculiar and limited jurisdiction, it is nowhere held, so far as we have been able in our brief research to discover, that such court, when acting within the limits of its special jurisdiction, is not supreme. This it as it should be. Where it otherwise the military power of the state, which is a

ized under the militia statutes of the state for the purpose of reviewing their decisions. The legislature is presumed to have known the common law, and to have made its enactments with reference to the decisions of the courts, yet, when providing general rules to govern the issuance of this great writ, although it excepted the action of certain tribunals from review, it did not except the action of military tribunals. Even when the Military Code was passed, no provision was made to exempt judgments of the tribunals created thereby from review by the civil courts according to the law and practice prevailing at the time. Under these circumstances, an exception should not be implied by the courts, but left to the legislature, in its wisdom, to express, if it sees fit."

And in *State ex rel. Grove v. Mott*, 46 N. J. L. 328, 50 Am. Rep. 424, it is said: "The line of demarkation between the jurisdiction of the civil and military tribunals is fixed, by determining whether the question involved relates to the organization and discipline of the corps composing the military forces of the state, or whether any civil disability, fine, or penalty attaches. In the latter case, the supreme court will entertain a writ of certiorari, but in the former only the military authorities can act; and, if the action of the inferior military tribunals be not satisfactory, recourse can be had only to the commander in chief."

The following cases are commonly regarded as lending more or less support to the contrary view:

In *Ex parte Dunbar*, 14 Mass. 393, an application for a certiorari to bring up the proceedings of a general court-martial, it was contended that authority had been expressly given to the justices of the supreme court, by certiorari, to cause to be brought before them "as well indictments, other criminal prosecutions pending in, as the records of sentences, orders, decrees, and judgments of, any court of inferior criminal jurisdiction, and to proceed, order, and award, thereon," and that courts-martial are created by statute, and are courts of inferior judiciary powers. The application was denied in a brief *per curiam* opinion in which it is said: "The inconveniences which may be foreseen from sustaining motions of this kind furnish, besides the total want of precedent, a strong argument against it. Parties who have legal ground to complain of the doings of these military courts have their remedy by action at law; and to that 20 L.R.A. (N.S.)

remedy they must be left." It is to be observed that the denial of the application seems to have been on the ground of expediency rather than on that of want of jurisdiction.

In *Re Contested Election*, 1 Strobb. L. 190, in which the court, after remarking that, while a declaration by the legislature that the decision of a military board, and the approval of the major general should be conclusive, would not of itself have the effect of preventing the great prerogative writ of certiorari from being granted to correct errors of law in the proceeding, said: "But that a certiorari to a military tribunal does not lie is, I think, apparent from what is said in Jacob's Law Dictionary, title 'certiorari' (1 Jacob's Law Dict. 412), where it is laid down to be law, that a 'certiorari does not lie to remove any other than judicial acts.' The proceedings and sentence of courts military can hardly be considered judicial acts. The absence of all precedent of a writ of certiorari directed to a military court is certainly a strong argument against its allowance now. But the very fact that the sentence of the court is not known until approved, then that the court is dissolved, and that the whole proceedings are in the possession of the officer ordering the court, show that the writ of certiorari cannot be awarded. For there is no one to whom it can go, and who can, as of and for the court, certify the proceedings. But that the court of sessions has no right to pronounce a military judgment upon the proceedings being certified up is itself conclusive against the writ."

In *Ex parte Vallandigham*, 1 Wall. 243, 17 L. ed. 589, it was held that there is no jurisdiction in the United States Supreme Court to issue the writ of certiorari to revise the proceedings of a military commission. This decision, however, seems to be based upon the constitutional limitation of the original jurisdiction of such court.

The English rule with respect to the grant of writs of certiorari to review the proceedings of a military commission appears to be that, where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, the civil courts should intervene; but that they should not do so where only the military status of such person is involved. See *Re Mansergh*, 1 Best. & S. 400.

branch of the executive department, might be seriously embarrassed, if not completely paralyzed, by the interference of the civil courts in the necessary discipline of its organized forces. To attribute to the framers of the Constitution an intent to give to the civil courts a superintending control over the military courts-martial would be to attribute to them an intent to depart from the well-known, and we believe almost universally recognized, rule to the contrary in this country. See *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 670; and cases cited, where it was said: "And this court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has repeatedly recognized the general rule that the acts of a court-martial within the scope of its jurisdiction and duty cannot be controlled or reviewed in the civil courts by writ of prohibition or otherwise,"—citing numerous cases. The Constitution should be construed in the light of well-settled principles recognized in this country prior to its adoption, and also in the light of contemporaneous history; and, when thus construed, no such intent will or can be inferred from the language employed in § 86. Furthermore, it is very apparent that the courts over which this court is given a superintending control are the inferior courts belonging to the judicial department, and which are expressly enumerated in the preceding section of the Constitution. A court-martial can in no sense be said to belong to the judicial department of the state, although its functions are judicial in character. As before stated, such court-martial belongs to the executive department, and is organized and its judgments approved by the governor as commander in chief. Of course, if it exceeds its jurisdiction or acts without jurisdiction, its judgments are a nullity, and any person aggrieved thereby may seek proper redress in the civil courts having jurisdiction, and such courts will furnish appropriate relief. Whether, in a proper case, the writ of prohibition may be employed, by a court having power in the exercise of its original jurisdiction to issue the same, to enjoin and prohibit a court-martial from exceeding its jurisdiction or from acting in a case without jurisdiction, we are not here required to decide. Such question is not before us, and we therefore refrain from intimating an opinion thereon further than to say that the authorities appear to leave the matter in doubt. See *Smith v. Whitney*, supra, and the few early American and English cases therein cited; 16 Enc. Pl. & Pr. p. 1108. See also the valuable note in 111 Am. St. Rep. p. 936; 20 L.R.A. (N.S.)

State ex rel. Grove v. Mott, 46 N. J. L. 328, 50 Am. Rep. 424, and cases cited; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773; and also 1 Andrews, Am. Law, 2d ed. pp. 207, 351, 352, citing numerous cases. The author of this valuable treatise, among other things says: "The writ of prohibition is not a proper writ in such cases for the reason that the courts-martial are not inferior to, and in fact are not within the same department with, the judicial establishment of the state,"—citing High, Extr. Legal Rem. 3d ed. 720-732. It is entirely clear, however, for the reasons heretofore stated, that this court has been given no jurisdiction to issue such a writ for the purpose aforesaid, or for any purpose other than in aid of its appellate or original jurisdiction, or where the same is necessary to effectuate its superintending control over inferior courts.

Entertaining these views, it is unnecessary, as well as improper, to notice the various contentions of counsel upon the merits. Writ denied.

Morgan, Carmody, and Spalding, JJ., concur.

Ellsworth, J., dissenting in part and concurring specially:

I am unable to concur in that part of the opinion of the majority of the court which holds that this court is wholly without jurisdiction in any case to issue the writ of prohibition to a court-martial.

I fully agree that this court is without jurisdiction to issue this writ originally, or at all, except in furtherance of its power of superintending control over inferior courts. Whether or not a court-martial comes within the meaning of the words "inferior courts," as contained in § 86 of the state Constitution, is the test of the power of this court to exercise any control over its proceedings even when it is acting without or in excess of its jurisdiction. It is a question in the determination of which we have little light or assistance from the decisions of other courts. The Supreme Court of the United States, in the case of *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570, characterizes the question as one of great importance, but in its deliberate consideration of an appeal from the supreme court of the District of Columbia is disinclined either to assert or deny the power of that court to issue the writ of prohibition to a court-martial. A question so grave and unprecedented that our highest court, after mature investigation, hesitates to bind itself by an express finding should not, in my opinion, be finally disposed of by this court in the haste that

necessarily accompanies the decision of a summary special proceeding.

The courts of several states, notably of New York and New Jersey, have at times asserted the power of a certain supervisory control over courts-martial upon the theory that courts-martial fall within the accepted definition of inferior courts; and the proposition that this court, in the case of a court-martial acting without or clearly in excess of its jurisdiction, has the power, under its grant of supervisory control over inferior courts, to issue to it the writ of prohibition, impresses me with great force. In the case here presented, however, I prefer to rest my concurrence in the result reached by the majority of the court on the ground that, whether or not a power of this court exists to issue the writ in a proper case, no case is here shown for the exercise of it.

The office of the writ applied for in this proceeding is not to review the procedure or correct the mistakes of the inferior court to which it issues, but only to prevent that court from assuming jurisdiction of a matter beyond its legal cognizance. The writ of prohibition never issues unless it appears that an inferior court is about to exceed its jurisdiction. The inquiry of the superior court is then directed wholly to two points only: (1) What are the limits of the jurisdiction of the inferior court; and (2) does it appear upon the face of its procedure that it is acting within these limits? The investigation permissible, even to a court having full jurisdiction to issue the writ, is therefore very narrow, and cannot, in any case, extend to the detail of the pleading, practice, or general procedure of the inferior court. If, from such inquiry, it appears in this case that the court-martial in question was acting within the limits of its special jurisdiction, I fully concur with the majority of this court in holding that it is supreme and cannot be interfered with by the civil courts, even though when acting without or in excess of its jurisdiction it is amenable to the superintending control of this court. A court-martial is a military tribunal, constituted and convened in the manner provided by law, to try and determine offenses against the military service. In this state a general court-martial can be ordered only by the governor as commander in chief of the militia and National Guard. Its jurisdiction is defined and its procedure regulated by the Articles of War of the United States. Rev. Codes 1905, § 1764. From the application of the relator, Thomas H. Poole, for the writ of prohibition, it appears that he is a member of the National Guard of the state, and that the court-martial in question is convened by order of the governor of the 20 L.R.A. (N.S.)

state as commander in chief of the National Guard. It further appears from the application, or was admitted by counsel upon the hearing, that the officers composing the court-martial are those whom the governor is authorized by law to detail for that purpose, and that, when convened and sitting as a court, the relator came before it and in person or by counsel participated in its proceedings. It is thus clearly apparent that the court-martial is a lawfully organized tribunal, and that it has jurisdiction over the person of the relator. Whether or not it has jurisdiction over the subject-matter is to be determined by an examination of the charges preferred against relator and upon which the court-martial is proceeding to try him. A copy of the charges are attached to relator's application, and it appears therefrom that they are two in number, *viz.*, "disobedience of orders in violation of the 21st Article of War," and "conduct unbecoming an officer and a gentleman in violation of the 61st Article of War." Reference to the Articles of War of the United States (Rev. Stat. § 1342, U. S. Comp. Stat. 1901, p. 944), which are expressly made a part of our own statute (Rev. Codes 1905, § 1764), discloses that by article 21 disobedience to any lawful command of his superior officer, and by article 61 conduct unbecoming an officer and a gentleman, are specified as offenses against military law and regulation. When properly constituted and convened, a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses specified in the Articles of War. Relator admits that he is charged almost in the language of the Articles of War with two offenses against military regulation. These offenses being thus charged in writing and in due and regular form before the court-martial, it has on the face of its proceedings jurisdiction over the subject-matter, or, in other words, the right to hear, try, and determine the charges preferred against relator. Certain specifications follow each of the two charges setting out the particulars of the offenses; but whether the specifications support the charges or the evidence adduced at the court-martial supports the specification it is not for this court, on such an application, to consider. The court-martial having jurisdiction of the person of relator and of the subject-matter may proceed in accordance with its own practices and usages to try and determine these matters without interference from this court. An abundance of the highest authority sustains the foregoing propositions. *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Carter v. McClaughry*, 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181;

Rose ex rel. Carter v. Roberts, 40 C. C. A. 199, 99 Fed. 948; United States v. Maney (C. C.) 61 Fed. 140.

While I dissent, therefore, from the holding that this court is without jurisdiction in a proper case to issue to a court-martial the writ of prohibition, I believe that, assuming the jurisdiction of this court to exist, there is no case here shown by relator for the exercise of it, and concur in holding that the writ should be denied.

OKLAHOMA SUPREME COURT.

CHARLES L. ECKER, Plff. in Err.,
v.
DELLA ECKER.

(— Okla. —, 98 Pac. 918.)

Error — review — absence of ruling and exception.

1. This court will not consider an alleged error of the trial court in refusing to sustain a motion to re-refer a case to the master for further findings when the record does not affirmatively show that the mo-

Headnotes by HAYES, J.

Case Note. — Right of wife against whom an absolute divorce is granted to permanent alimony.

This note includes only those cases in which it is sought to recover permanent alimony for a wife against whom her husband had secured an absolute divorce. It therefore does not include those cases passing on her right to temporary alimony, or the right of a wife against whom a divorce from bed and board was granted, to an allowance for alimony.

Whatever may have been the rule at common law, it is recognized, at least in those jurisdictions wherein there is a statute similar to the one in ECKER v. ECKER, that is, one which directs the court, upon a decree of divorce being granted, to make such order touching the alimony of the wife as, under the circumstances and nature of the case, shall be reasonable, that alimony may be decreed the wife although the divorce is granted against her. But, since it is also recognized in these cases that it is discretionary with the court whether or not alimony shall be granted, the question in each particular case becomes not so much whether, under any circumstances, alimony may be granted the wife when the divorce is granted in favor of the husband, as whether the circumstances in the particular case are such that she should be allowed alimony.

In the following cases the circumstances were such that the court, within its discretion, decreed the payment of alimony to the wife although the divorce was granted against her: Reavis v. Reavis, 2 Ill. 242 20 L.R.A. (N.S.)

tion was ever acted upon by the court, and exceptions taken thereto by the complaining party.

Alimony — divorce against wife.

2. Under § 2565, Mansfield's Dig. (Ark.) (Ind. Terr. Anno. Stat. 1899, § 1853), providing that, when a decree of divorce is granted, the court shall make such order touching the alimony of the wife as, under the circumstances and nature of the case, shall be reasonable, the court may decree alimony to a wife against whom a divorce is granted.

Same — award of specific property.

3. The court is without authority under said section to decree absolutely a certain and specific sum of money as alimony, or a division of the husband's property, and to vest in the wife the title to one half of his estate.

(December 21, 1908.)

ERROR to the United States Court for the Northern District of the Indian Territory to review that portion of a judgment in an action for divorce awarding to the defendant wife one half of the husband's property. Reversed.

Statement by Hayes, J.:

This is a bill by the husband against the

(divorce granted husband for desertion by wife); Deenis v. Deenis, 79 Ill. 74 (divorce granted husband for desertion by wife, who had materially contributed to his acquiring of property, and who at least had some cause for desertion); Stacker v. Stacker, 117 Ill. App. 549 (facts similar to Deenis Case); Coon v. Coon, 26 Ind. 189 (divorce granted to the husband for wife's misconduct); Hedrick v. Hedrick, 28 Ind. 291 (divorce granted husband for abandonment by wife, who was charged with maintaining one of the children, and it appearing that husband was in good circumstances); Janvrin v. Janvrin, 59 N. H. 23 (divorce for alleged desertion); Richardson v. Wilson, 8 Yerg. 67 (husband securing legislative divorce for which there would have been no ground in a court of justice); Ashcroft v. Ashcroft [1902] P. 270.

So, alimony was allowed to the wife in Sheafe v. Sheafe, 24 N. H. 564, where, although a divorce was granted the husband for the alleged adultery on her part, there was some question whether the evidence was sufficient to sustain the charge; and it appeared that she was utterly destitute.

In Lovett v. Lovett, 11 Ala. 763, it was held that, under a statute requiring the court of chancery, upon dissolving the bonds of matrimony, to order a division of the estate of the parties in such a way as to them should deem just and right, a wife, although the divorce was granted against her because of abandonment, might be given a share of her husband's estate, the amount depending somewhat upon the nature of her offense.

wife for divorce and for custody of one child, brought originally in the United States court for the northern district of the Indian territory, at Vinita. Plaintiff alleges in his bill, as grounds for divorce, adultery of the wife, and divers acts of cruel treatment of him by her, consisting of threats to kill him, plots to poison him, and of abusive language. Defendant filed her answer and cross bill, denying all the allegations of plaintiff's petition relative to his grounds for divorce, and charging plaintiff with adultery and various acts of gross and abusive conduct toward her, beginning shortly after their marriage and continuing until the time of their separation. She charges that plaintiff had at different times struck and choked her, cursed and called her vile names. She alleges that plaintiff and defendant own different items of personal property and real estate, all of

which has been acquired by their joint labor subsequent to their marriage. She prays for divorce and decree of the court dividing the property between them, and for custody of the child. The master, in separate findings, finds that each has offered such indignities toward the person of the other as to render his or her condition intolerable; and finds that they own and possess certain property which they acquired with their joint earnings. Upon the recommendation of the master, the court rendered judgment granting to plaintiff a divorce from defendant, and custody and care of the minor child, and decreed that the property should be divided equally between them, or that defendant have judgment for one half of its value as found by the master in his report. Plaintiff in error, who was plaintiff in the court below, appealed from that portion of the judgment

In *Graves v. Graves*, 108 Mass. 314, it was held that, under statutes not limiting the granting of alimony to those cases in which the decree of divorce was in the wife's favor, a wife may receive alimony where the husband secures the divorce; the court taking into consideration the amount of property and the circumstances of the separation of the parties.

In *Lofvander v. Lofvander*, 146 Mich. 370, 109 N. W. 662, it was held that, under a statute providing, in effect, that, upon every divorce for any cause, except adultery committed by the wife, the court might decree the payment of alimony to the wife in such a sum as it should deem just and reasonable, a wife may be allowed alimony though the divorce is granted to her husband. The ground of complaint in this case was extreme cruelty.

Under a similar statute, it was held in *Dickerson v. Dickerson*, 26 Neb. 318, 42 N. W. 9, that a wife may recover alimony although a divorce was granted against her for desertion.

This was also recognized in *State ex rel. Child v. Smith*, 19 Wis. 531.

In *Pauly v. Pauly*, 14 Okla. 1, 76 Pac. 148, it was held that, under a statute providing, in effect, that, if the divorce shall be granted by reason of the fault or aggression of the wife, the court may grant her such share of her husband's property as may appear just and reasonable, a wife may be granted alimony, although the husband secured a divorce on the ground of her adultery.

So, in Kentucky, notwithstanding a statute providing that, if the wife has not sufficient estate, she may, "on a divorce obtained by her," have an allowance out of the estate of her husband, it has been held that, where a divorce is improperly obtained by the husband, or even properly obtained, but it appears that the wife was not in fault or has an equal or greater right to one, she may be granted alimony. *Davis v. Davis*, 86 Ky. 32, 4 S. W. 822 (securing of divorce by husband because of abandonment where not en- 20 L.R.A. (N.S.)

titled to it, the abandonment being made necessary by his own criminal conduct); *Lacey v. Lacey*, 95 Ky. 110, 23 S. W. 673 (securing of divorce by husband because of having lived apart for five years, though properly granted because of a statute, yet made necessary because of his conduct); *Newsome v. Newsome*, 95 Ky. 383, 25 S. W. 878 (divorce granted husband because of having lived apart for five years, both being equally entitled to a divorce); *Hoover v. Hoover*, 14 Ky. L. Rep. 680, 21 S. W. 234 (divorce obtained by husband because of abandonment made necessary by his unseemly conduct); *Masterson v. Masterson*, 20 Ky. L. Rep. 631, 46 S. W. 20 (improper granting of divorce to husband because of abandonment); *Pore v. Pore*, 20 Ky. L. Rep. 1980, 50 S. W. 681 (abandonment by wife not wholly without husband's fault); *Turner v. Turner*, 23 Ky. L. Rep. 370, 62 S. W. 1022 (husband securing divorce after they had agreed to a separation, and she had sacrificed a pension by her marriage).

So, alimony was given to the wife in *Tilton v. Tilton*, 16 Ky. L. Rep. 538, 29 S. W. 290, where a divorce was secured by the husband on the ground of adultery, there being, however, no ground of belief that this crime had been committed, and the husband himself being addicted to the use of morphine and liquor.

To the same effect is *Alderson v. Alderson*, 113 Ky. 830, 69 S. W. 700, where a divorce was improperly granted the husband because of abandonment, it appearing that he had married her to end a prosecution for her seduction, and she, under the exciting circumstances of the marriage, had refused to live with him, afterwards offering to do so.

This was also recognized in *Irwin v. Irwin*, 105 Ky. 632, 49 S. W. 432, where, however, the wife secured the absolute divorce because of having lived apart for the statutory period, and it clearly appeared that the husband was at fault.

In Pennsylvania, by statute, a court may

of the court awarding to defendant one half of the property specifically mentioned in the judgment, or have one half of its value, to the United States court of appeals in the Indian territory, and the same is now before us under the provisions of the enabling act (June 16, 1906, chap. 3335, 34 Stat. at L. 267), for final disposition.

Messrs. James S. Davenport, William M. Hall, and John Goldsberry for plaintiff in error.

Messrs. H. Jennings, J. B. Rutherford, and J. H. Keith for defendant in error.

Hayes, J., delivered the opinion of the court:

The master, in his findings, did not specifically find upon the issue made by plaintiff

in his petition charging defendant with adultery, which was denied in her answer. After the report of the master had been filed, plaintiff moved the court to re-refer the case, with directions to the master to find upon this issue; and the first alleged error complained of is that the court refused to sustain the motion and re-refer the case. After a careful examination of the record, however, we are unable to find that this motion was ever acted upon by the court, either favorably or adversely to plaintiff, or that he saved his exceptions to the action of the court thereon. If plaintiff permitted the court to proceed to judgment without acting upon his motion, he waived his right to have the same acted upon; and, in the absence of affirmative showing by the record that the same was acted upon adversely to plaintiff, and exceptions taken thereto at the time, this court cannot

grant a wife alimony where a divorce is granted in favor of the husband because of his wife's cruel and barbarous treatment. Shoop's Appeal, 34 Pa. 233; Miles v. Miles, 76 Pa. 357.

In Cox v. Cox, 25 Ind. 303, the trial court granted alimony to a wife against whom a divorce had been granted, and, the evidence not being before the higher court, the propriety of the trial court's action was not determined.

In Pence v. Pence, 6 B. Mon. 496, a wife against whom a divorce was granted because of abandonment, for which, however, it appears that, because of the husband's conduct, there was ample reason, was given, in addition to her separate estate, also a sum of money for her support.

In Reynolds v. Reynolds, 92 Mich. 104, 52 N. W. 295, it was recognized that, although the divorce was obtained by the husband on the ground of desertion, yet, where he himself was also somewhat at fault, and was a man of means, alimony should be granted the wife.

In Edwards v. Edwards, 84 Ala. 361, 3 So. 896, where a divorce was granted to the husband for abandonment, after a divorce had been refused the wife in a former suit, permanent alimony was granted the wife, it appearing that the fault was not all hers.

To the same effect are Luthe v. Luthe, 12 Colo. 421, 21 Pac. 467 (children left with the wife leaving him unencumbered with a family, and she not being guilty of gross misconduct); and Butler v. Butler, 38 N. J. Eq. 626, where a divorce had been granted the husband on the unfounded ground of adultery, this decree, however, being afterwards opened on account of surprise and fraud, and the wife allowed to answer and defend.

In Fulk v. Fulk, 8 Blackf. 561, where a husband, in a suit for divorce, charged his wife with adultery and other misconduct, the latter denying the charge and alleging that the husband had received personal property from her to the value of \$200, the 20 L.R.A. (N.S.)

court in decreeing the divorce allowed the wife \$100 in certain payments.

A class of cases in which it is recognized that a wife, though a divorce is granted against her, may recover alimony, is represented by Zuver v. Zuver, 36 Iowa, 190, where it was held that the fact that the husband obtained a divorce for the fault of the wife had a material bearing on the amount of alimony to be allowed the wife; and therefore in this case, where the wife had been granted practically all her husband's property, it was considered too great, and was consequently largely reduced.

So, in Conner v. Conner, 29 Ind. 48, it was held that the granting of alimony to a wife against whom a divorce had been granted for adultery, and to an amount equal to one third of the husband's estate, was unreasonable. In this case she was allowed a small sum because of public policy, together with the fact that her industry had contributed to create the husband's estate.

In Chandler v. Chandler, 13 Ind. 492, although the court recognized that alimony may be granted to the wife as incident to a judgment for a divorce in favor of the husband, yet it would not grant alimony when it was not asked.

In Becklenberg v. Becklenberg, 102 Ill. App. 504, reversed on other points in 232 Ill. 120, 83 N. E. 423, a wife against whom a divorce had been granted was given a certain sum as alimony in gross, the court saying, however: "It should be remembered that the bill was filed by the husband against the wife, and the decree, as shown on its face, was granted for reasons existing because of her own fault. The fact of habitual drunkenness by her having been found against her, the husband was not bound to pay her any alimony, nor was he bound to convey his right of dower to her in real estate she might own, unless because of the §§ 17 and 18, chapter 40, entitled 'Divorce,' although it cannot be doubted that the court, by virtue of the

review the same. *Saxon v. White* (Okla.) 95 Pac. 783.

The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one half of plaintiff's property or one half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the state of Arkansas, from which state the statutes in force in the Indian territory were adopted, the common law has been modified by statute. The statute governing in this case reads: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as, from the circumstances of the parties and the nature of the case, shall be reasonable." *Mansfield's* (Ark.) Dig. § 2565 (Ind. Ter. Anno. Stat. 1899, § 1853). Under the language of this statute, or similar language of

the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. *Reavis v. Reavis*, 2 Ill. 242; *Deenis v. Deenis*, 79 Ill. 74; *Spitler v. Spitler*, 108 Ill. 120; *Edwards v. Edwards*, 84 Ala. 361, 3 So. 896; *McDonald v. McDonald*, 117 Iowa, 307, 90 N. W. 603; *Reynolds v. Reynolds*, 92 Mich. 104, 52 N. W. 295; *Lofvander v. Lofvander*, 146 Mich. 370, 109 N. W. 662; *Pauly v. Pauly*, 14 Okla. 1, 76 Pac. 148; *Bishop, Marr. Div. & Sep.* p. 865; 2 *Nelson, Div. & Sep.* p. 907. It is, however, a discretion that a court should at all times exercise with great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances. In the case at bar the wife is guilty of gross misconduct, but the husband has not

powers vested in it might decree both. The plaintiff in error was the beneficiary under the decree, in the respects complained of, and is not in a position, without a certificate of evidence, to complain of the relief given her. It is a familiar doctrine that a party cannot complain of any error that is beneficial to himself."

It will be noted that in some of the above cases the court granted the wife alimony although there seemed to be no statute as in the other cases, granting it such a discretionary power; the courts evidently depend upon the principles of equity to justify their decisions. In view of these cases, the presence or absence of such a statute would seem to be of very little importance.

From the above cases, it follows as a matter of course that, where the wife is wholly at fault, and, from the circumstances of the case, it would be inequitable to grant her permanent alimony, the payment of such alimony will be refused. *Spitler v. Spitler*, 108 Ill. 120 (divorce obtained by husband for wife's desertion and adultery); *Hickling v. Hickling*, 40 Ill. App. 73 (divorce granted husband for adultery); *Spaulding v. Spaulding*, 133 Ind. 122, 36 Am. St. Rep. 534, 32 N. E. 224 (divorce granted to husband because of wife's many adulterous acts with many men); *Fivecoat v. Fivecoat*, 32 Iowa, 198 (divorced wife guilty of adultery soon after marriage, she having brought no property to husband); *Gaines v. Gaines*, 26 Ky. L. Rep. 471, 19 S. W. 929 (abandonment by wife, she being wholly in fault herself); *Dollins v. Dollins*, 26 Ky. L. Rep. 1036, 83 S. W. 95 (husband securing divorce showing wife to be guilty of adultery); *Robards v. Robards*, 33 Ky. L. Rep. 565, 110 S. W. 422 (divorce secured by husband because of wife's adultery); *Tuggles v. Tug-* 20 L.R.A. (N.S.)

gles, 17 Ky. L. Rep. 221, 30 S. W. 875 (divorce obtained by husband on ground of lewd and lascivious conduct of wife); *Shafer v. Shafer*, 10 Neb. 468, 6 N. W. 768 (divorce granted husband through fault of wife); *Harris v. Harris*, 31 Gratt. 13 (husband securing divorce on ground of desertion).

Where a divorce was granted the husband for abandonment by the wife; and it appeared that, on settlement of a prior action for divorce brought by her, she received property, which she still owned, and that the husband was in feeble health and nearing old age, and owned property of but little value,—refusal to grant the wife alimony was proper. *Cottrell v. Cottrell*, 24 Ky. L. Rep. 2417, 74 S. W. 227.

A similar case, holding to the same effect, is *Henry v. Henry*, 25 Ky. L. Rep. 596, 76 S. W. 130.

So, where a wife, absolutely without cause, deliberately refuses to live with her husband, and has not helped to accumulate any of his estate, she is not entitled to alimony. *Isaacs v. Isaacs*, 71 Neb. 537, 99 N. W. 268.

In *Mutter v. Mutter*, 123 Ky. 754, 124 Am. St. Rep. 381, 97 S. W. 393, it was held that, where a divorce is granted against the wife because of malformation which was known to her at the time of her marriage, she is "in fault," and therefore cannot be granted alimony.

In *Elliott v. Elliott* (Mo.) 115 S. W. 486, it was held that, where divorce is granted the husband as the innocent party and for his wife's fault, the latter is not entitled to permanent alimony.

It will be noted that in the above cases, as was before stated, the equities were clearly with the husband, the wife being wholly at fault, and for that reason she was not permitted to recover alimony. In

been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce. The evidence is convincing that each has been guilty of cruel treatment of the other and gross immoral conduct, consisting of adultery with different persons. The question whether, upon the evidence in the case and the findings of the master, either party should be granted a divorce, is not before us. The part of the judgment granting a divorce has not been appealed from. The sole question is whether, the divorce having been granted to plaintiff, the court should have granted alimony to defendant. At the time defendant married plaintiff he had but little property. During their fifteen or sixteen years of married life the husband, principally through the thrift, frugality, and industry of the wife, who labored

on the farm, and conducted, at different times, a boarding house, restaurants, and kept books in a grocery store, had accumulated property of the value of about \$5,000. It is not clear from the record that the beginning of defendant's wrong doing was not caused by plaintiff's cruel treatment. She is now past the meridian of her life, the greater portion of which she has spent in faithfully laboring in the discharge of her domestic duties and in contributing materially to plaintiff's accumulation of his property. Under these circumstances, it is within the discretionary power of the trial court, upon granting to plaintiff a divorce, to allow defendant such alimony as, under the circumstances, is reasonable, just, and right, taking into consideration the amount of plaintiff's property, the extent to which defendant contributed to the accumulation thereof, the ability of each to earn money in the future, and their conduct in the past. But the court ordered an equal division of the property, or that defendant

the following cases, however, it would seem to be recognized that, if the husband secures a divorce for his wife's offense, no matter what excuses she may have to offer, she cannot recover permanent alimony.

Thus, in *Everett v. Everett*, 52 Cal. 383, where a husband secured a divorce from his wife on account of extreme cruelty, the court, after quoting a statute permitting the granting of alimony when the divorce is granted for the offense of the husband, simply dismissed the case by saying that there was no provision of law authorizing the court to require the husband to pay, subsequent to the divorce and out of his separate property, any sum toward the maintenance of the former wife, when the divorce was for her offense.

So, in *McIntire v. McIntire*, 80 Mo. 470, it was held that, in the face of a statute declaring that in case of divorce from the bond of matrimony the guilty party shall forfeit all rights and claim under and by virtue of the marriage, a woman can have permanent alimony only as incident to a decree of divorce in her favor.

To the same effect are *DeHoog v. DeHoog*, 65 Mo. App. 246 (husband obtaining divorce for wife's misconduct); *Motley v. Motley*, 93 Mo. App. 473, 67 S. W. 741 (divorce obtained by husband because of many indignities offered him by wife, including the latter's attempt to poison him); *Slaughter v. Slaughter*, 106 Mo. App. 104, 80 S. W. 3; *Cole v. Cole*, 115 Mo. App. 466, 91 S. W. 457.

In *Allen v. Allen*, 43 Conn. 419, it was held that, a statute empowering the court to grant a divorce to any man or woman for certain offenses committed by the other party, and to assign to any woman so divorced part of her husband's estate, did not empower the court to assign such prop-

erty to a woman divorced for her own misconduct. The court said: "Although the expression 'any woman so divorced,' taken by itself, seems to be broad and all-inclusive, yet the act, read as a whole, furnishes good foundation for the belief that only those husbands who are divorced for their own violations of the marriage contract are to be punished by such diminution of their estates; for instance, the 6th section provides as follows: 'When any married woman shall have derived from her husband, in consideration of their marriage, or of love and affection, any estate; and her husband shall thereafter be divorced from her on the ground of her misconduct,—the court may decree that such personal estate remaining in her possession, and such real estate standing in her name, shall thereafter belong to him.' Hereby the legislature strips the guilty wife of all the estate which she may have received upon certain specified consideration from her husband, and returns the same to him. This can mean nothing in reality if she can immediately reclaim even a greater sum under another section of the same act. We can hardly attribute to the legislature the intention of providing simply for an exchange of estates."

And, where a statute provides for the granting of alimony to the wife only in case the divorce is granted the husband because of the former's cruel and barbarous treatment, she cannot recover permanent alimony where the husband procured a divorce on the ground of desertion as well as barbarous treatment. *Parker v. Parker*, 35 Pa. Super. Ct. 341.

Effect of wife's subsequent adultery upon an allowance of alimony, see subject note to *Cole v. Cole*, 19 L.R.A. 811.

have judgment for one half the value of the same. This was error.

Section 2568, Mansfield's (Ark.) Dig. (Ind. Ter. Anno. Stat. 1899, § 1856), authorizes the court, upon rendering final judgment for divorce, to restore each party to all property, not disposed of at the commencement of the action, which either party obtained from or through the other or in consideration or by reason of their marriage. But none of plaintiff's property was obtained by him from or through his wife during their marriage or in consideration thereof. All the property he has is property which he had at the time of his marriage, consisting of one farm, on the purchase price of which he had paid the sum of \$400, and on which there was a balance due of \$800, and of a small amount of personal property, or that he acquired since their marriage with their joint earnings. Whether courts, under statutes the same or similar to the section quoted above, have authority to decree a gross sum for alimony and maintenance of the wife is a question upon which the courts have divided, but it will serve no useful purpose to review here the two lines of authorities. The supreme court of Arkansas, prior to the adoption of this statute in the Indian territory, had held in *Brown v. Brown*, 38 Ark. 324, that the court is without authority to decree absolutely a certain and specific sum of money, or a certain specific portion of the property, as alimony, but may decree alimony in a continuous allotment of sums payable at regular intervals. That case is controlling in the case at bar.

The judgment of the trial court is therefore reversed, and the case remanded, for further proceedings in accordance with this opinion.

Williams, Ch. J., and Turner, Kane, and Dunn, JJ., concur.

SOUTH CAROLINA SUPREME COURT.

J. M. THOMPSON, Admr., etc., of Charles A. Thompson, Deceased, Resp't.,
v.

SEABOARD AIR LINE RAILWAY, Appt.

(81 S. C. 333, 62 S. E. 396.)

Railroad — negligence — killing person on track.

1. The mere fact that those in charge of an engine on a misty night failed to observe one attempting to signal it to stop because of an obstruction on the track, in time to stop the train before striking him, is not sufficient to establish negligence on the part of the railroad company.
20 L.R.A. (N.S.)

Proximate cause — injury on track.

2. The negligence of a railroad company in maintaining the approach to its tracks in an unsafe condition so that a wagon is caught, holding the team on the tracks, may be found to be the proximate cause of the death of the driver, who was struck by a train in attempting to signal it to stop before striking the team.

Railroad — signaling train — negligence.

3. It cannot be said to be negligence *per se* for the driver of a team caught on a

Note. — The subject of the defective condition of a railroad crossing as affecting a traveler's right to recover for injuries sustained in a collision with a train is treated in the case note to *Gehring v. Atlantic City R. Co.* 14 L.R.A. (N.S.) 312. A few cases in point have been reported since that note.

Thus, the failure to comply with a statute requiring railroad crossings and approaches to be covered with macadam or gravel to a depth of 6 inches may properly be found to be the proximate cause of an injury to the driver of a team who was struck by a sack of bran hurled against him when the engine collided with his wagon, which had run off the end of a culvert into a mud hole and become stalled while he was attempting to cross the track in the nighttime, the beaten path for vehicles being sinuous at the crossing and its approaches. *Day v. Missouri, K. & T. R. Co.* 132 Mo. App. 707, 112 S. W. 1019. It was also held in this case that the failure of the employees in charge of the train to give the signals upon approaching the crossing might be found to be a proximate cause of the injury, even though the wagon had already become stalled before the locomotive reached the signal point, the plaintiff having testified that, if a signal had been given, he would have abandoned his property at once and sought a place of safety for himself, whereas in fact he did not leave the team until he saw the headlight when the engine was not more than 400 feet away. It was further held that he was not guilty of contributory negligence, as a matter of law, in remaining by the team and attempting to extricate it, relying on the signals being given of the approach of a train, although he knew that a train was due.

But in *Flanery v. St. Louis & S. F. R. Co.* 129 Mo. App. 652, 108 S. W. 575, where there was evidence tending to show that the driver was prevented from backing the horse off the crossing in time to avoid a collision by the fact that one of the planks of the crossing just inside the rail was missing, leaving a depression of about 4 inches, the court held that there was no evidence to support a recovery on the theory of the company's negligence in failing to maintain the crossing at the highway in a reasonably safe condition, there being no evidence that it had notice of the defect, or as to the length of time it had existed.

railroad track by the negligence of the railroad company, to go onto the track for the purpose of attempting to stop an approaching train.

Contributory negligence — standing on track.

4. The fact that one who rightfully goes upon a railroad track to attempt to stop an approaching train which is carrying a powerful headlight cannot be said to have been negligent *per se* merely because he did not get off in time to avoid being struck by the train.

Railroad — crossing signals — beneficiaries.

5. The question is for the jury to determine, whether or not the failure of a railroad company to give signals for a street crossing contributed to the death of the driver of a team struck while attempting to stop the train after his team had been caught on the tracks at the crossing, where the circumstances would warrant an inference that the team was caught only a very few moments before the train approached, although at the time of his injury he had gone along the track 100 feet or so from the crossing.

Damages — punitive — noncompliance with orders.

6. Punitive damages may be awarded against a railroad company for killing a person at a railroad crossing which was manifestly dangerous, if it had failed to comply with warnings by the public officials to make it safe.

Railroad — entry on tracks — permission.

7. One entering upon a railroad track to attempt to stop a train approaching a crossing on which a team is stalled is not a trespasser, since the consent of the railroad company to his act will be presumed.

(September 17, 1908.)

APPPEAL by defendant from a judgment of the Common Pleas Circuit Court for Lexington County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Efrid & Dreher and Lyles & McMahan for appellant.

Messrs. George T. Graham and Nelson & Nelson for respondent.

Woods, J., delivered the opinion of the court:

Charles A. Thompson early in the night of October 23, 1905, was driving a wagon and pair of mules along the Two Notch road in Richland county. The road turns at a sharp angle to cross the track of the defendant, Seaboard Air Line Railway, and at the crossing there is a shallow ditch and a bridge on each side of the track. One of

the front wheels of the wagon missed the bridge, and went into the ditch, and the mules were thus held on the railroad track. The defendant's fast train, known as the "Florida Limited," was approaching. Thompson left his team, and ran probably about a 100 feet towards the train, waving his hat in the effort to stop it. The train did not stop in time, and struck and killed both Thompson and the mules. J. M. Thompson, the owner of the mules, recovered against the defendant damages for their loss, and the judgment of the court of common pleas was affirmed by this court in *Thompson v. Seaboard Air Line R. Co.* 78 S. C. 384, 58 S. E. 1094. As administrator of Charles A. Thompson's estate, J. M. Thompson brought this action, alleging the death of his brother to have been due to the negligent, reckless, wanton, and wilful conduct of the defendant, and recovered a judgment for \$3,000. Defendant appeals, charging error in the refusal to grant a nonsuit, in instructions to the jury, and in refusing to grant a new trial.

The first question raised was whether there was any evidence of negligence by the defendant constituting a proximate cause of the death of Thompson. Some of the plaintiff's witnesses testified that, by actual measurement in approaching the crossing, the train was on a straight track for 583 yards. The engine was equipped with an electric headlight. There was some evidence from W. H. Tiller, an engineer sworn in behalf of plaintiff, that under favorable conditions such a headlight would enable the engineer to see an object on the track 250 to 300 yards, but this was a misty night, and the witness said on such a night "the sweat from the glass would stop your reflection and light to a certain extent." Although testifying that such a train as this could be stopped in about 100 to 125 yards, he said that the distance would be greater on a wet track or down grade. According to plaintiff's evidence, the fatality occurred on a down grade, and the misty night no doubt made a damp or wet track. The train was stopped just beyond the crossing. M. A. Drawdy testified he was standing on the side of the track, and saw the headlight of the approaching train and a man running along the track towards it, waving his hat as if to sign it down; that the train passed him, and he did not see it strike deceased; that the speed was not slackened until about the time it struck the mules. The impression of this witness as to the precise time the speed of the cars was slackened was necessarily vague, and hence his evidence is indefinite. Of course, the testimony of the engineer of the train that he was on the watch, saw the de-

ceased signaling, and immediately used every effort to stop the train is to be left out of view in deciding whether the above facts prove negligence in failing to use proper efforts to stop the train. But negligence is to be proved, not assumed, and we do not think, if all the plaintiff's evidence on the point be taken as true, it would tend to establish in the mind of a reasonable juror the conclusion that the engineer was negligent in failing to see the deceased before he did, or in failing to stop the train in time. If this had been the only proof of negligence, the defendant would have been entitled to a nonsuit, but other charges of negligence are to be considered.

The bridge on which the wagon and mules were caught was built by the railroad company on its roadbed for its own purposes. Hence there can be no doubt of the duty of the railroad company to keep it in order for the safety of the traveling public. There was evidence that the bridge, though at a sharp turn in the road, was only 10 to 12 feet in width; whereas, safety to vehicles required it should be 20 feet, the same width as the highway. The wheel tracks of the wagon indicated that, if the bridge had been of the requisite width, the wheels would not have left the bridge, the wagon would not have been caught, and the deceased, of course, would have passed on in safety. From these facts it is very clear there was evidence of defendant's negligence resulting in the mules and the wagon being caught. But it is insisted the court should have held as a matter of law this negligence could not be the proximate cause of the death of Thompson. The mules and wagon were in a place of utmost peril. Not only so, but their position on the track was such as to imperil the safety of defendant's approaching train and the passengers thereon. All this was due to defendant's negligence in the construction of the bridge. Thompson lost his life in the effort to stop the train, and avert the threatened loss of other lives, and destruction of the property in his charge. That effort was immediate and direct, and was the only one he could have made. He was alone, the train was approaching, and his pressing obligation was to try to communicate to the engineer the danger. This right and duty to signal the train, according to the evidence, was forced on him by defendant's negligence. Therefore, if the jury believed this evidence, it was certainly sufficient to sustain the conclusion that defendant's negligence was a proximate cause of the peril assumed by Thompson, and of his death. This conclusion is fully sustained by the very analogous cases of *Cooper v. Richland County*, 76 S. C. 202, 10 L.R.A. (N.S.) 799, 121 Am. St. Rep. 946, 56 S. E. 20 L.R.A. (N.S.)

958, and *Snipes v. Atlantic Coast Line R. Co.* 76 S. C. 207, 56 S. E. 959. The defendant maintains, however, that, even if the defendant's negligence was a proximate cause of Thompson's death, yet he knew of the approach of the train, and was guilty of contributory negligence in not getting off the track before the train reached him. Under these circumstances, the court could not have said it was negligence *per se* for Thompson to go on the track for the purpose of stopping the train. It is equally clear it would be very harsh judgment to say the fact that he stayed on the track too long conclusively shows he was negligent in not getting off in time to escape injury. If the evidence is credible, the emergency was brought upon him by the defendant. He was absorbed in the effort to stop the train, and no doubt excited to the degree of consternation by the emergency. He was facing a powerful electric headlight, which, it is reasonable to suppose, blinded him to the extent that he erred in his estimate of the distance of the train from him, until it was too late to escape. The rule was established in this state in 1840 by the case of *Ivy v. Wilson, Cheves*, L. 74, that it is not contributory negligence *per se* for one who owes the duty to protect property to take a manifest risk to save it, unless the risk was wanton or unreasonable; and that the exposure by a person so situated is not to be presumed to be wanton or unreasonable exposure to unnecessary danger. The test is whether a reasonably prudent man in the same exigency would have assumed the peril. *Ivy v. Wilson*, supra; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; 29 Cyc. Law & Proc. p. 524. The exceptions on this point are overruled.

There was direct evidence of the violation of the signal statute,—that is, of a failure to sound the whistle 500 yards before reaching the crossing,—but the defendant contends that Thompson was not within the protection of the statute, because he was about 100 feet from the crossing when struck by the train; and therefore the circuit judge should not have submitted to the jury the issue of negligence under the signal statute. Referring to the signal statute, Chief Justice Simpson, for the court, says in *Neely v. Charlotte, C. & A. R. Co.* 33 S. C. 130, 11 S. E. 636: "Now, there can be no doubt but that the object of these sections was to prevent collisions which might occur between persons attempting to cross the track of the railroad and the locomotive and cars approaching the crossing at the same moment, and the provisions of the act did not include, nor was the act intended to include, injuries inflicted upon bystanders

not intending to cross, or upon cattle that happened to be killed or injured pasturing near by, but not upon the crossing or using it to pass from the one side to the other." This rule has been followed in this state, and is in accord with almost all precedents in other states. *Hale v. Columbia & G. R. Co.* 34 S. C. 292, 13 S. E. 537; *Fletcher v. South Carolina & G. Extension R. Co.* 57 S. C. 205, 35 S. E. 513; *Sims v. Southern R. Co.* 59 S. C. 246, 37 S. E. 836; *Hutto v. South Bound R. Co.* 61 S. C. 495, 39 S. E. 710; *Ringstaff v. Lancaster & C. R. Co.* 64 S. C. 546, 43 S. E. 22; *Fowles v. Seaboard Air Line R. Co.* 73 S. C. 306, 53 S. E. 534. But we can find no case where the application of the statute to a case like this has been considered. Here the circumstances would warrant the inferences that Thompson's team had been caught on the track a very few moments before the approach of the train, and that, if he had heard signals, he would not have attempted to cross before it passed. It was therefore for the jury to say whether a failure to give the signals was negligence contributing to bring the deceased into the predicament in which he found himself. The whole trouble arose at the crossing to a traveler exercising his right to cross. If he would not have gotten into the predicament but for defendant's failure to give the signal, then all reasonable efforts to extricate himself from it may well be said to have been made necessary by defendant's negligent failure to signal. If such efforts had been made by deceased while standing on the crossing, there can be no doubt that the case would have fallen under the signal statute. It would be a very technical distinction to hold that when his team was thus caught on the crossing, and Thompson extended his efforts to prevent a catastrophe 100 feet from it, he lost all benefit of the statutory protection, provided for persons passing over a crossing on the highway.

Without extended analysis of the cases on the subject, it is sufficient to say none of them in this state or elsewhere are like this case, and there is no principle laid down in them which requires such a technical distinction as is here contended for by the appellant. The request to charge on this subject was as follows: "Failure to ring the bell or blow the whistle of a locomotive approaching a crossing is not negligence as to a person on the track a little distance from the crossing." After reading it to the jury, the circuit judge said: "Generally speaking that may be, but the circumstances may be such (and you and I are to be judges of the circumstances in each particular case) where it might be negligence. I charge you that as a general proposition, 20 L.R.A. (N.S.)

but I say there may be circumstances in each case where the jury have the right to conclude it would be negligence under certain circumstances." For the reasons stated, we think this instruction was not error as applied to this case.

The issue as to punitive damages was properly submitted to the jury. There was evidence tending to show the crossing was obviously dangerous on account of the narrowness of the bridge, and that the county authorities had several times warned the agents of the railroad company of the danger, and requested that the bridge be made safe; and that the defendant nevertheless failed to take any steps to perform the duty required of it by law. The consent of the railroad company that one in the situation of Thompson should enter on its track to stop its train by signal, and thus avert the danger of loss of valuable property or of human life, will be presumed. The circuit court, therefore, did not err in refusing to charge the law applicable to trespassers on the railroad property.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

TEXAS SUPREME COURT.

TEXAS MIDLAND RAILROAD, Plff. in Err.,
v.

J. W. BYRD.

(— Tex. —, 115 S. W. 1163.)

Trial — communication with jury — error.

1. It is reversible error for the judge to communicate with the jury otherwise than as provided by law, as by holding conferences with the foreman not in open court.

Railroad — licensee — negligence.

2. A licensee who unnecessarily selects a railroad bridge as a route to his destination is negligent so that he cannot hold the railroad company liable for an injury received, when compelled to jump therefrom, by an approaching train.

(January 27, 1909.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Delta County in plaintiff's favor in an action brought to recover damages for personal injuries alleged

Note. — As to effect of judge communicating with jury not in open court, see case note to *State v. Murphy*, 17 L.R.A. (N.S.) 609.

to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. A. H. Dashiell and Ogden, Brooks, & Napier, for plaintiff in error:

It is error for the trial judge, without the consent of the parties to the suit, to communicate with the jury, or any member thereof, during their deliberations upon the case on trial.

Holliday v. Sampson, 42 Tex. Civ. App. 364, 95 S. W. 643; Lester v. Hays, 14 Tex. Civ. App. 643, 38 S. W. 52; Kilgore v. Moore, 14 Tex. Civ. App. 20, 36 S. W. 317; North Dallas Circuit R. Co. v. McCue (Tex. Civ. App.) 35 S. W. 1080; Hurst v. Webster Mfg. Co. 128 Wis. 342, 107 N. W. 666; Danes v. Pearson, 6 Ind. App. 405, 33 N. E. 976; High v. Chick, 81 Hun, 100, 30 N. Y. Supp. 652.

A person walking along the track of a railroad company, whether as a licensee or a trespasser, assumes the risks incident to the business of the company whose way he uses, and cannot recover for injury resulting therefrom.

Davis v. Chicago & N. W. R. Co. 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 413; Vanderbeck v. Hendry, 34 N. J. L. 472; Williams v. Delaware, L. & W. R. Co. 18 N. Y. S. R. 857, 2 N. Y. Supp. 435; Tucker v. Baltimore & O. R. Co. 8 C. C. A. 416, 8 U. S. App. 491, 59 Fed. 968; Kenna v. Central P. R. Co. 101 Cal. 26, 35 Pac. 332; McAllister v. Burlington & N. W. R. Co. 64 Iowa, 395, 20 N. W. 488.

The operatives of an approaching train have the right to assume that a person on the track for his own convenience will leave the same in time to avoid being injured, and, until it becomes apparent to them that such person does not intend leaving, they owe him no duty.

Houston & T. C. R. Co. v. Smith, 52 Tex. 185; Artusy v. Missouri P. R. Co. 73 Tex. 195, 11 S. W. 177; International & G. N. R. Co. v. Kuehn, 70 Tex. 585, 8 S. W. 484; International & G. N. R. Co. v. Garcia, 75 Tex. 583, 13 S. W. 223; Gulf, C. & S. F. R. Co. v. Hill (Tex. Civ. App.) 58 S. W. 257; St. Louis & S. F. R. Co. v. Christian, 8 Tex. Civ. App. 246, 27 S. W. 933; Texas & P. R. Co. v. Lowry, 61 Tex. 154; Galveston City R. Co. v. Hewitt, 67 Tex. 480, 60 Am. Rep. 32, 3 S. W. 705; St. Louis & S. F. R. Co. v. Herrin, 6 Tex. Civ. App. 724, 26 S. W. 425; Texas & P. R. Co. v. Roberts, 14 Tex. Civ. App. 532, 37 S. W. 870; Frazer v. South & North Ala. R. Co. 81 Ala. 185, 60 Am. Rep. 145, 1 So. 85; Georgia P. R. Co. v. Blanton, 84 Ala. 154, 4 So. 621.

A trestle of a railroad over which trains pass is a place of danger; and a person who attempts to cross it as a matter of con-

venience to himself, instead of using a safer way thereunder, is guilty of negligence, and cannot recover for injury resulting therefrom.

Gulf, C. & S. F. R. Co. v. Matthews, 100 Tex. 63, 93 S. W. 1068; Atchison, T. & S. F. R. Co. v. Schwindt, 67 Kan. 8, 72 Pac. 573; Kenna v. Central P. R. Co. supra; Illinois C. R. Co. v. Hall, 72 Ill. 222; Tucker v. Baltimore & O. R. Co. supra; 5 Thomp. Neg. § 6247; International & G. N. R. Co. v. DeOllos (Tex. Civ. App.) 76 S. W. 222.

Messrs. B. O. Evans, C. L. Elder, and Patterson & Sharpe for defendant in error.

Gaines, Ch. J., delivered the opinion of the court:

This suit was brought by the defendant in error against the plaintiff in error to recover damages for personal injuries alleged to have been received through the negligence of the servants of the railroad company. After the case was tried and verdict rendered, a motion for new trial was filed on behalf of the plaintiff in error, and, among other grounds for said motion, was the misconduct of the court and jury after the case had been submitted to the jury. This ground of the motion claimed that, after the evidence was introduced, the case argued, and the jury were charged and had retired to consider of their verdict, the court had more than one conference with the foreman of the jury, which was not in open court with all of the jury present. Upon a hearing of the motion evidence was introduced on both sides, and in some particulars the evidence in support of the motion was controverted by contradictory testimony. Counsel for the defendant in error invoked the rule that where the evidence showing misconduct of the jury is contradicted on the other side, and the court has passed upon it, and held it is not sufficient to show misconduct in the action of the court in overruling the motion, it will not be held to be error. But, in signing the bill of exceptions upon overruling the motion, the court pended to the bill a statement of the grounds upon which it acted, and this statement shows the fact that the court did so confer with the foreman of the jury was true. And this much we can therefore say was clearly established, and we think it was such improper conduct on the part of the court as requires the motion to have been granted. It is not a question simply of the misconduct of the jury, and of whether such misconduct would probably influence the verdict, but it was a question of the misconduct of the court, and the propriety of allowing a judgment to stand after such action on the court's part. It seems to us that in deciding this question

we are not required to enter into a discussion of the question of how a conference between the judge and the foreman would have affected a verdict if at all.

The statutes (Rev. Stat. 1895) prescribe that:

"Art. 1305. The officer having the jury under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon a verdict, unless by order of the court; and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

"Art. 1306. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person, on any subject connected with the trial.

"Art. 1307. When the jury wish to communicate with the court, they shall make their wish known to the officer having them in charge, who shall inform the court thereof; and they may be brought into open court, and, through their foreman, shall state to the court, either verbally or in writing, what they desire to communicate.

"Art. 1308. The jury may, after having retired, ask further instruction of the court touching any matter of law. For this purpose they shall appear before the judge in open court in a body, and, through their foreman, state to the court, either verbally or in writing, the particular question of law upon which they desire further instruction, and the court shall give such instruction in writing; but no instruction shall be given except upon the particular question on which it is asked."

It is thus seen that the statutes very carefully provide the manner in which the court shall confer with the jury, and that he shall give no instructions, or confer with them in any manner, except in open court. The obvious purpose of this is that counsel may be present and see that the conference is proper, and, if not, may take a bill of exception to the action of the court. It seems to us, therefore, that it is error for the judge to confer with the jury in any other manner than that prescribed by law, and that, if he does, his judgment on that account ought to be reversed.

In numerous cases from other jurisdictions it is held that the private conversation of the judge and the jury is not only improper, but that it is misconduct for which the judgment will be reversed, without reference to the question whether such misconduct affected the verdict. *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185; *Read* 20 L.R.A. (N.S.)

v. Cambridge, 124 Mass. 567, 26 Am. Rep. 690; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558; *Fish v. Smith*, 12 Ind. 563; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694; *Moody v. Pomeroy*, 4 Denio, 115; *Kirk v. State*, 14 Ohio, 511; *Bunn v. Croul*, 10 Johns. 239; *State v. Smith*, 6 R. I. 33. In speaking for the court in the case first cited above Chief Justice Parker says: "The communication in question in this case was made upon the ground of this practice, which had been so common here as to pass without notice. The object of the note of the foreman was probably to obtain leave for the jury to separate, and the answer of the judge was calculated to enable them to revise the case in a systematic manner, in the hope that such a revision would produce a union of opinion on one side or other of the cause. It probably had that effect. As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper; and, if it was not, the party against whom the verdict was is entitled to a new trial. And we are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in presence of the counsel in the cause. The oath administered to the officer seems to indicate this as the proper course: 'He is to suffer no person to speak to them, nor to speak to them himself unless to ask them whether they are agreed;' and he is not to suffer them to separate until they are agreed, unless by order of court. When the court is adjourned, the judge carries no power with him to his lodgings, and has no more authority over the jury than any other person; and any direction to them from him, either verbal or in writing, is improper. It is not sufficient to say that this power is in hands highly responsible for the proper exercise of it. The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case, except in open court, in presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of jurors is of small consideration compared with this great object. If, by reason of the long intervals between the sessions of the court, jurors here are subjected to inconveniences, which do not exist elsewhere, this must be remedied by holding two sessions a day instead of one. It is better that everybody should suffer inconvenience than that a practice should be continued which is

capable of abuse, or at least of being the ground of uneasiness and jealousy." It is but just to the learned judge before whom the case was tried to say that his conduct in the matter involved no moral delinquency on his part, nor, so far as we can see, did it in any way affect the verdict of the jury.

We approve the remarks just quoted, and we think they are supported by the overwhelming weight of authority. In the view we take of the case it is not necessary that we should pass upon the assignment; but we consider the question of such importance as to make a ruling upon it appropriate.

But there is another assignment, the determination of which is, in our judgment, fatal to the plaintiff's case, and that is the refusal of the court to grant a request for an instruction for the defendant. The facts of the case show that the plaintiff, while walking over the bridge of the defendant, which was 195 to 200 feet in length, discovered a train approaching, and, in order to escape being struck thereby, attempted to jump off the bridge, and in doing so was injured. There is evidence tending to show that the bridge in question was generally used by persons while walking along the track, so that it might be deemed that they had a license to use the track for the purpose of a foot passage; but, as was said by Associate Justice Williams, speaking for the court in the case of *Gulf, C. & S. F. R. Co. v. Matthews*, 100 Tex. 63, 68, 93 S. W. 1068: "An implied permission, such as is claimed, to use a railroad track as a footpath, may relieve the person enjoying it of the imputation of being a trespasser, but it does not relieve the place of its inherent dangers, nor exempt the traveler from the duty to act with ordinary prudence. When he voluntarily chooses the dangerous pathway, instead of a safe one beside it, we can see no escape from the conclusion that he is guilty of negligence, if there be no justifying or excusing circumstances. This is in accordance with what is said in *Illinois C. R. Co. v. Hall*, 72 Ill. 222: "It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter. The crossing of a track of a railroad is a different thing. The one is unavoidable, but in the other case he voluntarily assumes to walk amid dangers constantly imminent. It is sought, in this case, to justify the conduct of appellee in traveling upon the track of the railroad by the fact there were no good walks elsewhere on that street for persons on foot, nor had the street, outside the roadbed, been graded to accommodate the travel. This was no fault of the [railroad] company. It was not its duty to grade the

street. The street is 80 feet wide, and, if graded, might be used with safety, as ordinary streets, notwithstanding the railroad is laid in it. But there was a path between the tracks and one at the side, which appellee could have used without the least danger. The side path was not so easy to walk upon as that between the rails, but that fact did not justify appellee in taking the dangerous path. He was familiar with the dangers to which he was exposed, and we must conclude he voluntarily assumed the hazard. He could have avoided all danger by a little inconvenience, but he did not choose to do it. The injury received must therefore be attributed to his want of ordinary care." *Irion v. Saginaw*, 120 Mich. 295, 79 N. W. 572; *Smith v. New Castle*, 178 Pa. 298, 35 Atl. 973; *Kenna v. Central P. R. Co.* 101 Cal. 26, 35 Pac. 332; *Atchison, T. & S. F. R. Co. v. Schwindt*, 67 Kan. 8, 72 Pac. 573. In the case of *Gulf, C. & S. F. R. Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. 227, it was held that a party who was crossing a defective bridge over the company's track in a public highway was injured, and was not guilty of negligence because there was a safer way which he might have taken. This was upon the ground that, under the circumstances of that case, a prudent man might have taken the way plaintiff had adopted without being guilty of contributory negligence; but in that case it is clear the bridge was upon the public road, and the plaintiff had the right to cross there. He had not simply a permission or license to cross, but an absolute right to use it; it being in the public highway. In *Thompson on Negligence* it is said: "If the traveler upon a highway has a choice of two ways, one of which is safe and the other unsafe; and if he knowingly chooses the one which is unsafe, without any necessity for so doing,—he is deemed to take upon himself the risks of his foolhardy act; and, if he is injured in consequence of it, he cannot recover damages from the municipality." *Thomp. Neg.* § 6247.

It is apparent from plaintiff's own testimony that there were other ways of going to his destination by which the crossing of the bridge might have been avoided; and, he having selected a way he knew to be dangerous, his conduct must be considered negligence on his part. Giving all the effect of implied license to use the bridge as is claimed for it in this case, it could hardly be said that it implied a license to use the structure to the obstruction of the defendant's business. Persons found on the track of the road would necessarily interfere with the free use of its track by the defendant company, for if his peril was discovered, the company would be compelled, in order to

avoid injuring him, to stop its train *in toto* until he had placed himself in a place of safety. We think that the doctrine upon which the license of the railroad company is implied by the use which persons put to it by using it as a footpath has been pushed far enough in this state, and we are not inclined to let it go any further. We are clearly of the opinion that the defendant was guilty of contributory negligence in going upon the trestle where he was in danger of being struck by a train or being forced to jump and injure himself, and that, therefore, the judgment should be reversed, and judgment here rendered for the defendant company.

We deem it unnecessary to pass upon the other assignments in the case.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Appt.,
v.

CHARLES HERALD, Resp't.

(47 Wash. 538, 92 Pac. 376.)

Sunday amusements — forbidding — property rights.

A statute providing for the punishment of any person who shall keep open any playhouse or theater on Sunday does not apply to the opening of such place for religious and other quiet, legitimate, and orderly exercises, and, therefore, unconstitutionally interfere with property rights of the owner as forbidding legitimate use of his property on that day.

(November 13, 1907.)

APPEAL by the State from an order of the Superior Court for Pierce County sustaining a demurrer to an information charging the violation of the Sunday law. Reversed.

The facts are stated in the opinion.

Messrs. H. G. Rowland and Robert M. Davis for appellant.

Messrs. McBride, Stratton, & Dalton and Ellis & Fletcher, for respondent.

Root, J., delivered the opinion of the court:

Respondent was informed against by the prosecuting attorney of Pierce county by an information charging him with having violated § 7250, Ballinger's Anno. Codes &

Note. — Keeping theater open on Sunday as a violation of Sunday laws, see case note to Topeka v. Crawford, 17 L.R.A.(N.S.) 1157.

20 L.R.A.(N.S.)

Statutes (§ 1886, Pierce's Code), which reads as follows: "Any person who shall keep open any playhouse or theater, race ground, cock pit, or play at any game of chance for gain, or engage in any noisy amusements, or keep open any drinking or billiard saloon, or sell or dispose of any intoxicating liquors as a beverage, on the first day of the week, commonly called Sunday, shall, upon conviction thereof, be punished by a fine not less than \$30, nor more than \$250. All fines collected for violation of this section shall be paid into the common school fund." A demurrer was interposed to the information, and sustained by the trial court, upon the ground that the statute was unconstitutional as being in conflict with § 12, art. 1, of the state Constitution, and § 1 of the 14th Amendment to the Federal Constitution.

It is urged by respondent that this statute prevents the opening of a theater building for any purpose whatever on Sunday; that the opening of such theater building for church, Sunday school, ordinary lecture, memorial service, or other legitimate, quiet, and proper service, would be invalid as much as if opened for the purposes of giving a theatrical play or dramatic performance; that the attempt to prevent such a building from being opened for such religious or other orderly and quiet exercises is an infringement of the rights of the individual and is consequently in contravention of the constitutional guaranties above referred to. The question depends upon the construction to be given the statute. If it be given a narrow, technical construction, respondent's position may be upheld. But, if it be given what we regard as a reasonable and a common-sense interpretation, to wit, that a theater building or playhouse should not be opened for theatrical plays or dramatic performances upon Sunday, then it is not open to the objections urged. We think it is perfectly apparent that the legislature intended by this statute to prevent the opening of theaters and playhouses on Sunday for the giving of such plays and performances, and that it had no intention of forbidding them to be opened for religious or other quiet, legitimate, and orderly exercises.

The judgment of the honorable Superior Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Fullerton, Rudkin, Mount, and Dunbar, JJ., concur. Hadley, Ch. J., and Crow, J., did not sit.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.

ALBERT E. TILLS, Respt.,
v.
GREAT NORTHERN RAILWAY COMPANY, Appt.

(50 Wash. 538, 97 Pac. 737.)

Master — vice principal — section foreman.

1. A section foreman on a railroad, having direction of the movement of a hand car used by the men, is a vice principal in having the car propelled at a reckless speed on down grade in the face of an approaching train of which he has knowledge, and suddenly applying the brake without warning when the train comes into view, so as to throw a section man from the car to his injury.

Case Note. — Section foreman as a fellow servant of the members of the crew with respect to operation of hand car.

This note is intended to be confined to cases which involve the question presented by the title; but a few cases, not involving the relationship of a section foreman to the members of the gang, have been included for the purpose of illustrating the general rule which has been followed by other cases in the same jurisdiction which are within the scope of the title. The subject will be treated from a practical standpoint rather than from a theoretical,—that is, cases in which a member of a section gang has been injured by the negligence of the foreman will be included although they merely pass upon the liability of the master for the negligence of the foreman, and there is no discussion of the theoretical question whether the foreman is a vice principal, or a fellow servant.

Cases arising under statutes which expressly provide that section bosses are not to be considered fellow servants of the members of the gang have been excluded from this note, as also have been cases which have arisen under the statutes permitting a recovery by an employee of a railroad, injured in the operation of cars by reason of the negligence of other employees, regardless of whether or not they are fellow servants.

Upon the general question of vice principalship as determined with reference to the character of the act which caused the injury, see note to Lafayette Bridge Co. v. Olsen, 54 L.R.A. 1.

Upon the general question of vice principalship considered with reference to the superior rank of a negligent servant, see note to Stevens v. Chamberlin, 51 L.R.A. 513.

As is stated in TILLS v. GREAT NORTHERN R. Co., a sharp conflict of authority exists upon this question. Not only do different courts adopt different tests to determine the relationship existing between the foreman and the members of his crew, but the 20 L.R.A. (N.S.)

Damages — personal injuries — excessive amount.

2. The reviewing court will not interfere with a verdict of \$20,000 damages for personal injuries to a man in good health, forty-three years old, earning \$2.25 per day, which dislocated a vertebra, paralyzing him from his hips down, in which condition he may reasonably expect to live out his natural expectation of life, suffering intense pain, requiring the constant attendance of a nurse, and frequent services of a physician.

(October 14, 1908.)

A PPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries al-

courts frequently differ in their conclusions, even when applying the same test to similar states of facts.

The cases may be roughly classified into two groups accordingly as they have adopted or rejected certain well-defined and established doctrines: First, cases which hold that the question whether a delinquent servant was a vice principal or a fellow servant of the injured employee is determinable by the character of the act producing the injury; second, cases which adopt the "superior-servant doctrine," and hold that all superior servants are vice principals as to those who are subject to their orders. Frequently the result is the same, regardless of the theory adopted, and it is difficult definitely to determine to which class a case belongs, as the courts frequently fail to refer the decision to one doctrine rather than to the other, where both lead to the same ultimate result. While, under the last rule, the character of the employee is definitely fixed, it will be noted that, under the first rule, a foreman may at one moment be a fellow servant of his crew, while at the next he may be a vice principal.

Doctrine that vice principalship is determined by nature of act.

Although possibly it would not be quite correct to say that this doctrine is supported by the weight of authority, yet it is adhered to by many well-considered decisions rendered in courts of the highest character. The doctrine as applied to the question under discussion is based upon the theory that the acts performed by a foreman are of two kinds; acts which the master is required to perform for the servant, and acts which the servants owe to the master. Some of the phases of this doctrine are well illustrated in Daves v. Southern Pacific Co. 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, where it was held that a railroad company was not liable for the negligent act of a section foreman in leaving a switch open after a hand car had been run upon it, thus permitting a train to run upon the

leged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. R. C. Saunders and James B. Howe, with Mr. L. C. Gilman, for appellant:

It was not a part of the master's duty to apply the brake, and the foreman in so doing was not acting as a vice principal, but as a fellow servant.

Gann v. Nashville, C. & St. L. R. Co. 101 Tenn. 380, 70 Am. St. Rep. 687, 47 S. W. 493; Justice v. Pennsylvania Co. 130 Ind. 321, 30 N. E. 303; Daves v. Southern Pacific Co. 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708; Hammond v. Chicago & G. T. R. Co. 83 Mich. 334, 47 N. W. 965; Olson v. St. Paul, M. & M. R. Co. 38 Minn. 117, 35 N. W. 866; Brunell v. Southern

Pacific Co. 34 Or. 256, 56 Pac. 129; 3 Elliott, Railroads, 2d ed. § 1319; Sroufe v. Moran Bros. Co. 28 Wash. 381, 58 L.R.A. 313, 92 Am. St. Rep. 847, 68 Pac. 896; Spancake v. Philadelphia & R. R. Co. 148 Pa. 184, 33 Am. St. Rep. 821, 23 Atl. 1006; Chicago & A. R. Co. v. Goltz, 71 Ill. App. 414; Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Grimm v. Olympia Light & P. Co. 42 Wash. 119, 84 Pac. 635; Labatt, Mast. & S. §§ 501, 501a; Donnelly v. Cudahy Packing Co. 68 Kan. 653, 75 Pac. 1017; Brown v. French, 104 Pa. 604.

The judgment recovered is so excessive that it ought not to be permitted to stand.

Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Williams v. Spokane Falls & N. R. Co. 42 Wash. 597, 84 Pac. 1129.

switch, demolish the hand car, and kill the plaintiff's intestate, who was at work on the car. A section of the Code provided that an employer was not bound to indemnify his employees for losses in consequence of the ordinary risks of the business, nor in consequence of the negligence of a coemployee, unless the master had neglected to use ordinary care in the selection of the culpable employee. The court held that the relationship of the foreman towards his employer and towards the other employees was to be determined in connection with the character of the particular act itself by which the accident was caused, and was not to be determined from the grade or rank of the section foreman. The court said: "If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or agent of his employer, for which the employer is responsible; if it was not, then they were fellow servants, and the offending servant is alone responsible. . . . It is the duty of the master to provide a suitable switch and competent servants for its operation; when he has done this, his duty is at an end and his liability ceases. The keeping of it in position and its use and operation is a duty belonging to the servant, the negligent performance of which, to the injury of another servant employed in the same general business, is a risk which the injured servant assumed when he took the employment, and for which the master is not liable. It is not denied that Bresnahan was a competent and experienced foreman, so that there was no neglect of duty by the master with respect to his selection. But the negligent act complained of was performed by him in the course of the work upon which they were all engaged, and by one who, so far as the particular act was concerned, was clearly not the agent of the master, but the fellow servant of Daves."

20 L.R.A. (N.S.)

In a number of cases, in which the facts were similar to those in *TILLS v. GREAT NORTHERN R. CO.*, the court adhered to this doctrine, but with conflicting results as to liability of the master.

Thus, in *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, it was held that the boss of a small gang of men engaged in making repairs upon a railroad was a fellow servant of a member of the gang, and not a superintendent of a separate department or branch of the business, so as to render the master liable for his negligence in suddenly applying the brake to a hand car upon which the members of the gang were riding, in consequence of which negligent act the plaintiff was thrown off the car and was run over by a second car which was closely following; and the fact that the boss did not actually handle a pick or shovel did not change the rule. The court, in holding that mere superiority of position and the power to give orders to subordinates did not make an employee a vice principal, said: "When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employees under them, vice principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent." The court, after stating that the master as such owed the servant the duty to furnish a reasonably safe place to work, reasonably safe tools with which to work, and proper diligence to employ reasonably competent servants, said: "If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but

Mr. Arthur C. Dresbach, for respondent:

The management, direction, and control being intrusted to the section foreman with power to employ men and direct their movements, he was, for that purpose, the superior and the vice principal of the defendant.

McDonough v. Great Northern R. Co. 15 Wash. 244, 46 Pac. 334; Howe v. Northern P. R. Co. 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100; Tham v. J. T. Steeb Shipping Co. 39 Wash. 271, 81 Pac. 711; Woods v. Globe Nav. Co. 40 Wash. 376, 82 Pac. 401; Nelson v. S. Willey S. S. & Nav. Co. 26 Wash. 548, 67 Pac. 237; Bateman v. Peninsular R. Co. 20 Wash. 133, 54 Pac. 996; Allend v. Spokane Falls & N. R. Co. 21 Wash. 324, 58 Pac. 244; Jancko v. West Coast Mfg. & In-

vest. Co. 40 Wash. 230, 82 Pac. 281; Morrison v. Northern P. R. Co. 34 Wash. 70, 74 Pac. 1064; Comrade v. Atlas Lumber & Shingle Co. 44 Wash. 470, 87 Pac. 517; Illinois C. R. Co. v. Josey, 110 Ky. 342, 54 L.R.A. 78, 96 Am. St. Rep. 455, 61 S. W. 703; Ft. Worth & D. C. R. Co. v. Peters, 7 Tex. Civ. App. 78, 25 S. W. 1078; Warren v. Chicago, B. & Q. R. Co. 113 Mo. App. 498, 87 S. W. 585; Taylor v. Georgia Marble Co. 99 Ga. 512, 59 Am. St. Rep. 238, 27 S. E. 768; Taylor v. Evansville & T. H. R. Co. 121 Ind. 124, 6 L.R.A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; Denver, S. P. & P. R. Co. v. Driscoll, 12 Colo. 520, 13 Am. St. Rep. 243, 21 Pac. 708; Chicago & A. R. Co. v. Euton, 194 Ill. 441, 88 Am. St. Rep. 161, 62 N. E. 784; Haworth v. Kansas City

is the neglect of the master to do those things which it is the duty of the master to perform as such."

So, in Thacker v. Chicago, I. & L. R. Co. 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605, it was held that a railroad section hand thrown from a hand car by the application of the brakes by a brakeman, without warning, on the signal of the foreman, cannot hold the railroad company liable for the resulting injuries, under a statute making an employer liable for injuries caused by negligence of a fellow servant who at the time is acting in the place and performing the duty of the employer in that behalf, the person injured conforming at the time of the injury to the order of some superior having authority to direct. The statute was declared to be merely declaratory of the common law.

And in Gann v. Nashville, C. & St. L. R. Co. 101 Tenn. 380, 70 Am. St. Rep. 687, 47 S. W. 493, it was held that, if a foreman undertakes to do the work of a section hand, and put himself in the place to do the work of such a hand, as, for instance, to apply a brake while riding on a hand car, he becomes a fellow servant as to that particular work; and his negligence in such case is that of a fellow servant, and not that of a vice principal. The court said: "An individual may act in a dual capacity, not, it is true, at the same moment and in the same act, but he may, while generally acting as vice principal and standing in the place of a master, lay aside that character and authority, and occupy, for the time being, the place and do the work of a fellow servant; and while thus engaged in the particular act he is, in the eye of the law, a fellow servant, and the principal is not responsible for his negligence."

But in Illinois C. R. Co. v. Josey, 110 Ky. 342, 54 L.R.A. 78, 96 Am. St. Rep. 455, 61 S. W. 703, the Gann Case was criticized, and it was held that a section foreman in charge of a crew on a hand car, with power to determine where the car should be stopped, is not, in the act of applying the brakes, a fellow servant of one of the crew, so as to relieve the railroad company from lia-

bility for injuries to the latter by his negligent application of the brakes. The court said: "Counsel for appellant urge in argument that, when a superior is engaged with an inferior servant in performing services ordinarily performed by the latter, he becomes a fellow servant, and the master is not liable for his negligence; that the same person may, in some things, be a superior, and in others a fellow servant, and in the latter event the master is not liable for injuries caused by his negligence. If the principle contended for by counsel is conceded to be correct, still it has no application to this case. The section foreman, Gayle, directed the movements of his force. He determined when the car should be placed upon the track and the place where it should be stopped. His duty placed him on the car, where he was when this accident occurred; and, furthermore, it was his duty to manage and control the brakes. He was not performing the duty of one of the section men in manipulating the brakes on the car, thus controlling its movements, but was performing the duty imposed upon him by reason of the fact that he was foreman of the crew, directing and controlling their movements, as well as the car. He controlled the brakes on that car as an engineer upon a locomotive engine does the air brakes upon a train. While it is not done by steam, as in the former case, he supplied the force which applied the brakes to the wheels of the car."

And this doctrine is clearly expressed in a number of cases in which it is held that a section foreman while engaged in riding on a hand car is a fellow servant of the members of the crew.

Thus, in Justice v. Pennsylvania Co. 130 Ind. 321, 30 N. E. 303, it was held that a section boss and the crew, while moving a hand car and their tools to and from the locality at which they worked, were in the discharge of a duty which they owed the master, and were therefore fellow servants. The court held that the inquiry whether two persons were or were not fellow servants at a certain period of time was not a question of rank, and said: "The ques-

Southern R. Co. 94 Mo. App. 215, 68 S.-W. 111; Atlantic Coast Line R. Co. v. Ryland, 50 Fla. 190, 40 So. 24; Kenney v. Central R. Co. 61 Ga. 590; Western & A. R. Co. v. Bryant, 123 Ga. 77, 51 S. E. 20; Brabbitts v. Chicago & N. W. R. Co. 38 Wis. 289; Mast v. Kern, 34 Or. 247, 75 Am. St. Rep. 580, 54 Pac. 950; Southern Indiana R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589; Thacker v. Chicago, I. & L. R. Co. 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605; Wallin v. Eastern R. Co. 83 Minn. 149, 54 L.R.A. 481, 86 N. W. 76; Chicago & E. I. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936.

When a superintendent, without the knowledge of the workman, negligently sets in operation an agency fraught with danger,

tion as to whether the relation of fellow servants exists in a given case is, in our opinion, determined by an inquiry into the nature of the service at the particular time in question. If, at the time the offending servant performed the act by which another servant was injured, he was in the performance of a duty which the master owed to his servants, he was not a fellow servant, for the rule is fundamental that the master cannot rid himself of the duty he owes to his servants by delegating his authority to another, and, if he attempts to do so, the person to whom he delegates the power to act is a vice principal, and not a fellow servant. . . . On the other hand, if at the time of the alleged negligence the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow servant with others engaged in the same common business, and the master will not be liable for any injury inflicted upon such fellow servant by reason of his negligence."

And in *Clarke v. Pennsylvania Co.* 132 Ind. 199, 17 L.R.A. 811, 31 N. E. 808, it was held that the common master is not liable for injuries inflicted upon a member of a section gang in consequence of the negligent use of a hand car by the boss of another section gang, as the difference in rank or power does not destroy the relationship of those in the service of a common master as coemployees, and the character of the work engaged in did not make the negligent boss a vice principal.

And in *Ohio River & C. R. Co. v. Edwards*, 111 Tenn. 31, 76 S. W. 897, it was held that a subboss or subforeman who had been directed by the boss to take three men and proceed a short distance up the track and return with a lever car and some tools was not, while so engaged, a vice principal. The true test was declared to be that a servant, in order to be a vice principal, must so stand in the place of his master as to be charged in the particular matter with the performance of a duty towards the inferior servant, which, under the law, the master

he thereby renders the company liable for the result of such negligence.

Creamer v. Moran Bros. Co. 41 Wash. 636, 84 Pac. 592; *Nelson v. S. Willey S. S. & Nav. Co.* supra; *Dosssett v. St. Paul & T. Lumber Co.* 40 Wash. 276, 82 Pac. 273; *O'Brien v. Page Lumber Co.* 39 Wash. 537, 82 Pac. 114; *Misouri, K. & T. R. Co. v. Smith*, 31 Tex. Civ. App. 332, 72 S. W. 418; *Consolidated Kansas City Smelting & Ref. Co. v. Peterson*, 8 Kan. App. 316, 55 Pac. 673; *Haworth v. Kansas City Southern R. Co.* supra; *Hollweg v. Bell Teleph. Co.* 195 Mo. 149, 93 S. W. 262; *Comrade v. Atlas Lumber & Shingle Co. and Illinois C. R. Co. v. Josey*, supra.

The duty of the foreman while in charge

owes to that servant, such as furnishing safe tools and appliances or giving orders to subordinates. In applying this test to the facts of the case, the court said: "It is not shown that the master had placed any of its servants under him, and conferred upon him authority to direct when, where, and how they were to work, or that there had been imposed upon him by the master the duty of furnishing tools or machinery, or the performance of any other duty towards such servants which, under the law, the master owed to such servants. It is not even shown in the testimony what were the duties of the main foreman, whose authority the subforeman was supposed to exercise in the absence of the former. The question is to be determined in every case, not by words and names, but by the nature and extent of the powers conferred by the master, and accepted and exercised by the superior servant."

And a section foreman while riding home from his work on a hand car was held, in *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 117, 35 N. W. 866, to be a fellow servant of the members of the gang, and, for his acts or omissions while in the discharge of his duties in the course of such employment, the defendant railroad company was not liable.

And, upon the principles enunciated in *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, cited supra, it was held in *Northern P. R. Co. v. Charless*, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848, that the negligence of the section boss or foreman in running a hand car at too high a rate of speed while carrying his gang of men is not the neglect of any duty which the master is bound to perform, but is that of a fellow servant of the members of the gang.

So, in *Sartin v. Oregon Short Line R. Co.* 27 Utah, 447, 76 Pac. 219, where a section hand was injured by the negligence of a foreman in running hand cars too close together, the *Peterson Case* was cited with approval, and followed.

So, in *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 399, 41 L. ed. 1051, 17 Sup.

of the hand car was to control the appliance provided him for operation of same.

Eidner v. Three Lakes Lumber Co. 45 Wash. 323, 88 Pac. 326; *O'Brien v. Page Lumber Co.* 39 Wash. 546, 82 Pac. 114; *King v. Griffiths-Sprague Stevedoring Co.* 45 Wash. 425, 88 Pac. 759; *Mullin v. Northern P. R. Co.* 38 Wash. 550, 80 Pac. 814; *Jancko v. West Coast Mfg. & Invest. Co.* 34 Wash. 556, 78 Pac. 78; *Sandquist v. Independent Teleph. Co.* 38 Wash. 313, 80 Pac. 539; *McDonough v. Great Northern R. Co.* supra; *D'Agostino v. Pennsylvania R. Co.* 72 N. J. L. 358, 60 Atl. 1113; *Jemnienski v. Lobdell Car Wheel Co.* 5 Penn. (Del.) 385, 63 Atl. 935; *St. Louis Southwestern R. Co. v. Pope*, 98 Tex. 535, 86 S. W. 5; *Comrade v. Atlas Lumber & Shingle Co.* supra.

Ct. Rep. 603, affirming 7 N. M. 158, 34 Pac. 536, it was held that the orders of a section foreman to a laborer who is with him on a hand car that he shall not look back to watch for a train, and assurance that the foreman himself will watch and give warning of any danger, does not make the master liable for an injury to the laborer resulting from negligence of the foreman in failing to watch for a train.

And to the same effect was *Kansas & A. Valley R. Co. v. Waters*, 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. 28, which was decided upon the authority of the United States Supreme Court decisions.

And in *Chandler v. St. Louis & S. F. R. Co.* 127 Mo. App. 34, 106 S. W. 553, it was held that the Federal rule was applicable to a case arising in Indian territory, although that rule was different from the one prevailing in Missouri.

And in *Hastings v. Montana Union R. Co.* 18 Mont. 493, 46 Pac. 264, it was held that a section hand who was injured while obeying the order of the section foreman in removing the hand car from the track by being struck by a switch engine, was a fellow servant of the foreman, although the latter had the power to employ and discharge the members of the gang and superintend their work. The court cited with approval the decisions in the United States Supreme Court cases which have been cited above.

The duty of properly placing signal flags to warn approaching trains of the locality of a hand car was held in *Whittlesey v. New York, N. H. & H. R. Co.* 77 Conn. 100, 107 Am. St. Rep. 21, 58 Atl. 459, to be the duty of the servants of the company, and consequently it was not liable for injuries to a section hand caused by the negligence of the foreman in failing so to place the flags. The court said: "The defendant provided a suitable hand car, properly equipped with signal flags and a sufficient number of competent men for the proper performance of the work. Having done this, it was not required to see that the flag was used when necessary. That was the duty of the servants, the negligent failure of Dwyer 20 L.R.A. (N.S.)

In the computation of damages plaintiff was entitled to include wages, suffering of pain in the past and future, expenditure because of such injuries during the past and the future, and deformity in consequence.

Cole v. Seattle, R. & S. R. Co. 42 Wash. 462, 85 Pac. 3; *McDonough v. Great Northern R. Co.* supra; *Morrison v. Northern P. R. Co.* 34 Wash. 70, 74 Pac. 1064; *Melse v. Alaska Commercial Co.* 42 Wash. 356, 84 Pac. 1127; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518.

Crow, J., delivered the opinion of the court:

This action was commenced by Albert E. Tills against the defendant, Great Northern Railway Company, to recover damages for

[the foreman] to perform which was the negligence of a fellow servant of Sullivan [the plaintiff's intestate], for the consequences of which the defendant is not liable."

In some cases it has been held that in giving orders to men, or in hiring or discharging them, a section foreman is acting for the master, and is not a fellow servant.

Thus, in *Justice v. Pennsylvania Co.* supra, it was held whether the relationship of fellow servant exists in a given case depends on the nature of the service being performed at the particular time. The court said: "That a section foreman may be a vice principal is not doubted. In this case he was a vice principal in the matter of hiring and discharging hands, for the master owes it as a duty to exercise reasonable care not to employ any but careful men, and to discharge those who prove to be negligent. In the hiring and discharging of the men he was in the performance, therefore, of a duty which the master owed to his servants, and was, while so engaged, a vice principal."

And in *Logan v. North Carolina R. Co.* 116 N. C. 940, 21 S. E. 959, it was held that a section boss, who had full power and authority to hire and discharge hands, and whose orders and commands the plaintiff, who was a section hand, was bound to obey, was not to be deemed a fellow servant of the plaintiff, when, by his failure to stop a hand car on time, and by his carelessness in directing the manner of its removal from the track in front of an approaching train, he caused the plaintiff to be injured. And this decision was followed in *Johnson v. Southern R. Co.* 122 N. C. 955, 29 S. E. 784, where it was said that, while in the broad and catholic meaning of the word a section boss and a section hand were fellow servants, still the boss was the vice principal of the plaintiff, and the defendant was liable for his negligence. And to the same general effect was the decision in *Allison v. Southern R. Co.* 129 N. C. 336, 40 S. E. 91.

So, in *Lake Shore & M. S. R. Co. v. Litz*, 18 Ohio C. C. 646, it was held that the section foreman in charge of the men was the responsible representative of the railway company.

personal injuries. From a judgment in his favor, the defendant has appealed.

The cause was submitted upon evidence offered by the respondent, the arguments of his counsel, and the instructions of the court. The undisputed evidence shows that, a short time prior to the date on which the accident occurred, the respondent was employed by one Ward, a section foreman, to work for appellant as a section hand; that from Index, Washington, west to the place where the accident occurred, appellant's railway track, with a descending grade, followed the right bank of the Skykomish river, a mountain stream; that curves, bluffs, and timber concealed approaching trains; that respondent and other section hands under Ward's direction loaded a hand car with

crowbars, jackscrews, shovels, and other tools, and, with Ward in charge, started westward thereon down grade; that respondent, standing between two section men, was riding backwards, while Ward, with two other section hands, stood facing him; that respondent stood with one foot on the car platform and the other upon a jackscrew; that all the men, including Ward, were propelling the car by using a handle bar provided for that purpose; that Ward, expecting to meet a freight train coming from the west, was anxious to reach his destination before its arrival; that he therefore caused the men to propel the car at a speed of 17 miles per hour, repeatedly giving the order, "Up and down," thereby directing its movements; that, on rounding a sharp

And in *Couch v. Charlotte, C. & A. R. Co.* 22 S. C. 557, it was held that a foreman in charge of a gang of men might be a vice principal while directing the movements of a push car; but, upon the facts of the case, it was held that the foreman did not fail in any duty which he owed to the plaintiff. The court said: "The true test is whether the person in question is employed to do any of the duties of the master: if so, then he cannot be regarded as a fellow servant or co-laborer with the operatives, but is the representative of the master; and any negligence on his part in the performance of the duty of the master, thus delegated to him, must be regarded as the negligence of the master."

So, in *Illinois C. R. Co. v. Atwell*, 198 Ill. 200, 64 N. E. 1095, it was held that, although a section foreman and one of the hands are fellow servants in many respects, yet, as to the exercise of authority one over the other, they are not fellow servants; and a railroad company is liable for injuries to a section hand while attempting to obey an improper command of the foreman to remove a car from the track in front of an approaching train.

Under this doctrine, also, the railroad has been held liable for the negligence of a foreman in failing to provide a safe car, as it was the master's duty to furnish the members of a crew a safe place to work.

Thus, in *Ward v. Louisville & N. R. Co.* 23 Ky. L. Rep. 1326, 65 S. W. 2, it was held to be the duty of a section foreman to inspect the hand car and see that it was safe; and, if he failed in this regard, and one of the crew was injured while riding on it because of its unsafe condition, the company would be liable for the injury. And to the same general effect was the decision in *Illinois C. R. Co. v. Leisure*, 28 Ky. L. Rep. 768, 90 S. W. 269.

And in *Missouri, K. & T. R. Co. v. Wilhoit*, 6 Ind. Terr. 534, 98 S. W. 341, the court applied the following rule from *Thompson, Neg.* ¶ 4445, which exactly met the facts of the case: "Under the principles of this chapter, if a railway company fails to exercise reasonable care and skill in pro-

viding and maintaining hand cars which are reasonably safe and free from dangerous defects, in consequence of which failure of duty to their employees, required to use such cars, are injured, they will be liable to them in damages; nor will the fact that the section foreman in charge of the hand car, whose duty it was to keep it in repair, was a fellow servant of the servant sustaining the injury, avert the liability of the company, since the proper inspection and reparation of such cars is one of the absolute duties which the law puts upon the master in favor of his servants."

In a few cases the language would seem to indicate that the court considered that, under no circumstances, could a section foreman be held to be a vice principal; or at least the court does not discuss the question whether the liability of the railroad is determinable by the nature of the act of the negligent foreman.

Thus in *Barringer v. Delaware & H. Canal Co.* 19 Hun, 216, the section boss, Brown, had charge of and was responsible for the tools and machinery used, hired the men, and, if machinery gave out or was defective, he was ordered to take it to the shop and have it repaired. He failed to give notice to the track master, as he was required to do, of a defect in the hand car through which the plaintiff, a section hand, was injured. The court, in holding that the railroad company was not liable, said: "Under such a state of facts, we think that the learned judge erred in holding that Brown represented the defendant and stood in its place. Brown was an employee just as plaintiff was. They were in the same circle of employment; they worked together for a common purpose. Each knew his relations to the other when the employment began, and each took the risks attending the same. The negligence of either was one of these risks. That Brown was foreman, and directed the action or hired the others, does not change the rule. Perhaps the track master did represent the defendant. We are not called upon to decide that. Possibly no one below the superintendent stood in the place of the defendant in respect to the mat-

curve, Ward saw the approaching freight train, and placed his foot upon the brake so suddenly as to instantly check the car, without any warning to respondent or the other men; that at the same instant he called out, "The freight!" and that, by reason of the sudden stop, the respondent, taken unawares, was thrown to the ground in front of the car, which ran over and severely injured him.

The appellant has based numerous assignments of error upon instructions given and refused. It is unnecessary to state these instructions, as appellant's controlling contention is that the act of Ward which resulted in the injury to respondent was not the act of a vice principal, but the act of respondent's fellow servant, for which ap-

pellant is in no manner liable. It insists that Ward's relation to appellant and the other men was only that of a "supervising employee;" that in a portion of his duties he represented the master; that in others he acted as a collaborer with the section men; that, while in the performance of the former he was a vice principal, he was in the performance of the latter a fellow servant; and that the relation of Ward to the other employees of appellant in this case must be determined by the nature of the acts he and they performed. In substance, the appellant contends that, while aiding the section men in propelling the car, and when he himself applied the brake, Ward was their fellow servant, and not a vice principal, representing the master. In sup-

ter in dispute. It is enough that two officers of a superior grade stood between Brown and the defendant, either of whom presumptively could have hired or discharged Brown at will. So Brown's position was that of an employee, and not a representative of the company."

And in *Clifford v. Old Colony R. Co.* 141 Mass. 564, 6 N. E. 751, it was held that the foreman of a section gang on a railroad, by whose negligence in the management of a hand car one of the section hands upon it was injured in a collision, was a fellow workman with the injured person, for whose negligent act the company was not liable.

So, in *Timm v. Michigan C. R. Co.* 98 Mich. 226, 57 N. W. 116, where the plaintiff, a section hand, was injured while engaged with a section boss and others of the gang in loading ties onto a hand car, it was held that a section boss and the gang were fellow servants; but there is no discussion of the question whether they are such at all times.

In *Hammond v. Chicago & G. T. R. Co.* 83 Mich. 334, 47 N. W. 965, the court, without passing upon the question whether, under all circumstances, a section boss must be considered as the fellow servant of the men working under him, so as to relieve the common employer from liability for his negligence, held that, where the sole act of negligence relied on was participated in and voluntarily consented to by the person injured, with full knowledge of the peril, the question of the master's liability does not arise.

Doctrine that vice principalship is dependent on rank.

In a number of cases falling within the scope of this note the result has been determined by application of the doctrine that any employee holding a superior position is, as to those subordinate to him, a vice principal.

Thus, in *Long v. Illinois C. R. Co.* 113 Ky. 806, 58 L.R.A. 237, 101 Am. St. Rep. 374. 68 S. W. 1095, it was held that it was the duty of a member of a section gang 20 L.R.A. (N.S.)

to obey the orders of the section foreman, and the latter represented the master. The court said: "The section foreman under whose direction he worked represented the master, and it was Long's duty to obey his orders in the usual course of business. . . . In determining whether Long should have obeyed the orders of his superior, it must be borne in mind that the crew were out on the road, and that, if Long had not obeyed, he could not have remained with the crew. . . . It was the section boss's duty to control the movements of the crew, and to do this with proper regard to their safety." And this decision was cited with approval, and followed, in *Illinois C. R. Co. v. McIntosh*, 118 Ky. 145; 80 S. W. 496, rehearing denied in 118 Ky. 156, 81 S. W. 270, and *Louisville & N. R. Co. v. Bishop*, 28 Ky. L. Rep. 321, 89 S. W. 221.

And in *Criswell v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 798, 6 S. E. 31, it was held that, when a railroad company puts a foreman in charge of a gang of laborers with power to discharge them subject to the approval of the supervisor, and makes it his duty to see that these laborers faithfully perform their duty, such foreman must, in the performance of all his duties to those laborers under him, be regarded as the representative of the railroad company; and if, through his neglect or duty, one of these laborers, while riding on a hand car in the performance of his duty, is injured, he may recover of the railroad company the damages he has sustained, caused by the negligence of such foreman.

And the *Criswell* Case was cited with approval, and followed, in *Gregory v. Ohio River R. Co.* 37 W. Va. 806, 16 S. E. 819.

In *Petty v. Atlantic & B. Air Line R. Co.* (Ga.) 63 S. E. 817, it was assumed without question that the railroad company would be liable to the section hand for injuries received on a hand car through the negligence of the foreman.

In Missouri the courts have consistently adhered to the superior-servant doctrine.

Thus, in *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588, the general rule is declared

port of this contention, the appellant has cited with others the following cases from courts of other states upon which it specially relies: *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 380, 70 Am. St. Rep. 687, 47 S. W. 493; *Justice v. Pennsylvania Co.* 130 Ind. 321, 30 N. E. 303; *Daves v. Southern Pacific Co.* 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708; *Hammond v. Chicago & G. T. R. Co.* 83 Mich. 334, 47 N. W. 965; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 117, 35 N. W. 866. A sharp conflict of authority exists on this question; a contrary position, having been taken by other courts. In *Haworth v. Kansas City Southern R. Co.* 94 Mo. App. 215, 224, 68 S. W. 111, 114, on a state of facts strikingly similar to those before us, the court said: "A superior or vice

principal in charge of workmen does not become a coworkman whenever he actively assists in the manual performance of a task, instead of superintending it. If he chooses to take on himself the role of laborer, he may do so, but he does not thereby divest himself of his responsibility as foreman or superintendent and his duty to see that work is done in a careful way. The judgment and care which he must use as superintendent to see that precautions are taken to avoid harm to his gang continue to be exacted of him by the law, although he may have stepped down from his pedestal for an interval. *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L.R.A. 823, 20 S. W. 472; *Dayharsh v. Hannibal & St. J. R. Co.* 103 Mo. 570, 23 Am. St. Rep. 900, 15 S. W. 554;

to be that all are fellow servants who are engaged in the prosecution of the same common work, leaving no dependence upon or relation to each other, except as collaborators without rank, under the direction and management of the master himself, or of some servant placed by the master over them. If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employee, as to that service, stands in the master's stead, with relation to other persons.

And, following this rule, it was held in *McDermott v. Hannibal & St. J. R. Co.* 87 Mo. 285, that a section foreman with authority to direct and control the men under him was not their fellow servant.

So, in *Haworth v. Kansas City Southern R. Co.* 94 Mo. App. 215, 68 S. W. 111, the court, in speaking of a section foreman through whose negligence a section hand was injured, said: "A superior or vice principal in charge of workmen does not become a coworkman whenever he actively assists in the manual performance of a task, instead of superintending it. If he chooses to take on himself the role of laborer, he may do so; but he does not thereby divest himself of his responsibility as foreman or superintendent and his duty to see that work is done in a careful way. The judgment and care which he must use as superintendent to see that precautions are taken to avoid harm to his gang continue to be exacted of him by the law, although he may have stepped down from his pedestal for an interval. . . . He was selected by the defendant company to direct the operation and movement of the car, as well as to control the other work of the hands under him. He was in fact directing them, and the company is liable for his negligent act or omission while so doing."

In *Mack v. Chicago, R. I. & P. R. Co.* 123 Mo. App. 531, 101 S. W. 142, where a section hand was injured while riding from his work, by the sudden application of the brakes by the foreman, upon his discovery of the approach of a train which he knew was overdue but against the dangers from

which he had taken no precaution, it was held that, in sending the plaintiff and his fellows out to work under the direction of a foreman, the company committed to its vice principal the performance of its duty to exercise reasonable care for his protection.

And in *Schroeder v. Chicago & A. R. Co.* 108 Mo. 322, 18 L.R.A. 827, 18 S. W. 1094, it was held that a foreman is not a fellow servant of a man under his orders, in respect to his performance of the master's duty of directing the work in his charge.

So, in *Warren v. Chicago, B. & Q. R. Co.* 113 Mo. App. 498, 87 S. W. 585, it was held that a section hand temporarily placed in charge of a hand car for the purpose of carrying a number of the hands home from their work was a vice principal; and the company was liable for injuries resulting to one of the members of the gang from his negligent acts in the running of the car.

And in *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L.R.A. 823, 20 S. W. 472, it was held that the railroad company was liable for the acts of a section foreman in negligently loading a hand car, which negligence caused injury to the plaintiff; the foreman was charged with the master's duty of reasonable care for the safety of the workman. And to the same general effect were the decisions in *Clowers v. Wabash, St. L. & P. R. Co.* 21 Mo. App. 213, *Banks v. Wabash Western R. Co.* 40 Mo. App. 458, and *Doss v. Missouri, K. & T. R. Co.* (Mo. App.) 116 S. W. 458.

In Texas the following test as to who are fellow servants was laid down in *Missouri P. R. Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867, 12 S. W. 835 (which was a case of a car repairer injured by the negligence of his foreman): "The employee who has charge of a special department of a company's business with power to employ and discharge the servants in his department is not to be deemed the fellow servant of those under his control. . . . A servant who has the authority to employ other servants under his immediate supervision exercises an important function of his master, and has as full control over them as the master

Steube v. Christopher & S. Architectural Iron & Foundry Co. 85 Mo. App. 646. Dyson was Haworth's superior, and the superior of all the men in his crew. He was selected by the defendant company to direct the operation and movement of the car as well as to control the other work of the hands under him. He was in fact directing them, and the company is liable for his negligent act or omission while so doing." In *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 292, 27 Am. Rep. 510, the supreme court of Ohio said: "The claim that Stone was a fellow servant engaged in the same service with Kraft is not supported by the proof. It is true that he was in the service of the same master, and engaged in the same general employment, but he was intrusted with duties and responsibilities of entirely a different nature, and wholly independent of those of Kraft. Occupying to the latter the relation substantially of principal, he was in no just or proper sense a fellow servant, nor engaged in what may properly be denominated a common service. The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this

court, and now firmly settled in the jurisprudence of the state, that, where one servant is placed by his employer in a position of subordination to and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury." In *Bien v. St. Louis Transit Co.* 108 Mo. App. 399, 412, 83 S. W. 986, 989, the court said: "The act of Dring which resulted in Bien's injury was not an act which it was Dring's duty manually to perform, but one which it was his duty to order; that is to say, it fell within the scope of his superintendence. The exact question then is: Did performance of it by his own hand make him a fellow servant? If it is to have a logical nature, the 'dual-capacity' doctrine would seem to require that an employee who is regarded as both a fellow servant and a vice principal should have duties assigned to him in each role. The doctrine ought not to take effect on the bare incident of a superintendent, *sua sponte* and momentarily, putting his hand to some chore. . . . If Dring, instead of running the car out of the way

would have were he present acting in person."

And in *Sweeney v. Gulf, C. & S. F. R. Co.* 84 Tex. 433, 31 Am. St. Rep. 71, 19 S. W. 555, the rule of the *Williams Case* was adhered to, and the foreman of a section gang was held to be a vice principal, and not a fellow servant, of one of the section hands; and the court further held that, the relationship of vice principal being established, no distinction should be drawn between the performance of those higher duties intrusted to him specially and those of an ordinary character, which both he and the subordinate servants and employees under him were in the habit of indiscriminately performing.

So, in *Gulf, C. & S. F. R. Co. v. Wells* (Tex.) 16 S. W. 1025, reversed on other grounds on rehearing in 81 Tex. 685, 17 S. W. 511, where a section hand was injured by a hand car which the foreman knew to be defective, the court, in holding that the foreman was a vice principal, said: "When a master intrusts his business to another, with power of supervision and control in a particular line of service, with a power to employ and discharge hands whose services are needful in the exercise of the duties incident to the service, it can safely be said that such person is the representative of the master, and is not a fellow servant of those under him in the service."

And the same general rule has been followed in several other Texas cases. *Cane Belt R. Co. v. Crosson*, 39 Tex. Civ. App. 369, 87 S. W. 867; *International & G. N. R. Co. v. Arias*, 10 Tex. Civ. App. 190, 30 S. W. 446; *Missouri P. R. Co. v. James* (Tex.) 10 S. W. 20 L.R.A. (N.S.)

332; *International & G. N. R. Co. v. Tisdale*, 39 Tex. Civ. App. 372, 87 S. W. 1063; *Galveston, H. & S. A. R. Co. v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362; *International & G. N. R. Co. v. Pina*, 33 Tex. Civ. App. 680, 77 S. W. 979; *International & G. N. R. Co. v. Garcia* (Tex. Civ. App.) 117 S. W. 206.

Statutory provisions.

Under Alabama statutes making the master liable for injuries to a servant, caused by the negligence of another servant to whom "any superintendence" has been intrusted, there are a number of decisions which hold directly or by implication that a railroad company is liable for injuries to a member of a section gang, caused by the negligence of a section boss while operating a hand car. *Highland Ave. & Belt R. Co. v. Dusenberry*, 98 Ala. 239, 13 So. 308; *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, second appeal in 121 Ala. 113, 25 So. 814, third appeal in 133 Ala. 664, 31 So. 1035; *Alabama Mineral R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135, second appeal in 128 Ala. 355, 30 So. 679; *Central R. Co. v. Lamb*, 124 Ala. 172, 26 So. 969; *Western R. Co. v. Arnett*, 137 Ala. 414, 34 So. 997.

So, also, in *St. Louis, I. M. & S. R. Co. v. Rickman*, 65 Ark. 138, 45 S. W. 56, it was held that, under the statutes of that state, a foreman of a section gang is not a fellow servant of the men belonging to the gang under him, for the reason that they are under his control and direction in the performance of their duties.

himself, contrary to his duty and habit, had ordered another man to do it, the company's liability would be certain. Is it any less certain because Dring ran it; it being, as stated, a duty which properly he should have ordered instead of performing? Unquestionably not according to decisions in Missouri on identical facts." See also *Russ v. Wabash Western R. Co.* supra; *Chicago & E. I. R. Co. v. Kimmel*, 221 Ill. 547, 77 N. E. 936. It cannot be contended that Ward was not in charge of the men; that he did not control the car, its movements, and speed; that he did not determine when it should be used, when it should start, what speed it should attain, or when and where it should stop. In the performance of these necessary duties he was a vice principal. It was under his direction that the car attained a reckless and dangerous rate of speed down grade and in the face of an approaching train, of which he had knowledge. Had he ordered one of the men to suddenly stop the car, without any warning to or knowledge of the others, his act would certainly have been that of a vice principal, and not that of a fellow servant. We fail to see that he changed his relation to the appellant or respondent by personally applying the brake, instead of directing one of the men to do so. If he was not a vice principal in charge of the men and car, then they were without any vice principal in control as the representative of the master, a condition which could not be assumed to have existed and certainly ought not to have been tolerated. The former holdings of this court, made in kindred cases, are directly contrary to the position of appellant and the cases which it has cited. See *McDonough v. Great Northern R. Co.* 15 Wash. 244, 46 Pac. 334; *Nelson v. S. Willey S. S. & Nav. Co.* 26 Wash. 548, 67 Pac. 237; *O'Brien v. Page Lumber Co.* 39 Wash. 537, 82 Pac. 114; *Woods v. Globe Nav. Co.* 40 Wash. 376, 82 Pac. 401; *Dossett v. St. Paul & Tacoma Lumber Co.* 40 Wash. 276, 82 Pac. 273; *Comrade v. Atlas Lumber & Shingle Co.* 44 Wash. 470, 87 Pac. 517. In the case last mentioned an engineer, without giving the usual warning, started the machinery in a sawmill while the plaintiff, a saw filer who was performing his duties, was in a dangerous position. It was contended that the negligence of the engineer was that of a fellow servant, but this court said: "It was customary for the appellant, by its engineer, to give a signal by two blasts of a steam whistle shortly before starting the mill, and in fact it was its duty to give some such warning so that its employees might remove themselves from positions of danger in which they might happen to be placed. In giving this warning the engineer was per-

20 L.R.A. (N.S.)

forming a nondelegable duty of the master, thus discharging the duties of its vice principal. This being true, his negligence was that of the master." Appellant also cites *Grimm v. Olympia Light & P. Co.* 42 Wash. 119, 84 Pac. 635, in support of its contention that Ward and the respondent were fellow servants. The facts in that case are not at all similar to those now under consideration. There two motormen were co-employees without authority the one over the other, although they were expected to consult together, while here Ward had undoubted authority, superintendence, and control over the respondent, Tills. It could not be reasonably contended that Tills had any connective or controlling influence over Ward arising out of consociation of duties. He was completely under Ward's commands, and it is not at all doubtful that any attempt on his part to assume control over Ward or give him directions would have resulted in loss of employment, a result not possible in the *Grimm Case*. After a careful examination of all instructions, both those requested and those refused, upon which the appellant has predicated its assignments of error, we hold that those given correctly stated the law applicable to the pleadings and evidence, and that no error was committed in the refusal of those requested.

The jury returned a verdict for \$26,985 damages. Upon the hearing of appellant's motion for a new trial, the trial court required the respondent to remit \$6,985 thereof, or submit to a new trial. This remission being made, final judgment was entered for \$20,000. The appellant now contends that the judgment is still excessive, that it should not be permitted to stand, and that this court should now grant a new trial by reason of excessive damages awarded under the influence of passion and prejudice. The undisputed evidence shows that the respondent was forty-three years of age, in good health, earning \$2.25 per day; that he was most seriously injured; that the loaded car ran over him, dislocating a vertebra; that he is paralyzed from his hips downward; that he has completely lost control of his bowels, urinary and other organs; that he has been confined to his bed since the accident, and will be during the remainder of his life; that he has sustained other injuries; that he has suffered and will continue to suffer intensely; that his condition is such as to require the constant attendance of a nurse and the frequent services of a physician; and that, although he is in this unfortunate condition, he may live the expected period for a man of his age. He is absolutely helpless, and it is difficult to understand how he could be more seriously injured and continue to live. There is no dis-

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pute of the evidence of respondent and his physician as to the nature or extent of his injuries. Bearing in mind the fact that the trial court has already made a reduction of \$6,985, we do not feel justified in disturbing the judgment or holding it excessive.

The appellant has also based an assignment of error upon the refusal of the trial court to grant it a continuance upon its motion made at the opening of the trial, and supported by affidavits. We have carefully examined the motion and affidavits, but fail to find that the court abused its discretion or committed any error in this regard.

The judgment is affirmed.

Hadley, Ch. J., and Dunbar, Rudkin, and Fullerton, JJ., concur. Mount and Root, JJ., took no part.

WISCONSIN SUPREME COURT.

JONATHAN S. ELLIS, Plff. in Err.,
v.

STATE OF WISCONSIN.

(— Wis. —, 119 N. W. 1110.)

Banks — insolvency — deposit — check as money.

1. If a person deposits in a bank for his credit a check, and it is presently treated between such person and such bank as money, the former obtaining credit upon which he may, at his pleasure, draw for

Headnotes by MARSHALL, J.

Case Note. — *When is a bank insolvent within statute making it an offense to receive further deposits.*

Aside from ELLIS v. STATE and the cases therein cited, very little authority has been found on the question here annotated. and those found contrary to the ELLIS CASE seem to have adopted what is called the bankruptcy rule.

Thus, in State v. Stevens, 16 S. D. 309, 92 N. W. 420, under a statute providing for the punishment of a bank officer upon his receipt of a deposit after the bank's insolvency, it was held that the term "insolvent" means a present inability to pay depositors as banks usually do, and meet all liabilities as they become due in the ordinary course of business.

This criterion would also seem to be recognized in State v. Sattley, 131 Mo. 464, 33 S. W. 41, where it was held that, on the trial of a bank officer for receiving deposits knowing that the bank was insolvent, evidence that depositors demanded their money, and of the refusal of the bank employees to pay them, is competent to show the failure of the bank to meet its obligations in the ordinary course of business; and this is true whether the defendant personally heard the demands or not.
20 L.R.A. (N.S.)

money, § 4541, Stat. 1898, is satisfied, as regards a deposit of money.

Same — officer — indictment — sufficiency.

2. A charge in an indictment or information under such section, that a particular person deposited in a specified bank, for his credit, a check on another bank, and that it was received for the bank by its president, naming him, and accepted on deposit, satisfies all the essentials of such section as to an officer of a bank, in his capacity as such officer, accepting or receiving money on deposit.

Same — insolvency — deposit — officer — status.

3. In case of an officer of a bank accepting for such bank money of another to be, and which is, deposited for his credit, to be, at his pleasure, drawn on, the status of such officer, as regards § 4541 of the Statutes of 1898, is thereby fixed regardless of whether the depositor owes the bank on paper, due to and which does mature shortly so as to absorb the deposit, in part, before the bank is forced to suspend.

Same — discharging overdraft.

4. In case of a person depositing money in a bank as against an existing overdraft, so far as it goes in discharge of such indebtedness, it is not a deposit within the meaning of § 4541, Stat. 1898.

Same — receiving deposits — what constitutes.

5. The call of the statute, as regards the act constituting a criminal fraud, is a deposit such as will create a credit; the relation of debtor and creditor between the parties, or that of bailor and bailee, or that of principal and agent.

The question also came up in State v. Darrah, 152 Mo. 522, 54 S. W. 226, the court in this case approving State v. Burlingame, 146 Mo. 227, 48 S. W. 72, which was quoted, as holding, in effect, that, within a statute making it a criminal offense for an officer of a bank to receive deposits after he has knowledge of the fact that it is insolvent or in failing circumstances, a bank is in failing circumstances when, from any cause, it is unable to pay its debts in the ordinary or usual course of business; and that the fact that this condition may have been produced by a "financial panic" affords no justification or excuse for the receipt by its president of deposits knowing the bank to be in failing circumstances.

The other cases in point on this question are sufficiently set forth in the opinion in ELLIS v. STATE.

Cases defining the term "insolvency" with respect to the administration of bankruptcy and insolvency laws, and as used in civil cases, are not intended to be included within this note.

On the general question of criminal liability for receiving deposit in bank knowing of its insolvency, see subject note to Com. v. Junkin, 31 L.R.A. 124.

Evidence — reputation — financial responsibility — relevancy.

6. Evidence of the reputation of a person as regards financial standing is relevant.

Same — commercial paper — value — relevancy.

7. Evidence of the value of commercial paper, based wholly on ignorance of the witness as to whether the maker possesses any property liable to execution, is not relevant on the subject of the solvency of the maker.

Same — presumptions — rebutting.

8. "When the existence of a person, a personal relation, or state of things, is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question."

Same — retroactive presumptions.

9. No presumption is raised in the manner aforesaid which is materially retroactive.

Same — insolvency.

10. Proof of insolvency at a particular time does not create a presumption that the same condition existed at any considerable time anterior thereto; nor is it evidentiary of such condition at a time very remote to that to which the evidence is directed.

Circumstantial evidence — insolvency — relevancy.

11. Proof that a person was insolvent at a particular time, by means of judgments against him shown at such time to be uncollectible, is circumstantial evidence that he was insolvent six months or more prior thereto, especially in case of his having, shortly after the earlier date, transferred his property for the purpose of securing payment of his obligations, and is not irrelevant.

Same — retroactive effect.

12. Within reasonable limits under reasonable circumstances, proof of insolvency of a person at a particular date as circumstantially bearing on like insolvency at an earlier date is relevant.

Appeal — insolvency — circumstantial evidence — admission by trial court review.

13. Whether evidence of the nature mentioned in the last foregoing is relevant or not raises, primarily, a question of competency, in which field the decision of the trial court should not be disturbed on appeal unless clearly wrong.

Circumstantial evidence — insolvency — relevancy.

14. In the situation suggested in the last foregoing, if the prior date under all the circumstances is too remote to permit of the circumstance of insolvency at the later date have reasonably any evidentiary significance, it is irrelevant.

20 L.R.A. (N.S.)

Banks — insolvency — officers — bank as creditor — transfer of property to bank — effect.

15. In case officers of a bank are largely indebted thereto, and possess property interests in a corporation to a very significant amount as compared to such indebtedness, and they convey such property to the bank on account of such indebtedness, pursuant to an understanding of long standing, the situation before the conveyance should be regarded substantially the same as that thereafter, as regards the mental state of such officers respecting the condition of the bank as to solvency.

Same — nondebtor officers — transfer to bank — effect.

16. In the situation in the last foregoing, the fact that some of the officers, equally interested in the bank and the outside property mentioned, are not debtors of the bank, but have, nevertheless, agreed with their associates to join in conveying such property to strengthen it as to paper on which they were not liable, creating a moral obligation only to so join, which obligation the other officers have good reason to suppose will be, and in fact is, redeemed, does not militate against the outside interest of such nondebtor officers being considered by the others, before the transfer, on the question of whether the bank is solvent.

Same — "unsafe or insolvent" — construction.

17. The words "unsafe or insolvent" in § 4541, Stat. 1898, are used therein as legal equivalents.

Same.

18. The term "unsafe or insolvent" as used in § 4541, Stat. 1898, does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business.

Same — definition.

19. The term mentioned means insolvent in the broad general sense of a deficiency of one's assets in realizable cash available within a reasonable time, treated as an ordinarily prudent person would generally conduct his business under the same or similar circumstances, to pay his liabilities.

Same.

20. A bank is unsafe or insolvent, within the meaning of the statute, when the cash value of its assets, realizable in a reasonable time, in case of liquidation by its proprietors as ordinarily prudent persons would ordinarily close up their business, is not equal to its liabilities, exclusive of stock liabilities.

(March 9, 1909.)

ERROR to the Circuit Court for Eau Claire County to review a judgment convicting defendant of having received money into a bank for the credit of the depositor with knowledge or good reason to

know that the bank was unsafe or insolvent, contrary to Statute. Reversed.

Wis. Stat. 1898, § 4541, provides that "any officer, director, stockholder, cashier, teller, manager, messenger, clerk, or agent of any bank, banking exchange, brokerage, or deposit company, corporation, or institution, or of any person, company, or corporation, engaged in whole or in part in banking, brokerage, exchange, or deposit business in any way, or any person engaged in such business in whole or in part, who shall accept or receive, on deposit, or for safe-keeping, or to loan, from any person, any money, or any bills, notes, or other paper circulating as money, or any notes, drafts, bills of exchange, bank checks, or other commercial paper for safe-keeping or for collection, when he knows, or has good reason to know, that such bank, company, or corporation, or that such person, is unsafe or insolvent, shall be punished by imprisonment in the state prison not more than ten years nor less than one year, or by fine not exceeding \$10,000."

Statement by Marshall, J.:

Writ of error to the circuit court for Eau Claire county to review a conviction for the offense of receiving money into a bank for the credit of a depositor with knowledge, or good reason to know, that the bank was unsafe or insolvent, contrary to § 4541, Stat. 1898.

The accused, during the time stated in the indictment, was president of the Security Savings Bank, a duly organized banking corporation under the laws of this state, located at Ashland, Wisconsin.

The indictment contained three counts, each for a violation of § 4541, aforesaid. The first was for receiving into the bank January 29, 1904, of A. L. Goodman, \$125, in lawful money for his credit. The second was for so receiving February 2, 1904, a check for \$1,000 of that value for credit of A. Donald. The third was for so receiving February 8, 1904, money and bank checks of the value of \$59.65 from W. T. Briggs for his credit.

As to each alleged violation of law, it was charged the accused received the deposit as president of the bank, knowing, or having good reason to know, that the bank was unsafe and insolvent.

The case was duly tried on a plea of not guilty. Questions discussed in the opinion were in due form saved for review.

The bank was duly incorporated September 10, 1903, as successor to a banking business previously conducted by a partnership composed of the accused, his brother E. H. Ellis, and his sisters, Danielia Loranger and 20 L.R.A. (N.S.)

Augusta Kennedy. Prior to such date the capital was \$20,000 and business was dominated by the accused, he being supposed by the public to be substantially the sole owner. In the new organization the four persons named took the stock in equal proportions, except one share taken by Ellis Kennedy, son of Augusta Kennedy. The stock was fixed at \$50,000. The corporation started business with a duly approved paid-up capital of that amount. All assets of the private bank were turned over to the new organization, and it assumed the liabilities. From the time of the new organization to the time it closed, February 13, 1904, by reason of general disturbed financial conditions, some special local disturbances and other causes, patrons of bank withdraw credits to the extent of about one third, the deposits being reduced from \$162,560.97, to \$107,000, or thereabouts. Prior to the day named the proprietors partially arranged to borrow on assets of the bank \$35,000, thinking that amount would tide over the difficulties, but, before concluding to secure the money, a consultation was had with the bank examiner, who, after an examination of the affairs of the bank, approved of its continuing, if, in the judgment of the proprietors, the \$35,000 would so strengthen the reserves as to provide against a continuation of the reduction of deposits. Not feeling certain in that respect, the proprietors concluded to go into liquidation, and the bank was closed accordingly, control of it being turned over to the bank examiner. At such time the amount of assets was \$231,006.05, and liabilities other than to stockholders \$108,270.46. The assets of the bank on February 3, 1904, and for a considerable period prior thereto, consisted of commercial paper around \$75,000 in amount, which depended, for its value, in the main, upon responsibility of the accused, E. H. Ellis and Ellis S. Kennedy, real-estate mortgage security as to Kennedy's indebtedness and a moral obligation hereafter explained as to some indebtedness of George C. Loranger. Of this paper \$6,300 was the obligation of George C. Loranger, on which the accused was liable as an indorser, \$1,100 was paper of one Holbrook, son-in-law of the latter, and \$12,500 of E. S. Kennedy, son of Augusta Kennedy. On such day the stockholders of the bank were proprietors of the stock of the Bay City Land Company in the same proportion as they were of the stock of the bank. Danielia Loranger, one of such stockholders, had verbally promised to convey her interest in the land company to the bank to care for the indebtedness of her husband to the bank and the indebtedness of Holbrook, and all the stockholders of such company understood from the organization of the bank:

that the company's property should be devoted to the interests of the bank. The value of the obligations of Mr. Loranger, the Ellises and E. S. Kennedy on such day depended, in the main, except as to the real-estate security mentioned upon the responsibility of the stockholders in the land company and the moral obligations of Mrs. Loranger and Mrs. Kennedy to devote their interests in such company to those of the bank. Pursuant to such obligation, the land company's assets, consisting of real estate of the assessed valuation of about \$75,000, was conveyed to the bank. It had all such property at the later date when the bank was taken possession of by the bank examiner.

The evidence established all the matters aforesaid without dispute, and further so established that the business of the bank was conducted without any refusal to pay any legitimate demand upon it up to the time it closed as aforesaid without supposing liquidation would be necessary, up to the time of the conference with the bank examiner aforesaid. There was further undisputed evidence that the value of the assets of the bank on the day of the closing and on and after February 3, and 4, 1904, was somewhere around \$160,000, as the same was reasonably viewed at the time, and that such value existed on the 29th day of January, 1904, and thereafter up to and inclusive of February 2, 1904, contingent upon the responsibility of the stockholders of the land company being such, by reason of their ownership of the stock of such company, as to render the obligation to the bank substantially as good before the assets of the land company were turned over to the bank as before. The evidence was further undisputed that, viewing the assets of the bank during the period from January 29, 1904, to and inclusive of February 13, 1904, exclusive of the land company's property and the obligation on account of which the same was turned over to the bank, were of the value of at least about \$188,000, or enough to cover the liabilities into about \$20,000, and that, taking the property of the land company at the value placed thereon by the witnesses, or taking the value of the paper, on account of which such property was turned over to the bank, at substantially equal to the value of such property as so placed, there was a surplus of assets over liabilities, at each of the times material under the information, of somewhere around \$50,000.

There was no evidence indicating that, on either of such dates, the proprietors of the bank contemplated going into liquidation, or had any thought, other than that the bank would remain indefinitely in business. There 20 L.R.A. (N.S.)

was evidence that at the time the bank was examined by the bank examiner, just previous to his taking possession, he was of the opinion there were assets sufficient to pay the liabilities, especially except stock liabilities; and that he was of the opinion, when the bank closed, the proprietors did not believe but what there were assets sufficient to pay out in money all liabilities to depositors.

There was evidence to the effect that, when the deposit was made, mentioned in the first count of the indictment, the same was placed to the credit of the depositor, who at that time owed the bank a considerable amount, but that none of it was then due. The evidence as to the deposit mentioned in the second count was to the effect that the deposit was treated as cash, the amount the check called for being placed to the depositor's credit, and that the check was afterwards paid to the bank.

There was evidence to the effect that, for a considerable time before the occurrence mentioned in the indictment, and up to the time the bank closed, the law was not complied with as to reserve, also evidence that some overdrafts were allowed, there being such at the time of the suspension to the amount of about \$4,000, about \$900 of which was against responsible persons other than the proprietors of the bank, and \$1,700 only good, so far as the responsibility of the proprietors of the bank would make it so, either as owners of the property of the land company, or as having turned such property over to the bank, leaving about \$1,600 of overdrafts of no value.

There was other evidence as to want of good judgment in the conduct of the bank, and evidence that, after the proprietors had turned all their money over thereto, as they did, nothing could be collected of them.

The cause was submitted to the jury, resulting in a verdict of guilty on the first and second counts and not guilty on the third. The various exceptions saved upon the trial will be mentioned in their order of importance in the opinion.

Messrs. Sanborn, Lamoreux, & Pray, for plaintiff in error:

Under the statute, a bank check is not the subject of deposit.

Koetting v. State, 88 Wis. 506, 60 N. W. 822; United States v. County Court, 99 U. S. 592, 25 L. ed. 331; 20 Am. & Eng. Enc. Law. 2d ed. pp. 837, 838; Waterman v. Waterman, 34 Mich. 491; Com. v. Howe, 132 Mass. 258; Thalheim v. State, 38 Fla. 169, 20 So. 938; 17 Am. & Eng. Enc. Law, 2d ed. p. 6; 5 Am. & Eng. Enc. Law, 2d ed. pp. 1042, 1043.

At the time the deposit was made the depositor was indebted to the bank in an

amount greater than the deposit, and receipt of a deposit under such circumstances is lawful.

Nichols v. State, 46 Neb. 715, 65 N. W. 774; Com. v. Junkin, 170 Pa. 194, 31 L.R.A. 124, 32 Atl. 617; State v. Strait, 99 Minn. 327, 109 N. W. 598; Slack v. Northwestern Nat. Bank, 103 Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51.

Establishing the insolvency of bank officials after the bank closed its doors and after the alleged unlawful deposits were received did not raise any presumption that they were insolvent at the time the deposits were received.

Hopkins v. State, 53 Md. 502; Body v. Jewsen, 33 Wis. 402; Redding v. Godwin, 44 Minn. 355, 46 N. W. 563; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Blank v. Livonia Twp. 79 Mich. 1, 44 N. W. 157; Hingham v. South Scituate, 7 Gray, 232; Chandler v. Jamaica Pond Aqueduct Corp. 122 Mass. 305; State v. Hubbard, 60 Iowa, 466, 15 N. W. 287; Martyn v. Curtis, 67 Vt. 263, 31 Atl. 296; Coffman v. Christenson, 102 Minn. 400, 113 N. W. 1064; State ex rel. Phelan v. Walsh, 62 Conn. 287, 17 L.R.A. 364, 25 Atl. 1; Louisville, N. A. & C. R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. 18, 9 N. E. 357; Dumangue v. Daniels, 154 Mass. 483, 28 N. E. 900; Martin v. Fox, 40 Mo. App. 664.

Messrs. F. L. Gilbert, Attorney General, V. T. Pierrelee, and M. Barry, for defendant in error:

A bank check is the subject of deposit.

20 Am. & Eng. Enc. Law, p. 838; Taylor v. Robinson, 34 Fed. 678; Hendry v. Benlisa, 37 Fla. 609, 34 L.R.A. 283, 20 So. 800; State v. Downs, 148 Ind. 327, 47 N. E. 670; State v. Boomer, 103 Iowa, 112, 72 N. W. 424; State v. Hill, 47 Neb. 456, 66 N. W. 541; Morris v. Edwards, 1 Ohio, 204; Allibone v. Ames, 9 S. D. 74, 33 L.R.A. 585, 68 N. W. 165; State v. McFetridge, 84 Wis. 514, 20 L.R.A. 223, 51 N. W. 1, 998; 5 Am. & Eng. Enc. Law, p. 1029; Aebi v. Bank of Evansville, 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329.

A bank receiving a deposit while insolvent has no right to apply it upon an unmatured note of the depositor so as to avoid criminal liability for receiving the deposit during insolvency.

State v. Beach, 147 Ind. 74, 36 L.R.A. 184, 43 N. E. 949.

Insolvency may be shown by general reputation.

Lee v. Kilburn, 3 Gray. 594; Bartlett v. Decreet, 4 Gray. 113; Heywood v. Reed, 4 Gray, 574; 1 Greenl. Ev. 15th ed. § 101; Nininger v. Knox, 8 Minn. 147, Gil. 110; 2 Wigmore, Ev. § 1623, p. 1971; McNeill v. 20 L.R.A. (N.S.)

Arnold, 22 Ark. 482; Hayes v. Wells, 34 Md. 518; Angell v. Rosenbury, 12 Mich. 252; West v. St. Paul Nat. Bank, 54 Minn. 406, 56 N. W. 54; Garrett v. Weinberg, 59 S. C. 162, 37 S. E. 51, 225; Hard v. Brown, 18 Vt. 97; Noyes v. Brown, 33 Vt. 431; Bank of Middlebury v. Rutland, 33 Vt. 430; Hudson v. Bauer Grocery Co. 105 Ala. 200, 16 So. 693; 20 Cyc. Law & Proc. p. 775; Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737; Sweetser v. Bates, 117 Mass. 466; Cook v. Mason, 5 Allen, 212; Lane v. Kingsbery, 11 Mo. 402; Bank of United States v. Macalister, 9 Pa. 475.

Marshall, J., delivered the opinion of the court:

In the foregoing statement we have avoided going into details or dealing much with figures, except in the way of generalizations. There is such a mass of things in the record that any attempt to state it in detail would fail of accomplishing any valuable purpose, and probably would leave the situation more or less involved in confusion.

The legal questions are few in number and will be presented in their logical order. The fact that the deposit relied upon in the second count in the indictment was a check does not militate against its satisfying the call of § 4541, Stat. 1898, for a deposit of money. True, the check, as it went over the counter, was not money, but it was treated as such between the bank and its customer. It was taken as the equivalent of money at the face value. The money equivalent was placed to the credit of the depositor the same in all respects, as if legal-tender money had been passed over the counter. The relation of debtor and creditor, as between the bank and the depositor, with the characterization of liability on the one side and expectancy on the other as to payment on demand at any time within the banking hours, was created. In short, the transaction, in practical effect, was the same as if the bank had passed to its customer \$1,000 for the check, and he had immediately passed the same back for deposit and received credit therefor.

The foregoing, in the opinion of the court, is in harmony with—and really required by the rule of *stare decisis* on account of—State v. Shove, 96 Wis. 1, 37 L.R.A. 142, 65 Am. St. Rep. 17, 70 N. W. 312. We cannot appreciate that there is any difference between passing a certificate of deposit on a bank over its counter for credit or a renewal, the presumption being that money equivalent for such certificate is on hand to be passed out in exchange for the paper if desired, and passing over the counter a certificate of deposit or check or bill of exchange on an-

other bank, which is taken as so much money in the ordinary course of business, the money itself being presumably present to be transmitted, if desired, in exchange for the paper. To say there is a difference in the two situations would, in our opinion, be trifling with the statute.

It is confessed that the indictment, in substance and practical effect, is the same as in *State v. Shove*, supra, but insisted that, as no point was made on the sufficiency of the charge in such case, the way is clear for a challenge in that regard now. Granted, for the purpose of the discussion. The following defects are now suggested: (a) It does not appear from the charge that the bank became the debtor of the depositor named in the first count; (b) It does not appear that the deposit consisted of money; (c) It does not appear that Ellis received the deposit for the bank.

The requisites of the statute as to (a) and (b), so far as is necessary to this case, is acceptance or reception on deposit of money tendered for that purpose by a customer. That is plainly charged in the first count, in the language of the statute, and is likewise so charged in the second, in the light of what we have said as to the reception of the check as money, being the same as if the thing passed over the counter had been money in fact.

(c) The claim that the indictment does not show that the accused acted, in receiving the deposits, for the bank, seems to be without merit. After charging receipt of money on deposit in the one case and the check in the other, the language of the indictment, as to each is, substantially, that the accused was, at the time of receiving the deposit, the president of the bank, and the money was accepted and received into the bank on deposit. What more is needed? We cannot discover anything wanting.

The fact that the customer mentioned in the first count was indebted to the bank at the time he made his deposit, especially since the indebtedness was not presently due, does not militate against the receipt of the money satisfying the statute as to that element. The credit created by the deposit was at the customer's disposal immediately upon its creation. The status of the accused was fixed, as regards guilt under the statute, the instant the deposit was accepted as creating a credit, liable to be called for at once, and was not subject to change by maturity of the depositor's indebtedness thereafter, before the bank closed, so as to absorb a part or the whole of it. Had the deposit been made on account of the indebtedness about to mature, and to be ap-

plied thereon, or made on account of an overdraft so as to operate to discharge the depositor's indebtedness to the bank, the case would be far different. True, it would be absurd to hold that a deposit in form, which, in practical effect, is only payment of an indebtedness on an overdrawn account, would satisfy the statutory call for a deposit of money or other thing used as money and subject to be recalled in money. Such call contemplates a deposit such as will create the relation of debtor and creditor between the parties, or bailor and bailee, or the relation of principal and agent, the former only being material to this case.

A witness who, upon the *voir dire*, was supposed to have shown special knowledge of the character of commercial paper made by parties in the city of Ashland and its vicinity, was permitted to give his opinion, generally, of the value of specific pieces of paper mentioned to him, about the time of the occurrences, material to the case. He was not asked as to whether he knew the reputation of the maker or indorser of the paper as to solvency, but as to the value of the paper as a commodity in the community, from the standpoint of whether the parties named, to the knowledge of the witness, had any property out of which the same could be collected. He stated, definitely, that his testimony was based, not on knowledge of whether the parties possessed property or not, but on ignorance of whether they had any. The motion made to strike out such testimony should have been granted. True, if the witness had shown, with any degree of fairness, on the *voir dire*, that he knew the reputation of the makers of the paper for solvency, he might have been permitted to testify to such reputation. True, evidence of the general reputation of a person for financial responsibility is relevant on the question of his solvency. That does not seem to have been directly passed upon by this court, but it has by many, and may be said to be entirely settled, though not by universal authority. We will not go into the subject at length, but state with approval that the rule is as indicated. The following are a sample of a multitude of judicial authorities on the subject. *Hahn v. Penney*, 60 Minn. 487-490, 62 N. W. 1129; *West v. St. Paul Nat. Bank*, 54 Minn. 466, 56 N. W. 54; *Angell v. Rosenbury*, 12 Mich. 241; *Bank of Middlebury v. Rutland*, 33 Vt. 414.

The evidence discussed was not of the character of opinion evidence as to reputation for solvency. True, on cross-examination there was some evidence from the witness that he testified, from reputation, as to the financial standing of one maker of a note brought to his attention, but in gen-

eral his evidence was confined to opinions on the basis before indicated. He gave no evidence that he in fact knew whether the debtor had property or not. On the whole, it seems that the evidence was not relevant. It did not approach near enough to the real point at issue to have sufficient probative force to be within the realms of competency. Therefore, in the opinion of the court, it should have been stricken out as indicated.

Complaint is made because the court permitted much evidence as regards financial condition of debtors of the bank, particularly the proprietors, long after the suspension, without direct proof that the same condition existed at the time of the occurrences charged in the indictment. A judgment against the accused for \$32,526.33, in favor of the receiver of the bank, rendered some six months after the suspension, covering substantially all the liabilities of the accused to the bank, was received. Similar proof was made as to other debts to the bank in connection with evidence of unsuccessful efforts to collect on the judgments. Much of this evidence, so far as direct effect was concerned, related to the condition of things from six months to some over a year after the deposits were alleged to have been wrongfully received.

It is an elementary principle of evidence that, as a general rule presumptions do not run backward; that while, "when the existence of a person, a personal relation, or a state of things, is once established by proof, the law presumes that the person [personal] relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *Greenl. Ev.* § 41. There is no retroactive evidentiary inference, especially reaching backward materially. So, proof of insanity or solvency at a particular time is not competent to prove, on the principle of natural and probable relation, the same condition a considerable period prior thereto. But the question of whether a circumstance is of sufficient probative force to have the dignity of a legal presumption of fact, establishing the matter in controversy, *prima facie*, as in case of the rule stated, is one thing, and that of whether it is so utterly void of probative power as to be outside the realms of competency and so irrelevant, is quite another.

It must be conceded that, while evidence of the character of that in question might not establish a condition which would raise a legal presumption running backward, if the condition were not too remote it would

not be entirely without evidentiary consequences. Such consequence might be considerable under some circumstances. For instance, in case of proof of entire want of assets to meet liabilities a few days after the particular time vital to a controversy. It would necessarily diminish in weight according to remoteness, and eventually become so shadowy as to pass into the realms of conjecture, and so outside the field of competency, thereby becoming wholly irrelevant. Within a considerable field, the primary question as to admissibility would be one of competency, in which field, as in all others where the trial court is required to determine matters of fact, there is a broad range for the exercise of judgment, in which the trial court is quite supreme, so much so that its rulings should not be disturbed unless clearly wrong. *Emery v. State*, 101 Wis. 627-648, 78 N. W. 145; *Johnson v. State*, 129 Wis. 140-152, 5 L.R.A. (N.S.) 809, 108 N. W. 55, 9 A. & E. Ann. Cas. 923.

It is the opinion of the court that considerable of the evidence objected to was improperly received under the principles suggested; particularly, judgments against persons who, before the suspension, divested themselves of all of their property by turning it over to the bank on account of the very indebtedness represented by the judgments subsequently rendered; and, further, in view of the failure of counsel to make good the pledge given to the court at the time the evidence was received, that evidence would be offered that there had not been any substantial change in the financial condition of the persons, to whose status the remote evidence related, from the time of the occurrences charged in the indictment down to the time of the remote condition proved, or attempted to be proved. These general observations are all that seem necessary on this branch of the case.

The trial court gave instructions excepted to, and refused to give instructions requested, upon the theory that the value of the property of the land company turned over to the bank on account of liabilities of the stockholders, in the main, February 3, 1904, could not be considered on the question of whether the bank was unsafe or insolvent to the knowledge, or with good reason for knowledge, on the part of the accused, at any time prior to such date, but could be from and thereafter. That, it seems, was manifestly wrong and a wrong which, quite likely, was fatal to the accused, as to the first and second counts, inasmuch as, while the accused was acquitted as to the circumstance that happened a few days after the land company's property was turned over to the bank, he was convicted as to that which

happened the day before and the one which happened five days before.

It seems that, aside from the interest which Mrs. Loranger and Mrs. Kennedy had in the land company, such company's property, from a legal standpoint, was behind the liability of the debtor, stockholders of the bank, substantially the same on the 29th day of January, 1904, as on the subsequent dates material to the case. Since there was an understanding prior to the 29th, to which Mrs. Loranger and Mrs. Kennedy were parties, that all the land company's property should be turned over to the bank on account of the liabilities of the stockholders thereto to strengthen its resources; and particularly as the accused had, as it seems, sufficient influence with his associates to secure their co-operation as to anything he desired done to strengthen the bank,—he had substantially the same reason on January 29, to consider the value of the land-company property with reference to the solvency of the bank as at any later time. In the light of the result of the trial as to the third count in the indictment, it seems reasonably certain that, had the case been presented to the jury in this way, there would have been a verdict of not guilty on all the charges. There can hardly be any mistake about that in view of the undisputed evidence that, considering the land-company property, the cash value of the bank assets at the times in question, as the accused had a right to view them, exceeded the liabilities to depositors by about 40 per cent.

On the question of whether there was the excess stated, we have little or no doubt. We have checked over carefully the claim in that regard by counsel for the accused, and find it substantially correct. There is no substantial claim to the contrary in the brief of counsel for defendant in error. On the oral argument counsel were pointedly challenged in respect thereto several times from the bench, and, while they did not concede there was such excess, their attitude was such as to suggest very strongly that they were not prepared to more than deny that there was assets of a convertible character sufficient to enable the bank to meet its liabilities in the ordinary course of business, or enough to pay anywhere near all the debts, as it turned out.

The latter condition mentioned is not very persuasive as to the condition of mind of the accused, or the knowledge he should have had on the 29th day of January, 1904. It is a matter of common knowledge that assets in the hands of a going banking concern are regarded very differently from the same assets upon the bank going into forced liquidation. The change of circumstances is 20 L.R.A. (N.S.)

quite likely to depreciate the value of the securities to a very marked degree.

The learned trial court charged the jury over and over again, that whether the bank was insolvent on the particular days material to the case turned on whether it had sufficient assets to meet its liabilities in the ordinary course of business, and whether the accused at such time had good reason to know the bank was unsafe or insolvent, was whether he had such reason to know it did not possess sufficient assets to pay all its liabilities as they matured and became payable in the ordinary course of business. On the other hand, the learned court refused to instruct the jury that the statutory test was whether the fair value of the assets on the particular days named was sufficient to cover the liabilities, exclusive of liabilities to stockholders.

In view of the situation, that, according to the undisputed proof, there was an excess of assets over liabilities, within the rule requested to be given to the jury, the error in refusing such request, if there were error in that regard, was prejudicial in the highest degree, since such request, in view of the evidence, was, in effect, one to render a verdict in favor of the accused.

There is no question but what insolvency, as the subject is dealt with under the insolvent and bankrupt laws, regarding a condition where, by the theory of such laws, the person or concern should suspend and take such measures, or submit to such, for the protection of creditors, as to insure equality of treatment, is as the court instructed the jury. That is the limited, not the common, popular, or general meaning of the term. The latter suggests merely a substantial deficiency of assets to cover liabilities. In a multitude of authorities involving administration of bankrupt and insolvent laws and situations properly classifiable therewith, the authorities mainly relied upon by the prosecution, insolvency is viewed in the limited sense, while the general sense is universally conceded to be as indicated. So it will be seen that a bank may be insolvent in the limited sense, and clearly not in the broad general sense.

Must the limited meaning be given to the term "unsafe or insolvent" as used in the statute? Is it true that, under all circumstances, the proprietors of a bank, though believing they have an abundance of assets to pay out within a reasonable time all liabilities to depositors, must close the doors and go into liquidation whenever they have good reason to know they will, or probably may, not be able to pay all demands upon the bank in the usual course of business, and that every moment of time they keep

open for business thereafter they are criminals before the law and liable to be prosecuted and punished by long terms of confinement in the state prison? If such is the law, the banking business is exceedingly unattractive, and the more conscientious the banker is, the less attractive it is.

It must be seen, at once, that the statute is open to construction. The words used have the two well-known and widely different meanings. By the familiar rule that, in general, the common ordinary meaning of words in a law is to be taken as the one intended by the legislature, we must discover some efficient reason for holding that, it did not have in mind in enacting the law in question the one which the learned trial court rejected.

While it is reasoned by some courts that the mischiefs to be guarded against by such legislation suggest the limited meaning as intended, such reasoning is not satisfactory, and is not in accord with the reasoning of other just as respectable courts holding to the contrary view.

There is no more legitimate business than that of banking. There are laws for the promotion of it, beneficial to those engaged therein and their patrons, in every civilized nation on earth. Our laws contemplate that all but a small portion of the deposits in a state bank and all of its capital stock may be loaned for considerable periods of time and with quite a proportion on real-estate security. It is permitted to put 25 per cent of its capital and surplus into banking house and fixtures. It is permitted to loan 50 per cent of capital, surplus, and deposits upon real-estate security, and without limit in this and adjoining states when authorized by a resolution of two thirds of the board of directors. There is a legal limit upon the amount that may be loaned directly to one person, but there is no limit whatever as to indirect loans, and no limit as to loaning on approved security of a single borrower, short of the whole capital stock and surplus, in case of two thirds of the directors consenting thereto by a duly recorded vote. There is no limit as to time upon which loans may be made. Notwithstanding this broad discretion, the law only requires a reserve on hand in cash, either in bank or available in correspondent reserve banks, of 15 per cent of the deposits.

In the situation indicated, would it be reasonable to suppose that a bank must at all events be prepared to pay everyone who calls his credit in the usual course of business, under peril of the severe punishment provided in § 4541 of the Statutes of 1898? Must persons engaged in such business, while not going outside the permitted methods with bad intent, upon every occasion of

their competency to pay in the usual course of business being challenged, regardless of competency to pay ultimately, be conscious of drifting within the shades of prison walls, into realms of everlasting disgrace for themselves and their families? The very picture, not at all overdrawn it is thought, suggests, most forcibly, that such a meaning as the learned trial court attributed to the statute would lead to the most absurd results. That of itself would require rejection of such meaning, there being another perfectly reasonable, and fairly, at least, appropriate one.

The reasons suggested for not adopting the drastic meaning attributed to the statute by the trial judge, suggested from the viewpoint of the banker, is reinforced by one quite as persuasive from the point of view of patrons of a bank. It is a matter of common knowledge that liquidation of a bank in insolvency proceedings is inevitably attended with great losses which commonly fall on the depositors. So, when a banker stands face to face with a condition of probable inability merely to pay all liabilities "in the ordinary course of business," he knows that to go into liquidation, unless that is absolutely necessary, is inviting disaster for the depositor often in far greater measure than to persist in going on. Premature suspension or unnecessary suspension often is the very worst thing that could happen to the persons the statute is designed to protect. In that situation, if the statute were construed as the counsel for defendant in error contend it should be, the fabled position of most unfortunate danger would be quite real, the banker, while bending all his energies to perform his duty of avoiding danger on the one side, would be quite likely to fall into a still greater danger on the other. Avoiding Scylla, he would fall into Charybdis.

Looking to our own decisions, we find that the precise question under discussion has not been heretofore treated. Our attention is called to *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *Re Koetting*, 90 Wis. 166, 62 N. W. 622; *State v. Shove*, 96 Wis. 1, 37 L.R.A. 142, 65 Am. St. Rep. 17, 70 N. W. 312, but in neither is the question discussed or helpfully alluded to, much less decided. The same condition exists in most all the adjudications elsewhere under similar statutes. The secret of that doubtless is that only in rare instances has there been a prosecution of this sort unless the bank was so hopelessly insolvent that its condition in that regard satisfied every meaning of the term "insolvency," beyond question.

In *State v. Cadwell*, 79 Iowa, 432, 44 N. W. 700, the bankruptcy rule was adopted, citing in support thereof wholly civil cases

where such rule is appropriate. The reasoning in the opinion does not appeal favorably to our understanding. It is wholly from a one-sided point of view. The bank there was insolvent under any rule, and unquestionably so. Reference is made to a Federal case, without stating where it may be found, but it is sufficiently identified to point unmistakably to *Dodge v. Mastin* (C. C.) 17 Fed. 660. Turning thereto, we find that it held that a bank may be insolvent in the limited sense the term is used in bankruptcy matters; it may even be forced to close its doors for want of money to pay all calls upon it in the ordinary course of business, and yet not be insolvent within the meaning of the criminal law. It was said: "A bank is solvent, within the meaning of the Constitution and the statutes we are considering, when it possesses sufficient of assets to pay within a reasonable time all its liabilities through its own agencies." The Iowa case has been cited with a measure of approval in some instances, but not in any one of consequence of this sort, so far as we are able to discover. It must be conceded it has some support in *State v. Beach*, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613; *Meadowcroft v. People*, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; *State v. Myers*, 54 Kan. 206, 38 Pac. 296. In a pretty full review of authorities in an article in 37 Cent. L. J. 147, it is condemned, authorities being cited and logic used to the conclusion that a bank is not unsafe or insolvent, in the language of the criminal law, if its property is worth more than all its liabilities, even though it be in a condition, at the time of receiving a deposit, that it has to default soon on maturing liabilities. We should remark, in passing, that the author took note of the fact that in the Iowa case the bank was hopelessly insolvent within any meaning of the term; so the court did not need to go to the extent it did. For that reason, we may well apprehend, the question did not receive the attention, at the hands of the court, it otherwise would.

We will close this opinion without any extensive review of authorities. We venture to say that, in all situations, except in respect to the administration of bankruptcy and insolvency laws, the term under consideration is regarded as contemplating insufficiency of assets, in money value, to balance liabilities, such money value to be realized, not by a forced and involuntary sale, but by handling in the ordinary way an ordinarily prudent man would generally conduct his business under the same or similar circumstances.

The following are examples of the applica-

tion of the rule we have stated: *Hamilton v. Menominee Falls Quarry Co.* 106 Wis. 352, 81 N. W. 876; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188; *Livingston v. Bank of New York*, 26 Barb. 304-308; *Walkenshaw v. Perzel*, 32 How. Pr. 233. The position of this court on the general question is well summarized in the syllabus to *Hamilton v. Menominee Falls Quarry Co.* supra, thus: "Insolvency, in such connection, does not mean an insufficiency of quick assets to pay all debts at once, nor the inability to meet commercial obligations as they fall due in the course of business, but that the property of the corporation, real and personal, estimated at a fair and reasonable valuation, is substantially less than its debts."

There is a peculiarity in our statutes, perhaps distinguishing it from the Iowa statute and certainly from those of Indiana, Kansas, Illinois, and many other states. The word "insolvent" only is used in most statutes, while that, in connection with the word "unsafe," is used in ours. Not in the disjunctive, as said in *Re Koetting*, supra, to suggest separate conditions forming bases for the criminal liability, but as "legal equivalents," the latter word to explain and emphasize the first. That fairly indicates that the legislative idea was something more than insolvency in the limited sense.

An examination of the statutes of other states fails to disclose any similar use of words in a similar statute, except in Minnesota. Laws 1895, chap. 219, p. 504. The supreme court of that state in *State v. Clements*, 82 Minn. 434, 85 N. W. 229, in defining the term rejected the idea of competency to pay liabilities "in the ordinary course of business," adopting this, by way of approval of the trial court's instruction on the subject: "If the assets of a banking firm and of the individual members thereof are insufficient in value to pay the debts of such firm, then such firm is insolvent. A bank or banking firm is solvent, within the meaning of the statute, when it and its several members possess assets of sufficient value to pay within a reasonable time all its liabilities through its own agencies, and is insolvent when it and its individual members do not possess assets of such value."

We approve of that, substantially, preferring, however, to express it in this way: The term "unsafe or insolvent" in § 4541, Stat. 1898; has regard to deficiency of assets, realizable in cash value within a reasonable time, treating them as an ordinarily prudent person would ordinarily conduct his business, to cover liabilities exclusive of stock liabilities. A bank is in-

solvent when the fair cash value of its assets, realizable within a reasonable time, in case of liquidation by the proprietors, as ordinarily prudent persons would ordinarily close up their business, is equivalent to its liabilities exclusive of stock liability.

That gives a sensible construction to the statute, treating the banking business with the consideration it deserves both from the standpoint of patrons and patronized, instead of treating those engaged therein, and responsible for the safety of the cash and idle capital of the country, and responsible for the correctness of the innumerable exchange transactions of business in everyday life, as if they were a dangerous class to be fenced about as classes generally are of criminal tendencies. It provides punishment for the really bad and without crushing the merely unfortunate, and subjecting all, or a large proportion, in perilous financial periods, to worriment of unreasonable menace.

A point made that the law under which the grand jury was drawn which found the indictment is unconstitutional, because it denies to an accused person the equal protection of the laws and due process of law, is ruled in favor of the defendant in error by *State ex rel. Gubbins v. Anson*, 132 Wis. 461, 112 N. W. 475; *Vought v. State*, 135 Wis. 6, 114 N. W. 518, 646.

There is no other question which needs discussion, or even mention. The judgment must be reversed. Whether the cause should be remanded with directions to discharge the accused upon the ground that he should have been discharged on the case and motion made therefor below, is not free from difficulty. That such course would be the right administration, in a clear case of uselessness of a new trial, within the contemplation of the Code which, on reversal, requires the cause to be remanded for a new trial only when necessary; that is, only when justice, in the judgment of this court does, or seemingly may, demand it. Section 3071, Stat. 1898, has been vindicated many times in recent years. *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800; *Hay v. Baraboo*, 127 Wis. 1, 3 L.R.A. (N.S.) 84, 115 Am. St. Rep. 977, 105 N. W. 654; *Miller v. State* (Wis.) 119 N. W. 850.

When it is clear that a full trial has been had and that a new trial would not be liable to change the situation, assuming that the witnesses who testified cannot honestly do more than repeat their testimony, public and private interests as well demand that, upon a reversal here, such disposition should be made of the matter as to terminate the litigation.

Because of the probability, amounting to almost reasonable certainty, in view of the 20 L.R.A. (N.S.)

verdict on the third charge, that, under proper instructions, there would have been a full acquittal, and other circumstances in the case, a demand for a new trial, from the standpoint of public justice, is not very clear. However, since the case was tried on quite an untenable theory, it is the opinion of the court that it should be remanded for a new trial, which will not preclude the prosecuting attorney, if he shall deem best, from dismissing the cause with consent of the trial court.

The judgment is reversed, and the cause remanded for a new trial.

Winslow, Ch. J., and Barnes, J., took no part.

ARKANSAS SUPREME COURT.

GEORGE M. JACKSON et al., Appts.,

v.

BECKTOLD PRINTING & BOOK MANUFACTURING COMPANY et al.

(86 Ark. 591, 112 S. W. 161.)

Judgment — vacation — proof.

1. That a decree was rendered in vacation may be shown by deposition.

Same — validity — laches.

2. Unexplained delay for five years to apply for the setting aside of a decree foreclosing a mortgage, void because rendered in vacation, during which time purchasers at the sale and their grantees had sold timber, changed fences, and in all respects used the property as their own, is such laches as will defeat relief.

Curtesy — equity of redemption.

3. Curtesy exists in the equity of redemption of the wife's lands.

(June 15, 1908.)

Case Note. — Curtesy in equity of redemption.

It is a well-settled rule of law that a husband has curtesy in the equity of redemption in mortgaged lands of his wife. An extensive search has failed to disclose any case which questions such right of the husband, while all the following authorities support it: 4 Kent, Com. 30; 1 Greenleaf's Cruise, title 5, chap. 2, § 15, title 15, chap. 3, §§ 11, 12; 1 Washb. Real Prop. § 320; 8 Am. & Eng. Enc. Law, p. 521; 11 Am. & Eng. Enc. Law, p. 210; *Davis v. Mason*, 1 Pet. 503, 7 L. ed. 239; *McDaniel v. Grace*, 15 Ark. 465; *Hart v. Chase*, 46 Conn. 207; *Robinson v. Lakenan*, 28 Mo. App. 135; *DeCamp v. Crane*, 19 N. J. Eq. 166; *Wade v. Miller*, 32 N. J. L. 296; *Gatewood v. Gatewood*, 75 Va. 407; *Casborne v. Scarfe*, 1 Atk. 603.

APPEAL by complainants from a decree of the Chancery Court for Clay County in favor of defendants in a suit to set aside a decree foreclosing a mortgage. Affirmed.

Statement by Hart, J.:

The present suit filed on the 11th day of August, 1902, by appellants, the husband and children of the late Fannie C. Jackson, against appellees, was brought to set aside a decree of the circuit court sitting in chancery purporting to have been rendered at the January term, 1897, of the court, but alleged to have been rendered and entered of record in vacation in July, 1897, and to redeem certain lands ordered sold by said decree, and for an accounting of the mortgage debt, rents, profits, and waste. Fannie C. Jackson, in her lifetime, was the owner of the premises referred to, and in March, 1892, she executed a mortgage thereon to W. G. Bryan, which he, in October, 1895, assigned to W. B. Bechtold & Company, a partnership. On the 29th day of April, 1896, Bechtold & Company brought suit to foreclose said mortgage, and made said Fannie C. Jackson and W. G. Bryan parties defendant thereto. In May, 1896, Fannie C. Jackson departed this life, intestate, leaving her surviving George M. Jackson, Sr., her husband, and the remaining plaintiffs and appellants in the present suit as their children and her sole heirs at law. On the 16th day of July, 1896, Bechtold & Company commenced a new suit to foreclose the mortgage above mentioned, in which all the appellants except George M. Jackson, Sr., were made defendants. In January, 1897, the appellee, Bechtold Printing & Book Manufacturing Company, hereafter called "Bechtold company" a corporation, was, by order of the court, on its own application and on the application of Bechtold & Company, substituted as plaintiff in that foreclosure proceeding by reason of the fact that Bechtold & Company had, pending the action, assigned the mortgage to the corporation. There was entered upon the records of said court a judgment and decree finding that there was due upon the mortgage the sum of \$5,525, and directing a sale of the premises for the payment thereof. The records of the court show that this decree was rendered and entered of record during the January term, 1897. Pursuant to the directions of the decree, the lands were advertised for sale by the commissioner of the court, and on the day of sale were struck off to the appellee, Bechtold company. The sale was reported to the court, and duly confirmed at the next term thereof. A deed was executed by the commissioner to said Bechtold company, which was approved by 20 L.R.A. (N.S.)

the court. Thereupon the said Bechtold company entered into possession of said lands. The complaint alleges that it went into possession of all said lands about the 1st day of January, 1898. On the 7th day of February, 1898, the Bechtold company, by its deed duly recorded, conveyed a part of these lands to B. B. Biffle. Thereafter and before the institution of this suit, Biffle conveyed a part of the lands so purchased by him to other appellees herein. The Bechtold company, also, by direct conveyances, duly recorded, conveyed a part of the lands to other appellees herein. The record does not disclose whether any of the lands are now owned by the Bechtold company, nor does it contain a complete description of the lands sold to Biffle. It only shows the date of the sale to Biffle, and contains a description of the lands sold by Biffle to other purchasers.

The testimony in this case shows that the foreclosure suit was not heard and determined at the January term, 1897, of the court, but that the case was taken under advisement until after the adjournment of the court; and it was agreed by the parties to the suit that the findings of the judge should be made in vacation, and the result embodied in a decree to be entered of record as if in term time. Pursuant to this understanding, the judge of the court decided the case, in July, 1907, in vacation, and caused a decree to be prepared in accordance with his findings, and had the same entered of record as if the proceedings were had during the January term, 1897, of the court. George M. Jackson, Sr., was present at the January term, 1897, when the agreement for rendering and entering of record the decree in vacation was made. He represented the defendants to that suit. They were non-residents and not present. Maude S. Jackson was alleged in the complaint in the foreclosure proceedings to be a minor, and a guardian *ad litem* was appointed to make her defense. His answer denies that she was at that time a minor. The present record does not disclose whether or not she was at that time a minor, nor at what time she reached her majority, but she sues as an adult in the present case. George M. Jackson, Sr., testified that he objected to the decree rendered in vacation after it was made, and told the Bechtold company that the defendants, all of whom he represented, would not be bound by the decree. No objections were made to the confirmation of the sale, or to any of the subsequent proceedings in the case. As above stated, the present suit was instituted to set aside the decree rendered in the foreclosure proceedings. The defendants, appellees in this court, filed separate answers containing a

general denial of the allegations of the complaint and pleading laches and estoppel on the part of the plaintiffs, to maintain their action. The chancellor found as a fact that the foreclosure decree was in vacation of the court, but held that such facts could only be shown by the record in the cause, and therefore dismissed the complaint, except as to George M. Jackson, Sr., for want of equity, because the record in the cause did not show that the foreclosure decree was pronounced in vacation. The court also found that George M. Jackson, Sr., as the husband of said Fannie C. Jackson, had an interest in the lands, and was not bound by the decree rendered in the foreclosure proceedings because he was not a party thereto, and appointed a commissioner to state an account between him and the Beckett company. This decree was rendered at the March term, 1907, of the court, and the Beckett company excepted to that part of the decree which held that G. M. Jackson, Sr., had an interest in the land, and prayed an appeal to the supreme court, which was granted. In October, 1907, the plaintiffs in the court below were granted an appeal by the clerk of this court.

Messrs. Block & Sullivan for appellants.

Messrs. L. Hunter, Moore & Spence, and J. L. Hornsby, for appellees:

A judgment record cannot be contradicted by parol evidence.

24 Am. & Eng. Enc. Law, 2d ed. p. 193; Cutter v. Kline, 35 N. J. Eq. 534; Bank of Tennessee v. Patterson, 8 Humph. 363, 47 Am. Dec. 618; Williams v. Tenpenny, 11 Humph. 176; Pettus v. McClannahan, 52 Ala. 55; Bennett v. Tiernay, 78 Ky. 580; Roche v. Beldam, 119 Ill. 320, 10 N. E. 191; Stony Island Hotel Co. v. Johnson, 57 Ill. App. 608; Hansen v. Schlesinger, 125 Ill. 230, 17 N. E. 718; Sweet v. Gibson, 123 Mich. 699, 83 N. W. 407; Pittman v. Lowe, 24 Ga. 429; Walker v. Smith, 50 Ga. 487; Williams v. Henderson, 90 Ind. 577; Riggs v. Collins, 2 Biss. 268, Fed. Cas. No. 11,824; Portis v. Talbot, 33 Ark. 218.

A judgment will never be vacated unless there is a valid defense to the action; and in the present instance the plaintiffs present only the same defense which has already been passed on in the original trial of the foreclosure suit.

Rotan v. Springer, 52 Ark. 80, 12 S. W. 156; State v. Hill, 50 Ark. 458, 8 S. W. 401; Chambliss v. Reppy, 54 Ark. 539, 16 S. W. 571; Tompkins v. Drennen, 6 C. C. A. 83, 13 U. S. App. 308, 56 Fed. 694; 11 Enc. Pl. & Pr. pp. 1192 et seq.

The confirmation of the sale under the foreclosure decree validates all prior action, 20 L.R.A.(N.S.)

and estops plaintiffs herein from complaining.

State Nat. Bank v. Neel, 53 Ark. 110, 22 Am. St. Rep. 185, 13 S. W. 700; Updegraff v. Marked Tree Lumber Co. 83 Ark. 154, 103 S. W. 606; Cowling v. Nelson, 76 Ark. 146, 88 S. W. 913; Collins v. Paepcke-Leicht Lumber Co. 74 Ark. 81, 84 S. W. 1044.

Plaintiffs, by delay for more than five years, have been guilty of such laches as to bar them from relief in equity.

Kirby's Dig. of Ark. Stat. § 5074; 18 Am. & Eng. Enc. Law, 2d ed. pp. 97 et seq.; 17 Am. & Eng. Enc. Law, 2d ed. p. 841; Wilson v. Anthony, 19 Ark. 16; Martin v. Campbell, 35 Ark. 141; Brewer v. Keeler, 42 Ark. 289; Gibson v. Herriott, 55 Ark. 93, 29 Am. St. Rep. 17, 17 S. W. 589; Ayers v. McRae, 71 Ark. 209, 72 S. W. 52; 12 Enc. Pl. & Pr. p. 99; Dixon v. Graham, 16 Iowa, 310; Foster v. Hall, 44 Wis. 568; Société Foncière v. Milliken, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; Johnston v. Sharpe (Tex. Civ. App.) 34 S. W. 1006; Williamson v. Hartman, 92 N. C. 236; Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223; Johnson v. Johnson, Walk. Ch. (Mich.) 309; Montgomery v. Merrill, 36 Mich. 97; Lyon v. Brunson, 48 Mich. 194, 12 N. W. 32.

Hart, J., delivered the opinion of the court:

The evidence in this case shows that the decree was rendered in vacation. The chancellor so found, but was of the opinion that such fact could only be shown by the record in the cause, and therefore excluded from his consideration all the evidence contained in the deposition of witnesses showing or tending to show that the decree was actually rendered in vacation. In this there was error. The precise question was otherwise determined in the case of Biffle v. Jackson, 71 Ark. 226, 72 S. W. 566. The court said: "That the original decree was rendered in vacation is abundantly established by the testimony both of witnesses and the record, since it is shown that the depositions upon which the decree was based were taken after the adjournment of the court at which the decree purports to have been rendered." It was held in the same case and in the later case of Boynton v. Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20, that a decree in chancery rendered in vacation, though entered on the judgment record in a blank space left for the purpose, is a nullity. This is the general rule in the absence of statutory provisions providing for the rendition of decrees in vacation. If the fact of its rendition in vacation could not be shown by testimony, and could only

be shown by record, we would have the anomalous conditions in cases like the present one of a decree being a nullity and of the parties affected by it being denied the right to establish that fact.

In the case of *Bobo v. State*, 40 Ark. 224, Chief Justice English said: "Courts have a continuing power over their records not affected by the lapse of time. Should the record in any case be lost or destroyed, the court whose record it was possesses the undoubted power, at any time afterwards, to make a new record. In doing this it must seek information by the aid of such evidence as may be within its reach tending to show the nature and existence of that which it is asked to re-establish. There is no reason why the same rule should not apply when, instead of being lost, the record was never made up, or was so made up as to express a different judgment than the one pronounced by the court. Hence the general rule that a record may be amended not only by the judge's notes, but also by other satisfactory evidence." This rule has been followed ever since by this court, and was reiterated in the case of *Ward v. Magness*, 75 Ark. 12, 86 S. W. 822.

While the consideration of public policy which requires that a record shall be taken as importing verity yields to equities which require it to speak the truth, it does so only when the party seeking the relief is not guilty of laches. *State v. Hill*, 50 Ark. 461, 8 S. W. 401. Mr. Freeman, in his work on Judgments, § 102, says that the rule will be strictly applied, and that any laches shown against the moving party will prove fatal to his relief. This court has held that the writ of certiorari will be refused when the party seeking it fails to show that he has proceeded with due expedition after discovering that it was necessary to resort to it. *Black v. Brinkley*, 54 Ark. 372, 15 S. W. 1030; *Lyons v. Green*, 68 Ark. 205, 56 S. W. 1075. The reason of the rule is based upon grounds of public policy, and the doctrine of laches is grounded upon the same principle. Its aim is the discouragement, for the peace and repose of society, of stale and antiquated demands. 18 Am. & Eng. Enc. Law, 2d ed. p. 98. The general rule of the doctrine of laches as stated by Mr. Justice Harlan has been quoted with approval by this court in the case of *Sturdivant v. Cook*, 81 Ark. 284, 98 S. W. 966. He said: "But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case, by granting the relief asked."

20 L.R.A. (N.S.)

Appellants contend the cases of *Earle Improv. Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84, and of *Updegraff v. Marked Tree Lumber Co.* 83 Ark. 160, 103 S. W. 606, are decisive of the present case. In the former case, the following language is used: "In the absence of some intervening equity calling for application of the doctrine of laches, equity by analogy follows the law and will not divest the owner of title by lapse of time shorter than the statutory period of limitations." In the *Updegraff Case* the court said: "The supervening equities referred to in that case [meaning the *Earle Case*] mean some element of estoppel aside from the mere lapse of time, payment of taxes and enhancement in value." It will be observed that both these cases were suits to quiet title; that the lands were unimproved and uninclosed, and therefore under the statute deemed to be in the possession of the parties who paid the taxes and against whom the doctrine of laches was sought to be invoked. There was no element of estoppel aside from the mere lapse of time, payment of taxes, and enhancement in value of the land.

The rule as applied to facts similar to those in the present case is aptly stated in the case of *Gallihier v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873, and approved by this court in the case of *Rhodes v. Cissel*, 82 Ark. 371, 101 S. W. 760. It is as follows: "The cases are many in which this defense [laches] has been invoked and considered. It is true that, by reason of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that, by reason of his delay, the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned, and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them." "Now, the doctrine of laches in courts of equity . . . is not an arbitrary or technical doctrine. When it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or when, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against

relief, which otherwise would be just, is founded upon mere delay, . . . the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance, of justice or injustice, in taking the one course or the other, so far as relates to the remedy." *Hall v. Otterson*, 52 N. J. Eq. 535, 28 Atl. 912.

In the present case, the parties invoking the doctrine of laches, under and by virtue of the decree of foreclosure, now sought to be annulled, became the purchasers of the lands, and were placed in possession of them. They have sold large quantities of timber from them, changed the fences on the cleared lands, and in all respects used them as owners by purchase under a valid foreclosure decree. All these facts were known to appellants. George Jackson, Sr., employed for appellants counsel to represent them in the foreclosure proceeding. He knew that their counsel agreed to a vacation decree. He was advised that this decree could be annulled, but would be valid unless appellants moved in apt time to set it aside. No effort was made to oppose the confirmation under the sale or the entry into possession by the purchasers by virtue of the deeds executed to them pursuant to the decree. They knew the lands were being sold off from time to time; for the knowledge of George Jackson, Sr., must be imputed to them, he being their agent in all respects concerning the lands. They made no effort to settle off the mortgage debt, or in any way to assert any rights to the lands. They did not move to set aside the decree until nearly five years after it was rendered. They do not claim to have been misled by any act of the parties to the suit, no excuse is given for the delay, which may be attributable to their own culpable negligence. These facts render appellants guilty of laches in not sooner moving to annul the foreclosure decree, and make it inequitable to divest the numerous purchasers of rights which they acquired under what purported on its face to be a valid decree, and which they were led to believe appellants had acquiesced in by their delay and negligence in moving to have it annulled and set aside.

Appellees insist that a husband does not have curtesy in the equity of redemption of the lands of his wife. In this they are in error. It is now fully settled in equity that the husband shall have curtesy of trust as well as of legal estates and of an equity of redemption. *Davis v. Mason*, 1 Pet. 503, 7 L. ed. 239; *Hart v. Chase*, 46 Conn. 212; *Robinson v. Lakenan*, 28 Mo. App. 135; *De-20 L.R.A. (N.S.)*

Camp v. Crane, 19 N. J. Eq. 166; 2 Jones, *Mortg.* § 1067. "Where a woman, having issue, dies possessed of an equitable estate in land, of which her husband holds the legal title, the husband is entitled to curtesy therein." *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796.

The decree is affirmed for the reasons given in this opinion.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

v.

BEATRICE BUCKNER.

(— Ark. —, 115 S. W. 923.)

Damages — mental anguish — fear — failure to heat station.

Mental anguish for fear of going into consumption is not an element of damage to be allowed against a railroad company because of whose neglect to heat its passenger station a passenger is made ill with cold and fever.

(January 18, 1909.)

Case Note. — Apprehension of injury to health as basis of recovery for mental anguish.

Whether or not apprehension of future injury to health is a proper element of damage in an action based on mental anguish, or in which mental anguish is in general allowed as an element of damage, is apparently determined by the majority of the decisions, according as the apprehension is real and reasonable, or only vague and fanciful. This distinction is clearly pointed out in *Watson v. Augusta Brewing Co.* 124 Ga. 121, 1 L.R.A. (N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152, where it was held that one who, in drinking soda water, swallows several small pieces of glass negligently allowed to be in the beverage by the defendant, and which are subsequently removed from his stomach, leaving apparently no injury, may recover on account of mental suffering caused by the fear of death while the glass was in his stomach; but a vague fear after the removal of the glass and he has been restored to health, that some time in the future he may again suffer as the result of his injury, cannot be made an element of damage in a suit against the manufacturer of the beverage.

In a few cases apprehension of the future effects of the bite of a dog has been held to be a proper element of damage in an action for personal injuries.

Thus, in *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751, the court said: "The apprehension of poison from the bite of the dog

PPEAL by defendant from a judgment of the Circuit Court for Chicag County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. T. M. Mehaffy and E. B. Kinsworthy, for appellant:

Such mental anguish, and such only, as is so intimately connected with the physical injury as to render a separation impracticable, is the subject of damages.

Hot Springs R. Co. v. Deloney, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351; 6 Thomp. Neg. 7320; 4 Elliott, Railroads, § 1816; 13 Cyc. Law & Proc. p. 137 (2), p. 138, note 99, pp. 39, 41, note 12; Chicago City R. Co. v. Anderson, 80 Ill. App. 71; Chicago City R. Co. v. Taylor, 170 Ill. 49,

48 N. E. 831; Morse v. Duncan, 14 Fed. 398; Chicago, R. I. & P. R. Co. v. Caulfield, 11 C. C. A. 552, 27 U. S. App. 358, 63 Fed. 396; Atchison, T. & S. F. R. Co. v. Chance, 57 Kan. 40, 45 Pac. 60; St. Louis, I. M. & S. R. Co. v. Wilson, 70 Ark. 143, 91 Am. St. Rep. 74, 66 S. W. 661.

Messrs. R. A. Buckner and Garland Street for appellee.

Wood, J., delivered the opinion of the court:

Appellee was a passenger on appellant's train from Lake village to Dermott. She had to change cars at Halley's station. She arrived there at 1 o'clock P. M. and waited until 3.25 P. M. for the train to Dermott. She alleged that the negligence of appellant in failing to keep its waiting room at Halley's station comfortably heated caused her

and the fear and solicitude as to evil results therefrom—all pain, anguish, solicitude occasioned by the bite—were proper matters for consideration by the jury in estimating the damages."

And fear of hydrophobia from the bite of a dog was held in Warner v. Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638, to be a proper element of damage in an action against the owner of the dog for personal injuries from its bite.

The admission, in an action for personal injuries caused by the bite of a dog, of evidence that plaintiff was informed by a physician that she was in danger of hydrophobia, lockjaw, and blood poison, which admission was for the purpose of showing the effect of the injuries upon the plaintiff's mind, was held error in Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; but the court said: "Mental suffering resulting proximately from the bite of the dog formed an element of damage; . . . but the inquiry should have been confined to the proof of such suffering, without bringing in the statements of others of facts which were calculated to mislead the jury." While the question under discussion was not squarely passed upon by the court, the implication is that apprehension of future disease may be a basis of recovery; and the case cites Godeau v. Blood, supra, with approval.

There are a few other cases which involve this question.

Thus, where there was evidence that the plaintiff was suffering from partial mental disability because of injuries received through the negligence of the defendant, it was held, in Walker v. Boston & M. R. Co. 71 N. H. 271, 51 Atl. 918, that if, as the result of mental disability induced by the defendant's fault, the plaintiff suffered from the apprehension of insanity, such suffering was an element of her damage.

So, also, in Butts v. National Exch. Bank. 99 Mo. App. 168, 72 S. W. 1083, the court said: "Plaintiff should have been permitted 20 L.R.A. (N.S.)

to show, as an element of damage, that he was in reasonable apprehension of blood poisoning as the possible, if not probable, consequence of his injury. Mental suffering, when a condition of mind produced by physical injury and attending it, is as proper an element of the damage sustained as the actual physical injury accompanying and causing it."

And in Southern Kansas R. Co. v. McSwain (Tex. Civ. App.) 118 S. W. 874, it was held that it was not error to permit the plaintiff to testify that he suffered mental anguish by reason, among other things, of "the fear that blood poison might set in and prove fatal."

In Illinois C. R. Co. v. Cole, 165 Ill. 334, 46 N. E. 275, it was said that certain remarks of counsel were improper to the extent that they sought "to have the jury infer that their verdict might include damages for future mental anguish which might be suffered by the plaintiff from a contemplation of what might occur." It will be noted that the court speaks of "future mental anguish," but the objectionable remarks set out in the opinion indicate present rather than future mental anguish, and the meaning of the court is not quite plain. However, the remarks of the court are really dicta, as the counsel for defendant did not object at the proper time, and the court declined to consider the objection.

In Cincinnati Traction Co. v. McKee, 27 Ohio C. C. 630, the court sustained the charge of the trial court that the plaintiff was entitled to recover compensation for resulting worry, anxiety, and care about the consequences of the injury, upon the authority of Smith v. Pittsburg, Ft. W. & C. R. Co. 23 Ohio St. 10; but in the latter case the court went no farther than to hold that mental anguish was a proper element of damage in an action for the public expulsion from a train, and there was no apprehension of future injury to health in the case.

great bodily pain and mental anguish; that, upon her arrival at home, she was prostrated with cold and fever, caused by the negligence of appellant as above alleged; and that since that time she has been an invalid. She sued appellant, laying her damages at the sum of \$5,000. The appellant denied all the material allegations of the complaint.

The evidence on behalf of appellee tended to show: That she was a passenger of appellant from Lake village to Dermott. That, on arriving at Halley's station she went into the depot. There was no fire there. She was suffering very much with the cold. It was a drizzling, windy, cold day. She had a chill while in the depot. The telegraph office adjoined the waiting room. There was a fire in it, but the agent would not permit passengers to avail themselves of it. The agent knew there was no fire in the waiting room. Appellee testified that after she got home she ached all over; that she had not recovered at the time of the trial from the effects of the cold and fever. She had fever and a cough the first month, and after that stomach trouble developed. After she had the cold and fever two months, gastritis set in, and her illness continued for months, necessitating her being carried to a sanitarium at Little Rock. Appellee goes into detail in explaining her long illness, the expenses thereof, and the suffering she endured by reason thereof. It is unnecessary to set out the testimony on this issue. It suffices to say the evidence is sufficient here to support the verdict.

During the examination of appellee the following questions were asked and answers given:

Q. You said that while you were suffering from the bronchitis, or whatever it was, your physical condition became so weakened, and you was worried. What occasioned that worry?

A. It was fear of death. I was very fearful that I would die. I was badly frightened.

Q. Did you have any particular reason for being frightened?

A. Yes, sir; I haven't any desire to die. I have a desire to live. I knew I was in a dying condition. I had a sister to die in my house with consumption. I wouldn't have undergone the mental suffering for a million dollars.

Q. Mrs. Buckner, you said yesterday that you suffered mentally from fear, and thought you were going to die. What produced that fear, aside from the disease you were suffering from?

A. I had a sister die from consumption. I knew all the symptoms. I nursed her. When my fever continued for weeks. I was afraid I was going into consumption. My 20 L.R.A. (N.S.)

mental worry I wouldn't have endured for a million dollars.

Appellant properly saved its exceptions to the introduction of this evidence.

"It is a fundamental rule of law," says this court, through Judge Riddick, in *St. Louis, I. M. & S. R. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226, "that to recover damages on account of the unintentional negligence of another it must appear that the injury was the natural and probable consequence thereof and that it ought to have been foreseen in the light of the attending circumstances." It should have been foreseen by appellant that its failure to keep its waiting room for passengers properly heated on a cold, damp day would naturally cause a delicate female passenger like appellee to have a cold, chill, fever, and even bronchitis, and to suffer the mental anguish that usually and naturally accompanies such ailments. But no one could contemplate, or would be expected to anticipate, that, if appellee became ill with cold, fever, bronchitis (or even gastritis) through the negligence of appellant in failing to heat its waiting room, she would, as a natural consequence of such illness, also be tortured with the "fear and dread of death." Much less could anyone reasonably be expected to foresee, if appellee, through the negligence as alleged, became ill as alleged, that, as the natural consequence of such illness, she would be "afraid of going into consumption." It was not shown that consumption was a natural and proximate consequence of physical injuries of the kind complained of here. The mental agony which appellee "wouldn't have endured for a million dollars" was caused by the fear that she was going into consumption. In law the proximate and natural, and not the remote and unnatural, cause and results are considered. Now, mental anguish of the character shown by this evidence is, at most, but a remote consequence of the physical injury which appellant is alleged to have caused. The jury in such cases should be allowed to consider only that mental anguish which accompanies the injury itself, which is fairly and reasonably the natural consequence that flows from it. 13 Cyc. Law & Proc. p. 137 (2); *Id.* p. 138, note 99; *Id.* pp. 39, 41, note 12.

"The correct doctrine," says Mr. Sutherland, "as we conceive, is that, if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person injured thereby is entitled to recover. There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable conse-

quences of his conduct. He is responsible therefor because the result proximately follows his wrongful act or nonaction. All persons are imperatively required to foresee what will be the natural consequences of their acts and omissions according to the usual course of nature and the general experience. The lawfulness of their acts and the degree of care required of them depend upon this foresight." Sutherland, Damages, pp. 42, 43, and cases cited; 4 Elliott, Railroads, § 1816, and numerous cases cited in note; Watson, Damages, for Personal Injuries, § 36. Some cases go even further, holding that the mental anguish must arise necessarily and spontaneously from the physical injury. Decatur v. Hamilton, 89 Ill. App. 561; Chicago City R. Co. v. Anderson, 80 Ill. App. 71. "The mental suffering is an element of damages recoverable in an action at law, because . . . [mental sufferings] are so intimately connected [with physical injuries] as to make separation impracticable." Peay v. Western U. Teleg. Co. 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965. See also Hot Springs R. Co. v. Deloney, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351; 6 Thomp. Neg. 7320.

The court erred, therefore, in admitting the above testimony, and, having admitted it, also erred in giving the following instruction: "If the jury believe from the evidence that the exposure of plaintiff in the waiting room at Halley station was the proximate cause of her illness, and that said exposure was occasioned by and due to the negligence of the defendant company, they will find for the plaintiff, and assess her damages in such amount, not exceeding \$5,000, the amount sued for, as they may believe from the evidence will be a just and fair compensation to her for all of the expense and pain and suffering, both mental and physical, which they find from the evidence was the result of such negligence." Under this instruction the jury may have considered that mental anguish shown by the incompetent testimony above discussed was the result of appellant's negligence, and therefore a proper element of damage; for they were authorized to assess damages for all suffering, both mental and physical. The instruction, however, would not have been misleading but for the incompetent testimony; for there are other instructions limiting the damages to be assessed to such as were the direct and proximate result of the negligence of appellant.

It follows, from what we have said, that the argument of counsel, based upon the above incompetent evidence, was erroneous and prejudicial.

The other objectionable argument it is not necessary to set out and discuss. It was 20 L.R.A. (N.S.)

highly improper, and we assume that it will not be repeated. The cross-examination of appellee, which her counsel claims provoked the argument, was strictly within the bounds of legitimate cross-examination, and furnished no excuse for the reference by appellee's counsel to matters not in evidence and beyond the scope of legal argument. As the cause must be reversed for the error considered above, we will not determine whether this error of allowing the improper argument was cured by the admonition and rebuke which the court gave the counsel for making it.

The other assignments of error are not well taken.

For the error indicated, the judgment is reversed, and the cause is remanded for new trial.

INDIANA SUPREME COURT.

PITTSBURG, CINCINNATI, CHICAGO, &
ST. LOUIS RAILWAY COMPANY,
Appt.,

v.
HARTFORD CITY.

(170 Ind. 674, 82 N. E. 787.)

Municipal corporation — ordinance — railroad crossings — light.

1. An ordinance requiring railroad companies to light street crossings is so far a reasonable exercise of the police power that the court will not declare it an unconstitutional interference with property rights of the railroad company.

Interstate commerce — lights at crossings.

2. Requiring an interstate railroad company to light its crossings in a city does not interfere with its rights as an interstate road, although the effect will be to compel those in charge of the engine to run slowly and cautiously in approaching the light to prevent its interfering with their duty to keep a lookout along the track by obscuring vision past it.

Municipal ordinance — passage — hearing.

3. A railroad company is not entitled to a hearing upon the question of the passage of an ordinance requiring it to light its street crossings.

Legislature — delegation of power.

4. The legislature may delegate to a municipality the selection of the character of light which it will require a railroad company to maintain at its street crossings.

Railroad — crossing lights — duration.

5. A municipal corporation may require

Note. — As to power to compel railroad company to light its tracks in cities, see case note to Chicago, I. & L. R. Co. v. Salem, 19 L.R.A. (N.S.) 658.

a light maintained by a railroad company at a street crossing to be burning for five minutes before the passage of a train.

Constitutional law — statute — discrimination.

6. Permitting only cities, not operating under special charters, to require railroad companies to light the street crossings within their limits does not render the statute invalid.

Municipal ordinance — definiteness.

7. An ordinance requiring railroad companies to light street crossings with lights of sufficient power to light the entire crossing is not invalid because of a provision that the power shall not exceed that of the lights used by the city, on the ground that the requirement is indefinite.

Same — construction.

8. An ordinance requiring a railroad company to maintain at street crossings lights of sufficient power to light the entire crossing, not exceeding in power the light used by the city, requires a light sufficient to enable a traveler with good sight in the nighttime to perceive, before going onto the crossing, the tracks at the point of intersection and the character of the way across the same.

Municipal power — implication.

9. Statutory authority to a municipality to prescribe the kind of lights a railroad company shall maintain at street crossings empowers it to direct a light to be located there.

On Petition for Rehearing.

Municipal ordinance — right to question.

10. A railroad company directed by municipal ordinance to light its street crossings has no right to question in the courts the necessity of the ordinance, or the fairness, honesty, or propriety of the exercise of the power.

(November 26, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Grant County convicting it of violating a municipal ordinance requiring the lighting of street crossings. Affirmed.

The facts are stated in the opinion.

Mr. George E. Ross for appellant.

Mr. L. F. Sprague for appellee.

Gillett, J., delivered the opinion of the court:

Action by appellee against appellant for the violation of a city ordinance. The charge is that the defendant violated said ordinance "by then and there unlawfully failing, neglecting, and refusing, while operating said railway as aforesaid, to keep and maintain an electric light at a point where said tracks across Walnut street, in said city, 20 L.R.A. (N.S.)

of sufficient power to light the entire of said Walnut street crossing, but not to exceed the power of the electric lights in use in said city." The ordinance requires that the company shall keep and maintain electric lights at certain points, where its tracks intersect streets in said city, of sufficient power to light "the entire of said crossings," but not to exceed the power of the electric lights used in said city, and also to keep said lights supplied with a sufficient amount of electric current, and burning for five minutes before the arrival of each and every engine and train of cars at said crossing, and until after such engine and train of cars has departed, at all times in the nighttime when there is no moon, or the moon is obscured. Appellant answered in seven paragraphs. Demurrers were sustained to the last four of said paragraphs. The fourth paragraph challenged, in general terms, the reasonableness of said ordinance. The fifth paragraph alleged that defendant was a large taxpayer in said city, and that said lights would be of no benefit to it, but for the exclusive use and benefit of those using said streets. The paragraph concluded with a charge that the requirement of the ordinance amounted to a taking of defendant's property without just compensation and without due process of law, contrary to the Constitution of the United States. The sixth paragraph set up the fact that defendant is a railroad company, organized and existing under the laws of Illinois, Indiana, Ohio, Pennsylvania, and West Virginia, and as such is a common carrier of freight and passengers between the states, and is also engaged in transporting United States mails; that it is necessary that all of defendant's locomotives used in carrying on said business should be equipped with a headlight to enable the engineer and fireman properly to perform their duties, and that the existence of an electric light at said street crossing would impair the efficiency of said headlights, and obscure and diminish, and in effect destroy, the light therefrom, and prevent the engineer and fireman from performing their duties, thus endangering defendant's trains and the passengers and freight carried thereon. That an electric light would prevent persons using said crossing from seeing the headlight upon an approaching locomotive, and would hinder and prevent defendant's servants operating said trains from seeing persons and objects along its tracks, thus increasing the danger to those using said street and incapacitating defendant from the performance of its duties as a carrier of interstate commerce and United States mails. The seventh paragraph chal-

lenges the constitutional validity of said ordinance as a taking of property without just compensation and without due process of law; and it contains the averment that said ordinance was passed without affording appellant an opportunity to be heard relative thereto. The court found the facts specially, and filed conclusions of law thereon, which were adverse to appellant. A judgment against it followed, and from said judgment this appeal is prosecuted.

The constitutional objections which appellant's counsel urge to the ordinance are, for the most part, indicated by the last four paragraphs of answer. It appears to us that these questions are pretty well solved by the consideration of whether the ordinance is so far reasonable, as an attempted exercise of the police power, that the court should, under the grant of authority found in the statute then in force (§ 5173, Burns's Anno. Stat. 1901), defer to the determination of the local legislative authority as to the expediency to its requirement. It is true that the courts will arrest an arbitrary or plainly unreasonable exercise of the police power, where there has been an attempt thereby to lay a burden upon a subject in the use or enjoyment of his property; yet, notwithstanding this, the courts recognize that, as respects the police power, there is a broad authority within the field of legislative discretion, wherein, as respects what is good and expedient, the lawmaking power is absolutely the master of its own discretion. The ordinance in question does not fix the height of the electric light, and appellant would be within the requirements of the ordinance if the light were located at such a height that the engineer would not be required to look directly toward it. This being so, we are of opinion, notwithstanding the broad allegations of the sixth paragraph of the answer, that the court knows enough of electric lighting to affirm that, at the most, there would be presented only a question of expediency, relative to what it would be wise to do in the premises, and the mere fact that we might be of opinion that the ordinance was in some measure unsuited to the attainment of its ostensible end would not justify us in striking it down. It must be presumed that the purpose of the requirement in question is to add to the security of life and limb, and the possibility that a traveler might unwittingly pass into danger at the crossing, particularly if in a conveyance, without real opportunity to safeguard himself by looking and listening, is too great to warrant us in holding that the light may not be required, even if its effect be to compel the engineer to run slowly or cautiously in approaching it.

Granting that the ordinance in question 20 L.R.A. (N.S.)

may in some degree affect interstate commerce, we are nevertheless of opinion that, as a local regulation designed to protect travelers upon the street, it was competent to establish the same. The railroad was built by the authority of the state, and, whether an interstate carrier or otherwise, the company must, so long as Congress does not interfere, submit to reasonable local regulations in the use of its property. Any other holding would substitute government by a board of directors for government by the representatives of the people. It was said in *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, that it is "within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns, with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and generally with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid." In *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086, the Federal Supreme Court upheld, against an interstate railroad, a statute of the state of Georgia forbidding the running of freight trains on Sunday. In *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 288, 43 L. ed. 703, 19 Sup. Ct. Rep. 465, that court upheld the right of the state to promote the convenience of local passengers by requiring all railroads to stop three trains a day (should so many be run) at all cities or towns in the state of more than 3,000 inhabitants. In that case the court said: "The plaintiff in error accepted its charter subject, necessarily, to the condition that it would conform to such reasonable regulations as the state might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. . . . Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the inter-

ests of stockholders, and without taking into consideration the interests of the general public." It was further held in that case that the statute authorizing railroad companies to carry the mails did not prohibit the enactment of reasonable police regulations by the state. See also *St. Bernard v. C. C. C. & St. L. R. Co.* 7 Ohio N. P. 183, 4 Ohio S. & C. P. Dec. 371; note to *People v. Chicago, I. & L. R. Co.* as reported in 7 A. & E. Ann. Cas. 1. Of course, the courts are open to appellant to challenge the validity of the ordinance as an attempted exercise of the police power, but, as the act was one of a legislative character, and was not judicial, appellant was not entitled to a hearing on the question whether the ordinance should be passed. The ordinance does not amount to a taking of property without just compensation. The regulation being a just exercise of the police power, appellant must submit to the requirement, even though it lays some expense or inconvenience upon it. There is too large a body of legislative regulations of this character which have received judicial sanction by the highest courts to make the proposition a debatable one. The mere fact that the general assembly has seen fit to give the common council the power to prescribe the character of the light,—with respect to its being electrical or otherwise,—and that the latter body has required that the lighting shall be done by electricity, affords no sufficient ground for an overthrow of the ordinance. As was said in *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Nor does it appear to us that the common council exceeded its authority in requiring the light to be burning for five minutes before the arrival of a train. Such a provision as to the time that the light shall be burning is a very moderate one, and can well be defended on the ground that it is calculated to make it more certain that the duty will be performed.

The validity of the statute is questioned, in that it purports to be a grant of power to all cities not operating under a special charter. We may grant that this makes the statute special in its character, but from this it does not follow that it is invalid. As long as the legislation is not of a character sufficiently radical to amount to the creation of a municipal corporation, within the prohibition of § 13 of article 11 of the 20 L.R.A. (N.S.)

state Constitution, we know of no constitutional provision, Federal or state, which is offended by a mere difference in the extent of lawmaking power which is granted to different cities or towns. As applied to the statute in question, it may be said that each street and railroad intersection presents its own considerations for the determination of the municipal legislature, and it is no discrimination that such power is not given to every city, or that every such intersection in the state is not ordered lighted.

It is contended by appellant's counsel that the ordinance is within the condemnation of *Chicago, I. & L. R. Co. v. Salem*, 166 Ind. 71, 76 N. E. 631, because of the provision that the power shall not exceed that of the lights used by the city. In that case there was no standard fixed, except the shifting standard of the lights which the city might from time to time use, and it was held unreasonable to enforce by penalty a requirement that would compel the company to take notice of changes *dehors* the ordinance. Here the requirement is that the light shall be "of sufficient power to light the entire of said Walnut street crossing." And the limitation thereon is designed merely to keep the ordinance from calling on the company to do more than the statute authorizes. In other words, if such limitation were not found in the words of the ordinance, it would still be subject to the statute. We are of opinion that in this respect the case is ruled by *Chicago, I. & L. R. Co. v. Crawfordsville*, 164 Ind. 70, 72 N. E. 1025. The ordinance is not so indefinite in its requirement as to be invalid. Upon the hearing of such a case, it would be the duty of the court to construe the ordinance, and we are of opinion that its legal effect is to require a light of sufficient power (not exceeding that used by the city) to enable a traveler, of good eyesight, in the nighttime, before going upon the crossing, to see the tracks at the point of intersection and the character of the way across the same. While it may be that a light of greater power than this might be required by the city, yet, as a matter of legal construction, any uncertainty must cut down the operation of the ordinance until it be brought within the limits of the clear requirements of the provision, and, when so construed, it must be said that the standard of duty is definite. See *Chicago, I. & L. R. Co. v. Crawfordsville*, *supra*.

We regard the complaint as sufficient. The statute specifically authorizes the city by ordinance or resolution to "provide what kind of lights the railroad company shall maintain," and, as a proper means to an authorized end, we are of opinion that it was prop-

er for the common council to direct that a light be located at the street intersection. There is no available error in the record.

Judgment affirmed.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down July 2, 1908:

The only question which we deem it important further to discuss relates to the insistence of appellant's counsel that there was a right to form issues of fact regarding the necessity of the ordinance, and as to whether the exercise of the power was fair, honest, and proper. It is scarcely necessary to state, we take it, that, as an exercise of a legislative power, pursuant to a proper delegation of authority, an ordinance of a city stands on the same general footing as an act of the legislature. See *Schmidt v. Indianapolis*, 168 Ind. 631, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 386, 80 N. E. 632. It was stated in *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 336, 16 N. E. 624, 626, that an ordinance "means a local law, prescribing a general and permanent rule." "The city is a miniature state, the council 'is its legislature, the charter is its Constitution; and it is enough if, in that, the power is granted in general terms, for, when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions." *Paulsen v. Portland*, 149 U. S. 30, 38, 37 L. ed. 637, 640, 13 Sup. Ct. Rep. 750, 753. Cases might be conceived of wherein a question of fact might be raised as a means of arresting a legislative act, as, for instance, an inquiry might be made whether a law regulating the charges of a public service corporation amounted to a taking of property in the particular instance; but we regard it as a general rule that the determination, by a legislative tribunal, of open or debatable questions concerning what is expedient, is not subject to review on questions of fact, provided that the question is one within the competency of the legislative tribunal to determine. See *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Paulsen v. Portland*, *supra*; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 174, 41 L. ed. 369, 394, 17 Sup. Ct. Rep. 56; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047.

The view that legislative action can, in general, be made to depend upon the varying opinions of juries concerning its necessity or propriety is wholly out of accord with the nature of a written law. This is illustrated by *Luther v. Borden*, 7 How. 1, 41, 12 L. ed. 581, 598, wherein the Supreme Court of the 20 L.R.A.(N.S.)

United States used the following language: "The question as to the majority is a question of fact. It depends upon the testimony of witnesses, and, if the testimony offered by the plaintiff had been received, the defendants had the right to offer evidence to rebut it; and there might, probably would, have been conflicting testimony as to the number of voters in the state; and as to the legal qualifications of many of the individuals who had voted. The decision would therefore have depended upon the relative credibility of witnesses, and the weight of testimony; and, as the case before the circuit court was an action at common law, the question of fact, according to the 7th Amendment to the Constitution of the United States, must have been tried by the jury. In one case a jury might find that the Constitution which the plaintiff supported was adopted by a majority of the citizens of the state, or of the voters entitled to vote by the existing law. Another jury, in another case, might find otherwise. And, as a verdict is not evidence in a suit between different parties, if the courts of the United States have the jurisdiction contended for by the plaintiff, the question whether the acts done under the charter of the government during the period in contest are valid or not must always remain unsettled and open to dispute. The authority and security of the state governments do not rest on such unstable foundations." As was said in *Lusher v. Scites*, 4 W. Va. 11, 14: "To exercise the power, the legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the legislature alone must determine; and, when so determined, it must conclude further inquiry by all other departments of the government; and the final action, terminating in an act of legislation in due form, must, of necessity, presuppose and determine all the facts prerequisite to the enactment, and that, too, as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like case."

In *De Camp v. Eveland*, 19 Barb. 81, 89, the court well observed: "The Constitution declares that the legislative power of the state is vested in the senate and assembly. This legislative power is the very highest attribute of sovereignty, and its depositary the embodiment and concentration of the whole political force of the body politic, with such restraints only as the charter of government has imposed. . . . The legislatures are nowhere restrained, directed, or limited in regard to the nature, grade, or character of evidence which they must have

as the basis of their action, or to guide them in their decisions. In some specified cases their power is limited, and in others conditional, depending upon the existence of certain facts. But they must necessarily decide whether such facts exist. Their general power to prescribe and regulate evidence for every other tribunal in the state has never been questioned, and it would present a singular anomaly if they were wanting in power to do the same for themselves, or to alter and change the same at pleasure; and it would be equally strange if any judicial tribunal in the state were permitted to review their decision upon the question of fact, on the existence of which their power to legislate in a particular case is made to depend. If such a thing were to be tolerated, it is not perceived why the existence of the fact in question may not, and in many cases must not, be proper to be submitted to a jury. It is believed that but a few would be bold enough to contend for a principle pregnant with such absurd results." In reviewing the act of a legislative body, involving an exercise of the police power, all reasonable assumptions must be indulged in its favor, and in determining upon its validity the court will treat the question as one of law, resort being had to extrinsic considerations only to the extent that the facts are, or may become, a matter of judicial knowledge.

We perceive no ground for the granting of a rehearing, and the petition is therefore overruled.

IOWA SUPREME COURT.

WILLIAM MCGILL

v.

PINTSCH COMPRESSING COMPANY,
Appt.

(— Iowa, —, 118 N. W. 786.)

Nuisance — smoke.

1. To constitute the imparting of smoke to the atmosphere a nuisance to neighboring property, it must have been emitted in unreasonable amounts or in an unreasonable manner in view of the locality and surroundings, and must be such as to render the occupancy of such property physically uncomfortable to a person of ordinary sensibilities for the purpose to which it is devoted.

Same — noise.

2. To render noise a nuisance, it must be of such a character as to be of actual physical discomfort to persons of ordinary sensibilities.

Same — manufacturing plant.

3. The operation of a manufacturing plant 20 L.R.A. (N.S.)

in such a manner that the noise from the engine exhaust shakes neighboring houses and the smoke from the chimneys requires the keeping of windows and doors closed in warm weather and blackens everything exposed constitutes a nuisance.

Same — undesirable business.

4. The owner of property cannot recover damages because of a diminution of its rental value because of the erection of a manufacturing plant near it.

Damages — nuisance — rented property.

5. The owner of property which is to be let as a dwelling cannot recover damages for the temporary operation near it of a manufacturing in such a manner as to constitute a nuisance, unless he shows a diminution in the rental value of the property because of the manner in which the manufacturing is conducted.

(December 15, 1908.)

Case Note. — Gas plant as a nuisance.

This note is confined to the question whether it is a nuisance to permit noxious and noisome vapors or substances to escape from a gas manufacturing to the annoyance and injury of others, and does not include nuisances arising from the escape of gas from pipes in streets or highways, the latter question being covered by the note appended to the case of *Hagerstown v. Witmer*, 39 L.R.A. 680.

As to the liability for negligence in the escape or explosion of gas from pipes in streets, see the note to *Ohio Gas Fuel Co. v. Andrews*, 29 L.R.A. 339.

As to municipal control of all smoke as a public nuisance, see the note to *St. Louis v. Edward Heitzberg Packing & Provision Co.* 39 L.R.A. 551, and *Atlantic City v. France*, 18 L.R.A. (N.S.) 156: as to the use of soft coal as a nuisance see the note to *McCarty v. Natural Carbonic Gas Co.* 13 L.R.A. (N.S.) 465.

In general.

It was held in *Donahue v. Stockton Gas & Electric Co.* 6 Cal. App. 276, 92 Pac. 196, that a public nuisance was stated by a complaint alleging, in substance, that a gas manufacturing plant was operated and maintained in such a manner as to cast into the air poisonous vapors and large quantities of smoke, together with other disagreeable and offensive substances, which corrupted, polluted, and poisoned the air in a designated section of the city, and especially that portion "belonging" to the complainant. and thereby rendered the residences unfit for occupancy, unhealthy, uncomfortable, and useless as homes.

The emission of noxious and noisome vapors and smoke from a gas manufacturing, which endangers the health or comfort of the inhabitants of neighboring dwellings or renders the property less valuable, constitute a private nuisance which will be enjoined. *Brown v. Illius*, 25 Conn. 583, s. c. second

APPEAL by defendant from a decree of the District Court for Pottawattamie County restraining the operation of a manufacturing plant alleged to be a nuisance to neighboring property and awarding damages therefor. Modified.

The facts are stated in the opinion.

Messrs. Wright & Baldwin, for appellant:

A depreciation of rental value cannot be recovered because of a prejudice which rests against this property in consequence of the location and operation of the plant.

Sutherland, Damages, 3d ed. p. 3058; Robb v. Carnegie Bros. 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649; San Antonio v. Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33; 21 Am. & Eng. Enc. Law, 2d ed. p. 696.

appeal 27 Conn. 84, 71 Am. Dec. 49; Farley v. Gate City Gaslight Co. 105 Ga. 323, 31 S. E. 193, s. c. 95 Ga. 796, 23 S. E. 119; Ottawa Gaslight & Coke Co. v. Thompson, 39 Ill. 598; Belvidere Gaslight & Fuel Co. v. Jackson, 81 Ill. App. 424; Terre Haute Gas Co. v. Teel, 20 Ind. 131; Baldwin v. Oskaloosa Gaslight Co. 57 Iowa, 51, 10 N. W. 317; Matthews v. Stillwater Gas & Electric Light Co. 63 Minn. 493, 65 N. W. 947; Cleveland v. Citizens' Gaslight Co. 20 N. J. Eq. 201; Crammer v. Atlantic City Gas & Water Co. 39 N. J. Eq. 76; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; affirming 45 Hun, 257; Rosenheimer v. Standard Gaslight Co. 36 App. Div. 1, 55 N. Y. Supp. 192; Rosenheimer v. Standard Gaslight Co. 39 App. Div. 482, 57 N. Y. Supp. 330; Francklyn v. People's Heat & Light Co. 32 N. S. 44; Watson v. Gas Co. 5 U. C. Q. B. 262.

And in Rosenheimer v. Standard Gaslight Co. 36 App. Div. 1, 55 N. Y. Supp. 192, in which the operation of a gas plant was enjoined, the additional element of the deposit of a sticky black substance upon the adjoining premises, as well as upon the contents of the dwelling house thereon, was presented; and, in addition, the blowing up of the fires in the gas works caused loud penetrating and disagreeable noises and vapors, especially in the nighttime.

And, in a companion case arising out of the same facts as the last case the court enjoined the nuisance where it also appeared that loud explosions and noises known as the "blow off, or pop off," and the flash of lights from the burning gases at the stack valves when the furnaces were replenished, added to the general discomfort. Rosenheimer v. Standard Gaslight Co. 39 App. Div. 482, 57 N. Y. Supp. 330.

And in Bohan v. Port Jervis Gaslight Co. supra, and Rosenheimer v. Standard Gaslight Co. 36 App. Div. 1, 55 N. Y. Supp. 192, where the operation of a gas plant was enjoined, in addition to odors arising from the manufacture of gas, disagreeable and noisome odors and vapors also arose from naph-

The noise, to warrant recovery, must be unusual, ill-timed, or deafening.

Butterfield v. Klaber, 52 How. Pr. 255; McKeon v. See, 4 Robt. 449; Dunsmore v. Central Iowa R. Co. 72 Iowa, 182, 33 N. W. 456; Biedeman v. Atlantic City R. Co. (N. J. Ch.) 19 Atl. 731; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Romer v. St. Paul City R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825; Doellner v. Tynan, 38 How. Pr. 176; Culver v. Ragan, 15 Ohio C. C. 228; Hafer v. Guyman, 7 Pa. Dist. R. 21; Hughes v. General Electric Light & P. Co. 107 Ky. 485, 54 S. W. 723; McCann v. Strang, 97 Wis. 551, 72 N. W. 1117; McCaffrey's Appeal, 105 Pa. 253; Gilbert v. Showerman, 23 Mich. 448.

In determining whether the maintenance

tha stored upon the premises of the defendant.

To render a gas works a nuisance where it pollutes the air with noxious smells and vapors, it is not necessary that the owners of adjacent property shall be thereby driven from their dwellings; it is enough that the enjoyment of life and property is thereby rendered uncomfortable. Bohan v. Port Jervis Gaslight Co. supra.

In Cleveland v. Citizens' Gaslight Co. supra, a company constructing a gas plant in a residential neighborhood was enjoined from using the so-called lime process for purifying gas, as well as any process of which lime was a substantial part, which sends forth noisome and noxious vapors and smoke, or manufacturing gas in any manner which would produce annoyance to persons dwelling near by, either by smoke, gases, odors, or other effluvia that might issue therefrom.

In Pottstown Gas Co. v. Murphy, 39 Pa. 257, the court held that an instruction, in an action against a gas company for maintaining a nuisance, defining a nuisance, as "wantonly, unnecessarily, or oppressively causing such smells as to annoy the plaintiff in a special and peculiar degree beyond others in the immediate vicinity;" when taken in connection with the further instruction that "a certain degree of offensive odor is inevitably incident to the business, and must be endured by the public" was as favorable to the defendant as a more perfect one would have been.

It was said in Bradbury Marble Co. v. Laclede Gaslight Co. 128 Mo. App. 96, 106 S. W. 594, that the operation of gas-making machinery is not a nuisance *per se* when not operated in a negligent manner; and whether it constitutes a nuisance to an adjoining landowner depends upon whether it interferes with the ordinary use and enjoyment of his property.

The destruction of trees, shrubs, and flowers, and rendering the adjoining soil unproductive by reason of the escape of noxious vapors and poisonous percolations from gas works, is a nuisance. Donahue v. Stockton

of a lawful business, productive of noises or offensive gases of stenches, amounts to a nuisance, it is necessary to take into consideration all of the surrounding circumstances, such as the character of the stench or gas complained of, the constancy or frequency of the annoyance, the extent of the injury or inconvenience occasioned thereby, the nature of the business or erection, its location, the manner in which it is conducted or kept, and, in case of an erection, the manner of its construction.

21 Am. & Eng. Enc. Law, 2d ed. p. 692; Stowe v. Miles, 39 Conn. 426; Com. v. Miller, 139 Pa. 77, 23 Am. St. Rep. 170, 21 Atl. 138; Fay v. Whitman, 100 Mass. 76; Pennoyer v. Allen, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609.

Gas & Electric Co. and Farley v. Gate City Gaslight Co. *supra*.

And the manufacture of gas in such a manner that the noxious vapors arising therefrom destroy crops upon adjoining premises will be restrained. Broadbent v. Imperial Gas Co. 7 DeG. M. & G. 436.

The owner of premises adjacent to a gas plant is not estopped from objecting to the continuance of a nuisance by reason of the fact that he did not object to its construction, where, ever since its operation began, he repeatedly objected to the continuance of such nuisance. Matthews v. Stillwater Gas & Electric Light Co. *supra*.

It was held error in Columbus Gaslight & Coke Co. v. Freeland, 12 Ohio St. 392, to instruct the jury to the effect that the degree of comfort one is entitled to in the use of his dwelling near a gas works is that ordinarily enjoyed by others in the same vicinity similarly situated; and that acts of the defendant, by reason of noxious vapors arising from the works, preventing this, would constitute a nuisance,—the vice of such instruction being that it might lead the jury into a mere comparison of the situation of the plaintiff with that of his neighbors, and away from the real question whether, by reason of the defendant's acts, the difference in the enjoyment of the plaintiff's property constituted actual damage to him.

Fouling wells and streams.

It is a nuisance to operate gas works so that percolations from the refuse matter therefrom contaminate the waters of neighboring wells to such an extent as to render them unfit for use. Donahue v. Stockton Gas & Electric Co. 6 Cal. App. 276, 92 Pac. 196; Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 593; Farley v. Gate City Gaslight Co. 105 Ga. 323, 31 S. E. 193, s. c. 95 Ga. 796, 23 S. E. 119; Ottawa Gaslight & Coke Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263; Terre Haute Gas Co. v. Teel, 20 Ind. 131; Belvidere Gaslight & Fuel Co. v. Jackson, 81 Ill. App. 424; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St. Rep. 711, 59 N. W. 925; Keiser v. Mahanoy City Gas Co. 143 20 L.R.A. (N.S.)

Dust, smoke, and cinders, even when accompanied by noxious gases, are not nuisances *per se*.

St. Louis v. Edward Heitzberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; Cleveland v. Malm, 5 Ohio N. P. 203; St. Paul v. Gilfillan, 38 Minn. 298, 31 N. W. 49; Roscoe Lumber Co. v. Standard Silica Cement Co. 62 App. Div. 421, 70 N. Y. Supp. 1130.

Messrs. William A. Mynster and E. E. Aylesworth for appellee.

Ladd, Ch. J., delivered the opinion of the court:

The defendant is and has been for the ten years last past engaged in the pro-

Pa. 276, 22 Atl. 759; Pottstown Gas Co. v. Murphy, *supra*; Shuter v. Philadelphia, 3 Phila. 228.

It is unnecessary that a gas company be aware of the fact that the water of a nearby well is contaminated by it; it is sufficient to sustain a recovery that the natural and probable consequences of the defendant's act caused a nuisance, the result of which it was bound to foresee. Beatrice Gas Co. v. Thomas, *supra*.

It was held in Brown v. Illius, 25 Conn. 583, that contamination of the water of a well upon adjacent premises by refuse deposited from a gas works near the division line being washed therein by the surface water, as well as by percolation through the soil, constituted a nuisance. Upon a second appeal, however (27 Conn. 84, 71 Am. Dec. 49), this doctrine was limited so as to impose a liability only when such substances are, by means of rain, washed and carried along the surface of the ground into the well without soaking into the soil, or if, although not carried literally on the very surface, they soak into it and are thence spread and diffused laterally towards the plaintiff's land, and find their way into the well without mingling with any of the underground streams or currents of water by which the well is fed and supplied. The court said that in the latter event the defendant would not be liable, even after notice that the plaintiff's well was being thus contaminated, unless the defendant's conduct was malicious.

Under the English act hereinafter cited, a well which is not used by the owner for several years, on account of its having been contaminated by neighboring gas works, does not cease to be a well within the meaning of such act. Millington v. Griffiths, 30 L. T. N. S. 65.

Mere nonuser and covering over of a well in consequence of its being polluted, and the acceptance by the owner of the use of the wells of the defendant, do not constitute such an abandonment as to create a license for the defendant to pollute it. *Ibid*.

However, one who has a mere license to take water from the well of another cannot

duction of compressed gas which it supplies to all the railroad companies whose lines enter Council Bluffs or Omaha. Immediately south and west of the plant are the extensive railroad yards essential to the business of a railroad center, and in other directions dwelling houses. The dwelling of plaintiff, occupied by a tenant, is within 135 feet to the northwest of it, with nothing intervening save a small coal shed. The plant consists of 4 furnaces, constructed of fire brick, with 5 or 6 smokestacks, 24 retorts, each 22 inches wide by 14 inches high, and 10 feet long, constructed of iron and steel. The oil is unloaded into tanks, from which it is drawn into these retorts or crucibles where the gas is produced, and this gas is then passed through the purifier into other

tanks, from which it is delivered to purchasers. About four tons of soft coal are burned in twenty-four hours, the plant being operated continuously. It represents an investment of about \$100,000, and the annual output approximates that sum in value. The complaint of the plaintiff is that as the prevailing winds are from the southeast in that locality, as the evidence tended to show, these carried such volumes of smoke and soot, together with offensive fumes, emitted from the plant over plaintiff's house as to interfere with its comfortable enjoyment and use, and that the noises from the exhaust on its boiler had the same effect. The sufficiency of the evidence to establish a nuisance is challenged, but, as defendant cheerfully complied with the re-

recover damages for its contamination by a gas company. *Ottawa Gaslight Co. v. Thompson*, 39 Ill. 598.

It is a nuisance to conduct a gas plant in such a manner that refuse therefrom finds its way into a stream, and renders the property of a lower proprietor less valuable by causing noisome and noxious odors to penetrate his hotel to such an extent as to drive away his customers, notwithstanding the refuse from the defendant's gas works was turned into a pit upon its own premises. *Keiser v. Mahanoy City Gas Co.* supra. The court said: "The manufacturing of illuminating gas in a town or city . . . is a lawful business. If the ordinary processes of manufacture are employed and conducted in the ordinary manner, equity will not restrain the prosecution of the business; but, if the company neglects to make use of the ordinary processes, or the ordinary precautions, and harm is thereby done to others, the negligence will justify intervention by a court of equity to restrain its continuance, and sustain an action at law for the recovery of damages by the injured party."

So, it is a nuisance to contaminate the waters of a stream with tarry and oily substances from gas works to such an extent that the necessary use of the water by a lower proprietor in the manufacture of carpets injures the wool and other materials used therein. *Carhart v. Auburn Gaslight Co.* 22 Barb. 297.

And the defendant will be liable, notwithstanding the incompact and pervious nature of the soil upon which its plant stands permits it to be percolated by the waters of the stream without its agency or fault, and it is the claim of the defendant that the escaping of any noxious substances into the stream is due to the reflux of such percolations. *Carhart v. Auburn Gaslight Co.* supra. The court, in substance, said that the defendant could probably have obviated all the damage complained of by draining off the water of the stream from its lot; and that it was bound to do so if it continued its works upon the present site.

The right to recover damages for the deterioration of the value of premises by the

pollution of a stream of water flowing beneath and near the surface of the earth under a gas plant, from which a neighboring landowner draws his supply, is recognized in *Decatur Gaslight & Coke Co. v. Howell*, 92 Ill. 19.

In England it is provided by statute that any gas company that shall empty, drain, or convey, or run, or flow any refuse from its plant into any river, brook, stream, reservoir, canal, aqueduct, or ditch, communicating with any of them, so as to spoil, foul, or corrupt the water contained therein, shall be liable therefor, a penalty being imposed for each offense. This act has been enforced in the following cases: *Jordeson v. Sutton*, S. & D. Gas Co. [1899] 2 Ch. 217, affirming [1898] 2 Ch. 614; *Millington v. Griffiths*, supra; *Parry v. Croydon Commercial Gas & Coke Co.* 15 C. B. N. S. 568.

In *Hipkins v. Birmingham & S. Gaslight Co.* 6 Hurlst. & N. 250, under its charter, expressly providing that it should be liable for creating a nuisance, a gas company was held liable for fouling a stream.

In a proceeding by indictment against a gas company for a nuisance by casting refuse from its plant into a public river, whereby the fish were destroyed and the water rendered unfit for drinking, it was held to be a question for the jury whether the acts of the defendant amounted to a nuisance. *R. v. Medley*, 6 Car. & P. 292.

The fact that, by reason of such nuisance, a considerable number of fishermen are thrown out of employment by reason of the diminution of the fish in the river, is not of itself sufficient ground to sustain an indictment. *Ibid.*

Effect of legislative authority to manufacture.

A gas manufacturing company is not absolved from liability for creating a private nuisance by reason of the fact that it is expressly empowered by the legislature to manufacture and supply gas (*Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18. 9 L.R.A. 711, 25 N. E. 246, affirming 45 Hun. 257; *Rosenheimer v. Standard Gaslight Co.* 36

quirement of the district court that its exhaust pipe be equipped with a muffler and the furnace with a smoke consumer or other device to lessen the escape of smoke, soot, and odors, we need only consider this question in so far as it bears on defendant's liability for damages.

A nuisance is defined by statute to be "whatever is injurious to health, indecent or offensive to the senses, or is an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property;" and damages because thereof may be recovered. Code, § 4302. Every person has the right to have the air diffused over his premises in its natural state, freed from artificial impurities, and therefore the use of one's property so as to unwarrantably impregnate the atmosphere with foreign substances, such as smoke, soot, noisome fumes and odors which would not exist therein but for his instrumentality is regarded as a nuisance and is actionable as such. By atmosphere freed from artificial impurities is not meant air absolutely pure, but an atmosphere as free and pure as reasonably could be expected in view of the particular location and the business conducted there. As every chimney or smokestack emits smoke, doing so does not constitute a nuisance *per se*: St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49; St. Louis v. Edward Heitzberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954. The air is more heavily laden with it in the thickly settled portions of a city or town than elsewhere, in the business

portion more than the residence. Such contaminations are indispensable to the reasonable enjoyment of property, and with these the law does not interfere. Only when an unreasonable amount of smoke is emitted or is emitted in an unreasonable manner so as to inflict injury on another will the courts interfere. There is no precise test by which to determine when the smoke imparted to the atmosphere is of a greater degree than is permissible. The injury must be tangible. Mere annoyance is not enough. It must be such as to render the occupancy of the complainant's premises physically uncomfortable to a person of ordinary sensibilities for the purpose to which devoted. Every person is entitled, generally speaking, to the exclusive and uninterrupted enjoyment of his premises, and to redress if such enjoyment shall be interrupted or diminished. Wood, Nuisances, §§ 495, et seq.

An offensive trade or manufacture may require interference in equity as well as any other nuisance, for, though necessary and lawful, they should be exercised in remote places. Says Judge Cooley concerning the subject generally in *Gilbert v. Showerman*, 23 Mich. 448: "The right, nevertheless, to have such a business restrained is not absolute and unlimited, but is, and must be in the nature of things, subject to reasonable limitations which have regard to the rights of others not less than to the general public welfare. One man's comfort and enjoyment with reference to his ownership of a parcel of land cannot be considered by itself distinct from the desires and interests of his

App. Div. 1, 55 N. Y. Supp. 192; *People v. New York Gaslight Co.* 64 Barb. 55, 6 Lans. 467; or by the fact that it erected its plant with the consent of the municipality (*Terre Haute Gas Co. v. Teel*, 20 Ind. 131).

And this is true even though the plant is owned and operated by a municipal corporation, it being subject to the rule, *Sic utere tuo ut alienum non laedas*, in the same manner as an individual. *Shuter v. Philadelphia*, 3 Phila. 228.

Nor is a gas company relieved from liability for creating a nuisance by the fact that it is under a public obligation to furnish gas. *Atty. Gen. v. Gaslight & Coke Co.* L. R. 7 Ch. Div. 217; *Terre Haute Gas Co. v. Teel*, supra.

If legislative exemption from liability exists, it must be express, or clearly and unquestionably implied from the power expressly conferred; and it must appear that the legislature contemplated the doing of the very acts which caused the injuries. *Bohan v. Port Jervis Gaslight Co.* supra.

But the legislative grant of the right to manufacture gas in a city operates as an estoppel against the state indicting it for creating a public nuisance by unwholesome 20 L.R.A. (N.S.)

smells, stench, and smoke arising therefrom, which corrupt and render the air offensive, uncomfortable, and unwholesome,—especially when it is conceded that the process of manufacturing gas is the best, and that due care and diligence are used by the gas company in its business. *People v. New York Gaslight Co.* supra.

Adoption of method free from objectionable features.

Where it appears that a gas company intends to adopt a new process for purifying gas, which will not cause offensive and noisome odors and smells, and to dispose of the offensive refuse by placing it in an underground cistern, from which it will be conveyed through gas-tight pipes into boats and carried away, the construction of gas works in a residential neighborhood of a city will not be restrained. *Cleveland v. Citizens' Gaslight Co.* 20 N. J. Eq. 201. The court observed that it was not entirely satisfied that it was impossible to manufacture gas in some way that would not create a nuisance, but that it would permit the erection of the works to continue if the gas company desired to do so after hearing the views en-

neighbors, as otherwise the wishes of one might control a whole community, and the person most ready to complain might regulate to suit himself the business that should be carried on in his neighborhood. In a crowded city, some annoyance to others is inseparable from almost any employment, and while the proximity of the stables of the dealers in horses, or of the shops of workers of iron or tin, seems an intolerable nuisance to one, another is annoyed and incommoded, though in less degree, by the bundles and boxes of the dealer in dry goods, and the noise and jar of the wagons which deliver, and remove them. Indeed, every kind of business is generally regarded as undesirable in the parts of a city occupied most exclusively by dwellings, and the establishment of the most cleanly and quiet warehouse might, in some neighborhoods, give serious offense and cause great annoyance to the inhabitants. This cannot be otherwise so long as the tastes, desires, judgments, and interests of men differ as they do, and no rule of law can be just which, in endeavoring to protect the interests and subserve the wishes of a complaining party, fails to have equal regard to the interests and wishes of others. The true principle has been said by an eminent jurist to be one 'growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the

rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such . . . reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient: Shaw, Ch. J., in *Com. v. Alger*, 7 Cush. 84." So that the degree of freedom from smoke in the atmosphere to which one is entitled is relative, and depends on the locality and prevailing use to which property there is put. What might constitute a nuisance in one locality would be what reasonably might be anticipated in another. As remarked at the outset, the smoke must be emitted in unreasonable amounts or emitted in an unreasonable manner in view of the locality and surroundings, to constitute a nuisance. These principles are of such universal acceptance that it seems unnecessary to cite authorities in their support, but see: *Harley v. Merrill Brick Co.* 83 Iowa, 73, 48 N. W. 1000; *Shively v. Cedar Rapids*, 1 F. & N. W. R. Co. 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133; *Shiras v. Olinger*, 50 Iowa, 571, 33 Am. Rep. 138; collection of cases in 29 Cyc. Law & Proc. pp. 1187 et seq. Precisely the same rule obtains with reference to noises. That they may be disagreeable or annoying is not enough to warrant an interference by the courts. They must be of such a character as to be of actual physical discomfort to persons of or-

tertained by the court; and that, upon a final hearing, it would have no hesitation in granting a perpetual injunction if it appeared that the works, as proposed to be conducted, would annoy one occupying a house adjacent thereto, although only occasionally, by smoke, gas, or offensive vapors, which might render living there uncomfortable as the defendant had chosen to locate its works in one of the most populous parts of the city it had done so for its own pecuniary advantage, contrary to the usual, if not universal, practice of locating gas works, and if it is correct in its theory that it will be no nuisance at all, it is safe; but if, in view of these general protests against it, it completes the works, it cannot expect the court to take into consideration the total loss of its expenditures if any annoyance to the comfort of plaintiff or others similarly situated should require the use of its works to be suppressed.

And in *Haines v. Taylor*, 2 Phill. Ch. 209, affirming 10 Beav. 75, Lord Langdale refused to enjoin the erection of a gas works in the plaintiff's vicinity, saying that he regarded it as uncertain whether, when completed, the manufacture of gas would prove a

nuisance as it appeared that it was possible to conduct the business without creating a nuisance, and, while he doubted that this could be accomplished, yet, with that doubt hanging over the matter, he would decline to grant an injunction.

So, in *Francklyn v. People's Heat & Light Co.* 32 N. S. 44, the court refused to enjoin a gas company where it appeared possible to remedy the defects in its works so as to obviate the annoyance created by it, provided the defendant would enter into an undertaking to correct such defects and compensate the plaintiff for the injury already suffered.

Effect of exercise of due care to prevent nuisance.

A gas company is not relieved from liability for maintaining a nuisance by the fact that it conducts its business with all reasonable care to avoid injuring the rights of others. *Belvidere Gaslight & Fuel Co. v. Jackson*, 81 Ill. App. 424; *Rosenheimer v. Standard Gaslight Co.* supra.

And in *Bohan v. Port Jervis Gaslight Co.* supra, it was held that the court properly refused to instruct the jury to the effect

inary sensibilities. See *Redd v. Edna Cotton Mills*, 136 N. C. 342, 87 L.R.A. 983, 48 S. E. 761; *Hill v. McBurney Oil & Fertilizer Co.* 112 Ga. 788, 52 L.R.A. 398, 38 S. E. 42; and authorities collected in 29 Cyc. Law & Proc. p. 1185.

Whether smoke or noise constitute a nuisance, then, depends on the evidence in each particular case. Reverting to that in the case at bar, it must be said that, owing to the proximity to the railroad yards the locality was noisy. The witnesses, however, especially complained of the peculiar noise from defendant's exhaust pipes, described by one as a popping noise, another as unbearable and happening day and night, and still another as "kind of popping noise which shakes the house and the glass." Others living in different directions from the plant do not appear to have been disturbed thereby. Some evidence was to the effect that the prevailing wind in the locality was from the southeast, and doubtless this and the relative distances from the plant account for the variance in the evidence. The showing that soot and smoke in unusual quantities and the odors were carried toward and enveloped plaintiff's house was all but conclusive. The tenants were shown to have been compelled to keep the doors and windows closed in warm weather to exclude the soot and fumes, and everything exposed was blackened. Without reviewing the evidence in detail, it is enough to say that the interference with the comfortable enjoyment of plaintiff's house was unreasonable and such as constitutes a nuisance.

2. Even though there was a nuisance, it does not follow that damages were proven. The dwelling was occupied by a tenant, and depreciation in the value of the premises because of the injury, as it was not permanent but subject to abatement, was not the measure of damages. *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Shively v. Cedar Rapids, I. F. & N. W. R. Co.* supra;

that, if the odors are those inseparable from the manufacture of gas with the most approved apparatus and with the utmost skill and care, and do not result from any defects in the works or from want of care in their management, the defendant will not be liable; as, where the damage is the necessary consequence of what the defendant is doing or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies.

So, it was held in *Atty. Gen. v. Gaslight & Coke Co.* supra, that a public nuisance created by stenches from a gas works would be enjoined, notwithstanding gas of a required purity could not be manufactured without creating the same, and, by the charter of the company, the location where the works

Randolf v. Bloomfield, 77 Iowa, 52, 14 Am. Rep. 268, 41 N. W. 562; *Ferguson v. Firmenwich Mfg. Co.* 77 Iowa, 581, 14 Am. St. Rep. 319, 42 N. W. 448. In such a case, in the absence of injury to the property itself, the measure of damages is the diminution in the rental value caused by the maintenance of the nuisance. This depreciation must result from interference with the comfortable enjoyment of the premises, and not from the mere prejudice against the property in consequence of its proximity to the plant, for the latter depreciation cannot be said to have been caused by the injury. 4 *Sutherland, Damages*, § 1048; *Rust v. Victoria Graving Dock Co.* L. R. 38 Ch. Div. 113, 131; *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649; *San Antonio v. Mackey*, 22 Tex. Civ. App. 145, 54 S. W. 33. The erection of undesirable buildings in the immediate neighborhood, as a livery barn or distillery, or the occupation of existing buildings for undesirable purposes in the immediate vicinity of the dwelling,—for instance, a saloon or poolroom,—might diminish the comfort of its use and even impair its rental value; but the owner would be without redress for any injury due to the proximity alone. If, however, the business is so conducted as to affect the use of the dwelling or the health of its occupants, these tangible injuries, capable of measurement by a pecuniary standard, may support an action for damages or other relief. Now the defendant had the right to construct its plant where it did, and to manufacture compressed gas at that place. If doing so affected the rental value of his house, the owner could no more complain than of the location of a saloon or livery stable in close proximity. The nature of the business must be left out of view, for this gas plant was not shown to be a nuisance *per se*, and it ought not to be so assumed in the absence of proof. The sole inquiry is whether harm has been done to

were erected was declared to be well adapted for that purpose.

Prescriptive right to maintain nuisance.

In order to establish a prescriptive right to maintain a nuisance caused by a gas plant, it is incumbent upon it to show that during the entire statutory period the nuisance has produced an injury equal to and of the character complained of. *Matthews v. Stillwater Gas & Electric Light Co.* 63 Minn. 493, 65 N. W. 947.

And a prescriptive right to foul a well by percolations from a gas works will be defeated by a variation and excess in the degree of fouling during the prescribed period. *Millington v. Griffiths*, 30 L. T. N. S. 65.

plaintiff by or as the direct result of the prosecution of defendant's business in the manner charged at the place it had the right to locate and conduct it. Looking to the evidence, there will be found none to sustain the award of damages. Plaintiff disclaimed any knowledge of the rental value of his property, but testified that he had fixed the rental at \$12.50 per month, that it had been vacant at different intervals,—in all, nine months,—and that the last tenant was paying \$10 per month. In explanation of this he related that "people said it was too near the gas house." Smith and Larson estimated the rental value of the premises at \$200 per year "if no gas plant were there." But this, as we have seen, was not the criterion by which to compute damages, for the company had the right to construct its plant at that locality. No evidence was adduced tending to show the diminution of the rental value because of the conduct of defendant's business in such a manner that smoke, soot, fumes, and noises emanated from the plant and interfered with the comfortable enjoyment of plaintiff's premises, and for this reason no more than nominal damages should have been allowed. The decree will be so modified as to eliminate the judgment for damages.

Modified and affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(— C. C. A. —, 165 Fed. 423.)

Safety-appliance act — transporting car to shop.

1. Hauling to the repair shops in another state, as part of a regular train engaged in interstate commerce, a foreign empty car which has been damaged in a wreck so as to be defective under the safety-appliance act of Congress, is a violation of the provisions of that act, although the damaged end of the car is chained to another car, from which it is not intended to be separated until it reaches its destination.

Same — switching cars.

2. The switching from an exchange track, where it had been left by another carrier, of a loaded car from another state to its destination a few blocks away within the city, which is so defective as not to comply with the requirements of the safety-appliance act of Congress, is a violation of the provisions of that act.

Evidence — defective apparatus — im- plication.

3. Where a car is received from another
20 L.R.A. (N.S.)

company to be switched to its destination within a city without any inspection as to its condition, it cannot be inferred, when it is discovered that the coupling apparatus is so defective as not to meet the requirements of the safety-appliance act of Congress, which fact is discovered *en route*, that the break in the apparatus occurred at the time it was discovered to be out of order.

(November 27, 1908.)

Case Note. — Duty and liability under Federal and state railway safety-ap- pliance acts.

It should be observed at the outset that in all the cases herein cited which arose under the Federal statute the cars in question were engaged in interstate traffic unless otherwise stated.

Cases not arising under the Federal or state safety-appliance laws, which pass upon the common-law duty of railroad companies to equip cars with safety couplers, are excluded herefrom.

Questions relating to the practice and procedure pertaining to actions for a recovery of penalties provided for a violation of the Federal safety-appliance act are excluded from this note.

In general.

The Federal safety-appliance act of March 2, 1893, chap. 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, provides that from and after a designated date "it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer . . . can control its speed without requiring brakemen to use the common hand brake for that purpose. [And] that when any . . . [carrier] engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars [with brakes] . . . it may lawfully refuse to receive from connecting lines . . . any cars not [so] equipped. [Or] . . . to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. . . . [Or] to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." A penalty is imposed "for using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of the provisions of" such act. It is further provided that railway employees injured by any violation of provi-

ERROR to the District Court of the United States for the Southern District of Iowa to review a judgment in plaintiff's favor in an action brought to recover penalties for alleged violations of the safety-appliance act. Affirmed.

The facts are stated in the opinion.

Argued before Hook and Adams, Circuit Judges, and Garland, District Judge.

Messrs. J. C. Cook and H. Loomis for plaintiff in error.

Messrs. Luther M. Walter and Marcellus L. Temple for defendant in error.

Hook, Circuit Judge, delivered the opinion of the court:

This was an action by the United States against the Chicago, Milwaukee, & St. Paul

sions thereof shall not "be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

By an amendment, the provisions of the act were extended so as to apply "to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and . . . [the other provisions of said act] shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, . . . [or] used in connection therewith." And it is further required that 50 per cent of the cars in such trains shall have their brakes so connected as to be operated by the engineer; the Interstate Commerce Commission being empowered to increase such minimum percentage. Act March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1907, p. 885.

Such act should not be strictly construed so as to defeat its obvious intent. *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 467.

And it has been said that, although the Federal safety-appliance act is penal in its nature and should be construed strictly, yet the construction to be given it must be such as fully to carry out the legislative intent disclosed by the act. *United States v. Southern R. Co.* 135 Fed. 122; *United States v. Central R. Co.* 157 Fed. 893.

The Nebraska statute forbidding the use of a car, that has been in the shops for general repairs before a certain date, unless equipped with automatic couplers, does not render a railway company liable for injuries sustained by an employee, by a defective coupler upon a car which had not been in the shops for general repairs before the specified date. *Thompson v. Missouri P. R. Co.* 51 Neb. 527, 71 N. W. 61.

Apparently the duty of a carrier under the provisions of the so-called safety-ap-

Railway Company, a railroad corporation engaged in interstate and local commerce, to recover penalties for four separate violations of the safety-appliance statute. Act March 2, 1893, chap. 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, amended by the acts of April 1, 1896, chap. 87, 29 Stat. at L. 85, and March 2, 1903, chap. 976, 32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1907, p. 885. Judgment was rendered against the company upon each of the four counts of the petition, but the only complaint here is of the recovery upon the first and fourth.

The evidence under the first count showed these facts without dispute: A west-bound freight train of the company was wrecked near Elmira, in the state of Missouri, and some of the cars were ditched. Among

pliance act is the same whether it is sought to recover a penalty or damages for injuries sustained by a servant by reason of a breach of such duty.

Standard or measure of duty; exercise of reasonable care.

The duty to equip cars "used in moving interstate traffic" with couplers "coupling automatically by impact, which can be uncoupled without necessity for men going between the ends of the cars" as required by the Federal safety-appliance act and amendments thereto, is absolute. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *United States v. Atlantic Coast Line R. Co.* 153 Fed. 918; *St. Louis & S. F. R. Co. v. Delk*, 85 C. C. A. 95, 158 Fed. 931; *United States v. Denver & R. G. R. Co.* 163 Fed. 519; *United States v. Atchison, T. & S. F. R. Co.* 163 Fed. 517, reversing 150 Fed. 442; *United States v. Philadelphia & R. R. Co.* 162 Fed. 403; *United States v. Philadelphia & R. R. Co.* 162 Fed. 405; *United States v. Pennsylvania R. Co.* 162 Fed. 408; *United States v. Lehigh Valley R. Co.* 162 Fed. 410; *United States v. Southern P. Co.* 154 Fed. 897; *Chicago Junction R. Co. v. King* (C. C. A.) 169 Fed. 372; *United States v. Southern P. Co.* (C. C. A.) 169 Fed. 407. *United States v. Southern P. Co.* supra.

For an instruction to the same effect see the unreported cases of *United States v. Southern R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 367, Appx. and *United States v. Atlantic Coast Line R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) id. 372, Appx.

It is generally held that a carrier's absolute duty to supply an automatic coupler and keep it in repair at all times is not satisfied by the exercise of reasonable care. *United States v. Atchison, T. & S. F. R. Co.* 163 Fed. 517; *United States v. Denver & R. G. R. Co.* supra; *United States v. Philadelphia & R. R. Co.* 162 Fed. 403; *United States v. Philadelphia & R. R. Co.* 162 Fed. 405; *United States v. Pennsylvania R. Co.*;

them was an empty foreign refrigerator car. In replacing this car on the track the coupler at one end was pulled out and the draft timbers and sills so broken as to be useless. It was then taken to the town of Elmira, the damaged end was chained to another car which was also injured in the wreck, and in that condition the two cars were incorporated in an east-bound freight train of the company and sent to its general repair shops at Dubuque, in the state of Iowa, about 350 miles from Elmira. During this interstate journey the refrigerator car moved upon its own trucks was empty, and was not equipped at its damaged end with the safety appliances prescribed by the statute.

Our conclusion is that the hauling by a railroad company from one state to another

of a car not equipped with the required safety appliances, upon its own trucks, as a part of a train of other cars moving in interstate commerce, is a use of the defective car in violation of the act of Congress, though it is empty and is being transported to a repair shop in the state of its destination. Had the car in question been put upon a flat car and so transported from Missouri to Iowa, that would have been a movement in interstate commerce, for traffic may as well consist of the property of carriers as of the property of merchants. In such a case the law would have required that the flat car be equipped with safety appliances. But, instead of adopting that course, the company used the injured car as the vehicle of its own movement; and it would

United States v. Lehigh Valley R. Co.; United States v. Southern P. Co.; United States v. Atlantic Coast Line R. Co., and United States v. Southern R. Co.,—*supra*; United States v. Louisville & N. R. Co. 162 Fed. 185; United States v. Chicago, B. & Q. R. Co. 156 Fed. 180; United States v. Wheeling & L. E. R. Co. 167 Fed. 198; United States v. Southern P. Co. (C. C. A.) 169 Fed. 407.

For instructions to the same effect see the unreported cases of United States v. El Paso & S. W. R. Co. (Jan. 30, 1907, D. C. Ariz.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 274, Appx.; United States v. Wabash R. Co. (1907; U. S. D. C. E. D. Ill.) *id.* 282, Appx.; United States v. Baltimore & O. R. Co. (Jan. 18, 1909; U. S. D. C. N. D. W. Va.) *id.* 357, Appx.; United States v. Southern R. Co. (Feb. 24, 1909; U. S. D. C. S. C.) *id.* 367, Appx.; and United States v. Atlantic Coast Line R. Co. (Feb. 24, 1909; U. S. D. C. S. C.) *id.* 372, Appx.

Nor does the highest degree of care in the inspection of cars for defective safety appliances satisfy the Federal act. United States v. El Paso & S. W. R. Co. (April 8, 1907; U. S. D. C. W. D. Tex.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 279, Appx.

In United States v. Atchison, T. & S. F. R. Co. (June 6, 1908; U. S. D. C. S. D. Cal.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 329, Appx., an instruction was given that defects in safety appliances must be discovered by a carrier at its peril, and that the exercise of diligence and care in inspecting cars will not excuse the failure to discover them.

The carrier's duty is not satisfied by equipping its cars in the first instance with automatic couplers; but they must at all times be kept in such condition that they may be operated without the necessity of men going between the ends of the cars to couple and uncouple them. Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609, affirming 68 S. C. 55, 48 S. E. 525; United States v. Southern R. Co.; Johnson v. Southern P. Co. *supra*; Chicago, 20 L.R.A. (N.S.)

M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459; Philadelphia & R. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112; United States v. Erie R. Co. 166 Fed. 352; United States v. Atchison, T. & S. F. R. Co. 167 Fed. 696; United States v. Southern R. Co. and United States v. Louisville & N. R. Co. *supra*; United States v. Nevada County N. Gauge R. Co. 167 Fed. 695; United States v. Great Northern R. Co. 145 Fed. 438, s. c. 150 Fed. 229.

For an instruction to the same effect see the unreported cases of United States v. Wabash R. Co. (1907; U. S. D. C. E. D. Ill.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 282, Appx.; United States v. Terminal R. Asso. (U. S. D. C. E. D. Mo.) *id.* 325, Appx.

The preparation of a coupler for the impact is not distinct from the act of coupling so as to relieve a carrier from the requirements of the statute making it unlawful to use a car which cannot be coupled without the necessity of going between the ends of the cars. Johnson v. Southern P. Co.; Chicago, M. & St. P. R. Co. v. Voelker; Southern R. Co. v. Simmons; and Philadelphia & R. R. Co. v. Winkler,—*supra*.

In United States v. Atchison, T. & S. F. R. Co. (1908; U. S. D. C. Ariz.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 299, Appx., an instruction was given that it is not sufficient that a coupling device may be operated with great effort from the side of a car but it must be in such condition that it may be operated with the use of reasonable effort.

In United States v. Boston & M. R. Co. 168 Fed. 148, an instruction was given to the effect that, if it is necessary that the air brake hose between two cars be connected or disconnected in order to couple or uncouple them, one going between cars for that purpose is engaged in coupling or uncoupling cars within the meaning of the Federal act requiring the ends of cars to be equipped with grab irons or handholds.

The Federal act is not complied with when a car, by reason of one coupler being defect-

seem as though the duty to comply with the requirements of the statute still remained. Even if the car did not itself carry traffic, it was engaged in intercourse between the states. The particular purpose of the movement or the character of the vehicle running on the rails between points in different states is not important. The statute applies to an engine which hauls but does not carry freight, to a dining car for the refreshment of passengers (*Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158), to an empty freight car (*Voelker v. Chicago, M. & St. P. R. Co.* [C. C.] 116 Fed. 867), and even to a steam-shovel car consisting of machinery bolted to a platform supported on trucks (*Schlemmer v. Buffalo, K. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep.

407). In the last case the court said the phrase "used in moving interstate traffic," occurring in the act of March 2, 1893, should not be taken in a narrow sense. The car in question was one of the connecting links between the engine and the caboose, and was a constituent part of a train moving on an interstate mission. Moreover, the case is wholly within the spirit of the act of Congress, for the presence in such a train of an empty, crippled car having no appliances as prescribed by § 2 of the act, or no grab irons or hand holds required by § 4, or with draw-bars higher or lower than as fixed under § 5, albeit the car is being forwarded for repairs, threatens the very dangers to life and limb against which Congress has commanded the maintenance of safeguards. It is said it was

ive, may be coupled or uncoupled from one side of the train only. *United States v. Denver & R. G. R. Co.* and *United States v. Louisville & N. R. Co.* supra; *United States v. Central R. Co.* 157 Fed. 893; *United States v. Chicago, M. & St. P. R. Co.* 149 Fed. 486; *Wabash R. Co. v. United States*, 168 Fed. 1.

And in *United States v. Southern P. Co.* 167 Fed. 699; *United States v. Philadelphia & R. R. Co.* 160 Fed. 696; *United States v. Atchison, T. & S. F. R. Co.* 167 Fed. 696; *United States v. Atchison, T. & S. F. R. Co.* (Dec. 1, 1908; U. S. D. C. N. D. Cal.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 333, Appx.; *United States v. Atchison, T. & S. F. R. Co.* (1908; U. S. D. C. Ariz.) id. 299, Appx.; and *United States v. Chesapeake & O. R. Co.* (Dec. 2, 1908; U. S. D. C. S. D. W. Va.) id. 339, Appx., the court instructed the jury that it was the duty of the carrier to keep both ends of its cars equipped with the safety device.

As such duty is absolute, it is no defense for the carrier to show that a car with a defective automatic coupler was moved without its knowledge. *United States v. Southern P. Co.* supra.

To same effect, see *Crawford v. New York C. & H. R. R. Co.* (N. Y.) 10 Am. Neg. Rep. 166.

As a carrier's duty to inspect and repair automatic couplers is absolute, it is unnecessary, in order to charge it with negligence, that notice of the defect therein be given to the person designated by it for that purpose. *Chicago & A. R. Co. v. Walters*, supra.

And such absolute duty cannot be delegated so as to relieve the master from liability. *Chicago Junction R. Co. v. King* (C. C. A.) 169 Fed. 372.

And it is no defense for a carrier to show that it employed competent inspectors and repairers to care for such safety appliances. *United States v. Southern R. Co.* supra.

Nor will the failure of a railway company's inspector to discover defective safety appliances relieve it from liability. *United States v. Atchison, T. & S. F. R. Co.* (1908; 20 L.R.A. (N.S.)

U. S. D. C. Ariz.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 299, Appx.

For an instruction to the effect that it is not the duty of a Federal inspector, employed by the Interstate Commerce Commission to discover violations of the Federal safety appliance act, to notify the railway company's employees of defects in cars, see the unreported cases of *United States v. Atchison, T. & S. F. R. Co.* (1908; U. S. D. C. Ariz.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 299, Appx.; *United States v. Southern R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) id. 367, Appx.; *United States v. Atlantic Coast Line R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) id. 372, Appx.

In *Crawford v. New York C. & H. R. R. Co.* supra, a nisi prius case, the jury was instructed that it was no defense on the part of a railway company that cars not equipped with automatic couplers were not owned by it, as, if it permitted such cars to be hauled on its road, it would be liable for resulting injuries to an employee.

As a railway company is under no obligation to receive cars from a connecting carrier with defective couplers, if it does so it must know at its peril that they are properly equipped with the required safety appliances, which are in good order and condition. *United States v. Southern P. Co.* 167 Fed. 699.

And it is no excuse that the coupling device of a car was deliberately put out of order by an employee for the purpose of placing part of it upon another car. *United States v. Southern P. Co.* supra.

For an instruction to the same effect see the unreported cases of *United States v. Cincinnati, H. & D. R. Co.* (1908; U. S. D. C. N. D. Ohio) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 331, Appx.

The fact that a car with defective coupler was hauled with an "M. C. B." card attached stating that the couplers were defective will not relieve the company from liability. *United States v. Southern R. Co.* 135 Fed. 122.

not intended that the two cars chained together should be separated before they reached the repair shops, but no one could foretell that an emergency would not arise requiring it; and the probability or improbability of it being necessary for an employee to go between the cars cannot qualify the duty of the carrier to observe the requirements of the statute. We pass by the evidence of the parties as to the existence or nonexistence of facilities for repairing the car in Missouri. Whether the duty of the carrier should be made to depend upon its course in maintaining suitable repair shops in the state where cars may need repairs is a question for Congress. The present statute makes no provision upon that subject, and a court cannot interpolate one. These

conclusions follow from the act of 1893, and we forbear discussing the larger questions arising under the amendment of 1903.

These were the facts under the fourth count: Another railroad company delivered to the defendant upon an exchange track in its yards at Ottumwa, in the state of Iowa, a string of six freight cars among which was a foreign car loaded with lumber that had come from a point in the state of Arkansas and was consigned to an industry located a few blocks distant from the exchange track. A switching crew of the defendant company with a switch engine pulled the cars out of the track where they had been placed, and were engaged in distributing them when it was discovered that the coupling appliance on the foreign car would

So, a jury has been instructed that placing a "bad order" card on a car, which has defective safety appliances, does not relieve the carrier from liability for moving it while in that condition. *United States v. Chicago, R. I. & P. R. Co.* (1908; U. S. D. C. W. D. Mo.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 362, Appx.

And in *United States v. Philadelphia & R. R. Co.* supra the trial court instructed the jury that a carrier will be liable to the prescribed penalty if a car stands in its yards one hour, and is then moved without a defective coupling device having been discovered.

So, the Federal act is violated by starting a car in transit with a defective coupler which might have been discovered by inspection. *United States v. Illinois C. R. Co.* (March 2, 1909; C. C. A. 6th C.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 376, Appx.

Notwithstanding, however, that the Supreme Court of the United States has held that the duty prescribed by such act is absolute, there are decisions holding that equipping cars with the required safety appliances satisfies the carrier's absolute duty; and that thereafter it is bound to exercise only ordinary care and diligence to keep them in repair. *St. Louis & S. F. R. Co. v. Delk*, supra; *Chicago & A. R. Co. v. Walters*, 217 Ill. 87, 75 N. E. 441, affirming 120 Ill. App. 152; *Missouri P. R. Co. v. Brinkmeier*, 77 Kan. 14, 93 Pac. 621; *Southern P. Co. v. Allen* (Tex. Civ. App.) 106 S. W. 441.

Irrespective of whether it is a defense to show that a carrier has exercised diligence to provide and maintain safety appliances, it will be liable to the penalty prescribed by the Federal act if it hauls a car with a defective coupler but a few miles, and it is probable that the defect would not have occurred by the ordinary handling of the car in that distance, and it would have been discovered at the point of the inception of its journey by proper inspection, as, if diligence is to be recognized as a defense, it must be of the highest form. *United States v. Indiana Harbor R. Co.* 157 Fed. 565, 20 L.R.A. (N.S.)

The Federal act is not violated if the safety appliances become defective while the car is in transit provided there is no subsequent lack of diligence in discovering or repairing it. *United States v. Illinois C. R. Co.* (March 2, 1909; C. C. A. 6th C.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 376, Appx.

A carrier is liable for the penalty prescribed by the act where two inspections were made without discovering the loss of a grab iron or hand hold upon the side of a car. *United States v. Louisville & N. R. Co.* 156 Fed. 193.

But the act is not violated where the automatic-coupling device becomes defective without the carrier's knowledge. *United States v. Illinois C. R. Co.* supra.

And in *United States v. Illinois C. R. Co.* supra, it was held necessary that the government show that an alleged defect in an automatic coupler existed at the time a car was started on its journey; and that the fact that the car had been traveling for one day when the defect was discovered would not warrant an inference that it existed when the journey began, it being presumed to have been sustained during that time.

In refusing the prosecution a new trial in *United States v. Atchison, T. & S. F. R. Co.* 150 Fed. 442, it was held that the Federal act was not violated by moving a car received from a connecting carrier to a side-track without discovering a defective coupler, which was repaired immediately upon being discovered, as due diligence was disclosed, and it did not appear that during the time the car was in possession of the respondent any person coupled or uncoupled it.

It is for the jury to determine whether the use of a car with a defective automatic coupler was the proximate cause of the injury sustained by a servant by catching his foot in an unblocked frog while stepping between the cars to uncouple them. *Donegan v. Baltimore & N. Y. R. Co.* 165 Fed. 869.

The substitution of a short or "stub" pilot in place of a long one in order to equip a locomotive with an automatic coupler does not constitute negligence, although it was the cause of the derailment of the

not work so it could be uncoupled from the car next to it. A switchman then went between the ends of the cars and with his hands manipulated the coupler of the opposite car and so detached them. The car with the defective coupler was then put back on the exchange track from whence it was taken. The defect consisted of a broken finger or lifting key that worked within the coupling block. The break would not appear to an external view, but there was substantial evidence that a mere manipulation of the lever without moving the car would disclose it. At the conclusion of the evidence each party requested a directed verdict in its favor; the trial court granted the request of the government. There had been no delivery of the car in question at its ultimate destination, and the switching of it from the time it was taken by defendant's employees on the exchange track to the time of the discovery of the defect was in the course of

such delivery and constituted a use in interstate commerce. There was no proof of such an inspection of the car while it was at rest on the exchange track as would have disclosed the condition of the coupling appliance, and there was no proof indicating the defect was caused while the switching crew were performing their duties. It cannot, therefore, be inferred that the finger or lifting key might have been broken at the time it was discovered to be out of order. The duty of defendant under the statute is an absolute one, and is not discharged by the exercise of reasonable care. The case is controlled by the principles announced in *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, and by this court in *United States v. Atchison, T. & S. F. R. Co. (C. C. A.)* 163 Fed. 517, and *United States v. Denver & R. G. R. Co. (C. C. A.)* 163 Fed. 519.

The judgment is affirmed.

locomotive in a collision with cattle. *Briggs v. Chicago & N. W. R. Co.* 60 C. C. A. 513, 125 Fed. 745.

Specific requirements.

Section 5 of the Federal safety-appliance act does not require that the drawbars of loaded or unloaded cars shall be of uniform height provided they do not vary more than the 3 inches prescribed as the maximum variation from the standard. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 71 Ark. 445, 78 S. W. 220, and same case on second appeal, 83 Ark. 591, 98 S. W. 958.

A carrier's absolute duty in this regard is not discharged by furnishing its car inspectors and train men metallic wedges or "shims" to use as occasion demands, to raise to the legal standard drawbars lowered by the natural effect of proper use. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

The jury has been instructed that the Federal act requires that drawbars of a car shall be not more than 34½ inches nor less than 31½ inches from the top of the rail. *United States v. Atchison, T. & S. F. R. Co.* (1908; U. S. D. C. Ariz.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 299, Appx.

Equipping locomotives and cars with automatic couplers of such different type as not to couple with each other automatically by impact does not satisfy the provisions of the Federal act. *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

And in *United States v. Louisville & N. R. Co.* 162 Fed. 185, the jury was instructed that it was a violation of the Federal act to haul a car loaded with interstate traffic with a locomotive having a defective air-brake pump, and which was not equipped with means of applying power brakes to 20 L.R.A. (N.S.)

the train, or having its driving wheels equipped with power brakes.

For an instruction as to the duty of a carrier to have 75 per cent of the cars of its freight trains equipped with automatic brakes, and its duty to repair defects therein when occurring while a train is upon its journey, see *United States v. Chicago G. W. R. Co. supra*.

In *United States v. Chesapeake & O. R. Co.* (1908; U. S. D. C. S. D. W. Va.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 339, Appx., the jury was instructed that in estimating the 75 per cent of the cars of a train that are required to be equipped with air brakes the engine and tender should be counted as two cars.

In *United States v. Boston & M. R. Co.* 168 Fed. 148, and *United States v. Baltimore & O. R. Co.* (Jan. 18, 1909, U. S. D. C. N. D. W. Va.) reported in *Thornton on Employers' Liability & Safety Appliance Acts* 357, Appx., the jury was instructed that if the end of a car is equipped with a ladder, brake lever, or thing other than a grab iron or hand hold, which affords equal security, there is no violation of the Federal act.

To what lines or traffic duty attaches.

A carrier whose line lies wholly within one state is within the Federal act and its amendments, when transporting, in its own cars, not equipped with automatic couplers, goods billed from a point without the state to one within; the test of whether a carrier is engaged in interstate traffic being the transportation of articles in interstate traffic, and not the means of transportation. *United States v. Colorado & N. W. R. Co.* 15 L.R.A. (N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, overruling *United States v. Geddes*, *infra*.

A car consigned to a point without the state is within the Federal safety-appliance act although the defendant hauls it only from the point of loading, and delivers it

to another carrier within the same state. *United States v. Chicago, P. & St. L. R. Co.* 143 Fed. 353; *United States v. Southern R. Co.* 135 Fed. 122.

It was held in *United States v. Southern R. Co.* 164 Fed. 347, that the Federal act and amendments are applicable where an interstate carrier hauls loaded cars of commodities consigned from point to point entirely within a state, in the same manner as though it had hauled them in interstate traffic.

And a railway company whose line is located entirely within a state is within the Federal act and its amendments by carrying articles of interstate commerce under a contract with an express company, although it has no control or management of the carriage thereof, so as to render it liable to a penalty for hauling a train carrying such articles, with an engine not equipped with an automatic coupler. *United States v. Colorado & N. W. R. Co.* supra, Philips, J., dissenting.

A binding instruction was given, in the unreported case of *United States v. Pacific Coast R. Co.* (1908; U. S. D. C. S. D. Cal.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 285, Appx., that an intrastate carrier is within the Federal act when hauling a car over defendant's line consigned from a point without the state to one within on the line of another carrier where its destination had been diverted to the line of the intrastate carrier before it reached the state.

A dining car used in interstate traffic, while waiting to be made up into an interstate train for its next trip is "used in moving interstate traffic" within the meaning of the Federal act and amendments thereto. *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 303, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 467.

So, a locomotive with a defective coupler is within the Federal act if used in moving interstate traffic, although it is used exclusively within a state. *United States v. Great Northern R. Co.* 145 Fed. 438.

And a car of merchandise consigned from one point to another in the same state comes within the Federal act if, in transit, it is carried through a portion of another state. *United States v. Erie R. Co.* 166 Fed. 352.

But the terms of the Federal safety-appliance act are not applicable to a railroad located entirely within a state when handling cars consigned from point to point therein. *Rio Grande Southern R. Co. v. Campbell* (Colo.) 96 Pac. 986.

And in *United States v. Geddes*, 65 C. C. 320, 131 Fed. 452, overruled in *United States v. Colorado & N. W. R. Co.* supra, it was held that the Federal safety-appliance act of 1893 did not apply to a road entirely within a state, which does not accept freight from an interstate carrier on through bills of lading, but requires it to be delivered to it and transported on local bills of lading at its own rates.

A shipment originating in one state does not lose its interstate character, so as to 20 L.R.A. (N.S.)

prevent its falling within the provisions of the safety-appliance act, by being temporarily suspended on its journey, whether its ultimate destination is near or remote. *Chicago, M. & St. P. R. Co. v. Voelker*, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522, reversing 116 Fed. 867.

In *United States v. Chicago G. W. R. Co.* 162 Fed. 775, the court instructed the jury that an interstate train remained such although the cars composing it when it started on its journey may have been set out and new ones taken on, and the train crew and engine changed; and it was immaterial whether the cars were owned by the defendant company or another.

And in *United States v. Chicago, M. & St. P. R. Co.* 149 Fed. 486, the jury was instructed that a car of old rails belonging to a carrier was engaged in interstate commerce when hauled in a construction train from one state to another.

In *United States v. Southern R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 367, Appx., an instruction was given to the effect that a car containing sand, intended for a carrier's own use, if hauled from one state to another in a train engaged in interstate commerce, is within the Federal act.

So, a car which has been set apart exclusively for and is loaded with intrastate traffic is within the Federal act and its amendments when hauled by an interstate train with cars engaged in interstate traffic. *Wabash R. Co. v. United States* (C. C. A.) 168 Fed. 1; *United States v. Erie R. Co.* 166 Fed. 352.

Juries have been instructed to the effect that it is a violation of the Federal act to move a car with defective safety appliances, although not containing an interstate shipment, in a train containing other cars engaged in interstate traffic. *United States v. Southern R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) reported in Thornton on Employers' Liability & Safety Appliance Acts, 367, Appx.; *United States v. Atlantic Coast Line R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) id. 372, Appx.

But the contrary was held in *United States v. Illinois C. R. Co.* 166 Fed. 997, unless the intrastate car is so located in a train as to require that it be coupled to, or uncoupled from, another car engaged in interstate traffic. The court being of the opinion that the words "used in connection" with interstate traffic, as contained in the amendment of March 2, 1903, chap. 976 (32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1907, p. 885), meant the actual connection between cars so used.

Railway tracks owned by a stockyard company and located exclusively on its own premises connecting several interstate railway lines, over which, with its own locomotives and servants, it hauls for hire and delivers cars loaded with interstate shipments to the transfer tracks of such interstate carriers, is within the terms of the Federal safety appliance act and amend-

ments thereto. *Union Stockyard Co. of Omaha v. United States* (C. C. A.) 169 Fed. 404, affirming 161 Fed. 919.

So, when a car consigned from one state to another is hauled in a train from the tracks of one interstate carrier to those of another by a belt line company whose tracks lie entirely within a city, and connect the tracks of various interstate carriers, and for so doing it receives an arbitrary charge per car from the interstate carriers, it is within the Federal act. *Belt R. Co. v. United States* (C. C. A.) 168 Fed. 542.

A jury has been instructed that if the coupling device of a shifting engine becomes defective while engaged in moving a car loaded with an interstate shipment from one yard to another at its destination, the company cannot be liable for a violation of the Federal act if the defect was repaired as soon as possible before moving it again. *United States v. Southern R. Co.* (Feb. 24, 1909; U. S. D. C. S. C.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 367, Appx.

It has been held that cars are within the provisions of the safety-appliance act when being moved for the purpose of making up a train to be moved in interstate traffic. *Mobile. J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395. See *Crawford v. New York C. & H. R. R. Co.* (N. Y.) 10 Am. Neg. Rep. 166, a nisi pruis case, for an instruction to the same effect. When a terminal company transfers a car delivered to it by an interstate carrier from one line of railway to another; and it is liable for the penalty if the car has a defective coupling. *United States v. Northern P. Terminal Co.* 144 Fed. 861. When a car is taken from one carrier and moved by another to its yards in order to be placed in a train and forwarded to its destination in another state, so as to render it liable for a penalty if the car is without a grab iron or hand hold. *United States v. Pittsburgh, C. C. & St. L. R. Co.* 143 Fed. 360. When a car has arrived at its destination, and nothing further remains but to deliver it to the consignee, but, by reason of a broken chain attached to the automatic-coupling device, and other defects therein, it is placed upon a siding for repairs, and, while switching it, an employee is injured by reason of the defects. *Lurton, J.*, dissented. *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95, 158 Fed. 931, rehearing denied in 162 Fed. 145.

But it was held in *Rosney v. Erie R. Co.* 68 C. C. A. 155, 135 Fed. 311, that, if it does not appear that cars being switched in a railway yard were used in interstate commerce, they are not within the Federal safety-appliance act.

The Federal act and amendments require that carriers engaged in interstate traffic shall keep the cars used therein equipped with safety devices at all times,—not only while actually used in such traffic, but when in use upon its road as well. *United States v. Great Northern R. Co.* 145 Fed. 438.

As the term "used in moving interstate

traffic" does not require that a car be actually loaded with interstate traffic on its journey from state to state, it is a violation of the Federal act to haul an empty car with a defective coupler. *United States v. St. Louis, I. M. & S. R. Co.* 154 Fed. 516. The court observed that the more natural meaning of the Federal act was that a car that has been used for interstate traffic, and stands ready and is intended to be so used whenever needed, is within the purview of the act. And, to the same effect, see also *United States v. Louisville & N. R. Co.* 162 Fed. 185; *United States v. Great Northern R. Co.* supra.

The Federal safety appliance act is applicable to both loaded and empty cars. *United States v. Atchison, T. & S. F. R. Co.* (1908; U. S. D. C. Ariz.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 299, Appx.

So, the provisions of such act require that grab irons or hand holds be applied to all cars used in interstate commerce, whether empty or loaded. *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247.

And an empty car is within the Federal act, if customarily or generally employed in interstate traffic, when moved by an interstate train. *United States v. Wheeling & L. E. R. Co.* 167 Fed. 198; *Wabash R. Co. v. United States* (C. C. A.) 168 Fed. 1.

But in *United States v. Illinois C. R. Co.* 156 Fed. 182, the jury was instructed that an empty car is not within the provisions of the Federal act unless it appears that it was used, or intended to be used, in moving interstate traffic.

And a car not shown to have ever been used or intended to be used in interstate traffic is not within such act. *United States v. Erie R. Co.* 166 Fed. 352.

And in *United States v. Chesapeake & O. R. Co.* (1908; U. S. D. C. S. D. W. Va.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 339 Appx., an instruction was given that it is immaterial whether a car is loaded or empty as it is within the Federal act if carried in a train which is composed of at least one car which engaged in interstate traffic.

But it was held in *United States v. Illinois C. R. Co.* 166 Fed. 997, that a car used in intrastate traffic did not fall within the Federal act and its amendments when hauled in a train containing a car bearing interstate traffic, but in a different part thereof.

In *Kansas City, M. & B. R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457, it was held to be for the jury to determine whether a car of coal was engaged in interstate traffic within the meaning of the Federal act of 1893, where it was drawn from a mine to the main line of an interstate carrier's road and placed upon a siding, and was afterwards billed and shipped to another state.

Duty to make immediate repairs.

The trial court, in *United States v. Chicago G. W. R. Co.* 162 Fed. 775; *United States v. Atchison, T. & S. F. R. Co.* and *United*

States v. Southern P. Co. supra, instructed the jury that it was the carrier's duty, if by any means the safety appliance of a car became injured or out of repair so as to become inoperative while being hauled upon its journey, immediately to repair the same, if it could be done with the means and appliances at hand at the time and place where the defect was discovered, or could have been discovered by the exercise of reasonable care; but, if such means and appliances were not at hand, it would have the right, without incurring a penalty, to haul the car to the nearest point on its line where the defects might be remedied; but, if it hauled the car from a place where repairs could have been made, it would be liable for the penalty.

In the last case the court gave a similar instruction as to the effect of the act if a train was started on its journey with 75 per cent of its cars equipped with automatic brakes, and, by reason of defects therein while upon the road, the number of cars so equipped was reduced below that number.

If a break or defect occurred during the journey of the car, the carrier will be liable if it was not repaired at the first opportunity; it being the duty of the carrier to exercise the utmost degree of diligence that would be used by highly prudent persons under the circumstances to discover and repair such defect. *United States v. Illinois C. R. Co.* 156 Fed. 182.

To same effect see *United States v. Illinois C. R. Co.* (March 2, 1909; C. C. A. 6th C.) reported in *Thornton on Employers' Liability and Safety Appliance Acts*, 376, Appx.

Juries have been instructed that it is the duty of a carrier to establish reasonable repair points along its lines for the purpose of repairing the safety devices required by the Federal act. *United States v. Atchison, T. & S. F. R. Co.* (1908; U. S. D. C. Ariz.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 299, Appx; and *United States v. Atchison, T. & S. F. R. Co.* (Dec. 1, 1908; U. S. D. C. N. D. Cal.) id. 333, Appx.; and *United States v. Baltimore & O. R. Co.* (Jan. 18, 1909; U. S. D. C. N. D. W. Va.) id. 357, Appx.

Instructions have been given to the effect that if couplers become defective while enroute they must be repaired at the nearest point where repairs can be made, and that a car cannot be hauled further, as it is the duty of the carrier to have on hand materials and facilities for making prompt repairs. *United States v. Atchison, T. & S. F. R. Co.* (1908; U. S. D. C. Ariz.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 299, Appx; *United States v. Atchison, T. & S. F. R. Co.* (Dec. 1, 1908; U. S. D. C. N. D. Cal.) id. 333, Appx.; *United States v. Baltimore & O. R. Co.* (Jan. 18, 1909; U. S. D. C. N. D. W. Va.) id. 357, Appx.

Cars being hauled to repair shops.

It is a violation of the Federal safety-appliance act to haul two empty freight cars
20 L.R.A. (N.S.)

chained together from one state to another for repairs if the carrier has a repair shop at the point where the car becomes defective (*United States v. St. Louis, I. M. & S. R. Co.* supra); or to haul an empty car without a grab iron or hand hold from one state to another to a repair shop (*United States v. Chicago & N. W. R. Co.* 157 Fed. 616); or to haul a car with a defective coupler 2 miles to a repair shop, notwithstanding it has other defects, which can not be repaired without sending the car to the shops, where the defective coupler can be repaired at the point where it becomes defective (*United States v. Southern P. Co.* 154 Fed. 897).

It was held in *United States v. Southern P. Co.* (C. C. A.) 169 Fed. 407, that the Federal act was violated by moving a car, actually engaged in interstate traffic, in connection with other cars, from one yard track to another, where its defective safety appliances could be conveniently repaired, the defendant claiming that it was necessary to move the car in order to get it out of the way and not interrupt the operation of its yard. And to the same effect see *Chicago Junction R. Co. v. King* (C. C. A.) 169 Fed. 372.

So, a trial court has instructed a jury that it is a violation of the Federal act to haul two cars without automatic couplers, which have been badly damaged, 379 miles to a repair shop in another state, where it passes through three points where the couplers might have been repaired. *United States v. Chicago, M. & St. P. R. Co.* 149 Fed. 486.

But it was held in *Chicago & N. W. R. Co. v. United States* (C. C. A.) 168 Fed. 236, that an empty car, generally used in interstate traffic, which, with a defective grab iron or hand hold, is hauled alone just across a state line for the sole purpose of being repaired, is not within the meaning of the Federal act and its amendments.

In *United States v. Chicago, M. & St. P. R. Co.* supra, the trial court instructed the jury that it is a violation of the Federal act to move a car engaged in interstate traffic, received from a connecting carrier at its destination with a defective coupler, to a track for repairs, as, under such act, the carrier need not accept a defective car from a connecting carrier.

But in *United States v. Louisville & N. R. Co.* 156 Fed. 195, the trial court instructed the jury that it was not a violation of the Federal act to move a car, upon arrival at its destination with a defective coupler, four blocks to the consignee's place of business, which was nearer than the defendant's repair track, and, after it was unloaded, to remove it to the repair tracks, where the point where the defect was discovered was such that it could not be there repaired without blocking the entire business of the carrier's terminal yard.

A damaged car which has lost its automatic-coupling device while being moved to a repair shop is not used "in moving traffic," within the Massachusetts statute for

bidding the handling of cars so used which are not equipped with automatic couplers operating by impact. *Taylor v. Boston & M. R. Co.* 188 Mass. 390, 74 N. E. 591.

What are "cars" within the meaning of the safety-appliance act.

The following have been held to be "cars" within the meaning of the Federal safety-appliance act: A steam-shovel car (*Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417); a locomotive (*Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 462); the tender of a switch engine used in placing cars engaged in interstate traffic upon a yard siding (*Philadelphia & R. R. Co. v. Winkler*, 4 Penn. [Del.] 387, 56 Atl. 112, affirming 4 Penn. [Del.] 80, 53 Atl. 90); a dining car, which is in constant use, while waiting for the making up of a train for its next interstate trip (*Johnson v. Southern P. Co.* supra).

A locomotive is not within the meaning of the Iowa statute requiring "cars" to be equipped with automatic couplers. *Bryce v. Burlington, C. R. & N. R. Co.* 119 Iowa, 274, 93 N. W. 275. The court bases its decision upon the fact that the act specifically provides that certain devices shall be used upon locomotives, which does not include safety couplers, and, had it been the legislative intent to have so required, the act would have so stated; but in *Johnson v. Southern P. Co.* supra, the Supreme Court of the United States refused to adopt this reason for holding that the Federal safety-appliance act did not include a locomotive.

A locomotive tender is not a car, within the meaning of the Massachusetts act forbidding any car to be used or hauled which is not equipped with automatic couplers. *Larabee v. New York, N. H. & H. R. Co.* 182 Mass. 348, 66 N. E. 1032.

In *United States v. Baltimore & O. R. Co.* (Jan. 18, 1909; U. S. D. C. N. D. W. Va.) reported in *Thornton on Employers' Liability & Safety Appliance Acts*, 357, Appx., an instruction was given that an engine and tender are within the Federal act.

A state statute requiring brakes to be placed upon freight cars other than four-wheeled cars applies to a gondola car used for hauling lumber, which has eight wheels. *Mew v. Charleston & S. R. Co.* 55 S. C. 90, 32 S. E. 828.

A locomotive tender is not within the meaning of the Michigan statute requiring automatic couplers to be applied to "freight cars." *Blanchard v. Detroit & M. R. Co.* 139 Mich. 694, 103 N. W. 170.

A state statute requiring cars to be equipped with automatic couplers does not apply to electric cars. *Cleveland & E. R. Co. v. Somers*, 24 Ohio C. C. 67.

Neither does such act apply to cars used in railway construction. *Ibid.* 20 L.R.A. (N.S.)

Right of action for injury to servant.

As any breach of the carrier's duty imposed by the so-called safety-appliance acts renders it liable to a servant who is injured by reason thereof, the reader is referred to the cases cited in the preceding sections, for a discussion of what will constitute a breach of the carrier's duty.

A carrier's failure to equip its cars with the required safety appliances, or to keep them in repair, will render it liable for injuries sustained by a servant in consequence thereof. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 71 Ark. 445, 78 S. W. 220, same case on second appeal, 83 Ark. 591, 98 S. W. 958; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 467; *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609, affirming 68 S. C. 55, 46 S. E. 525; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417; *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95, 158 Fed. 931, rehearing denied in 162 Fed. 145; *Chicago, M. & St. P. R. Co. v. Voelker*, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; *Kansas City, M. & B. R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457; *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395; *Philadelphia & R. R. Co. v. Winkler*, 4 Penn. (Del.) 387, 56 Atl. 112; *Chicago & A. R. Co. v. Walters*, 217 Ill. 87, 75 N. E. 441, affirming 120 Ill. App. 152; *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247; *Crawford v. New York C. & H. R. R. Co.* (N. Y.) 10 Am. Neg. Rep. 166; *Mew v. Charleston & S. R. Co.* 55 S. C. 90, 32 S. E. 828; *Southern P. Co. v. Allen* (Tex. Civ. App.) 106 S. W. 441; *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459; and see also the cases hereinafter cited.

The violation of the Federal safety-appliance act will permit an employee who is injured in consequence thereof to maintain an action in the courts of any state. *Mobile, J. & K. C. R. Co. v. Bromberg*, and *Southern P. Co. v. Allen*, supra.

A prima facie case of negligence is established by showing the neglect to equip cars engaged in interstate traffic with automatic couplers, and an injury resulting therefrom. *Mobile, J. & K. C. R. Co. v. Bromberg*, supra.

Assumed risk.

By the terms of § 8 of the Federal act, an employee of any common carrier, who is injured by reason of noncompliance with the provisions of the act, is declared not to have assumed the risk thereby occasioned, although he continues in the employment of the carrier after knowledge of the unlawful use of the rolling stock, which is not equipped with the required safety appliances. This has been applied in *Kansas City, M. & B. R. Co. v. Flipppo*; *Mobile, J. & K. C. R. Co. v. Bromberg*; and *Philadelphia & R. R. Co. v. Winkler*,—supra.

The Federal act relieves a servant of the assumption of risk of injury from the negligence of his fellow servant where the carrier has failed to discharge its duty to equip its cars with automatic couplers. *Southern P. Co. v. Allen*, *supra*.

A switchman does not assume the risk of injury from a car with a defective automatic coupling device because the track on which it is located is sometimes used to handle cars in need of repairs, but which is not a hospital track, but is used actively for handling trains and the defective car by which he is injured is not marked. *Chicago, M. & St. P. R. Co. v. Voelker*, *supra*.

The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under § 8 of that act, he does not assume, as to prevent a court from holding as a matter of law that he was guilty of contributory negligence which would defeat any recovery for lifting his head a little too high after being warned of the danger. *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

But the provisions of the act relieving an employee of the assumption of risk will not excuse a failure to use ordinary prudence where one is aware that the grab irons or hand holds upon a car are missing. *Cleveland, C. C. & St. L. R. Co. v. Baker*, 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224.

And a servant who uses cars which are not equipped with such safety appliances as are required by the Ohio statute, after knowledge thereof, assumes the risk of injury therefrom. *Cleveland & E. R. Co. v. Somers*, 24 Ohio, C. C. 67.

Upon the general subject of assumption of risk from master's violation of a statutory duty, see case notes to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A.(N.S.) 981, and *Johnson v. Mammoth Vein Coal Co.* 19 L.R.A.(N.S.) 646.

Contributory negligence.

The Federal safety-appliance act does not deprive a carrier of the right to interpose the defense of contributory negligence. *Denver & R. G. R. Co. v. Arrighi*, 63 C. C. A. 649, 129 Fed. 347; *Cleveland, C. C. & St. L. R. Co. v. Baker*; *Crawford v. New York C. & H. R. R. Co.*; *Southern P. Co. v. Allen*,—*supra*. To same effect see *Mobile, J. & K. C. R. Co. v. Bromberg*, *supra*.

It is for the jury to determine whether the employee was guilty of contributory negligence in failing to go to the opposite side of the train, where he might have uncoupled the cars without going between them. *Southern P. Co. v. Allen*, *supra*.

And the question of contributory negligence is for the jury, where it appears that an accident would not have occurred if the engineer had not moved the cars in disobedience of a signal given by the injured servant before he entered between them. *Ibid.* 20 L.R.A.(N.S.)

So, it is for the jury to determine whether a brakeman was guilty of contributory negligence in going between cars to prepare them for coupling, which the nature of the coupling device requires shall be done, and was injured by the engineer moving the cars upon a signal from the conductor, where the employee alleges that the conductor, having sent him to make the coupling, must have known of the danger of his position. *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

For a similar decision where a switchman, apparently with the knowledge of the engineer and conductor, went between cars to repair a broken coupler, and was injured by the movement of the train, see *Chicago Junction R. Co. v. King* (C. C. A.) 169 Fed. 372.

So, it is for the jury to determine whether it was contributory negligence for one who had no reason to anticipate the defective condition of an automatic coupler to go between a car and a moving engine in the nighttime without stopping it to prepare the coupler, immediate action being required, believing he had time safely to make the coupling in that manner. *Chicago & A. R. Co. v. Walters*, 217 Ill. 87, 75 N. E. 441.

It is not contributory negligence, as a matter of law, for a brakeman to place his arm between the buffers of a car, where the engine was moved in disobedience to his signal, which he had a right to assume would be obeyed. *Southern P. Co. v. Allen*, *supra*.

So, the question of contributory negligence is for the jury where one, by reason of a defective coupler, went between moving cars to uncouple them, and caught his foot in an unblocked frog. *Donegan v. Baltimore & N. Y. R. Co.* 165 Fed. 869.

But it was contributory negligence for one to go between cars to uncouple them when equipped with sufficient automatic couplers, so that they might have been uncoupled from the side of the car. *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 128 Fed. 529.

So it is contributory negligence for an experienced brakeman to go between cars which are not equipped with automatic couplers that will couple by impact, and to guide a link into a drawhead with his hand. *Denver & R. G. Co. v. Arrighi*, *supra*.

And it is contributory negligence for a brakeman, where an automatic coupler fails to open by the use of the lever upon one side of the train, to go between the cars to uncouple them without first attempting to use the lever upon the opposite side thereof. *Morris v. Duluth, S. S. & A. R. Co.* 47 C. C. A. 661, 108 Fed. 747; *Gilbert v. Burlington, C. R. & N. R. Co.* and see *Southern P. Co. v. Allen*, *supra*.

But the contrary, however, was held in *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395, where an employee, while attempting to make a coupling from the inside of a curve by reason of the defective condition of the coupler, went between the ends of the cars to uncouple them, and was injured.

See also *United States v. Denver & R. G.*

R. Co. 163 Fed. 519; United States v. Louisville & N. R. Co. 162 Fed. 185; United States v. Central R. Co. 157 Fed. 893; United States v. Chicago, M. & St. P. R. Co. 149 Fed. 486; Wabash R. Co. v. United States, 168 Fed. 1, cited under the title "Standard or measure of duty," supra.

KANSAS SUPREME COURT.

WILLIAMSON-HALSELL FRAZIER COMPANY, Plff. in Err.,
v.

JOSEPH J. ACKERMAN et al.

(77 Kan. 502, 94 Pac. 807.)

Mortgage — duress — threatened prosecution.

1. A contract, in order to be valid and binding, must be the result of the free assent of the parties making it; and, where a father is coerced into executing a mortgage to secure the payment of a defalcation of

Headnotes by JOHNSTON, Ch. J.

Case Note. — Contracts procured by threats of prosecution of a relative.

The earlier cases on this subject are presented in a note to the case of City Nat. Bank v. Kusworm, 26 L.R.A. 48, and the present note is confined to the decisions rendered since that note.

As opposed to public policy, as compounding a felony.

As shown in the earlier note (subd. 1, b), such contracts have been held void upon the ground of public policy, as amounting to the compounding of a felony.

It is an abuse of process for a creditor to use the criminal process for the purpose of coercing a father into securing the debt of his son. Green v. Moss, 65 Ill. App. 594.

It is against public policy that the enforcement of the criminal law should be obstructed by contracts made on such consideration in furtherance of personal and private interests. Corbett v. Clute, 137 N. C. 546, 50 S. E. 216.

A mortgage executed in consideration of an agreement to compound a felony is void and unenforceable. Ibid.

It is both an illegal and an immoral act to make an agreement, for a consideration, to suppress the prosecution of a criminal offense, whether the offense is of the grade of felony, or misdemeanor. Jones v. Dannenberg Co. 112 Ga. 426, 52 L.R.A. 271, 37 S. E. 729.

Money paid by a wife to save her husband from threatened prosecution for a felony of which he is innocent, is not compounding a felony, since none in fact exists. Woodham v. Allen, 130 Cal. 194, 62 Pac. 398.

A mortgage executed to prevent a threatened prosecution of the mortgagor's son for

his son by threats of the arrest and prosecution of the son for embezzlement if such security is not given, the mortgage may be avoided on the ground of duress.

Same — test of duress.

2. The test in determining whether there was duress is not so much the means by which the father was compelled to execute the mortgage as it is the state of mind induced by the means employed,—the fear which made it impossible for him to exercise his own free will.

Duress — threatened prosecution — guilt of accused.

3. If the threats of the arrest and prosecution of the son operated to deprive the father of his free-will power and to constrain the execution of the mortgage, the actual guilt or innocence of the son upon the charge of embezzlement was not a material question in determining whether there was duress; and, in charging the jury upon that defense, it was not essential that the court should give a complete definition of the offense of embezzlement.

(March 7, 1908.)

a felony is invalid for illegality of consideration. Koons v. Vauconsant, 129 Mich. 260, 95 Am. St. Rep. 438, 88 N. W. 630.

Such a mortgage cannot be rendered valid by showing that the son was in fact innocent, so that there was no felony to be compounded. Ibid.

A note executed by a husband and wife is void when given in settlement of pre-existing debts, and in consideration of discontinuing a pending criminal prosecution against the husband. Stanard v. Sampson (Okla.) 99 Pac. 796.

There can be no binding ratification of such a contract between the same parties. Ibid.

And a contract, the consideration for which was that a brother should not be prosecuted for embezzlement is against public policy and void. McCormick Harvesting Mach. Co. v. Miller, 54 Neb. 644, 74 N. W. 1061.

An agreement given to suppress a criminal prosecution of a son-in-law for embezzlement will not be enforced. Tracy v. Deatrick, 10 Ohio C. C. 111.

Under Iowa Code, § 4889, which makes it a crime for any person to take any money or valuable consideration, or promise therefor, on an agreement, express or implied, not to prosecute a criminal, a note given in part consideration of such an agreement is void. Rosenbaum Bros. v. Levitt, 109 Iowa, 292, 80 N. W. 393.

Thus, a mortgage executed to a bank because of threats made by an officer of the bank to prosecute a brother of the mortgagor for embezzlement, and because of a promise not to prosecute if the mortgage was executed, is void. Henry v. State Bank, 131 Iowa, 97, 107 N. W. 1034.

A note given to one whose money has been

ERROR to the District Court for Sedgwick County to review a judgment in defendants' favor in an action brought to recover on three promissory notes and to foreclose a mortgage purporting to secure the payment thereof. Affirmed.

The facts are stated in the opinion.

Messrs. H. C. Sluss, H. E. Valentine, and A. A. Godard for plaintiff in error.

Messrs. David M. Dale, Samuel B. Amidon, Kos Harris, and V. Harris, for defendants in error:

Even if the accused was guilty of embezzlement, the notes were void.

Adams v. Irving Nat. Bank, 116 N. Y. 606, 6 L.R.A. 491, 15 Am. St. Rep. 447, 23 N. E. 7; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76; Heaton v. Norton County State Bank, 59 Kan. 281, 52 Pac. 876; Thompson v. Niggley, 53 Kan. 664, 26 L.R.A. 803, 35 Pac. 290; Gorringer v. Reed, 23 Utah, 120, 90 Am. St. Rep. 692, 63 Pac. 902; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Giddings v. Iowa Sav. Bank, 104 Iowa, 676, 74 N. W. 21; Delta County Bank v. McGranahan, 37

Wash. 307, 79 Pac. 796; Mack v. Prang, 104 Wis. 1, 45 L.R.A. 407, 76 Am. St. Rep. 848, 79 N. W. 770; City Nat. Bank v. Kusworm, 91 Wis. 166, 64 N. W. 843; Hovorka v. Havlik, 68 Neb. 14, 110 Am. St. Rep. 389, 93 N. W. 990; Foote v. De Poy, 126 Iowa, 366, 68 L.R.A. 302, 106 Am. St. Rep. 365, 102 N. W. 112; 2 Cooley, Torts, 3d ed. p. 969; Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; Silsbee v. Webber, 171 Mass. 378, 50 N. E. 555; Baker v. Morton, 12 Wall. 150, 20 L. ed. 262; Brown v. Pierce, 7 Wall. 205, 19 L. ed. 134; Fay v. Oatley, 6 Wis. 42; First Nat. Bank v. Bryan, 62 Iowa, 42, 17 N. W. 165; Green v. Scranage, 19 Iowa, 461, 87 Am. Dec. 447; Hatter v. Greenlee, 1 Port. (Ala.) 222, 26 Am. Dec. 370; Bane v. Detrick, 52 Ill. 19; Severance v. Kimball, 8 N. H. 386; Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Strong v. Grannis, 26 Barb. 122; Bowker v. Lowell, 49 Me. 429; Work's Appeal, 59 Pa. 444; Taylor v. Cottrell, 16 Ill. 93; Phelps v. Zuschlag, 34 Tex. 371; Shenk v. Phelps, 6 Ill. App. 612; Richardson v. Duncan, 3 N. H. 508; Shaw v. Spooner, 9

embezzled (by the brother of the maker), for the amount of his civil damages, to prevent a criminal prosecution, is void as against public policy. Groesbeck v. Marshall, 44 S. C. 538, 22 S. E. 743.

And a check given in pursuance of a contract not to prosecute the maker's son was held void in *McNeese v. Carver*, 40 Tex. Civ. App. 129, 89 S. W. 430.

A note executed for the purpose of making restitution of money misappropriated is not void, in the absence of an express agreement by the payee not to prosecute the obligor for the crime. *Powell v. Flanary*, 109 Ky. 342, 59 S. W. 5.

While a person cannot convert a crime into a source of profit or benefit to himself, yet this rule does not prevent a person whose property has been misappropriated from seeking to recover the same by compromise or otherwise, if nothing is done to suppress the criminal prosecution. *Ibid*.

A contract to repay the person whose property has been stolen is not of itself illegal. But, if the consideration for the promise in whole or in part be an agreement to stifle or discontinue prosecution for the crime committed, the contract will not be enforced. *Giles v. De Cow*, 30 Colo. 412, 70 Pac. 681.

Thus, a contract to return property alleged to have been stolen by defendant's brother-in-law, and also to pay a debt owed by him to plaintiff, in consideration that plaintiff would not prosecute the brother-in-law for the larceny, is illegal and unenforceable. *Ibid*.

It is not necessary for a person to be under arrest and actually in the course of being prosecuted to enable one who secures the termination of the prosecution for a money consideration to plead the illegality of the consideration in bar of its collection. *Beal & 20 L.R.A. (N.S.)*

D. Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58.

The fact that the money procured from plaintiffs was to be used to settle claims held by persons against defendant's brother, who was being prosecuted criminally for wrongful appropriation of property, does not render void the contract under which the money was advanced, where plaintiffs had no knowledge of any agreement to stifle the criminal proceedings. *Cohen v. Grimes*, 18 Tex. Civ. App. 327, 45 S. W. 210.

There can be no recovery on a note executed by a father to avoid a threatened prosecution of his son and son-in-law for obtaining money by false representations. *First Nat. Bank v. Payne*, 19 Ky. L. Rep. 839, 42 S. W. 736.

A note given in settlement of a deficit of an agent, and for the purpose of securing to him further employment, is not invalid because the agent was liable to prosecution for his defalcation, in the absence of any threat to prosecute or agreement not to prosecute. *Provident Sav. Life Assur. Soc. v. Edmonds*, 95 Tenn. 53, 31 S. W. 168.

An agreement by a corporation to waive a large money claim against an employee accused of embezzlement, and to retain him in its employ, is sufficient consideration for a deed to such corporation by the employee's wife. *Girty v. Standard Oil Co.* 1 App. Div. 224, 37 N. Y. Supp. 369.

Promissory notes, with sureties, for the amount embezzled by the maker's son-in-law, are based upon sufficient consideration, although the chief consideration therefor is to obtain the latter's release from arrest and prevent his further prosecution. *Loud v. Hamilton* (Tenn. Ch. App.) 45 L.R.A. 400, 51 S. W. 140. The court based its decision upon *Allen v. Dunham*, 92 Tenn. 257, 21 S.

N. H. 197, 32 Am. Dec. 348; Hackett v. King, 6 Allen, 58; Seiber v. Price, 26 Mich. 518; Osborn v. Robbins, 36 N. Y. 365; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Sharon v. Gager, 46 Conn. 189; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Hullhorst v. Scharner, 15 Neb. 57, 17 N. W. 259; Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741; Searle v. Gregg, 67 Kan. 1, 72 Pac. 544; James v. Blackman, 68 Kan. 725, 75 Pac. 1017.

Johnston, Ch. J., delivered the opinion of the court:

This action was brought by the William-son-Halsell Frazier Company to recover on three notes, one for \$1,166.66 and each of the other two for \$1,166.67, due respective-

ly, in one, two, and three years after date, signed by Joseph J. Ackerman and his two children, John H. Ackerman and Mary H. Sproat, and to foreclose a mortgage on the home of Joseph J. Ackerman, purporting to secure the payment of the notes. The defense of Joseph J. Ackerman was that the notes and mortgage were signed under duress, and therefore unenforceable, and this defense prevailed. The defendant alleged, and offered testimony to show, that during the years of 1903 and 1904, John H. Ackerman was an employee of the plaintiff corporation, and that Halsell, a representative of the company, came to Joseph J. Ackerman, and informed him that John had embezzled about \$4,000 of the company's money; that he, Halsell, had obtained and

W. 898, where it is said that the statute permits the settlement of an embezzlement charge, and that it would constitute a sufficient consideration for a contract.

An agreement for the lease of a building for a stipulated rental, with a further consideration that defendants would not prosecute plaintiff's husband on a charge of burglary, is void as against public policy. *Graham v. Hiesel*, 73 Neb. 433, 102 N. W. 1010.

A deed by parents conveying land in payment of a debt due grantee from their son, on grantee's agreement to forego his purpose to prosecute the son criminally, is void as contrary to public policy. (*Medearis v. Granberry*, 38 Tex. Civ. App. 187, 84 S. W. 1070), being a compounding of crime under Penal Code, art. 291.

A note signed by a father as surety, upon an agreement to conceal the crime of embezzlement committed by his son, is void and unenforceable. *Folmar v. Siler*, 132 Ala. 297, 31 So. 719.

A guaranty of a son's debt, made to suppress a criminal prosecution, is not rendered valid by the fact that a legal consideration also entered into the agreement. *Beal & D. Dry Goods Co. v. Barton*, supra.

A mortgage executed by a wife to raise money to pay her husband's debts and to compromise a criminal prosecution against him was valid as to the sum used in payment of the debts, but invalid as to the amount used in compromising the prosecution, where the mortgagee assisted in such compromise. *Pierson v. Green*, 69 S. C. 559, 48 S. E. 624.

In *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677, the court held the evidence sufficient to support a finding that defendant's note was made in consideration of plaintiff's forbearance to sue the son civilly, and was not, therefore, void as a contract to refrain from prosecuting the son criminally, though he was guilty of the crime of forgery.

The mere fact that a landowner executing a mortgage in consideration that the mortgagor would not prosecute the mortgagor's son for a felony was guilty of compounding the son's crime did not prevent him from annulling the contract on the ground of duress. 20 L.R.A. (N.S.)

Gray v. Freeman, 37 Tex. Civ. App. 556, 84 S. W. 1105.

Voidable upon the ground of duress.

As shown in the earlier note, such contracts have been held voidable upon the ground of duress. As a general rule an agreement cannot be avoided because the duress was imposed on a third person. In other words, the law does not regard one person as under duress who enters into a contract to relieve another person and not himself. An exception to the general rule is where the subject of duress is the wife, husband, parent, child, or other near relative, as is the case of an aunt or brother who enters into a contract under duress to protect a nephew or brother.

What constitutes duress is matter of law; whether duress existed in a particular transaction is matter of fact. There is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract; and was the contract thereby obtained? *Galusha v. Sherman*, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495.

The doctrine that, in order to produce duress by threats, there must be such threats as are reasonably necessary to control by fear the free-will power of a person of ordinary firmness and courage, is not the true doctrine or the law of Wisconsin. *Ibid*.

If, in making a contract, one party to the transaction is incapable of exercising his free will by reason of threats made by the other for the purpose of producing such condition, to the end that he may obtain such contract, such party may, at his option, repudiate such contract on the ground of duress. *Ibid*.

The court held, in *Jaeger v. Koenig*, 30 Misc. 580, 62 N. Y. Supp. 803, that it was

had in his pocket a warrant for John's arrest for embezzlement, and that there was a deputy sheriff waiting in an adjoining room to serve the warrant, and, unless the notes and mortgage were signed, the warrant would be served and John would be convicted and sent to the penitentiary; that, when the father and sister of John asked that they be permitted to consult with John about signing the papers, Halsell objected, saying that he would deliver the warrant which he had in his pocket to the deputy sheriff, and that the prosecution would go on, but that, if the notes and mortgage were signed, there would be no prosecution. After negotiation which continued for about two hours, Halsell insisted that, in case the notes and mortgage were not executed,

John would be arrested and locked up, but, if they were given, no arrest would be made, and, after Mrs. Sproat, who was frightened and crying, had begged her father to save John, he signed the notes and mortgage in suit. Two days afterwards a flaw was found in the mortgage, and a representative of the company came to Wichita and demanded a corrected mortgage, and, when Mr. Ackerman held back, he was informed that a refusal meant a prosecution and the penitentiary for his son, and, under these threats, a corrected mortgage was executed. There was abundant testimony to show that the notes and mortgage were secured from Ackerman by threats of arrest and prosecution of his son, and that they would never have been executed if

not necessary to show any definite or precise method of duress; but that the question of duress must be decided upon all the facts and circumstances adduced upon the trial.

The age, sex, state of health, temper, and disposition of the party, under the circumstances, calculated to give greater or less effect to the violence or threats, must be taken into consideration. *Gray v. Freeman*, supra.

In *WILLIAMSON-HALSELL FRAZIER CO. v. ACKERMAN* a father was held to be subject to duress because of threats directed against a member of his family, as much as if they had been directed against himself.

A mortgage given by an old woman seventy years of age, who was told that she would have to sign the mortgage to save her son-in-law from jail, was held void for duress. *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146.

Guilt or innocence of a threatened criminal charge is immaterial in determining whether there was duress. *Thompson v. Nigley*, 53 Kan. 604, 26 L.R.A. 803, 35 Pac. 290; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *WILLIAMSON-HALSELL FRAZIER CO. v. ACKERMAN*; *Beindorff v. Kaufman*, 41 Neb. 824, 60 N. W. 101.

And it is of no consequence whether the threat is of lawful or unlawful imprisonment. *Gorringe v. Reed*, 23 Utah, 120, 90 Am. St. Rep. 692, 63 Pac. 902.

Whether the threat by which a wife is induced to enter into a contract is of lawful or unlawful imprisonment of her husband, she may make the defense of duress where the guilt of the husband has not been conceded or shown. *Heaton v. Norton County State Bank*, 59 Kan. 281, 52 Pac. 876.

In order for duress of imprisonment, either actual or threatened, to have been available at common law as a defense to a contract, the imprisonment must have been unlawful. *Bailey v. Devine*, 123 Ga. 653, 107 Am. St. Rep. 153, 51 S. E. 603.

A threat to detain a son in prison for an indefinite period, and prevent a trial from taking place, amounts to a threat of unlawful imprisonment. *Ibid.*

The unlawful imprisonment of one's child, 20 L.R.A. (N.S.)

or the threat of such imprisonment, may constitute duress. *Ibid.*

Hesitation and long deliberation and repeated attempts at a compromise are held to show an absence of duress. *Loud v. Hamilton* (Tenn. Ch. App.) 45 L.R.A. 400, 51 S. W. 140.

Threats to arrest a man for embezzlement unless his wife will execute a mortgage constitutes duress which will avoid the mortgage obtained thereby, if they are sufficient to control her will. *Mack v. Prang*, 104 Wis. 1, 45 L.R.A. 407, 76 Am. St. Rep. 848, 79 N. W. 770.

Duress is a sufficient defense to an action upon a contract where it shows that, by reason of threats, the defendant was deprived of his free will. *Nebraska Mut. Bond Assn. v. Klee*, 70 Neb. 383, 97 N. W. 476.

Threats which so overcome the wills of a husband and wife as to induce them to affix their signatures to a mortgage upon their homestead and thus give a security which they would not voluntarily have executed, are sufficient to constitute duress, and avoid the operation of the instrument so obtained. *Hargreaves v. Korcek*, 44 Neb. 660, 62 N. W. 1086.

A mortgage given upon a homestead and signed by the wife was executed under duress, where her fear or affections were worked upon through threats made against her husband, and she was induced thereby, against her will, to convey her property to secure his debt, although the liability was valid and the threat was of a lawful prosecution of a crime which he had in fact committed. *Giddings v. Iowa Sav. Bank*, 104 Iowa, 676, 74 N. W. 21.

In *Lessor County v. Allen*, 80 Miss. 298, 31 So. 815, it was held that, where the wife of a defaulting county treasurer is threatened by a district attorney with the prosecution of her husband unless she conveys all of her property to the county, and refuses; but subsequently, while her husband is still living and liable to prosecution, conveys a part of her property on a renewal of the application,—her deed is void as the result of duress. In the statement of the facts, it is said: "It does not appear that the

Ackerman had been left to act of his own free will.

The plaintiff complains that the trial court did not properly define the crime of embezzlement, and that it took from the consideration of the jury an element necessary to determine whether or not John was guilty of the offense. The suit was not one to determine the guilt or innocence of John; nor was the matter of his actual guilt an essential feature of the defense of duress. The point for decision was whether the threats of arrest and prosecution of John put the father in fear, and thus overcame his will, and rendered him incompetent to contract. If there was no free will in the execution of the notes and mortgage, there is no contract, nor any binding obliga-

tion. Under the modern theory, duress is to be tested, not by the nature of the acts or threats, but rather by the state of mind of the victim induced by such acts and threats. In *Galusha v. Sherman*, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495, there is a full discussion of the subject and of the development of the law from the ancient doctrine that duress should be tested by the means used to overcome the person threatened to the later and better one of the condition of the mind induced by the threats. It was there said: "The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and, if such

threats were repeated at the time she signed the deed last presented to her." But the court granted her relief.

'The fact that a wife lived two years after making a deed, void because made under threats of the prosecution of her husband, and expressed satisfaction at the acceptance of the deed and the prevention of disgrace, is not a sufficient ratification to validate the deed, the husband being still alive and subject to prosecution. *Ibid*.

A mortgage executed to a bank by a woman to secure the amount of her son's forgeries was held to be voidable as being executed under duress through fear that her son would be prosecuted criminally, where she was assured by her son's friend that such steps would be taken and would result in imprisonment, and she believed that there was no other way to prevent the prosecution, though neither the bank nor its attorneys ever authorized the statements, or knew anything about them. *National Bank v. Cox*, 47 App. Div. 53, 62 N. Y. Supp. 314.

A mortgage executed under an implied threat of a criminal prosecution is obtained by duress and undue influence, equally as if given under an express threat of prosecution. *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193.

Thus, a mortgage by a wife to secure the repayment of money embezzled by her husband, executed at the time she was first informed of her husband's crime, and after she had been told by the one whose money had been appropriated that he "must have the money or the security, or there are the papers;" and "I shall go on with the proceedings,"—will be set aside as having been obtained by duress. *Ibid*.

And a payment made by a wife to her husband's employer after he had informed her that her husband had been discharged for larceny, and also informed her that, while detectives were looking for her husband, "it would go no farther" if she settled the claim, may be recovered as money obtained by duress. *Jaeger v. Koenig*, supra.

Whether an assignment was obtained by duress was for the jury, where it appeared that defendant had threatened several times

to tell plaintiff's husband, who was in poor health, that her son had embezzled defendant's money; and plaintiff, fearing the knowledge would make her husband insane, and to prevent defendant doing so, assigned her share in her father's estate. *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555.

Threats made by an officer of a bank to prosecute a brother of the mortgagor for embezzlement if the mortgage was not executed were held sufficient to constitute duress, in *Henry v. State Bank*, 131 Iowa, 97, 107 N. W. 1034.

A threat by a man to his wife, that, unless she signed certain papers, he would be arrested for embezzlement, and would commit suicide, does not constitute duress. *Girty v. Standard Oil Co.* 1 App. Div. 224, 37 N. Y. Supp. 369.

In *Moyer v. Dodson*, 212 Pa. 344, 61 Atl. 937, it was held to be no defense to a mortgage that it was given to stop a threatened criminal prosecution of the mortgagor's husband, where no showing was made of a promise not to prosecute if the mortgage was executed; that the opposite party must have agreed to abandon or suppress the prosecution, else it is not duress.

Duress of the mortgagor in executing a mortgage is not established where it appears that her son requested her to execute the mortgage, and, upon her refusal, told her that if she did not the mortgagee would have him arrested and put in prison, and that she executed the mortgage to save him the disgrace; where it also appeared that the mortgagor executed the mortgage in expectation of receiving part of the amount thereof in cash from the mortgagee. *Dodd v. Averill*, 7 App. Div. 290, 39 N. Y. Supp. 1097.

Duress of the principal in a contract is not a defense to either surety or indorser who assumes the undertaking with knowledge of that duress, unless the relationship between them is that of parent and child, or husband and wife. *East Stroudsburg Nat. Bank v. Seiple*, 29 Pa. Co. Ct. 245.

In *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398, a wife gave her notes to save her husband from threatened imprisonment, and,

absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free-will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is: Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirm-

ative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained." Following the same theory, neither the legality of the threatened arrest and prosecution, nor the guilt or innocence of John, was material to the determination of whether there was duress. The conduct of John, whatever it may have been, was no excuse or justification for intimidating and coercing the father to pay John's debt, or to give a mortgage on his home to secure the payment of such debt. If it is assumed that John misappropriated the money of the plaintiff, and was therefore indebted to it for a large sum of money, it nevertheless gave its rep-

in a suit to recover the money, it was held that the taint of duress attaching to the execution of the notes was not removed by payments on the notes, made under the same influence which controlled its original execution; and that, if the payment was made under fear of the arrest of her husband, caused by the threats of the defendant, the money could be recovered back.

Duress is not a defense to notes and a deed given to settle a claim against a son-in-law and release him from arrest for felony, when he enters into the transaction deliberately after manœvering for a compromise, and on an understanding with his daughter that the payment shall constitute an advancement to her. *Loud v. Hamilton* (Tenn. Ch. App.) 45 L.R.A. 400, 51 S. W. 140.

Though a father, in executing a mortgage, had been guilty of compounding the son's crime, that fact would not prevent him from annulling the contract on the ground of duress. *Gray v. Freeman*, 37 Tex. Civ. App. 550, 84 S. W. 1105.

The right of a mortgagor to have a cancellation of the mortgage on the ground that it was obtained by duress passed to the purchaser of the land. *Ibid.*

Recovery of money paid by plaintiff in settlement with defendant while under duress—because her husband was accused of stealing from defendant—could not be defeated on the ground that the payment was compounding a felony, when no criminal action had been contemplated. *Jaeger v. Koenig*, 30 Misc. 580, 62 N. Y. Supp. 803.

An act of the legislature authorizing a board of supervisors to take land in settlement of the debt of a defaulting county treasurer, and providing that, upon such settlement, he should be relieved from all liability for the indebtedness, does not include his relief from criminal liability, nor prevent the deed whereby his wife conveyed her land to effectuate the settlement from being void for duress, resulting from threats of his prosecution. *Leflore County v. Allen*, *supra*.

A note and mortgage executed by a wife on consideration that the payee would cease to 20 L.R.A. (N.S.)

prosecute her husband for a criminal offense are void; and such fact may be pleaded and proven as a defense to the foreclosure of the mortgage so given, even in the hands of one who was a bona fide holder of such note for value, before due, and without notice. *Jones v. Dannenberg Co.* 112 Ga. 426, 52 L.R.A. 271, 37 S. E. 729.

A note and mortgage extorted from a husband and wife by means of threats of prosecution for criminal offenses of which the husband was guilty in fact, but which were in no manner connected with the demand for which compensation was sought, may be avoided not only in the hands of the original payee, but of his assignees having notice of the circumstances under which the securities were taken. *Thompson v. Niggley*, 53 Kan. 664, 26 L.R.A. 803, 35 Pac. 290.

A wife is entitled to recover property transferred by her for the purpose of suppressing a criminal prosecution against her husband and son, and to settle a debt due by the husband. *Mills v. Hudgins*, 97 Ga. 417, 24 S. E. 146.

In *Beindorff v. Kaufman*, 41 Neb. 824, 60 N. W. 101, the evidence tended to show that defendant executed a mortgage because of threats of prosecution and imprisonment of his son; and the court held such mortgage might be avoided. To the same effect, *Delta County Bank v. McGranahan*, 37 Wash. 307, 79 Pac. 796 (husband).

In *Page v. Cranford*, 43 S. C. 193, 20 S. E. 972, it was held that, where a married woman held the legal title to a half interest in a tract of land conveyed to her by her brother as security for a debt which the brother had afterwards paid, her mortgage of such moiety at her brother's request, when he was under a threat of criminal prosecution, to pay another debt due by him, was a valid instrument.

Relief in equity.

Equity will not enforce an agreement given to suppress a criminal prosecution. *Tracy v. Deatrick*, 10 Ohio C. C. 111.

Equity will cancel a mortgage executed through fear of a criminal prosecution

representatives no right to use, or threaten the use of, the criminal law to make the father pay or secure the debt. Such a method is not an appropriate one for enforcing the payment of the debt by the debtor himself, much less to compel the securing of it by one who was in no sense liable for its payment. In *Heaton v. Norton County State Bank*, 59 Kan. 281, 52 Pac. 876, where it was held that a wife was not bound by a contract induced by the threats of parties that, if she failed to enter into the contract, they would cause the arrest and imprisonment of her husband, the court, in speaking of the misuse of the criminal law, said: "Imprisonment may be lawful so far as the public or those representing the public are concerned; but is it ever lawful for a party to force the signing of a contract, the surrender of property, or the obtaining of some other private advantage, against the will of another, by using or threatening to use the machinery of the law intended for the protection of the public and the punishment of criminals?" In *Thompson v. Niggley*, 53 Kan. 664, 26 L.R.A. 803,

against a relative, induced by threats and representations made by the mortgagee for the express purpose of obtaining it. *Gray v. Freeman*, supra (son); *Leflore County v. Allen*, 80 Miss. 298, 31 So. 815 (husband); *Davis v. Smith*, 68 N. H. 253, 73 Am. St. Rep. 584, 44 Atl. 384; *Henry v. State Bank*, 131 Iowa, 97, 107 N. W. 1034 (brother).

A court of equity will set aside a mortgage executed under an implied threat of a criminal prosecution, as having been procured by duress and undue influence. *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193.

Equity may grant relief from an agreement to stifle a criminal prosecution when the parties, though *in delicto*, are not *in pari delicto*, as when at the time of the transaction the complainant was under undue influence, and acted involuntarily. *Goringe v. Reed*, 23 Utah, 120, 90 Am. St. Rep. 692, 63 Pac. 902.

One who made use of the criminal process for the purpose of overcoming the will of another to secure an advantage to himself is not in a position to obtain and hold the fruits of a contract on the ground that both parties were *in pari delicto*, and that in equity the court will leave them where it finds them. *Ibid*.

Where a creditor resorts to the use of criminal process to coerce the father of a debtor into securing the debt of his son, and not for the purpose of enforcing the criminal law, a note given to avoid the threatened prosecution will be canceled. *Green v. Moss*, 65 Ill. App. 594.

The maxim, *In pari delicto, melior est conditio defendentis*, does not apply to a case where a married woman sues to set aside a deed of her separate property, made by her under express or implied threats of the prosecution of her husband for the crime

35 Pac. 290, the question of whether a charge of duress could be maintained by showing threats to prosecute a person for an offense of which he was in fact guilty was considered. There Niggley and his wife were induced to execute a note and also a mortgage upon their home by threats of the prosecution of Niggley for certain offenses which he conceded were committed, but which were in no way connected with the debt sought to be secured. The court repudiated the doctrine that duress could not be predicated upon a threatened arrest and prosecution for an offense of which the party was in fact guilty, saying: "We are not inclined to encourage a resort to such pressure as was used in this instance to compel the settlement of private demands." The decision as formulated in the syllabus is: "Written securities, extorted by means of threats of prosecution for criminal offenses of which the party threatened was guilty in fact, but which were in no manner connected with the demand for which compensation was sought, may be avoided by the parties executing them, not

of embezzlement, and to save him from such prosecution,—particularly so when she was sick and nervous, and when she does not appear to have had abundant opportunity for consideration and consultation with disinterested advisers. *Burton v. McMillan*, 52 Fla. 469, 8 L.R.A.(N.S.) 991, 120 Am. St. Rep. 220, 42 So. 849, 11 A. & E. Ann. Cas. 380.

A wife is not *in pari delicto* with a defendant, so as to preclude a recovery for a sum of money paid to check an unwarranted prosecution of her husband for a felony, unless she paid such sum. *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

In *Gregor v. Hyde*, 10 C. C. A. 290, 27 U. S. App. 75, 62 Fed. 107, it was held that a threat of lawful arrest of a son justly amenable to criminal prosecution for embezzlement is not ground for cancellation of a deed, though it was executed under pressure of such threat, where there were no circumstances of oppression or fraud, and no objection was made for nearly three years.

In *Russell v. Durham*, 17 Ky. L. Rep. 35, 29 S. W. 635, the court refused to set aside a foreclosure sale of a wife's land on the ground that she had been induced to execute the mortgage because of the importunities of her husband, who was a defaulter, and because of threats of criminal prosecution by his sureties, where she did not defend the suit brought to enforce the mortgage liens, and the lands had been sold and a deed made to a stranger.

The courts will not aid the grantee in recovering possession of land from the grantor under a deed the consideration for which was the compounding of crime. *Medearis v. Granberry*, 38 Tex. Civ. App. 187, 84 S. W. 1070.

only in the hands of the original payee, but of his assignees having notice of the circumstances under which such securities were taken."

In a very early case the supreme court of New Hampshire, in considering what amounted to duress, said: "Where there is an arrest for improper purposes, without just cause; or an arrest for a just cause, but without lawful authority; or an arrest for a just cause and under lawful authority, for an improper purpose; and the person arrested pays money for his enlargement,—he may be considered as having paid the money by duress of imprisonment, and may recover it back in an action for money had and received." *Richardson v. Duncan*, 3 N. H. 508. The supreme court of Alabama, in a recent case, ruled that threats of unlawful imprisonment were not necessary to constitute duress; and that, if there was a liability for arrest and imprisonment, and such liability was used to overcome the will and compel the making of a contract, which would otherwise not have been made, it would amount to duress. In disposing of the case, the court said: "It was never contemplated in the law that either the actual or threatened use or misuse of criminal process, legal or illegal, should be resorted to for the purpose of compelling the payment of a mere debt, although it may be justly owing and due, or to coerce the making of contracts or agreements from which advantage is to be derived by the party employing such threats. Ample civil remedies are afforded in the law to enforce the payment of debts and the performance of contracts; but the criminal law and the machinery for its enforcement have a wholly different purpose, and cannot be employed to interfere with that wise and just policy of the law that all contracts and agreements shall be founded upon the exercise of the free will of the parties, which is the real essence of all contracts." *Hartford F. Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651. See also *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 6 L.R.A. 491, 15 Am. St. Rep. 447, 23 N. E. 7; *Henry v. State Bank*, 131 Iowa, 97, 107 N. W. 1034.

The important consideration in cases like this one is not whether there was ground for the arrest or imprisonment threatened, but rather whether the free will of the party making the contract was constrained by the threats of the other. It is clear, therefore, that an explicit and complete definition of the crime of embezzlement was not essential in charging the jury upon the issues pleaded in this case. If, for any rea-

son, it had been necessary to advise the jury as to the elements of embezzlement, either with respect to duress or to the stifling of a prosecution, there would be little reason to complain of the instruction given. The complaint is that in one part of the charge the court said that the taking of the employer's money without returning it upon demand is a felony under the statute. It is contended that the court should have stated that it was the fraudulent misappropriation of the money which constitutes the crime of embezzlement. The phrase was used by the court, not in defining "embezzlement," but for the purpose of informing the jury that embezzlement was a felony. It appears that, when the court undertook to define the crime of embezzlement, it was fully and correctly done; the statutory language being employed. In no view can the statement criticized be deemed to have prejudiced the plaintiff.

In the same connection, it is said that there is an absence of evidence showing an intention on the part of John to appropriate the plaintiff's money,—a contention that is hardly consistent with plaintiff's own evidence in which John is characterized as a defaulter and an embezzler. There is no lack of testimony to show threats of the arrest and prosecution of John, nor that the notes and mortgage were procured through the fear excited by the threats. *Joseph J. Ackerman* was subject to duress because of the threats directed against a member of his family, as much as if they had been directed against himself. In *Winfield Nat. Bank v. Croco*, 46 Kan. 620, 26 Pac. 939, as well as in *Heaton v. Norton County State Bank*, supra, it was held that a threatened prosecution of the husband may cause duress of the wife. Many cases may be found in the books where the threatened prosecution of a child amounted to duress of the parent. An illustration may be found in *Williams v. Bayley*, L. R. 1 H. L. 200, 35 L. J. Ch. N. S. 717, where bankers had acquired paper forged by a young man, and had brought pressure upon the father to assume the payment of his son's obligations. The lord chancellor spoke of the pressure brought upon the father as of this nature: "We have the means of prosecuting and so transporting your son. Do you choose to come to his help, and take on yourself the amount of his debts,—the amount of his forgeries? If you do, we will not prosecute. If you do not, we will. That is the plain interpretation of what passed. Is that, or is it not, legal? In my opinion, my lords, I am bound to go the length of saying that I do not think it is legal." Lord Westbury, in concurring in the judgment, said: "The question, therefore, my

lords, is whether a father appealed to under such circumstances to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent. I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract which should be based upon the free and voluntary agency of the individual who enters into it." See also *City Nat. Bank v. Kusworm*, 88 Wis. 188, and note thereto in 26 L.R.A. 48 (43 Am. St. Rep. 880, 59 N. W. 564).

Finding no error in the record, the judgment will be affirmed.

KANSAS SUPREME COURT.

JOHN DEERE PLOW COMPANY, Plff. in Err.,
v.

B. F. SPATZ.

(—Kan. —, 99 Pac. 221.)

Dismissed action—expense of defense—recovery.

1. Where a plaintiff commences a civil action, and, before trial, dismisses it with prejudice and pays all legal costs incurred therein, the defendant, in the absence of malice, want of probable cause, and bad faith, cannot recover damages for loss of time, expenses, or attorney fees incurred by him on account of such suit.

Headnotes by GRAVES, J.

Case Note.—Right of purchaser of goods to recover costs and other expenses incurred by him in defending a collateral action, as damages for breach of the seller's warranty.

An extended search fails to disclose but one case other than *JOHN DEERE PLOW Co. v. SPATZ*, and the case therein cited, where it was sought to recover from the vendor the expenses incurred in defending an action for the purchase price, brought by either the vendor, or a third person in whose hands notes given for the purchase price had fallen.

This case is *Walter A. Wood Mowing & Reaping Mach. Co. v. Hancock*, 4 Tex. Civ. App. 302, 23 S. W. 384, where it was held that a purchaser of a harvesting machine, who executes his note therefor, cannot, in a 20 L.R.A. (N.S.)

Same—elements of action to recover expenses—malice.

2. S. bought a threshing machine, giving his promissory note in payment therefor. In the contract of purchase it was stipulated that, if the machine did not work, the notes would be returned and the machine taken back. The machine failed to work and was returned, and the notes demanded. The demand to return the notes was refused. Afterwards an action commenced on the notes, and before trial was dismissed with prejudice, and the plaintiff paid all the costs taxed in the case. Afterwards the defendant commenced an action against the plaintiff to recover attorney fees, hotel, traveling, and other expenses incurred when preparing for the trial in the case which was dismissed. No malice, want of probable cause, or bad faith being alleged against the plaintiff.—Held, that such an action cannot be maintained.

(November 7, 1908.)

ERROR to the District Court for Jewell County to review a judgment in plaintiff's favor in an action brought to recover moneys expended in preparing for the defense of an action which was afterward dismissed without trial. Reversed.

Statement by GRAVES, J.:

Spatz bought a threshing machine from the John Deere Plow Company for which he gave three notes. The machine was warranted to work, and, if it did not, the notes were to be returned upon delivery of the machine. It did not work. It was returned, and the notes demanded by Spatz. The plow company refused to return the notes and brought suit on them in the district court of Jewell county, where the cases were dismissed because the plaintiff, being a foreign corporation, had not complied with the statute usually called the "Bush law." On proceedings in error to this court, the district court was affirmed. *John Deere Plow Co. v.*

suit to rescind the sale for failure of the machine to work, and for damages, recover costs and attorneys' fees paid by him in an action on such note by the indorsee thereof.

In regard to those cases passing upon the question whether a purchaser of a chattel may recover from his vendor the cost and other expenses incurred by defending his title from a third person, or incurred by defending a suit for breach of warranty by one who purchased from him, it has been almost universally held that, if the original vendor had notice of the suit, his vendee may recover, besides the other damages sustained, the costs incurred in such suit. and, where asked, his attorneys' fees as well. Cases so holding are *Balte v. Bedemiller*, 37 Or. 27, 82 Am. St. Rep. 737, 60 Pac. 601; *Carleton v. Lombard, A. & Co.* 19

Wyland, 69 Kan. 255, 76 Pac. 863, 2 A. & E. Ann. Cas. 304. Afterwards the plow company commenced another action in Jewell county upon the same notes, and, after some delay, it dismissed the case with prejudice, and paid the costs. In making preparation for the trial of this last case, Spatz employed lawyers, took depositions in other states, and expended large amounts in anticipation of a trial, all of which was made unnecessary by the dismissal of the case by the plaintiff. He then commenced this action in the district court of Jewell county to recover the money so uselessly expended, and recovered a judgment for \$1,010, and the plow company brings the case here for review. The petition contains no specific allegations of malice, want of probable cause, or bad faith.

Messrs. Lee Monroe and George A. Kline, for plaintiff in error:

In the absence of malice and without proof of probable cause the failure to maintain a civil action does not afford ground for a suit for damages beyond the costs allowed by statute.

19 Am. & Eng. Enc. Law, 2d ed. p. 673; Carbondale Invest. Co. v. Burdick, 67 Kan. 329, 72 Pac. 781; 26 Cyc. Law & Proc. p. 20; Emory v. Eggan, 75 Kan. 82, 88 Pac. 740; Mitchell v. Southwestern R. Co. 75 Ga. 398; Mayer v. Walter, 64 Pa. 283; Norcross v. Otis, 152 Pa. 481, 34 Am. St. Rep. 669, 25 Atl. 575; Smith v. Michigan Buggy Co. 175 Ill. 610, 67 Am. St. Rep. 242, 51 N. E.

569; Wetmore v. Mellinger, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870; 2 Addison, Torts, Wood's ed. p. 78; Cooley, Torts, 2d ed. 220; Salado College v. Davis, 47 Tex. 135; McNamee v. Minke, 49 Md. 122; Rice v. Day, 34 Neb. 100, 51 N. W. 464; Cade v. Yocum, 8 La. Ann. 477; Terry v. Davis, 114 N. C. 31, 18 S. E. 943; Thomas v. Rouse, 2 Brev. 75; Potts v. Imlay, 4 N. J. L. 330, 7 Am. Dec. 603; Paul v. Fargo, 84 App. Div. 9, 82 N. Y. Supp. 369; Lucy v. Metropolitan L. Ins. Co. 31 Ohio L. J. 22.

Messrs. Frank T. Burnham and George W. Dashiell, for defendant in error:

In an action against a vendor for damages for breach of warranty the costs incurred in preparing the defense to an action on a purchase-money note are a legitimate consequence of the wrongful action of the defendant in suing upon the note, and may be taken into consideration by the jury.

D. M. Osborne & Co. v. Ehrhard, 37 Kan. 413, 15 Pac. 590; Sutherland, Damages, 2d ed. § 58; Philpot v. Taylor, 75 Ill. 309, 20 Am. Rep. 241; Boston & A. R. Co. v. Richardson, 135 Mass. 473; Smith v. Bolles, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39; Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Roberts v. Heim, 27 Ala. 678; Seay v. Greenwood, 21 Ala. 492; Ferguson v. Baber, 24 Ala. 402; Pond v. Harris, 113 Mass. 114; First Nat. Bank v. Williams, 62 Kan. 434, 63 Pac. 744; Westfield v. Mayo, 122 Mass. 100, 23 Am. Rep. 202; Newhaven & N. Co. v. Hayden, 117 Mass. 433.

App. Div. 297, 46 N. Y. Supp. 120, affirmed without opinion in 162 N. Y. 628, 57 N. E. 1120; Scaling v. Knollin, 94 Ill. App. 443; Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357; Johnson v. Blanks, 34 Mo. 255; Thurston v. Spratt, 52 Me. 202; Boyd v. Whitfield, 19 Ark. 447; Hammond v. Bussey, L. R. 20 Q. B. Div. 79; Lewis v. Peake, 7 Taunt. 153; Noel v. Wheatly, 30 Miss. 181; Rowland v. Shelton, 25 Ala. 217.

And especially so where the original vendor instructed his vendee to defend the title, and promised that he would pay all costs and expenses of the controversy. Bash v. Young, 2 Ind. App. 297, 28 N. E. 344.

In Reggio v. Braggiotti, 7 Cush. 166, it is held that, where a purchaser of opium is compelled to pay damages for breach of warranty to his own vendee, if he has given his vendor notice of the suit, he may recover, besides other damages, the taxable costs of the former suit, but in no case counsel fees.

So, in Armstrong v. Percy, 5 Wend. 535, it seems to have been held that a vendee may recover from his vendor the costs paid in a suit for breach of warranty of title, which was brought by a subvendee, the court at the same time denying the recovery of attorneys' fees.

20 L.R.A. (N.S.)

But, where a suit is unnecessarily resisted by the vendee, the costs so incurred are not chargeable against the vendor. Lunt v. Wrenn, 113 Ill. 168.

So, in Western v. Short, 12 B. Mon. 153, where a vendee of a slave, against whom a foreclosure suit had been brought, executed a bond to have the slave forthcoming to abide the result of the suit, and then evidently unnecessarily permitted a suit to be brought upon his bond, it was held that he could not hold his vendor responsible for the costs of such suit.

And so, where no notice is given the vendor of the pending suit and to defend, costs and attorneys' fees are not recoverable. Marlatt v. Clary, 20 Ark. 251; Eldridge v. Wadleigh, 12 Me. 372; Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92.

In Nashua Iron & Steel Co. v. Brush, 33 C. C. A. 456, 50 U. S. App. 461, 91 Fed. 213, it was recognized that, if the seller was given no opportunity to defend in the suit against the buyer for damages, he should not be held for any of its costs and expenses.

Cases involving the sale of notes or other commercial paper are not included within this note.

Graves, J., delivered the opinion of the court:

The plow company contends that the object of this action is to recover damages on account of the unsuccessful suit filed against the plaintiff, Spatz, and the nature of the damages alleged in the petition are such that no recovery can be had in the absence of malice and want of probable cause, which are not alleged. In other words, it is contended that the action is, in substance, an action for malicious prosecution with the essential elements omitted. On the other hand, Spatz claims that it is merely an action on a breach of the warranty upon which the machine was purchased. The petition is too long to give a copy in full. It will be sufficient to say that it recites fully the contract of purchase, the warranty, the failure of the machine to work, the return thereof, and a demand for the notes, the refusal to comply with the demand, the suits brought to recover on the notes, and then proceeds as follows: "That, by reason of the refusal of the defendant to return said notes when demanded, and accept said worthless machinery, and by reason of its institution of the actions hereinbefore set out, plaintiff was compelled to and did employ counsel to defend, and was compelled to and did pay out large sums of money as counsel and attorneys' fees in maintaining his defense thereto; that the reasonable value of the services that he was compelled to and did procure was the sum of \$430; that, by reason of said wrongful acts of the defendant, plaintiff was compelled to pay out \$297 to procure testimony and maintain his defense in said actions; that, in preparing and maintaining such defense, he was put to large expense in the way of traveling expenses, hotel bills, printing briefs, etc., to the amount of \$83; and that he necessarily lost a great deal of time from his work, the fair value of which was \$200. The plaintiff has been damaged by the failure of the defendant to comply with the terms of said contract, in the aggregate sum of \$1,010. Prays judgment for \$1,010 and costs."

From this the nature of the damages sought to be recovered appears quite clearly. They are not such as followed directly from the refusal to take back the machine and return the notes. The immediate cause of the alleged damages was this last action on the notes. If it had not been commenced, the injuries of which the plaintiff complains in his petition would not have been sustained. It seems, therefore, that the real object of the suit is one to recover damages sustained on account of the prosecution of an action against the plaintiff, and nothing else. The suit was the proximate cause of the damages

alleged, and the breach of warranty had no direct connection therewith. The plow company paid all the legal costs incurred in the action dismissed. This is the measure of liability incurred by an unsuccessful litigant where there is no malice or wrong intent on his part in commencing the action. 1 Sedgw. Damages, 52, 174, and notes; Salado College v. Davis, 47 Tex. 131; Young v. Courtney, 13 La. Ann. 193; Henry v. Davis, 123 Mass. 345. This law is conceded by the defendant in error to be elementary, but he insists that it does not apply to this action. Malice, want of probable cause, bad faith, it is insisted, are not necessary elements in this action; it being brought merely for the purpose of recovering damages for a wrongful breach of warranty. The case of D. M. Osborne & Co. v. Ehrhard, 37 Kan. 413, 15 Pac. 590, is cited in support of this contention. We do not understand that case to sustain this view. In that case Ehrhard bought a machine under a contract similar to the one in this case. The machine was returned and accepted. A demand was made for the note given therefor, as in this case. This was refused, and the note was sold to an innocent holder, who brought suit thereon. While the words "malice," "want of probable cause," or "bad faith," do not occur in the petition, the language used quite clearly shows that the company in that case, with full knowledge that the machine was worthless, accepted it as such and then placed the note in other hands with the evident design that it should be collected, knowing that no defense could be made thereto. This was bad faith, if not fraud. The damages which resulted to the defendant in that case were the direct result of the action brought by the holder of the note, and were contemplated and intended by the company when the note was transferred to an innocent holder. In this respect the case here being considered falls far short of the one cited.

The refusal of the plow company to deliver the notes to Spatz upon demand may have created a cause of action which gave Spatz a right to recover damages therefor; but, if it did, none of such damages constituted any part of those here sought to be recovered. These damages and every item thereof resulted directly from bringing the suit, but their connection with the refusal to deliver the notes, if any, is too remote to be considered.

We conclude that the petition fails to state facts sufficient to entitle the plaintiff to a judgment for any of the damages awarded. The facts found by the court are insufficient to entitle the plaintiff to a judgment for any of the damages prayed for or

awarded to him. The court's conclusion of law is erroneous.

The judgment of the District Court is reversed, with instruction to grant a new trial and proceed in accordance with the views herein expressed.

Petition for rehearing denied December 18, 1908.

MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE

v.

J. P. BASS PUBLISHING COMPANY.

(— Me. —, 71 Atl. 804.)

Intoxicating liquor — advertisements — punishment.

1. A statute imposing a penalty upon anyone publishing a newspaper in which appear advertisements of the keeping for sale of intoxicating liquors, applies to those kept without as well as within the state.

Same — interstate traffic.

2. Since the passage by Congress of the Wilson act, a state may forbid the publication, within its limits, of advertisements of the keeping for sale of intoxicating liquors at places in other states.

(July 15, 1908.)

REPORT by the Supreme Judicial Court for Penobscot County upon an agreed statement of facts for the opinion of the full bench of a conviction by the Bangor Municipal Court of a violation of a statute prohibiting the publishing of advertisements of intoxicating liquors. Judgment for the State.

The facts sufficiently appear in the opinion.

Mr. H. H. Patten for the State.

Messrs. F. H. Appleton and Hugh R. Chaplin for defendant.

Emery, Ch. J., delivered the opinion of the court:

Chapter 29 of the Revised Statutes, popularly known as the "prohibitory law," contains, in § 45, the following prohibition: "Whoever advertises or gives notice

Note. — No other reported case has been found presenting the point decided in *STATE v. J. P. BASS PUB. CO.*, either as to the power of a state to forbid the publication within its limits of advertisements of the keeping for sale of intoxicating liquors at places in other states, or as to the application of a statute forbidding a publisher to advertise the keeping for sale of intoxicating liquor, to liquors kept for sale without the state.

20 L.R.A. (N.S.)

of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offense the sum of \$20 and costs, to be recovered by complaint."

The defendants knowingly published, August 10, 1906, at Bangor, in Penobscot county, a newspaper, the Bangor Daily Commercial, in which was given a notice and advertisement that intoxicating liquors were sold and kept for sale at 297 Congress street, in Boston, Massachusetts, by Charles Gallagher & Company, who were then carrying on business in Massachusetts, and were legally authorized under the laws of that commonwealth to sell and keep for sale intoxicating liquors. Their advertisement in question was published in the Bangor Daily Commercial in pursuance of a contract made in Boston, Massachusetts, between them and an advertising agency there acting as the agent of the defendants.

The defendants claim that their act of publishing the advertisement was lawful upon two grounds: (1) That the statute is susceptible of the construction that it only prohibits notices or advertisements of liquors for sale or kept for sale within this state, and, being a penal statute, should therefore receive this strict construction; (2) that, if it should be construed as prohibiting notices or advertisements of liquors for sale or kept for sale in another state where such sale and keeping for sale are lawful, as in this case, then, so construed, the statute is so far nullified by that clause of the Constitution of the United States known as the "commerce clause," which confers upon Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." U. S. Const. art. 1, § 8, ¶ 3.

1. In construing the statute, penal though it be, the intent and object of the legislature in enacting it are to be ascertained and given effect if the language be fairly susceptible of such a construction. As said by the Massachusetts court per Shaw, Ch. J., in a criminal case (*Com. v. Kimball*, 24 Pick. 366, 370): "It is unquestionably a well-settled rule of construction, applicable as well to penal statutes as to others, that, when the words are not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute." In a criminal case (*United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830) the court at page 396 of 6 Wall., said of the penal statute there in question: "The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature. The

rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the more narrow technical, one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

The statute in this case is but a part of the legislation of this state upon the subject-matter of the sale and keeping for sale of intoxicating liquors, and is to be construed, so far as its language will fairly and reasonably allow, in harmony with what appears from that legislation to be the legislative policy and purpose. The selling and keeping for sale of intoxicating liquors are in themselves harmless acts. If the people purchasing such liquors used them only "for medicinal, mechanical, and manufacturing purposes," no harm would result to the people of the state; and the sale and keeping for sale of intoxicating liquors, for such purposes are provided for in § 14. of chapter 29. It is common knowledge that it is the use of intoxicating liquors as a beverage that is deemed harmful, and is the mischief sought to be prevented by the legislation. The prohibition of the sale and keeping for sale of intoxicating liquors is only a means. The end sought for is the prevention, or at least the diminution, of the drinking of intoxicating liquors by the people of the state. The legislation upon the subject, including the statute in question, should be construed to further that end, so far as the language, without bending either way, fairly allows.

The language of the statute (§ 45) is comprehensive. There are in it no words limiting the prohibition to notices or advertisements of liquors kept for sale or to be sold within this state. Read in connection with the other legislation, its evident purpose is to further the ulterior purpose of all that legislation, viz., to diminish the use of intoxicating liquors as a beverage. To effect that purpose, it must be construed as prohibiting notices and advertisements of liquors for sale or kept for sale without the state as well as within; and we think the language fully permits, if it does not require, such a construction, and we accordingly accept it as the true construction.

We are not unmindful of the rule that penal statutes are to be construed strictly. "But, though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Lacher*, 134 U. S. 624, 632, 20 L.R.A. (N.S.)

33 L. ed. 1080, 1084, 10 Sup. Ct. Rep. 625. In *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, the statute provided a punishment if "any master or other officer" without justifiable cause imprisoned "any one or more of the crew," etc. The master was indicted for imprisoning the "chief officer." It was held that, to further the purpose of the statute, the word "crew" should be held to include the "chief officer," though the rule of strict construction alone might exclude him. So, in *United States v. Moulton*, 5 Mason, 537, Fed. Cas. No. 15,827, gold coin was held to be included in the term "personal goods" in a penal statute, though the rule of strict construction might exclude it. We think further illustration or authority unnecessary.

2. As to the second ground of defense, it may be conceded that but for the act of Congress known as the "Wilson act" (act August 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177), the state statute as above construed would be in conflict with the commerce clause of the United States Constitution. The Wilson act, however, goes far to remove intoxicating liquors from the protection of that clause, and to give full effect to state legislation concerning them. Decisions of United States courts upon the subject, made prior to the passage of that act, are now inapplicable, and need not be considered. Since the Wilson act the state may prevent the sale within its limits of intoxicating liquors in the original package, and to that end may seize them in such packages the moment they are delivered. Also, to further the welfare of its people, the state may now prohibit the solicitation within the state of orders for the purchase of liquors without the state. This seems to be settled by the recent decision of the United States Supreme Court in *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733. *Delamater*, a salesman for a firm of liquor dealers in Minnesota, carried on the business in South Dakota of soliciting orders from residents of that state for the purchase of intoxicating liquors from his firm in Minnesota. The law of South Dakota imposed an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within the state. The statute was admittedly a police regulation, and not a revenue measure. *Delamater* did not offer to make sale of intoxicating liquors within the state. He merely solicited orders for liquors to be sold in Minnesota, and shipped from there to the purchaser at his risk. Being prosecuted for not paying the license fee, he set up in defense the commerce clause of the United States Constitution. The United

States Supreme Court, following the decision of the supreme court of South Dakota, held the state statute constitutional on the ground that the Wilson act authorizes a state to restrain persons from soliciting within its territory orders for the purchase of intoxicating liquors in another state to be shipped to the purchaser in his state.

Under that decision neither the Boston firm of Charles Gallagher & Company, nor any agent for them, can, within the territory of this state, solicit orders for the purchase of intoxicating liquors in Massachusetts to be shipped to the purchaser in Maine, if our statutes so forbid. Since advertising is really soliciting, it would seem to follow that they cannot lawfully advertise in this state such liquors for sale in Massachusetts, and that the publishers of newspapers within this state cannot lawfully publish such advertisement in the face of the state statute expressly forbidding it. It may be noted that in the advertisement in this case the advertisers say to the reader: "Send us \$3 and we will ship you in plain sealed case prepaid, with no marks to show contents, four full quarts of Gilbert Club Pure Rye Whisky." The advertisement was in a Maine newspaper, and plainly was for orders for intoxicating liquors to be shipped to the purchaser in Maine. The case would therefore seem to be well within the rule of the decision in the case cited.

For answer to the able argument and citations of the defendant's counsel, we refer them and the profession to the opinion of the court in the Delamater Case, *supra*. The Supreme Court in that case did not hold, nor do we hold in this case, that an inhabitant of a state where the sale of intoxicating liquors is prohibited may not purchase intoxicating liquors in another state and bring them into his own state for any lawful use; but we understand that court to hold, and hence we hold, that a state may prohibit an inhabitant of another state making in this state a contract for, or soliciting orders for, the sale of intoxicating liquors in any state. The question is fully discussed in the opinion with illustrations drawn from some state insurance statutes. While a state cannot prevent one of its citizens from making a contract of insurance in another state, it may forbid the making, within its own borders, insurance contracts by foreign companies or their agents. *Cooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Com. v. Nutting*, 175 Mass. 154, 78 Am. St. Rep. 483, 55 N. E. 895; *Nutting v. Massachusetts*, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238. The court there goes on to

say: "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the state in respect thereto. As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one state into another, after delivery, and before the sale in the original package. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state 'would not have thought of making' must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

The defendant's counsel urge upon us the language of this court in its opinion in the case. *Corbin v. Houlehan*, 100 Me. 246, 70 L.R.A. 568, 61 Atl. 131. The decision in that case, however, sustained the state statute as not in conflict with any provision of the United States Constitution. So far as the opinion discussed the question here involved, it must be regarded as *dicta* only. The question is a Federal question, the decision of which rests finally with the United States Supreme Court. In view of the decision of that court and the reasons stated therefor in the case cited (*Delamater v. South Dakota*, *supra*), whatever may have been said in the opinion in *Corbin v. Houlehan*, we must now hold that the statute in question (§ 45) at the time of its violation by the defendants in 1906 was not in conflict with the state or United States Constitution, but was valid and operative upon the defendants.

The defendants further urge that newspapers and magazines published in other states and containing advertisements of intoxicating liquors for sale come into this state by mail and otherwise in large quantities, and yet cannot be interfered with by the state authorities. That may be; but it does not follow that the state may not prevent such advertisements being printed in newspapers published in this state. If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them

wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within the state. It may to that extent control the conduct of printers and publishers within its own territory. Such we understand to be the logical result of the decision and reasoning in the Delamater Case by the court of last resort upon such questions.

It follows that the state must have judgment.

Judgment for the State.

MICHIGAN SUPREME COURT.

JOHN GODKIN

v.

JOSEPH F. WEBER, Plff. in Err.

(154 Mich. 207, 117 N. W. 628.)

Statute of frauds — acceptance.

1. That personal property is in possession of an intending purchaser at the time he makes a verbal offer for it which is duly accepted is not sufficient to comply with a statute providing that no contract for the sale of goods of the value of \$50 or more shall be valid unless the purchaser shall accept and receive part of the goods sold.

Same — estoppel.

2. Failure of one who has made a verbal offer to purchase chattels, to reply to a letter accepting the offer, does not effect a contract binding upon him.

Same — sufficient acceptance.

3. A binding contract to purchase mill culls is not effected by the fact that one making a verbal offer for them accepted and paid for merchantable lumber which was cut from them.

(Grant, Ch. J., and Blair and Moore, JJ., dissent.)

(September 16, 1908.)

ERROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor in an action brought to recover the purchase price of certain mill culls al-

leged to have been sold and delivered. Reversed.

A decision was reached and opinion handed down in this case on January 31, 1908, reversing the decision below; but a rehearing was granted, and the former opinion so materially modified that it is of little value upon the question of principal interest in the case, and is therefore omitted.

Statement by Carpenter, J.:

A detailed statement of the facts in this case will be found in the former opinion, written by Chief Justice Grant, 154 Mich. 207, 114 N. W. 924. The testimony, stating it most favorably to the plaintiff, may be briefly summarized as follows: On the 16th of February, 1905, there was in defendant's possession mill culls belonging to plaintiff amounting to 22,957 feet. Defendant made a verbal offer to plaintiff's agent to purchase these at \$9.50 per M. This offer was communicated to plaintiff February 17th. On that day plaintiff wrote defendant, accepting the offer. Very soon thereafter defendant informed plaintiff's agent that he would not purchase at that figure, and later, on the 22d of February, he wrote plaintiff offering to purchase at \$9 per M. This last offer never was accepted. Did this evidence justify an inference of sale?

Mr. Jasper C. Gates, for plaintiff in error:

Mere possession does not take the case out of the statute.

J. H. Silkman Lumber Co. v. Hunholz, 132 Wis. 610, 11 L.R.A. (N.S.) 1186, 122 Am. St. Rep. 1008, 112 N. W. 1081; Hinchman v. Lincoln, 124 U. S. 38, 31 L. ed. 337, 8 Sup. Ct. Rep. 369; Couillard v. Johnson, 24 Wis. 533; Snider v. Thrall, 56 Wis. 674, 14 N. W. 814; Edan v. Dudfield, 1 Q. B. 302; Taylor v. Wakefield, 6 El. & Bl. 765; Duplex Safety Boiler Co. v. McGinness, 64 How. Pr. 99; Re Hoover, 33 Hun, 553; Dorsey v. Pike, 50 Hun, 534, 3 N. Y. Supp. 730; Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Stone v. Browning, 51 N. Y. 211; Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619.

Mr. Lee E. Joslyn for defendant in error.

Note.—The question as to the receipt and acceptance necessary to satisfy the statute of frauds when the goods are in possession of the purchaser at the time of the agreement is discussed in a case note to J. H. Silkman Lumber Co. v. Hunholz, 11 L.R.A. (N.S.) 1186.

The doctrine of the majority of the cases as there shown is followed in the subsequent case of Charlotte Harbor & N. R. Co. v. Burwell (Fla.) 48 So. 213, holding that, 20 L.R.A. (N.S.)

where the owner of crushed granite offers to sell the same to a party on whose premises the rock is located, who accepts the offer, the latter must do some act showing an acceptance of the rock, as, for instance, selling or attempting to sell or dispose absolutely of the whole or some portion of it, or altering its nature, or the like, in order to take the contract out of the statute of frauds, if there is no note or memorandum or part payment to satisfy the statute.

Carpenter, J., delivered the opinion of the court:

The important question in this case is this: Has there been a compliance with § 9516, Comp. Laws 1897? That section reads: "No contract for the sale of any goods, wares, or merchandise, for the price of \$50 or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized." When this case was first determined by us, we decided that there was in writing nothing to indicate defendant's assent to the sale. We adhere to that determination for the reason stated in our former opinion; that is, to be specific, we hold that defendant's letter of February 14th, which it was claimed contained an offer for these culls, referred to other culls, and not to those in controversy. It is urged that the section was complied with because the goods were already in defendant's possession. We assented to this view on the former hearing. In doing this I think we failed to note—at least, I failed to note—that the statute required acceptance as well as delivery. There is in this case no evidence of acceptance. And to hold that the statute was complied with is to disregard that portion of the statute requiring acceptance. In *Duplex Safety Boiler Co. v. McGinness*, 64 How. Pr. 99, it is said (this is quoted from the headnote, but it is correct): "In order to constitute a delivery and acceptance of goods, something more than words are necessary; and the fact that the goods are already in the defendant's possession under a prior understanding does not amount to a delivery or acceptance. There must be some affirmative act of his to take the case out of the statute." This is supported by a long line of cases. See *Dorsey v. Pike*, 50 Hun, 534, 3 N. Y. Supp. 730; *Follett Wool Co. v. Utica Trust & D. Co.* 84 App. Div. 151, 82 N. Y. Supp. 597; *Hinchman v. Lincoln*, 124 U. S. 38, 31 L. ed. 337, 8 Sup. Ct. Rep. 369; *J. H. Silkman Lumber Co. v. Hunholz*, 132 Wis. 610, 11 L.R.A. (N.S.) 1186, 122 Am. St. Rep. 1008, 112 N. W. 1081; *Lillywhite v. Devereaux*, 15 Mees. & W. 285; *Proctor v. Jones*, 2 Car. & P. 532; *Taylor v. Wakefield*, 6 El. & Bl. 765.

It is contended that *Webster v. Anderson*, 42 Mich. 554, 36 Am. Rep. 452, 4 N. W. 288; *Couillard v. Johnson*, 24 Wis. 533, 1 Mechem 20 L.R.A. (N.S.)

on Sales, § 389, and 29 Am. & Eng. Enc. of Law, 2d ed. p. 985, are opposed to this view of the law. We think otherwise. In *Webster v. Anderson* and *Couillard v. Johnson* there was no question about an acceptance. The question of delivery alone was in doubt, and therefore these authorities have no application. It is not to be inferred from 1 Mechem on Sales, § 389, or 29 Am. & Eng. Enc. of Law, 2d ed. p. 985, that evidence of acceptance is unnecessary where the goods are in possession of the purchaser. I quote from Mr. Mechem as follows: "'If it appears,' said the court in a leading case upon the subject, 'that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the statute of frauds.'" It is said in 29 Am. & Eng. Enc. of Law, 2d ed. p. 985: "It may be stated as a general proposition that the buyer has little more to do, if anything, than to remain in possession and claim under the contract of sale." The necessity of an acceptance is here sufficiently indicated.

It is urged that, because defendant, after receiving plaintiff's letter of February 17th, delayed replying until February 22d, an inference of acceptance may thereby be drawn. In other words, it is argued that defendant was bound by the void parol contract because he did not repudiate it. This is only an indirect method of evading the statute, and it forces upon defendant the obligations of a contract contrary to the provisions of the statute. It should also be said that the record does not sustain the claim that defendant delayed until February 22d in notifying the plaintiff that he refused to accept the culls in accordance with the terms of the letter of February 17th; for it is shown by a letter of plaintiff, written February 21st, that prior to that time defendant had informed plaintiff's agent that he would not purchase the culls on those terms. Out of the mill culls rejected by defendant, plaintiff's agent, Ward, cut out 5,424 feet of merchantable lumber, which defendant accepted and paid for as such. Plaintiff insists that this was an acceptance of the mill culls. We do not think this argument sound. This 5,424 feet was accepted and paid for upon the ground that it was not a part of the mill culls. Its acceptance had no effect upon the transfer of title of the mill culls. In my judgment, the trial court

should have directed a verdict in defendant's favor.

Judgment reversed, and a new trial ordered.

Montgomery, Ostrander, Hooker, and McAlvay, JJ., concurred.

Grant, Ch. J., dissenting:

I see no occasion to retreat from my former opinion. The question, as I read the record, is not: Was the defendant bound by a void parol contract because he did not repudiate it? The question is: Was the contract, otherwise void, made valid by delivery? Under the record as I read it, defendant made a parol offer for the property already in his possession, bulky, and as to which further delivery was unnecessary and impracticable. This parol offer was promptly communicated to plaintiff. He wrote accepting the offer, and defendant kept silence for five days. Where one having goods in his possession belonging to another makes a parol offer to buy, and that parol offer is accepted, the law does not require the vendee to accept the acceptance of his offer to purchase in order to complete the sale. Remaining in possession and keeping silence for five days, when an answer, if the vendee intended repudiation, could have been made in a few minutes by telephone or a few hours by letter, are evidence of delivery and acceptance of the goods. The circumstances in this case are, in my judgment, sufficient to justify the finding by the jury that there was a delivery which satisfied the statute of frauds and made a valid contract.

The inspection of the culls, made by plaintiff's inspector, in conjunction with the defendant's inspector and the defendant's men, was made February 15th, and at that time the ends were cut off from certain culls, leaving the balance merchantable lumber. The amount of this merchantable lumber was 6,435 feet, leaving the amount of the culls 22,957. Defendant's offer to pay \$9.50 per M. was made after this inspection and communicated to the plaintiff on the 16th. On the 21st of February plaintiff wrote defendant, demanding payment. The bill claimed 22,957 feet of mill culls at \$9.50 per M. I am unable to find anything in that letter indicating that defendant had informed plaintiff's agent, subsequent to the time of his offer, that he would not purchase the culls on those terms. There is evidence of a refusal to purchase before that time.

Blair and Moore, JJ., concur with Grant, Ch. J.
20 L.R.A. (N.S.)

MICHIGAN SUPREME COURT.

EDWARD A. BRAASCH, by Next Friend,

v.

MICHIGAN STOVE COMPANY, Appt.

(153 Mich. 652, 118 N. W. 366.)

Master — minor — false statement of age.

1. A minor whose age is falsely represented with his knowledge and acquiescence, for the purpose of securing employment for him, is not estopped, in an action against his employer to recover damages for personal injuries, from showing that he was under the age at which the statute permitted him to be employed.

Expert evidence — erroneous admission — error.

2. Admitting expert testimony upon the question of the dangerous character of a machine at which a minor is set at work, in an action by him to hold his employer liable for an injury, is not reversible error where the machinery is so dangerous that the court will take judicial notice of the danger.

Master — minor — dangerous machine — elevator.

3. A freight elevator which passes floors is a dangerous machine, within the meaning of a statute forbidding employment of children under sixteen years of age upon such machines.

Appeal — instruction — damages.

4. A reviewing court will not reverse a judgment for error in an instruction in an action by a minor to recover damages for personal injuries, which does not expressly deny a recovery for reduced earning capacity during minority, to which no exception was taken at the time, although the statute permits the assignment of errors upon the charge after judgment, where, from the whole instruction, the jury must have understood that such damages could not be allowed, they having been instructed that he could not recover for lost time.

(July 13, 1908.)

Case Note. — Liability of master for injury to employee under statutory age of employment as affected by misrepresentations as to his age by himself or his parents.

In *Koester v. Rochester Candy Works*, 194 N. Y. 92, 19 L.R.A. (N.S.) 783, 87 N. E. 77, reversing 122 App. Div. 894, 106 N. Y. Supp. 1134, it was held that, since the gist of the civil liability is the negligence of the master in employing a person of such tender years that the legislature has forbidden his employment, the representation of the employee as to his age was not conclusive, even if accompanied by a similar statement by his parents; but that if the employer, in the exercise of proper vigilance and due caution, was led to believe, and was justifi-

APPEAL by defendant from a judgment of the Circuit Court for Wayne County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Bowen, Douglas, Whiting, & Murfin, for appellant:

The statute will not protect an infant under the age of sixteen who either affirmatively or negligently misrepresents his age for the purpose of obtaining employment.

Beghold v. Auto Body Co. 149 Mich. 14, 14 L.R.A.(N.S.) 609, 112 N. W. 691; Malloy v. American Hide & Leather Co. 148 Fed. 482; Newcomb v. Boston Protective Department, 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Leathers v. Blackwell Durham Tobacco Co. 144 N. C. 330, 9

L.R.A.(N.S.) 349, 57 S. E. 11; Bishop. Non-Contract Law, §§ 132-141; Schmidt v. Bruen, 56 Misc. 130, 106 N. Y. Supp. 443; People v. Welch, 71 Mich. 548, 1 L.R.A. 385, 39 N. W. 747.

Expert testimony was not admissible to show that this employment was such as to endanger the life or limb of the plaintiff.

Atherton v. Bancroft, 114 Mich. 241, 72 N. W. 208; Girard v. Kalamazoo, 92 Mich. 610, 52 N. W. 1021; Smead v. Lake Shore & M. S. R. Co. 58 Mich. 202, 24 N. W. 761; Smith v. Sherwood Twp. 62 Mich. 159, 28 N. W. 806; Harris v. Clinton Twp. 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425; Lindley v. Detroit, 131 Mich. 11, 90 N. W. 665; People ex rel. Esper v. Detroit & S. Pl. Road Co. 125 Mich. 370, 84 N. W. 290; Melzer v. Peninsular Car Co. 76 Mich. 94, 42 N. W. 1078; Kelley v. Detroit, L. & N.

fed in the belief, that the employee was above the statutory age, he could not be charged with negligence in employing the child, in which event the statute forbidding such employment would have no bearing upon the case; that, since what would constitute vigilance in one case of misrepresentation might not in another, the question of the employer's negligence in failing to ascertain the truth should be left to the jury under proper instructions.

In Schmidt v. Bruen, 56 Misc. 130, 106 N. Y. Supp. 443, the court said that, since the master is liable in damages only for his negligence in employing a child under the age specified in the statute, statements of parents, affidavits and careful and painstaking investigations showing the child to be over that age, may be given in evidence to meet and rebut the presumption of negligence arising from the mere employment. It does not appear, however, that there was any misrepresentation in this case by the child or its parents.

In Malloy v. American Hide & Leather Co. 148 Fed. 482, where it was not disputed at the argument that the statute making it unlawful for persons under sixteen years of age to operate elevators was aimed at both employer and employee, it was held that plaintiff could not recover for the death of his intestate while operating an elevator, the intestate having secured employment by fraudulently misrepresenting that he was eighteen years of age, whereas in fact he was less than fifteen.

But in American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766, the court—in answer to the contention that, if the child, knowing that he was under the age at which the statute forbids his employment in a factory, obtained the employment by falsely stating that he was over that age, he could not recover on the theory that the law will not permit one to recover where his own unlawful act concurs in causing the injury—said: "This doctrine is not applicable for the reason that the statute

under consideration is aimed at the master, and not at the servant. The act of the child in accepting or entering into the employment is not unlawful. Moreover, if the child's statement to the effect that he was above the age of sixteen would constitute a defense, the law could never be enforced in any case where the child was willing to make a false statement in reference to his age for the purpose of obtaining the employment. The object of this statute was entirely to prevent the employment of children under the age of fourteen in the occupations named therein, and it should be given a construction that will effectuate that purpose if that end can be attained, as we think it can, without doing violence to the letter of the enactment."

In Swift & Co. v. Rennard, 119 Ill. App. 173, the court said: "The fact, if it be a fact, that appellee knew he was under the age of sixteen years, and concealed that fact from appellant, or that he falsely stated his age to appellant, would not relieve appellant from the duty to know, nor the responsibility of not knowing, that he was of legal age, before employing him and exposing him to the perils absolutely prohibited by the statute enacted solely for the protection of children, thus legislatively declared to be incapable of protecting themselves. Anything such a child might say about his age would be competent evidence, to be considered by the jury in connection with all the other evidence, as bearing upon the question of age, in a suit wherein such child was a party, but a false statement of its age to its employer would not bar its right of action."

In Inland Steel Co. v. Yedinak (Ind.) 87 N. E. 229, it was held that the corporation was chargeable with knowledge of the legal disabilities of children to engage in it—ice, and was required to ascertain at its peril that a child employed in the operation of its factory, which had been classified by the legislature as dangerous, was above the age fixed by the statute which prohibited

R. Co. 80 Mich. 237, 20 Am. St. Rep. 514, 45 N. W. 90; 17 Cyc. Law & Proc. pp. 25 et seq.; Clinton v. Root, 58 Mich. 184, 55 Am. Rep. 671, 24 N. W. 667; Detzur v. B. Stroh Brewing Co. 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948; Indiana Bituminous Coal Co. v. Buffey, 28 Ind. App. 108, 62 N. E. 279; Sprague v. Atlee, 81 Iowa, 1, 46 N. W. 756; Gleason v. Smith, 172 Mass. 50, 51 N. E. 460; Bergen County Traction Co. v. Bliss, 62 N. J. L. 410, 41 Atl. 837; Harley v. Buffalo Car Mfg. Co. 142 N. Y. 31, 36 N. E. 813; Ft. Worth & D. C. R. Co. v. Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137; Houston v. Brush, 66 Vt. 331, 29 Atl. 380; Hunt v. Kile, 38 C. C. A. 641, 98 Fed. 49; Atchison, T. & S. F. R. Co. v. Myers, 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793.

No recovery can be based upon a failure to give the warning of danger where it appears affirmatively that the plaintiff, though of tender years, knew of the danger and appreciated it.

Ertz v. Pierson, 130 Mich. 161, 89 N. W. 680; Beghold v. Auto Body Co. supra; Berlin v. Mershon, 132 Mich. 183, 93 N. W. 248; Allen v. Jakel, 115 Mich. 484, 73 N. W. 555; Dutchowski v. Handy Things Co. 141 Mich. 11, 104 N. W. 358; Roberts v. Sanitas Nut Food Co. 142 Mich. 589, 106 N. W. 68; Kolodziejski v. Seestadt, 143 Mich. 38, 106 N. W. 557.

Mr. James H. Pound, with Mr. William Van Dyke, for appellee:

The manner of operating a hydraulic-pressure elevator, and the training, skill, and experience needed by the operator, is not a matter of such common knowledge as to preclude the giving of expert testimony.

James v. Rapides Lumber Co. 50 La. Ann. 717, 44 L.R.A. 33, 23 So. 469; Punkowski v. New Castle Leather Co. 4 Penn. (Del.) 544, 57 Atl. 559; Gammel-Statesman Pub. Co. v. Monfort (Tex. Civ. App.) 81 S. W. 1029; Finn v. Cassidy, 165 N. Y. 591, 53 L.R.A.

the employment of children under fourteen years of age; and the master was not relieved from liability for an injury to a child under that age, due to the unlawful employment, because of the fact that its mother, to secure its employment, made affidavit that it was above that age.

In Beghold v. Auto Body Co. 149 Mich. 14, 14 L.R.A. (N.S.) 609, 112 N. W. 691, it was held that evidence that a master believed, and was informed by the child's brother, that the child was above the statutory age, did not entitle the master to an instruction relieving him from liability based on a violation of the statute, where the minor, at the time of his employment, was not asked his age, and did not know that it had been misrepresented by his brother.

In Syneszewski v. Schmidt, 153 Mich. 20 L.R.A. (N.S.)

877, 59 N. E. 311; Combs v. Rountree Constr. Co. 205 Mo. 389, 104 S. W. 77; Helfenstein v. Medart, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; Fischer v. Edward Heitzberg Packing & Provision Co. 77 Mo. App. 113; McNamara v. Logan. 100 Ala. 197, 14 So. 175; Northern Alabama R. Co. v. Shea, 142 Ala. 119, 37 So. 796; Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487; Pullman's Palace-Car Co. v. Harkins, 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932; Schroeder v. Chicago & N. W. R. Co. 128 Iowa, 365, 103 N. W. 985; Kehler v. Schwenk, 151 Pa. 505, 31 Am. St. Rep. 777, 25 Atl. 130; Taylor v. Monroe, 43 Conn. 36; Rochester & S. R. Co. v. Budlong, 10 How. Pr. 289; Union Show Case Co. v. Blindauer, 175 Ill. 325, 51 N. E. 709, 75 Ill. App. 358; Merkle v. Bennington Twp. 68 Mich. 145, 35 N. W. 846; Bettys v. Denver Twp. 115 Mich. 228, 73 N. W. 138; Blank v. Livonia Twp. 79 Mich. 2, 44 N. W. 157; Laughlin v. Street R. Co. 62 Mich. 222, 28 N. W. 873; Cross v. Lake Shore & M. S. R. Co. 69 Mich. 369, 13 Am. St. Rep. 399, 37 N. W. 361; Williams v. Lansing, 152 Mich. 169, 115 N. W. 962; Blank v. Livonia Twp. supra; Hall v. Murdock, 114 Mich. 233, 72 N. W. 150; Northern Supply Co. v. Wangard, 123 Wis. 1, 107 Am. St. Rep. 984, 100 N. W. 1066; Ryder v. Jacobs, 182 Pa. 630, 38 Atl. 471; Philadelphia use of McAvoy Vitrified Brick Co. v. Neill, 211 Pa. 363, 60 Atl. 1033.

Allowing the boy to operate the electric elevator in which there was no skirting or apron to the floors was flagrant negligence.

O'Brien v. Sanford, 22 Ont. Rep. 136; Goodsell v. Taylor, 41 Minn. 209, 4 L.R.A. 673, 16 Am. St. Rep. 700, 42 N. W. 873; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Webb, Passenger & Freight Elevators, §§ 52, 58, 59.

438, 116 N. W. 1107, it was held no defense in an action for injuries in a factory to an employee thirteen years old, by a coemployee, that he falsely stated that he was over fourteen; that the statute prohibiting employment of any child under fourteen years in any manufacturing establishment did not accept the mere statement of a child as to his age, and the court could not aid one who did accept it.

In Kirkham v. Wheeler-Osgood Co. 39 Wash. 415, 81 Pac. 869, 4 A. & E. Ann. Cas. 532, it was held that, in an action for injuries to a child twelve years old, employed contrary to the provisions of a statute forbidding the hiring out of children under fourteen years of age in factories, it was no defense that the child represented himself as being over fourteen, since the doctrine of estoppel *in pais* is not applicable to infants.

Hooker, J., delivered the opinion of the court:

The defendant, a corporation engaged in the manufacture of stoves, employed the plaintiff, and set him at work running an electric freight elevator in its factory. A few hours later he was injured; his foot being crushed between the elevator and a floor. It is obvious that this happened by reason of his foot being allowed to extend over the edge of the floor of the elevator as it approached the fifth floor of the factory from below. He recovered upon this, the second trial of the cause, a verdict and judgment for \$4,000; and, a new trial having been denied, the defendant has appealed. The plaintiff gave testimony tending to show that at the time of his employment he was fourteen years and eight months old, and it is claimed on his behalf that such employment was in violation of §§ 2 and 3, Pub. Acts 1901, p. 157, No. 113, and conclusive evidence of defendant's negligence. The defendant produced testimony tending to show that application for work was made, on behalf of the plaintiff, by his cousin, one Myers, an employee of the defendant; that later he was told by defendant's superintendent to bring the plaintiff to the factory. He did so, and at the interview Callan, the superintendent, in plaintiff's presence, asked Myers "How old is he; has he got papers?" and Myers answered, "Why no; he doesn't need any papers. He is as big as you [Callan] are;" that he [Callan] told plaintiff to stand up, which he did, and that he was at least 2 inches taller than Myers. He was therefore employed and, soon after, placed under the charge of a man then running the elevator, with direction to the latter to instruct him in his duties, and to stay with him until he had learned it all. It is defendant's contention that the superintendent was deceived, by the statement of Myers, into the belief that the plaintiff was more than sixteen years of age, and that the plaintiff was a party to such deception, and estopped from making a claim that the defendant was guilty of a violation of the statute. The learned circuit judge left the cause to the jury and a verdict for \$4,000 followed.

The cause is before us for a second time. In our former decision we reversed the judgment previously rendered in favor of the plaintiff, holding that the defendant had a right to have the verdict of a jury upon the following questions, *viz.* (Braasch v. Michigan Stove Co. 147 Mich. 676, 111 N. W. 197): "Whether the employment of a boy under sixteen, to run an electric freight elevator is within the prohibition of § 3, act No. 113, p. 157, Pub. Acts 1901, as amended L.R.A. (N.S.)

dangerous life or limb, is a question for the jury. In an action by a boy under sixteen for injuries received in operating an electric freight elevator, evidence examined, and held that whether he should have had other and further instructions as to the danger incident to his employment, and should have been warned of its danger, were questions for the jury." Upon the present record, it is claimed that the court erred in refusing to give defendant's seventh request; *i. e.*: "It appears from the testimony of the witnesses Braasch, Myers, and Callan that it was represented to Callan, the superintendent of the Michigan Stove Company, that the plaintiff, Braasch, was of the age of sixteen or over; and, if you believe that Mr. Callan employed Braasch relying upon the statements, made in Braasch's hearing by Myers, that he did not require any papers, then the defendant did not in any way violate the provisions of Pub. Acts 1901, p. 157, No. 113, in reference to the employment of persons under sixteen years of age, and the plaintiff cannot recover." It is urged that the record conclusively shows that the defendant was deceived in regard to the age of the plaintiff, and that he (the plaintiff) should therefore be estopped from claiming damages upon the ground of a violation of the statute. One who deliberately falsifies regarding his age to get employment is not entitled to much sympathy, in a suit against the employer whom he has deceived, in an action based upon the statute. It is said that he should be estopped from recovering on such a claim. We held the contrary in the case of *Syneszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107.

A witness was called by plaintiff's counsel, as an expert, to prove that a freight elevator was a place of danger to life and limb. Counsel truly say that this was a question which it was the province of the jury to decide, and there is force in the contention that it was not competent to call witnesses to decide it for them. We understand that this injury was not the result of any inherent and hidden danger involved in the use of the machine, but was the obvious consequence of placing a foot over the edge of the floor of the elevator, voluntarily or involuntarily. This was as apparent to a juror as anyone, and the jurors could decide that it was so, as well without the opinion of the expert as with it. We think the testimony was within the rule laid down in *Melzer v. Peninsular Car Co.* 76 Mich. 94, 42 N. W. 1078, and other cases cited in appellant's brief. But this was harmless error, for we will take judicial notice that a freight elevator is a place of danger to life and limb in the hands of an inexperienced

rienced boy of fourteen years. The legislature has seen fit to forbid the employment of such persons for the management of dangerous machinery, fixing the age limit at sixteen years. An elevator, like many other machines, is a reasonably safe machine under proper management, but accidents are not infrequent. Any construction of the statute which does not take into account the inexperience and natural heedlessness of children overlooks an important consideration. Undoubtedly it was passed to protect children against accidents, which in adults might well be said to result from negligence on the part of the victim, but which in children would be largely due to a want of experience, or heedlessness, for which experience is ordinarily the only cure. Without implying that a child can never be chargeable with contributory negligence in such a case, it may well be said that all so-called heedlessness may not be negligence. But this may, perhaps, be thought a digression. The point of it all is that we feel justified in saying that the management of an elevator passing floors, as this did, is an occupation, dangerous, within the meaning of the statute, to the life and limb of a boy of fourteen years of age. It is not a question of the obviousness of the danger, but whether the occupation is one attended with dangers which a child would not be competent, in view of childish habits and instincts, to understand or avoid. The case of *Allen v. Jakel*, 115 Mich. 484, 73 N. W. 555, was a case involving an obvious danger, but it was held that an increased obligation, growing out of the ignorance and inexperience of childhood, rested upon one who would employ a child. This did not involve a statute against child labor, and the case was a recognition of an increased duty of instruction, growing out of immaturity of the employee. See also *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755, where we said that "the statute . . . clearly recognizes that a child under sixteen years is immature in judgment."

Error is assigned upon the following charge: "He is entitled further, gentlemen of the jury, to recover damages for his decreased earning capacity, if you find from the evidence in this case, and from your observation from the injured limb, that during his lifetime his earning capacity will be decreased by reason of the injury." It is said that this permitted the jury to award damages to his earning capacity for the period intervening the trial and the time when plaintiff should reach the age of twenty-one years, a period somewhat over a year, which counsel claim was a right belonging to his father, and not to him, upon the theory that

his father was entitled to his earnings for that time; no proof of emancipation being offered. From the charge itself we take the following: "If you resolve all these questions, gentlemen of the jury, in favor of the plaintiff, you will then consider the question of damages. I charge you, first, as to what damages he cannot recover. He cannot recover for any medical attendance or doctor's bills, to start with. He cannot recover for any time lost during the time that he was ill. I think the testimony shows that there was about a year that he was unable to get work. He is an infant, and under the law his time, at this time, would belong to his father, and there is no evidence in the case that his father manumitted to him, or gave him his own time, so that that element of damage is not in the case for your consideration. He is entitled to recover, gentlemen of the jury, if you find under my instructions that he is entitled to recover. He is entitled to recover for his pain and suffering, not alone what he has suffered in the past, but what you find he will suffer in the future, as the direct and necessary result of the accident. He is entitled to recover for the inconvenience and the humiliation which you find that he will suffer by reason of his crippled condition, if you find that his condition will entail either inconvenience or humiliation in the future. Now, gentlemen of the jury, both of these elements of damage are elusive. It is hard to determine accurately what the plaintiff is entitled to for the value of that pain, or suffering, or inconvenience and humiliation. As I have said before, they can neither be weighed nor measured. They ought never to be oppressive, but they ought to be full and fair compensation for those elements. They must, in the last analysis, be referred to the exercise of the judgment of twelve honest men, intent only upon doing the right thing between these two parties. He is entitled further, gentlemen of the jury, to recover damages for his decreased earning capacity, if you find from the evidence in this case, and from your observation from the injured limb, that during his lifetime his earning capacity will be decreased by reason of the injury. There is no testimony in the case tending to show that, since the happening of the injury up to the present time his earning capacity has been decreased. But I am still of the opinion that you may, viewing the foot and taking into consideration the condition in life of the plaintiff, that you are the judges as to whether or not such an injury will result in a decreased earning capacity through the life of this boy; and, if you find that the injury is such a one as to decrease his capacity to earn

a livelihood, then your verdict should include such a sum as will fairly compensate him for that decrease, if you find it to exist." The jury was explicitly told that he could not recover for lost time while ill, and that his time, during the year that he could not get work, belonged to his father. But he afterwards allowed them to find damages through his lifetime "if they should find that his earning capacity will be decreased," etc.

The defendant's counsel did not call attention to the question now raised, in any request to charge, although plaintiff's sixth request plainly claimed damage for loss of earning capacity. Nor did they, when the charge was given, call attention to the omission to notice the period of a year or two between the trial and the time when he would reach his majority. Had they done so, no doubt, the judge would have said to the jury, expressly what he had impliedly said before as to failure to get work, that he had no right to recover for lost earning capacity prior to his majority. Under the former and fairer practice of requiring exceptions to be taken before the return of a verdict, the court and plaintiff would have been protected against errors of this kind, and the statute allowing assignments of error upon the charge, after judgment and without exception, is productive of injustice, affording, as it does, the opportunity for raising points before us which have not been brought to the attention of the trial court. It certainly is not conducive to the administration of justice that just and hard-earned verdicts and judgments, procured at large expense, should be lost through the intentional or inadvertent omission of opposing counsel to carefully cover all points involved before the trial court, and his right, based on a recent statute, to raise them later in this court. Thereby the plaintiff is made an insurer of the accuracy of all the instructions of the trial court, and the defendant is relieved from the necessity of bringing all points that he intends to rely on before the trial court. There is nothing in this case to indicate any intentional omission of counsel to raise this point before verdict. On the contrary, we have every reason to believe that their conduct of the case was eminently fair. What has been said is merely to call attention of the bar to the injustice of the existing statute eliminating exceptions to the charge, and the manifest injustice that has followed its enactment, in the many cases which we have been obliged to reverse upon comparatively unimportant points. We think, however, that the charge, when it is all read together, shows that the learned circuit judge in-

tended that the jury should not award any damages for lost earnings during plaintiff's minority, and it would be a stupid juror who would render a verdict for decreased earning capacity covering a period when the earnings, if made, would not belong to the plaintiff. He expressly told them that he could not recover for time already lost, whether from inability to get work, or want of ability to work, for the reason that he was an infant during this time, and his father had not emancipated him. It is not unreasonable to presume that every citizen competent to act in the capacity of juror knows that a person is an infant, and that his father is entitled to his services until he reaches the age of twenty-one years. We find nothing to indicate a claim to the contrary in this record, and we feel warranted in the conclusion that court, counsel, and jurors must all have understood that recovery for increased earning capacity must commence when the plaintiff became his own master.

We are not convinced that the verdict was so excessive as to require a reversal, or that the court erred in denying a new trial.

The judgment is affirmed.

Petition for rehearing denied November 30, 1908.

MINNESOTA SUPREME COURT.

HARRY DYER et al., Respts.,

v.

PETER SCHNEIDER et al.

MINNEAPOLIS THRESHING MACHINE COMPANY, Claimant, Appt.

(106 Minn. 271, 118 N. W. 1011.)

Chattel mortgage—threshing outfit — future earnings—validity.

A chattel mortgage is void—at least against creditors without actual notice—which purports to assign, to secure a speci-

Headnote by START, Ch. J.

Case Note.—Validity of chattel mortgage of future earnings of threshing outfit.

It will be noticed that in the foregoing case the court, in holding that a chattel mortgage on future earnings of a threshing outfit is void, bases its decision upon the broad ground that future earnings are, at most, mere contingencies or expectancies, and are too vague and uncertain to be the subject of a chattel mortgage. But in South Dakota such mortgages have been held valid where the instrument itself satisfies the requirements of the law in respect to chattel mortgages, and a suggestion is made in

fied debt, all the future earnings of a threshing machine, therein described, also of any other threshing machine operated by the mortgagor, and of the crew, including men and teams, operating them, which may accrue for threshing during the then ensuing two years within three designated townships.

(December 24, 1908.)

A PPEAL by claimant from a judgment of the District Court for Stearns County disallowing its claim upon a complaint in intervention in garnishment proceedings as a creditor of defendant. Affirmed.

The facts are stated in the opinion.

one decision that a mortgage of this character should be upheld upon the ground of public policy.

Thus, in *Flanders v. French*, 20 S. D. 316, 106 N. W. 54, it was held that such a mortgage was valid where the machine was described by numbers so as to be easily identified, and the territory and the years in which it was to be operated were definitely indicated and described. The court further said: "The terms of the contract seem to fulfil the most exacting requirements of the rule which requires the intention of parties to be clearly and fully expressed before a court will enforce the contract. We can discover no reason why such a contract, if sufficiently clear and specific, should not be enforced by the courts. Such contracts enable parties of small means to secure threshing rigs, and to pay for them out of their earnings. There is nothing in the terms of such contracts contrary to public policy, or to the best interests of agricultural communities, but they rather tend to encourage and develop such interest."

So, in *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682, the validity of such chattel mortgages was asserted, but the one in dispute, not having been filed, was held void as to a creditor who, without knowledge of the mortgage, relied for security for defendant's debt upon the debtor's supposed ownership of the machine and its earnings. The court distinguished between the earnings of the machine as such and the earnings of the men who operated it. "In holding that it was competent for the owner and operator of a threshing machine to mortgage the future earnings of such machine, we must not be understood as intending to hold that the accounts due from the farmers to the person operating the machine necessarily represent such earnings. Such accounts usually, in this state, represent not only the earnings of the machine, but also the earnings of a large number of men and teams used in conducting the business of threshing. A description such as we find in the instrument in this case, to wit, 'all and singular the earnings of the aforesaid threshing rig' would not cover the earnings of the men and teams."

20 L.R.A. (N.S.)

Mr. J. D. Sullivan for appellant.

Mr. James E. Jenks for respondents.

Start, Ch. J., delivered the opinion of the court:

Appeal by claimant from a judgment of the district court of the county of Stearns in favor of the plaintiffs, and against the garnishee, for the amount of their claim against the defendant, with costs and disbursements against the claimant.

The admitted facts upon which the judgment is based are to the effect following: The plaintiffs duly recovered judgment against the defendant and duly instituted garnishee proceedings, and at the time of

It may be well to call attention to the fact that the *Sykes Case* is cited in *Dyea v. SCHNEIDER* as sustaining the proposition that such mortgages are invalid for uncertainty; but that point was not raised in the *Sykes Case*, and the quotation given above clearly shows that the South Dakota court considered such mortgages valid if sufficiently definite and properly filed.

And in *Minneapolis Threshing Mach. Co. v. Skau*, 10 S. D. 636, 75 N. W. 199, a mortgage of such earnings was held void solely upon the ground of its uncertainty, the instrument not giving the number of the machine or the name of its maker, nor describing the place where it was to be operated or the person or persons from whom the earnings were to accrue.

So, also, in *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 567, 14 L.R.A. 126, 49 N. W. 1031, it was implied that a mortgage on threshing machine accounts not yet earned might be valid, but the mortgage in question was held void as to the earnings for lack of definite description, they being described only as all such accounts which shall be earned up to the time the mortgage debt is fully paid by a threshing machine which was also included in the mortgage.

In *Baylor v. Butterfass*, 82 Minn. 21, 84 N. W. 640, the court questioned, but did not determine, the validity of such a mortgage.

A search has failed to reveal any other decisions which pass upon the validity of a chattel mortgage of the future earnings of a machine or machinery which was at the time of the mortgage owned or controlled by the mortgagor.

Upon the question, mortgage or assignment of future accounts or earnings, see note to *Sandwich Mfg. Co. v. Robinson*, 14 L.R.A. 126.

As to sale or mortgage of future crops, see note to *Dickey v. Waldo*, 23 L.R.A. 449.

As to chattel mortgage on after-acquired property, see case note to *Burrill v. Whitcomb*, 1 L.R.A. (N.S.) 451.

the service of the garnishee summons there were funds in the hands of the garnishee, amounting to \$95, which represented moneys earned by the defendant with the threshing outfit described in the chattel mortgage hereinafter referred to, upon which there was then due and unpaid more than \$95. The plaintiffs' demand against the defendant was for extras furnished and labor performed by them in repairing his threshing outfit at his request. The claim of the claimant to the money in controversy was based upon an alleged chattel mortgage, executed by the defendant to it, to secure a specified debt, of all the earnings of the outfit and of the men and teams connected therewith. The mortgage purported to mortgage all the earnings of a threshing outfit, therein described, and of any other threshing outfit owned or operated by the mortgagor, and of the crew, including men and teams, used with such outfits, which might accrue for threshing during the then ensuing two years within three designated townships. When the mortgage was executed there were no existing contracts under which threshing was to be done, nor were there any parties named for whom it was to be done. The mortgage purported to cover not only the earnings of any and all threshing machines the defendant might thereafter operate for two years, but also the earnings of all the men and teams operating the same. The mortgage was duly filed, but the plaintiff had no actual notice of the claim of the claimant. Upon these facts, the trial court held the mortgage invalid as against the creditors of the mortgagor without actual notice. The correctness of this conclusion is the only question for our decision.

This precise question has never been directly decided by this court. See *Baylor v. Butterfass*, 82 Minn. 21, 84 N. W. 640. But the reasoning of our prior decisions sustains the conclusion of the trial court. In *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494, 82 N. W. 651, we held that an assignment of wages to become due, without limit as to amount or time, and without acceptance by the employer, was void as to an attaching creditor without notice. In *Leitch v. Northern P. R. Co.* 95 Minn. 35, 103 N. W. 704, 5 A. & E. Ann. Cas. 63, we held, distinguishing the cases holding valid a mortgage on crops to be thereafter raised upon specified land, that an assignment of wages to be earned in the future under an existing contract of employment, to secure a present debt or future advances, was a valid agreement, which would take effect as the wages were earned, but that an assignment of wages to be earned under an existing contract, without limit as to 20 L.R.A. (N.S.)

amount or time, was void. In each of these cases there was an existing contract for the employment of the assignor. In the case at bar there were no existing contracts for employment, nor were any persons named or in any manner designated in the mortgage from whom future earnings were to accrue.

There can be no difference in principle between an absolute assignment of future earnings to secure a debt, and a chattel mortgage of such earnings; that is, a conditional assignment. There can be no earnings of a threshing outfit, except in connection with the earnings of the men, including the mortgagor, and teams operating it; hence the mortgage is, in effect, a mortgage of the future earnings of the mortgagor and his employees in operating a threshing machine, if, perchance, they should ever do so. The description of the supposed personal property attempted to be assigned by this mortgage is so vague and uncertain as to afford no protection to third parties working for or extending credit to the mortgagor on the strength of his earnings in operating the machine, having no actual knowledge of the claim of the mortgagee. Again, the supposed property attempted to be mortgaged in this case had then no existence, substantial or incipient. It was, at most, a mere expectancy depending on contingencies, or, as said in *Lehigh Valley R. Co. v. Woodring*, 116 Pa. 513, 9 Atl. 58, "a mere possibility of a subsequent acquisition of property." See also *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 567, 14 L.R.A. 126, 49 N. W. 1031, and *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682.

We therefore hold that the mortgage in question, so far as it attempted to assign the future earnings of the threshing outfit and the men and teams who might operate it, was void, at least as to creditors without actual notice.

Judgment affirmed.

MISSISSIPPI SUPREME COURT.

T. J. CAMPBELL, Appt.,
v.

D. E. BROOKS.

(— Miss. —, 47 So. 545.)

Replevin — deed.

Replevin will not lie to recover possession of a title deed where the real con-

Case Note. — *Replevin to recover deed of real property.*

Replevin will not lie for the unlawful taking or wrongful detention of a title deed of real estate where the delivery thereof is

troversey is as to whether or not there had been such a delivery of it as to pass title to the property.

(November 30, 1908.)

APPEAL by plaintiff from a judgment of the Circuit Court for Washington County in defendant's favor in a replevin proceeding to recover possession of a deed. Affirmed.

The parties to this controversy had agreed to exchange lands on certain conditions. They met in the office of a notary public, where each signed and acknowledged the deed for the property intended to be conveyed. The deeds were handed by the notary public to Mr. Campbell, and he subsequently attempted to deliver his deed to Mr. Brooks by messenger. Mr. Brooks refused to accept the deed until certain encumbrances had been provided for in accordance with the exchange agreement. Subsequently Mr. Brooks, upon meeting Mr. Campbell, asked to see his deed, and, when it was handed to him, he declined to return it, whereupon this action was brought to recover its possession.

disputed and the controversy thus involves the determination of the title to the land described therein. *Hooker v. Latham*, 118 N. C. 179, 23 S. E. 1004; *Bridgers v. Ormond*, 148 N. C. 375, 62 S. E. 422; *Flannigan v. Goggins*, 71 Wis. 28, 36 N. W. 846.

So, when the delivery of a deed is disputed, replevin therefor will not lie in a court without jurisdiction to determine actions involving title to real estate. *Simonsen v. Curtis*, 43 Minn. 539, 45 N. W. 1135.

In the last case the court said it could not see why replevin might not be maintained in a court of competent jurisdiction to recover possession of a title deed, where the only fact to be determined affecting the title to the property therein described is that of the delivery of the deed.

But in *Atkinson v. Baker*, 4 T. R. 229, Lord Kenyon, sustained an action of detinue, without questioning the right to maintain the action for title deeds, notwithstanding it became necessary to decide to whom an estate descended in order to determine who was entitled to the possession of the deed.

The following cases apply the doctrine that, where the object sought is to obtain possession of a title deed, and not to test the right or title to the property represented by it, replevin may be maintained therefor. *Goodman v. Boycott*, 31 L. J. Q. B. N. S. 69; *Reeve v. Palmer*, 5 C. B. N. S. 91; *Phillips v. Robinson*, 4 Bing. 106; *Parker v. Stevens*, 12 U. C. C. P. 81; *Anderson v. Hamilton*, 4 U. C. Q. B. 372; *Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486; *Pasterfield v. Sawyer*, *infra*; and this doctrine is recognized in *Bridgers v. Or-* 20 L.R.A. (N.S.)

Further facts appear in the opinion.

Mr. Hugh C. Watson, for appellant:

The deed in question was a proper subject of an action of replevin.

24 Am. & Eng. Enc. Law, 2d ed. p. 479; 7 Lawson, Rights, Rem. & Pr. p. 3632; *Saunders v. Jordan*, 54 Miss. 428. *Hall v. Whittier*, 10 R. I. 530; *Johnson v. Stone*, 69 Miss. 826, 13 So. 858.

Messrs. Campbell & Cashin, for appellee:

Replevin will not lie to recover a deed to lands where there is a dispute as to its delivery, involving a determination of the title to the land.

Cobbye, Replevin, § 79; *Flannigan v. Goggins*, 71 Wis. 28, 36 N. W. 846; *Hooker v. Latham*, 118 N. C. 179, 23 S. E. 1004; *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799; 7 Lawson, Rights Rem. & Pr. § 3643; *Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486.

Mayes, J., delivered the opinion of the court:

Without entering into any discussion of the facts in this case, we simply say that the

mond; Hooker v. Latham; and *Flannigan v. Goggins*,—*supra*.

In *Wilson v. Rybolt*, *supra*, however, one justice dissented on the ground that a deed was not "personal goods," within the meaning of a replevin statute.

It was held in *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799, that a court that is without jurisdiction to entertain an action involving the title to real estate is not deprived of jurisdiction of a replevin suit to recover possession of a deed by reason of the fact that the defendant's answer alleges that he holds the deed in escrow, the conditions of which have not been complied with on the part of the plaintiff, the court not being deprived of jurisdiction until proof of such facts is made. And, upon a second appeal of the case (see 133 N. C. 42, 45 S. E. 524), it was held that the evidence did not establish an escrow, but at most a right to hold the deed as bailee, and that the latter question should have been submitted to the jury.

A mortgagee, to whom two title deeds were delivered under a condition in the mortgage that all deeds and security affecting the encumbered property should be deposited with him, upon discovering one of the deeds to be a forgery, may, by an action of detinue, recover the original from one to whom the mortgagor had subsequently, without notice of the plaintiff's right, delivered the deed as security for money advanced thereon. *Newton v. Beck*, 3 Hurlst. & N. 220.

But detinue for deeds deposited as security for a loan will not lie at the suit of the depositor prior to the repayment of the loan. *Bank of New South Wales v. O'Connor*, L. R. 14 App. Cas. 273.

action of replevin will not lie to recover the deeds sued for here. While it is true, as said in the case of *Hooker v. Latham*, 118 N. C. 179, 23 S. E. 1004, that a writ of replevin "will lie for the recovery either of deeds or certificates of stock, where the object is to regain possession of the specific paper, and not to test the right to the property which it represents," yet replevin cannot "be maintained for the unlawful taking or the wrongful detention of a title deed, where there is a dispute about its delivery, and the controversy involves the determination of the title to the land conveyed by it." A deed, as such, is recoverable in an action of replevin, where same is unlawfully detained, if the controversy be really about the deed and nothing else, and the delivery of the deed is beyond dispute; but, where the real thing sought is an adjudication of title to property, and not the actual recovery of the specific deed, as is the case here, the action of replevin is not an appropriate remedy and will not be maintained. The real controversy here is as to title. The real issue in this case is whether the deeds have been delivered, and the court properly dismissed the cause. *Flannigan v. Goggins*, 71 Wis. 28, 36 N. W. 846; *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799; *Lawson, Rights, Rem. & Pr.* § 3643; *Wells, Replevin*, § 58, and note.

Affirmed.

MISSISSIPPI SUPREME COURT.

WILL SHERROD, Appt.,
v.
STATE OF MISSISSIPPI.

(— Miss. —, 47 So. 554.)

Criminal law — presence of accused — waiver.

One on trial for a capital offense cannot waive his right to be present when the verdict is rendered, even by voluntarily absenting himself from the court room in case he is on bond; and it is immaterial that the verdict actually returned is for an offense not capital.

(November 30, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Winston County convicting him of manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. Jones & Jones for appellant.

Mr. George Butler for the State.

Note. — As to right of accused to waive his presence at the time of receiving verdict upon the trial for felony, see case note to *State v. Way*, 14 L.R.A. (N.S.) 603. 20 L.R.A. (N.S.)

Whitfield, Ch. J., delivered the opinion of the court:

The appellant was indicted for murder, and convicted of manslaughter, and sentenced to five years in the penitentiary.

At the time of the trial appellant was on bond, but present during the progress of the trial until the case was given to the jury, when he voluntarily absented himself and went into the country to spend the night, as he says, though the court announced in his presence before the jury that, if a verdict should be agreed upon before 11 o'clock that night, he would return to the courthouse and receive it. About 8:30 o'clock the jury came in to render their verdict, and the appellant could not be found. The verdict was received in his absence, and this is assigned for error. It will thus be seen that this is an indictment charging a capital offense, and that the appellant's absence when the verdict was received was voluntary; that he was not in jail, and thus subject to the power of the court to have him present.

The learned assistant attorney general, in endeavoring to save the case, cites four authorities: *Gales v. State*, 64 Miss. 105, 8 So. 167, but that was an indictment for assault with intent to kill and murder, not a capital charge at all, and is not in point; *Finch v. State*, 53 Miss. 363, which was an indictment for grand larceny, and is also not in point; *Stubbs v. State*, 49 Miss. 716. In this case the indictment was for murder, but the case is not in point here, for the reason that *Stubbs* was in jail, and not on bond, in which respect the *Stubbs* Case is like the *Finch* Case, *supra*. *Finch* also was in jail when the verdict was received. *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195, but that was an indictment for assault with intent to kill and murder, and is therefore not in point.

In this case it was held, the case not being a capital one, that, since the defendant was on bond, and had voluntarily absented himself, he could not complain of the verdict having been received in his absence. He was present when the trial began, and when the case was put to the jury, but absconded before the verdict was rendered. It will thus be seen that, of the four cases cited by the learned assistant attorney general, only one was a case where there was an indictment for murder, and in that case the judgment was reversed because defendant was not present when the verdict was received, he being in the jail at the time; and the reasoning of the court would indicate that it would have been reversed for that reason whether he was in jail or out of jail, though that is not expressly stated, the charge being a capital one. We have no case exactly like

this in which there was an indictment for murder, and the defendant, being on bond, voluntarily absented himself when the verdict was returned, having been present throughout the trial up to that time.

We have most carefully examined all authorities cited on both sides, and many more, and as a result of this examination we announce the following conclusions:

First. In the trial of all felonies, not capital, where the defendant is on bond, and has been present throughout the delivery of the testimony, up to the rendition of the verdict, but is absent at the rendition of the verdict, voluntarily, he will not be permitted to avail himself of his own wrong in being thus voluntarily absent, but the verdict may be properly received in his absence. In other words, he may waive the right to be present when the verdict is received, which is not, as seems popularly supposed, a constitutional right, though a very sacred right, secured by the common law as well as by statute.

Second. Wherever the charge is a capital one, the courts have held uniformly, *in favorem vitæ*, that the defendant cannot waive his right to be present, and that whether he be in jail, subject to the power of the court to produce him, or on bond, it is fatal error to receive the verdict in his absence.

Third. Even in felonies, not capital, if the defendant be in jail when the verdict is received, it is fatal error.

Fourth. In cases not capital, the right of the defendant, where he is on bond, to waive his own presence when the verdict is received, is strictly his personal right, and no such waiver can be exercised for him by his own counsel.

These four propositions are clearly sustained by an overwhelming weight of authority. Indeed, we have found no case anywhere holding that, where the charge is a capital one, the defendant's failure to be present at the time the verdict is rendered is not fatal error, whether he be in jail or whether he be on bond. We will refer briefly to a few of the authorities.

In support of the first proposition above we cite the cases cited by the learned assistant attorney general, *supra*, except the Stubbs Case, Bishop's New Criminal Procedure, vol. 1, § 273, and the learned note of Mr. Freeman in 28 Am. Dec. 630, 631. In this note he points out the two lines of authorities, holding, the one that the record must affirmatively show the presence of the prisoner when the verdict is received, which is the rule in Mississippi (Kelly v. State, 3 Smedes & M. 518), and the other rule, which he pronounces the better rule, which he declares in these terms: "In view of the fact that the appellate court will not presume er-

ror on the part of the court below, it seems somewhat difficult to perceive the justice of these decisions. The doctrine best supported by authority, and, as it seems to us, best sustained by reason, is that where the record shows that the accused was present at the commencement of his trial, and nothing to the contrary appears therefrom, it will be presumed that he was present at every subsequent stage of the proceeding down to the rendering of the final judgment of the court." In *Rolls v. State*, 52 Miss. 395-397, the record was silent as to whether the defendant was present when his motion to set aside the judgment and sentence was heard; but it stated that he made that motion in person, and the court concluded from this that he was personally present, although there was no affirmative express recitation to that effect in the record. This case supports the first proposition above clearly, and the court pronounces that holding to be "the rule of safety." Mr. Freeman, in the note just above referred to, quotes that great judge, Chief Justice Gibson, as saying, in *Prine v. Com.* 18 Pa. 105, that "the right of a prisoner to be present at his trial is inherent and inalienable;" and Mr. Freeman pronounces this an extreme statement of the law, and deduces the correct rule to be, as stated in the first proposition above, that the accused may waive that right, where he voluntarily absents himself during the progress of the trial, meaning in cases not capital. The case of *Booker v. State*, 81 Miss. 395, 95 Am. St. Rep. 474, 33 So. 221, also supports the first proposition fully, though that is properly put upon the higher constitutional right the prisoner had to be confronted by the witnesses against him. The right to be present when the verdict is received is not a constitutional right, but a very sacred legal right, which may, as indicated, be waived under the conditions stated in the first proposition. These authorities just referred to abundantly support the first proposition, *supra*.

Coming, now, to the second proposition, we think that clearly settled by the authorities. The *Stubbs Case*, *supra*, is a clear authority for the second proposition. *Scaggs v. State*, 8 Smedes & M. 723, in principle also supports the second proposition. In *Dyson v. State*, 26 Miss. 362, the indictment was for murder, and the court, at page 383, in commenting on the principle under discussion, stated: "Out of abundant tenderness for the right, secured to the accused by our Constitution, to be confronted by the witnesses against him and to be heard by himself or counsel, our court has gone a step further, and held that it must be shown by the record that the accused was present in court pending the trial. This is upon the ground

of the peculiar sacredness of this high constitutional right. It is also true, as has been held by this court, 'that nothing can be presumed for or against a record, except what appears substantially upon its face.' But this rule has reference to those indispensable requisites necessary to the validity of the record as a judicial proceeding, and can have no application to those incidental matters which transpire during the progress of the proceeding in the court." Among those "indispensable requisites" the court placed the rendition of the verdict. This case is approved in *Lewis v. United States*, 146 U. S. 374, 36 L. ed. 1013, 13 Sup. Ct. Rep. 137, and that court pointed out the important fact, as to the question of the right of defendant to waive his presence in a capital case, that "the public had an interest in his life and liberty," as well as himself: citing 1 Bl. Com. 133; the court holding in the case of *Lewis* that it was not in the power of the prisoner, by himself or his counsel, to waive the right to be personally present during the trial, and, further, that the record must show affirmatively the prisoner's presence in court. But it must be remembered that this language was used with reference to an indictment for murder, and not a felony not capital, though it must be confessed the language of the court does not itself draw this distinction; the court apparently holding squarely that this would be true in the case of all felonies. We think the statement in the *Dyson Case*, as to its being a constitutional right, must be understood with reference to the confrontation of the witnesses by the accused, guaranteed by the Constitution, and not to the right merely to be present when the verdict is received, which is not a constitutional right. In *State v. Jenkins*, 84 N. C. 814, 37 Am. Rep. 644, the great Judge Ruffin said, in a case of arson, not capital, that "in every criminal prosecution it is the right of the accused to be informed of the accusation against him and to confront his accusers. In capital trials this right cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial. *State v. Blackwelder*, 61 N. C. (Phill. L.) 38; *State v. Craton*, 28 N. C. (6 Ired. L.) 164. In prosecutions for lesser felonies, the accused has exactly the same rights. *State v. Bray*, 67 N. C. 283. Whether the right can be waived in such cases is a point about which the authorities seem to be still divided some holding his actual presence to be necessary during the entire trial, and others that, being a right personal to the accused and established for his benefit, it might be waived by him."

By far the clearest and best authority we
20 L.R.A. (N.S.)

have anywhere found on this subject is the case of *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185. We quote as follows: "That the prisoner in capital felonies has the right to be, and must be, personally present at all times in the course of his trial, when anything is done or said affecting him as to the charge against him on the trial in any material respect, is not questioned. Indeed, it is conceded that he has such right, and that he must be so present. *State v. Craton*; *State v. Blackwelder*; and *State v. Bray*,—supra; *State v. Jenkins*, 84 N. C. 812, 37 Am. Rep. 643. As to felonies less than capital, the prisoner has precisely the same right to be present, but it is not essential that he must be, at all events. In the case last cited Mr. Justice Ruffin said, in reference to the prisoner's right to be present: 'Whether the right can be waived in such cases is a point about which the authorities seem to be still divided; some holding his actual presence to be necessary during the entire trial, and others that, being a right personal to the accused and established for his benefit, it might be waived by him.' The rule that he must be so present in capital felonies is *in favorem vite*. It is founded in the tenderness and care of the law for human life, and not in fundamental right,—certainly not in this state, as seems to be supposed by some persons. The Constitution (art. 1, §§ 11–13) provides, in respect to persons charged with crime, that 'in all criminal prosecutions, every man has the right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and to have counsel for his defense;' that he shall be put to answer for a criminal charge only 'by indictment, presentment, or impeachment,' except in cases of petty misdemeanors, and that he shall not be 'convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' These embrace all the provisions of the Constitution bearing upon the subject, and surely they cannot be reasonably interpreted to imply that it is essential that the party 'put to answer any criminal charge' shall—must—be continuously present at his trial at all events. They do not have such meaning, in terms or effect. The just and reasonable implication is that the party accused of crime shall have fair opportunity to defend himself in all respects as allowed and secured by the principles of law, procedure, and statutory provisions applicable to and regulating criminal trials. While it is settled in this state that the prisoner has the right to be so present during his trial upon a charge for a felonious offense not capital, there is neither principle, nor statute, nor judicial precedent that

makes it essential that he shall be; nor, in our judgment, is there any common principle of justice, essential to the security of personal right, safety, and liberty, that so requires. Unquestionably a party put to answer any criminal charge may plead guilty, or *nolo contendere*. In such case he waives a trial altogether. The law allows him to do so, presuming that he has capacity and intelligence to know and be advised as to his rights, and that he will not voluntarily refuse to make defense if innocent. The law in such cases will not compel him to make defense for himself, nor will it make defense for him; it will only afford him just opportunity to do so for himself. He could not reasonably expect or ask more, nor is there anything in the nature of personal safety or liberty that requires more. If the prisoner may thus waive his right to a trial altogether, why may he not waive his right to be present at his trial, if he shall, for any cause, see fit to do so? We can conceive of no just reason why he may not, especially when he is represented by counsel, as he has the right to be, who, it is presumed, is fully advised by him, and can generally take care of his rights better than he could do himself. He may deem it of advantage to him not to be present, or it may be inconvenient for him to be. He may choose to rely upon the skill and judgment of his counsel, and expect that the court will see that the trial is conducted according to law, as it will always do. He may do this; but the waiver should appear to the satisfaction of the court, either expressly, or by reasonable implication from what he says, or by his conduct. His counsel cannot waive his right for him. *State v. Epps*, 76 N. C. 55; *State v. Paylor*, 89 N. C. 539; *State v. Sheets*, 89 N. C. 543; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Fight v. State*, 7 Ohio, pt. 1, p. 180, 28 Am. Dec. 626, and numerous cases there cited."

That court further says, speaking of the right of a defendant to waive his presence in offenses not capital, when the verdict is received: "In such cases, if the defendant fly, pending the trial, the court is not bound to stop the trial and discharge the jury [that is, where the defendant on a charge less than a capital one is on bail], and thus give the defendant a new trial. To do so would compromise the dignity of the court, trifle with the administration of justice, and encourage guilty parties to escape. The defendant has no right, fundamental or otherwise, that renders such absurd practice and procedure necessary." It will thus be seen that the second proposition above is supported by two authorities in our own state, the *Stubbs Case* and the *Scaggs Case*, both cases of murder, and by many authori-

ties which we have cited elsewhere, including the Supreme Court of the United States.

The third proposition above is also thoroughly well settled, and is directly held in the case of *Finch v. State*, 53 Miss. 365. *Finch*, though indicted for only grand larceny, was nevertheless allowed to make the point that the verdict was received in his absence, because he was in jail, and it was the duty of the court to exercise its power and have him present when the verdict was received.

The fourth proposition above set forth is supported by the case just quoted from, *State v. Kelly*, *supra*, and by all the authorities.

Mr. Freeman, in his note to *Fight v. State*, 28 Am. Dec. 630, says: "The waiver must be the act of the accused himself, and not that of his counsel. *People v. Perkins*, 1 Wend. 91; *R. v. Streek*, 2 Car. & P. 413; *Rose v. State*, 20 Ohio, 31. And his absence must be due to his own voluntary act; for, if he is prevented from being present by being confined in jail, proceeding with the trial in his absence will be an irregularity for which a new trial will be granted."

So that we regard the four propositions which we have stated as abundantly settled, both on principle and authority. Of course, it is entirely immaterial that the verdict in this case was for manslaughter. The test is, Was the charge in the indictment a capital one? It is curious to note, in passing, that in Tennessee it has been held that the absence of the prisoner, even when due to his having made his escape, in a felony not capital, deprives the court of jurisdiction to proceed with the trial at all. *Andrews v. State*, 2 Sneed, 550.

The judgment is hereby reversed, and the cause remanded.

Fletcher, J., took no part in this decision.

KENTUCKY COURT OF APPEALS.

J. C. ELAM, Appt.,

v.

CITY OF MT. STERLING.

(— Ky. —, 117 S. W. 250.)

Pleading — obstruction in street.

1. A complaint seeking to hold a city liable for injuries caused by its piling stones in a street in such a manner as to be likely to frighten horses of ordinary gentleness must allege that they would naturally do so, where the mere placing of the stones in the street was not in and of itself negligence.

Same — gentleness of horse.

2. A complaint in an action to hold a

city liable for injuries caused by its placing in the street an object calculated to frighten horses of ordinary gentleness should allege that the horse which was in fact frightened was of ordinary gentleness.

Highway — frightening horse — liability of municipality.

3. A city cannot be held liable for injuries due to the frightening of a horse by stones which, for the purpose of repairing a highway, it had piled along the curb out of the traveled path, if it has used due care in their location, although they may be of such a nature that horses of ordinary gentleness are occasionally frightened by them, though they are permitted to remain longer than is absolutely necessary before the injury occurs.

(March 10, 1909.)

Subject Note. — Liability of municipal corporation for defects or obstructions in streets.

I. Scope, 516.

II. Different general rules as to liability.

- a. The common-law rule, 516.
- b. Rule of liability based on control and duty to keep in safe condition, 518.
- c. Liability under statutes, 523.
- d. Exemption from liability by statute, 526.

III. Power to perform duty as affecting liability.

- a. Generally, 529.
- b. Insufficiency of funds, 529.
- c. Insufficient time or opportunity, 531.

IV. Application of rule as to nonliability for governmental and discretionary acts.

- a. Generally, 532.
- b. In particular classes of cases, 535.

V. Delegation of duty.

- a. Right and effect of generally, 538.
- b. Imposition on railway in street, 539.
- c. Imposition on abutting owner, 540.

VI. Cause of obstruction or defect as affecting liability.

- a. Generally, 541.
- b. By act of city itself, 542.
- c. By act of agent or servant, 544.
- d. By permission or license of city, 547.
- e. By independent contractor.

- 1. General rules where contract calls for obstruction, 547.

- 2. Application in particular cases, 548.

- 3. Injury collateral to contract work, 549.

- 4. Effect of retention of control, 550.

- 5. Particular contract required by law, 552.

- f. By wrongdoer, 552.

APPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Prewitt & Senff** for appellant.

Messrs. **W. C. Hamilton** and **W. B.**

White, for appellee:

In order to establish this cause of action, it was indispensably necessary that the petition should allege that the object at which the horse took fright should be such an object, or should be placed in such a way, as was "naturally calculated to frighten horses of ordinary gentleness," or was "reasonably

VI.—continued.

- g. By abutting owner, 553.

- h. By act of railroad occupying street, 553.

VII. Ways as to which the duty exists.

- a. Generally, 553.

- b. The question of title, locality, etc., 554.

- c. Opening and improvement of ways, 556.

- d. Dedication and acceptance, 558.

- e. Improvement, repair, and other acts of recognition as affecting.

- 1. Generally, 560.

- 2. Sufficiency of recognition, 562.

- f. Particular ways and classes of ways.

- 1. Sidewalks.

- (a) Generally, 565.

- (b) Sidewalks made by citizens, 568.

- (c) Walks outside of highway, 569.

- 2. Bridges, 571.

- 3. Crossings, 572.

- 4. Alleys, tunnels, and passageways in public buildings, 573.

- 5. Park paths, bicycle paths, etc., 574.

- g. Streets in annexed territory, 575.

- h. Abandonment and closing, 575.

VIII. The degree of diligence or care as affecting liability.

- a. General rules, 577.

- b. Necessity of negligence to liability, 579.

- c. What constitutes reasonable diligence, 581.

- d. Reasonable diligence, how determined, 583.

IX. The degree of perfection required.

- a. General rules, 583.

- b. As affected by locality and uses, 585.

- c. With reference to whole width of street.

- 1. The roadway, 588.

calculated to frighten horses of ordinary gentleness."

28 Cyc. Law & Proc. p. 1380; Elliott, Roads & Streets, § 616; Smith, Mun. Corp. § 1543; Nicholasville v. Fain, 30 Ky. L. Rep. 564, 99 S. W. 275; Royal Center v. Bingaman, 37 Ind. App. 626, 77 N. E. 811.

The obstructions were not, as a matter of law, such obstructions as were reasonably calculated to frighten a horse of ordinary gentleness.

Bloor v. Delafield, 69 Wis. 273, 34 N. W. 115; Ouversen v. Grafton, 5 N. D. 281, 65 N. W. 676; Cleveland, C. C. & I. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; Pearce v. Lancaster, 1 Ky. L. Rep. 412.

Carroll, J., delivered the opinion of the of the court:

The appellant, in his petition to recover damages for personal injuries received, al-

leged that the city of Mt. Sterling, by its officers and agents, negligently and carelessly placed and permitted to remain on Richmond street, in said city, two large piles of crossing stones directly opposite each other on each side of the street, so close to the route of travel as to frighten horses passing same, thereby rendering the street dangerous and unsafe for travel, which fact was known to the officers of the city, or could have been known by them by the exercise of ordinary diligence on their part; that, while driving a gentle horse attached to a buggy along the street in the ordinary and usual mode of travel, his horse became frightened at the stones and ran away, causing his buggy to collide with another vehicle, which collision resulted in appellant being thrown violently to the ground, thereby injuring him severely. A demurrer to the petition being overruled, an answer was filed traversing the averments of the peti-

IX. c—continued.

2. The sidewalk, 591.
3. Use of sides of street.
 - (a) Generally, 592.
 - (b) Objects outside of traveled track.
 - (1) General rules, 592.
 - (2) Park strips, 593.
 - (3) Obstructions, excavations, etc., outside the right of way, 595.
 - (4) Obstructions in proximity to sidewalks, 597.
- d. What obstructions or defects impose liability.
 1. Generally, 598.
 2. Obstructions authorized by law, 600.
 3. Obstructions for general public convenience, 600.
 4. Obstructions for private or individual convenience, 602.
 5. Obstructions for improvement or repair.
 - (a) Generally, 602.
 - (b) Barriers, lights, etc., 604.
 - (c) By abutting owner, 606.
 6. Particular obstructions and classes of obstructions.
 - (a) Poles, posts, stumps, trees, etc., 607.
 - (b) Rubbish, refuse, etc., 610.
 - (c) Storage of vehicles, lumber, etc., 612.
 - (d) Machines, tools, etc., 613.
 - (e) Markets and other business or individual enterprises, 614.
 - (f) Stones and other similar articles, 615.
 - (g) Unevenness, inequalities, 618.

IX. d, 6—continued.

- (h) Slopes or grades, 619.
- i) Hydrants and other appliances pertaining to municipal waterworks, 620.
- (j) Cellar ways, stairways, and other projections, 622.
- (k) Railways in streets, 624.
- (l) Embankments, 626.
- (m) Gutters and drains, 627.
- (n) Holes and openings,
 - (1) Generally, 629.
 - (2) For sewer purposes, 631.
- (o) Defects and obstructions in sidewalks and crossings.
 - (1) Breaks, excavations, and depressions, 632.
 - (2) Holes, 634.
 - (3) Hatchways, areas, and other openings, 635.
 - (4) Steps, 637.
 - (5) Unevenness, inequalities, 640.
 - (6) Holes in cross walks, 641.
- (p) Decay and wear, 642.
7. Overhanging and falling objects.
 - (a) Generally, 644.
 - (b) Awnings, sheds, etc., 645.
 - (c) Signs, billboards, etc., 646.
 - (d) Electric wires, appliances, etc., 648.
 - (e) Trees, poles, etc., 649.
 - (f) Other objects or structures in and over streets generally, 650.

tion and pleading contributory negligence. Upon the conclusion of the evidence for the plaintiff the trial judge directed the jury to return a verdict for the city; so that the question we are called upon to determine is whether or not this ruling of the trial judge was erroneous.

The testimony established, in substance, that the city, desiring to make a foot crossing out of stone across the street, employed a contractor to do the work, and this contractor, on Saturday, the 22d of February, hauled crossing stones to the point where the crossing was to be laid, and placed them in the street close to the curbing of the sidewalk and parallel with it. The stones, four in number, were 6 feet long, 4 feet wide, and 4 inches thick; two being placed on each side of the street, one on top of the other. They were not on the traveled or macadamized part of the street, and the space in the street for vehicle travel be-

tween the stones was some 15 feet. It was the intention of the contractor to lay the stone walk on the Monday following, but rain and other pressing engagements delayed him in the work, and it was not commenced until Wednesday, the 26th, the day appellant was thrown from his buggy. There was some conflict in the testimony as to the gentleness of the horse, but the weight of the evidence was to the effect that he was ordinarily gentle. The appellant offered to prove by several witnesses that stones placed on the street as these were were reasonably calculated to frighten horses of ordinary gentleness; but objection to this character of evidence was made and sustained. He also offered to prove by other witnesses that gentle horses driven by them were frightened by these stones before the accident to appellant occurred; and one witness was permitted to say that his horse did scare at them, and that they were rea-

IX. d, 7—continued.

- (g) Objects and structures adjacent to streets, 651.

8. Objects calculated to frighten horses.

- (a) Generally, 652.
- (b) Steam rollers, etc., 654.
- (c) Building material and other objects, 655.

9. Snow and ice.

- (a) Limitation to recent cases, 656.
- (b) General rules, 656.
- (c) Mere slipperiness, 657.
- (d) Ordinary falls of snow, 657.
- (e) Rough accumulations of snow and ice, 658.
- (f) Time and opportunity for removal, 661.
- (g) Snow and ice combined with defect in street, 662.

a. General condition and other accidents as evidence of negligence.

- 1. General condition of street, 665.
- 2. Subsequent repair or removal of defect or obstruction, 667.
- 3. Other accidents, 668.

f. Sufficiency of way, how determined, 670.

X. Failure to prevent improper conduct in streets as affecting liability, 671.

XI. Precautions against injury.

a. Warning of obstruction.

- 1. General rules, 671.
- 2. Necessity of, 673.
- 3. Nature and sufficiency of barrier, 676.
- 4. Application to particular classes of obstructions,
 - (a) Excavations, embankments, etc., 678.

XI. a, 4—continued.

- (b) Defective bridges, 681.
- (c) Elevated streets and sidewalks, 682.
- (d) Objects outside of way, 684.

b. Lighting streets, 686.

XII. Knowledge or notice of obstruction.

a. Necessity of, to liability.

- 1. General rules, 689.
- 2. Effect of special statutory provisions, 692.

b. Actual knowledge or notice.

- 1. General rules, 694.
- 2. How established, 695.
- 3. Officers or agents whose knowledge or notice is binding, 697.

4. Creation of obstruction as affecting.

- (a) By act of city itself, 701.
- (b) By officers, agents, or servants, 703.
- (c) By contractor, 704.
- (d) Under permit or license, 705.

c. Constructive or implied notice.

- 1. General rules, 705.
- 2. Duration of existence of obstruction as affecting.
 - (a) Generally, 708.
 - (b) Visible and notorious defects as distinguished from latent ones, 711.
- 3. Cause naturally calculated to produce obstruction, 714.
- 4. General defectiveness or obstruction as affecting particular defect, 717.
- 5. Other accidents, 721.
- 6. Place, circumstances, etc., 721.
- 7. Removal of safeguard by unlooked-for event, 723.
- 8. The duty to inspect, 725.

sonably calculated to frighten horses of ordinary gentleness.

It is the contention of the appellee that the offered evidence that the stones were reasonably calculated to frighten horses of ordinary gentleness was properly excluded, because there was no averment in the petition to this effect. It is further insisted that, in omitting to state this fact, the plaintiff failed to set out a cause of action, and a demurrer to the petition should have been sustained. As the cause of action was necessarily grounded upon the proposition that the stones were calculated to frighten horses of ordinary gentleness, it seems to us the petition should have contained this or a like averment. Placing the stones in the street was not in and of itself an act

of negligence. The negligence, if any, consisted in the fact that the stones were calculated to frighten horses of ordinary gentleness. If they were not calculated to do this, it was not negligence to place them in the street, and travelers would have no cause of action against the city on account of their presence. As a general rule, a person cannot recover for injuries inflicted by the fright of his horse unless he proves that his horse was ordinarily gentle; and hence it would seem to follow that there should be an allegation of this fact. The stones might have frightened horses, but this fact of itself would not warrant a recovery against the city unless the horse so frightened was ordinarily gentle, and the stones calculated to frighten such a horse. Elliott,

XII. c—continued.

9. Time to remove, 728.

d. Question for the jury, 730.

XIII. Injury as result of obstruction or defect.

a. Generally, 732.

b. Proximate cause.

1. General rules, 732.

2. Immediate contact with obstruction, 735.

3. The primary or original cause as the proximate one, 737.

4. Active as distinguished from passive agency of obstruction, 739.

5. Fright of horses as affecting, 742.

XIV. Right to redress of the person injured.

a. With reference to the person.

1. Nature of the injury, 746.

2. Character, capacity, and condition, 748.

b. With reference to the use of the street.

1. General rules, 750.

2. Loitering, deviation, 751.

3. Play, 753.

4. Relative use of footways and carriage ways, 754.

5. Use of bicycles and automobiles, 756.

XV. Notice of claim and cause of injury, 757.

XVI. Effect of concurrent liability of third person, 760.

XVII. Contributory negligence, 763.

XVIII. Damages.

a. Generally, 763.

b. Exemplary damages, 764.

XIX. Conclusion, 765.

I. Scope.

This note is confined to the question of the liability for creating or permitting defects or obstructions in a street of a municipal corporation proper as distinguished from quasi municipal corporations, such as towns, counties, etc. The liability of townships for defects in highways is fully considered in 20 L.R.A. (N.S.)

a subject note to James v. Wellston Twp. 13 L.R.A. (N.S.) 1219, and this note includes cases with relation to incorporated cities and villages only, except, perhaps, in a few instances in which principles have been declared in township cases which are equally applicable to cities and villages.

II. Different general rules as to liability.

a. The common-law rule.

The general and common-law rule has been held to be that, in the absence of express statutes declaring liability, a municipal corporation is not liable for damages sustained by individuals upon its streets and highways in consequence of defects therein or obstructions thereon. Bates v. Rutland, 62 Vt. 178, 9 L.R.A. 363, 22 Am. St. Rep. 95, 20 Atl. 278; Buchanan v. Barre, 66 Vt. 129, 23 L.R.A. 488, 44 Am. St. Rep. 829, 28 Atl. 878; Parker v. Rutland, 56 Vt. 224; Hyde v. Jamaica, 27 Vt. 443; Arkadelphia v. Windham, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; Ft. Smith v. York, 52 Ark. 84, 12 S. W. 157; Chope v. Eureka, 78 Cal. 588, 4 L.R.A. 325, 12 Am. St. Rep. 113, 21 Pac. 364; Tranter v. Sacramento, 61 Cal. 271; Winbigler v. Los Angeles, 45 Cal. 36; Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877; Haines v. Lewiston, 84 Me. 18, 24 Atl. 430; Barry v. Lowell, 8 Allen, 127, 85 Am. Dec. 690; Roberts v. Detroit, 102 Mich. 64, 27 L.R.A. 572, 60 N. W. 450; McEvoy v. Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; McArthur v. Saginaw, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; Carter v. Rahway, 55 N. J. L. 177, 26 Atl. 96, affirmed in 57 N. J. L. 197, 30 Atl. 863; Vandyke v. Cincinnati, 1 Disney (Ohio) 532; Dunn v. Barnwell, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 315; Young v. Charleston, 20 S. C. 116, 47 Am. Rep. 827; Navasota v. Pearce, 46 Tex. 535, 26 Am. Rep. 279; Uecker v. Clyman (Wis.) 118 N. W. 247; St. John v. Campbell, 26 Can. S. C. 1.

Within this rule, a municipal corporation is liable for injury caused by a defect in a street only by force of the statute. Beards-

Roads & Streets, § 616; 28 Cyc. Law & Proc. p. 1380; Royal Center v. Bingaman, 37 Ind. App. 626, 77 N. E. 811; Rushville v. Adams, 107 Ind. 476, 57 Am. Rep. 124, 8 N. E. 292; Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Nicholasville v. Fain, 30 Ky. L. Rep. 564, 99 S. W. 275.

Without passing upon the correctness of the rulings of the trial court in respect to the evidence offered and rejected, we will proceed to consider the question whether or not placing the stones in the street and permitting them to remain there for the time mentioned was an actionable nuisance. It is elementary doctrine that cities and towns must keep their streets, and all parts of them, in reasonably safe condition for public travel; but streets can only be kept in rea-

sonably safe condition for public travel by improving and repairing them. And, if it becomes necessary to improve or repair streets, the municipal authorities must of necessity have the right to put in the streets the material needed to improve and repair them, as well as the implements and machinery that it is requisite or proper to use in this kind of work. It would be most unreasonable to impose upon a city the duty to improve and repair, and at the same time to hold it liable for accidents happening on account of horses becoming frightened at the material or implements or machinery used. In cases of this character the doctrine of nonliability should be applied, unless there is negligence independent of merely placing material needed in a proper place

ley v. Hartford, 50 Conn. 529, 47 Am. Rep. 677; Daly v. New Haven, 69 Conn. 644, 34 Atl. 397.

And, where a public duty with reference to streets or otherwise is imposed on a town or other quasi corporation without its consent, express or implied, such town or corporation is not liable to an action for negligence in respect to such duty, unless a right of action is given by statute. Jones v. New Haven, 34 Conn. 1.

In this respect municipal corporations are not distinguishable in principle from counties. Tranter v. Sacramento; Winbigler v. Los Angeles; and Arkadelphia v. Windham,—*supra*; Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450.

And this has been held to be the rule though the municipal corporation is charged by its charter with the duty of keeping in proper repair the streets or public highways within the corporate limits. Dunn v. Barnwell; Young v. Charleston; Ft. Smith v. York; and Roberts v. Detroit,—*supra*; King v. St. Landry, 12 La. Ann. 858; Moore v. Shreveport, 3 La. Ann. 645.

And the acceptance by an incorporated village of a charter which merely allows the village, as a volunteer, to take supervision of the highways does not impose upon it the duty of keeping the highways in repair, where the town never surrendered the right of control over them, and never had been released from its obligation to repair. Parker v. Rutland, *supra*.

The New England idea is that creating villages and cities by legislative action does not, by implication, impose upon them civil liability for the neglect of corporate duties in respect of those matters which are governmental in their nature and which they administer as it were for and in behalf of the state, such as the control of the streets and the like. Weller v. Burlington, 60 Vt. 28, 12 Atl. 215.

And substantially the same idea obtains in Arkansas. Arkadelphia v. Windham, *supra*.

So, in Michigan the duty of a city to keep its streets which are public highways 20 L.R.A. (N.S.)

in repair was regarded as a duty to the public, and not to private individuals, the mere neglect of which is a nonfeasance only; and, for an injury resulting from such neglect, no cause of action arose. Detroit v. Blackeby, *supra*.

And the rule is the same in South Carolina. Young v. Charleston, *supra*.

And it is immaterial, on the question of exemption of a municipal corporation from liability to a civil action for damages at the suit of an individual who has sustained an injury either in person or property by reason of a failure on the part of the corporation to perform a duty imposed upon it, in the absence of a statute imposing such liability, whether such duty is imposed upon one set of public officers or another. *Ibid*.

In the above case it was said that the decision in Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440, *infra*, II., b, was by a divided court, and that it is quite manifest from an examination of the case that the question now under consideration was not so fully considered as its importance demands. And it was said that Bathurst v. Macpherson, L. R. 4 App. Cas. 256, *infra*, II., b, seems to rest the decisions mainly upon the ground that the defect in the highway which caused the injury complained of was the result of an act of the corporation; and it declined to decide the general question whether the corporation was bound to keep all the roads in the municipality in good repair and was therefore liable for an injury sustained by reason of any defect in such roads.

This doctrine seems to have been founded upon Russell v. Devon, 2 T. R. 668, an early case which is frequently cited to sustain it, and which holds that no action will lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair.

In Zanesville v. Fannan, 53 Ohio St. 605, 53 Am. St. Rep. 664, 42 N. E. 703, however, it is said that a municipal corporation is liable at common law for permitting a nuisance in streets under its control.

And Greensboro v. McGibbony, 93 Ga.

on the street. The city should, of course, exercise care in placing the material; and, if it is of an unusual character, the additional duty might be imposed of exercising reasonable care to prevent injuries growing out of the fright of horses using the street. But in the case before us the uncontradicted evidence is that there was nothing unusual, or grotesque, or out of the ordinary, in the stones at which the horse became frightened. And it also appears that these stones were put at the place in the street where they would be least likely to frighten horses. They could not well have been put on the pavement or sidewalk, and to have placed them in the traveled part of the street would have been negligence, and so they were put alongside the curbing and parallel

with it, and over a ditch or gutter, leaving both the sidewalk and the traveled part of the street entirely free from obstruction. It is a matter of common knowledge that piles of rock that have been placed there for the purpose of repair are constantly seen on the side of turnpikes and highways, and are permitted to remain there until it is convenient or deemed advisable to use them; and so, in the repair of streets and sidewalks in towns and cities, brick, sand, rock, and other material used in the construction or repair are placed conveniently for use. And, if occasionally horses become frightened at rock on the side of the turnpike, or brick or stones on the side of the street that have been placed with due care and out of the traveled part of the highway,

672, 20 S. E. 37, holds that the right to redress for an injury occasioned by a defective structure erected and maintained by a municipal corporation upon a public highway within its territory is a right derived from the common law.

And substantially the same holding was made in *Batdorff v. Oregon City* (Or.) 100 Pac. 937.

And public highways, whether they are in the country or in a city, belong entirely to the public at large; and any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law. *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818.

And, where a municipality has control of its streets, it may proceed in its corporate name to prevent or remove obstructions therein by judicial proceedings. *Yates v. Warrenton*, supra.

And a city which suffers a dangerous structure constituting a nuisance to remain in its principal thoroughfare for a long time is liable to a person injured thereby while exercising reasonable and proper care, where the injuries complained of were caused by the structure or nuisance. *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745.

And the rule has been asserted that a municipal corporation is liable in damages for personal injuries caused by its negligence in causing or permitting a street to be left in an unsafe condition, in the absence of any express statutory provision imposing such liability. *Guthrie v. Swan*, 5 Okla. 779, 51 Pac. 562; *Ludlow v. Fargo*, 3 N. D. 485, 57 N. W. 506; *Webster v. Beaver Dam*, 84 Fed. 280.

And that the duty of a municipal corporation to keep its streets and sidewalks in repair may exist without express statutory provision. *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

b. Rule of liability based on control and duty to keep in safe condition.

The prevailing rule in the American states 20 L.R.A. (N.S.)

would seem to be that municipalities having the full, complete control of and power over the roads, streets, and bridges within their precincts, ordinarily conferred upon them, are charged with the duty of using reasonable care in their proper construction and repair and in keeping them free from obstructions. *McLaughlin v. Corry*, 77 Pa. 113, 18 Am. Rep. 432; *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Albrittin v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Smoot v. Wetumpka*, 24 Ala. 112; *Denver v. Dunamore*, 7 Colo. 328, 3 Pac. 705; *Makepeace v. Waterbury*, 74 Conn. 360, 50 Atl. 876; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414; *Anderson v. Wilmington* (Del.) 70 Atl. 204; *Colbourn v. Wilmington*, 4 Penn. (Del.) 443, 56 Atl. 605; *Sterling v. Thomas*, 60 Ill. 264; *Bloomington v. Bay*, 42 Ill. 503; *Springfield v. Le Claire*, 49 Ill. 476; *Vandalia v. Huss*, 41 Ill. App. 517; *Decatur v. Hamilton*, 89 Ill. App. 561; *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566; *Centerville v. Woods*, 57 Ind. 192; *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Clark v. Epworth*, 56 Iowa, 462, 9 N. W. 359; *Jansen v. Atchison*, 16 Kan. 358; *Shawnee County v. Topeka*, 39 Kan. 197, 18 Pac. 161; *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165, 11 Pac. 38; *Cline v. Crescent City R. Co.* 41 La. Ann. 1031, 6 So. 851; *Baltimore v. Walker*, 98 Md. 637, 57 Atl. 4; *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326; *Hagerstown v. Klotz*, 93 Md. 437, 54 L.R.A. 940, 86 Am. St. Rep. 437, 49 Atl. 836; *Young v. Waterville*, 39 Minn. 196, 39 N. W. 97; *St. Paul v. Seitz*, 3 Minn. 297, Gil. 205, 74 Am. Dec. 753; *Moore v. Minneapolis*, 19 Minn. 300, Gil. 258; *Shurtle v. Minneapolis*, 17 Minn. 308, Gil. 284; *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612; *Buckley v. Kansas City*, 95 Mo. App. 188, 68 S. W. 1069; *Reinhard v. New York*, 2 Daly, 243; *Nelson v. Canisteo*, 100 N. Y. 89, 2 N. E. 473; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Hines v. Lockport*, 50 N. Y. 238; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Garrett v. Buffalo*, 26 N. Y. Week. Dig. 257, 7 N. Y. S. R. 96; *Wallace v.*

there can be no recovery for the damages sustained. There is quite a difference between the liability of a city for placing or permitting to remain in its streets material or objects not necessary for the use of the city in the construction or improvement of its streets and its liability for occupying its streets with material that is needed for construction or repair. In the first-mentioned state of case the city would not be keeping its streets reasonably safe for public travel if by its negligence it permitted them to become encumbered with articles or objects calculated to frighten horses of ordinary gentleness; whereas, in the other instance, no liability would attach if proper care was taken in the location of the usual material.

Cities are not liable for every accident or

injury that happens because horses take fright at objects on the side of the street. As said in 2 Dillon on Municipal Corporations, § 1019: "From what has already been said . . . it follows that a municipal corporation is not an insurer against accidents upon the streets and sidewalks; nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes by night as well as by day; and whether they are so or not is a practical question to be determined in each case by its particular circumstances." Generally the question whether or not an object is one calculated to frighten horses of ordinary

New York, 2 Hilt. 440, 9 Abb. Pr. 40, 18 How. Pr. 169; Russell v. Canastota, 98 N. Y. 496; Murphy v. Dayton, 8 Ohio S. & C. P. Dec. 354; Moon v. Middletown, 14 Ohio C. C. 498; Evans v. Cincinnati, 1 Ohio Dec. Reprint, 462; Farquar v. Roseburg, 18 Or. 271, 17 Am. St. Rep. 732, 22 Pac. 1103; Erie City v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Aiken v. Philadelphia, 9 Pa. Super. Ct. 502; Fritsch v. Allegheny, 91 Pa. 226; Klein v. Dallas, 71 Tex. 280, 8 S. W. 90; Navasota v. Pearce, 46 Tex. 525, 26 Am. Rep. 279; Roanoke v. Harrison, 1 Va. Dec. 801, 19 S. E. 179; Gordon v. Richmond, 83 Va. 436, 2 S. E. 727; Noble v. Richmond, 31 Gratt. 271, 31 Am. Rep. 726; Mischke v. Seattle, 26 Wash. 616, 67 Pac. 357; Lorence v. Ellensburg, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; Hutchinson v. Olympia, 2 Wash. Terr. 314, 5 Pac. 606; Larsen v. Sedro-Woolley, 49 Wash. 134, 94 Pac. 938; Curry v. Mannington, 23 W. Va. 14; Griffin v. Williamstown, 6 W. Va. 312; Evanston v. Gunn, 99 U. S. 660, 25 L. ed. 306; Chicago v. Robbins, 2 Black. 418, 17 L. ed. 298; Weightman v. Washington, 1 Black. 39, 17 L. ed. 52.

And that a city or village having exclusive control of its streets, and ample means under the control of its constituted authorities to maintain its streets in a reasonably safe condition, is liable to travelers exercising ordinary care and using them in the usual mode, who are injured by a failure to perform such duty. Goodrich v. University Place, 80 Neb. 774, 115 N. W. 538; Omaha v. Olmstead, 5 Neb. 446; Selma v. Perkins, 68 Ala. 145; Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Bessemer v. Carroll (Ala.) 45 So. 419; Denver v. Magivney (Colo.) 96 Pac. 1002; Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705; Denver v. Dean, 10 Colo. 375, 3 Am. St. Rep. 594, 16 Pac. 30; Larson v. Grand Forks, supra; Carson v. Genesee, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862; Sterling v. Thomas and Bloomington v. Bay, supra; Browning v. Springfield, 17 Ill. 146, 63 Am. Dec. 345; Grove v. Ft. Wayne, supra; Muncie v. Hey, 20 L.R.A. (N.S.)

164 Ind. 570, 74 N. E. 250; Kentland v. Hagan, 17 Ind. App. 1, 46 N. E. 43; Laporte v. Osborn (Ind. App.) 86 N. E. 995; Eudora v. Miller, 30 Kan. 494, 2 Pac. 685; Kansas City v. Bradbury, 45 Kan. 381, 23 Am. St. Rep. 731, 25 Pac. 889; Ft. Scott v. Brothers, 20 Kan. 455; Topeka v. Tuttle, 5 Kan. 311; Jansen v. Atchison, supra; Gould v. Topeka, 32 Kan. 485, 49 Am. St. Rep. 496, 4 Pac. 822; Langan v. Atchison, supra; Henderson v. Sizemore, 31 Ky. L. Rep. 1134, 104 S. W. 722; O'Neill v. New Orleans, 30 La. Ann. 220, 31 Am. Rep. 221; Cline v. Crescent City R. Co. 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122; Aucoin v. New Orleans, 105 La. 271, 29 So. 502; Baltimore v. Beck, 96 Md. 183, 53 Atl. 976; Baltimore v. Walker, 98 Md. 637, 57 Atl. 4; Shartle v. Minneapolis, supra; Kellogg v. Janesville, 34 Minn. 132, 24 N. W. 359; Young v. Waterville, 39 Minn. 196, 39 N. W. 97; Bell v. West Point, 51 Miss. 262; Smith v. St. Joseph, 45 Mo. 449; Bowie v. Kansas City, 51 Mo. 454; Beaudan v. Cape Girardeau, 71 Mo. 392; Loewer v. Sedalia, 77 Mo. 431; Maus v. Springfield, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; Young v. Webb City, 150 Mo. 333, 51 S. W. 709; Carthage v. Garner, 209 Mo. 688, 108 S. W. 521; Hedges v. Kansas City, 18 Mo. App. 62; Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96; McCune v. Missoula, 10 Mont. 146, 25 Pac. 442; Sullivan v. Helena, 10 Mont. 134, 25 Pac. 94; May v. Anaconda, 26 Mont. 140, 66 Pac. 759; Snook v. Anaconda, 26 Mont. 128, 66 Pac. 756; Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76; McDonough v. Virginia City, 6 Nev. 90; Durant v. Palmer, 29 N. J. L. 544; Wendell v. Troy, 39 Barb. 329, affirmed in 4 Abb. App. Dec. 563; Turner v. Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622; Twist v. Rochester, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131; Garrett v. Buffalo, supra; Seymour v. Salamanca, 137 N. Y. 364, 33 N. E. 304; Wallace v. New York, 18 How. Pr. 169; Davenport v. Ruckman, 10 Bosw. 20, 16 Abb. Pr. 341, affirmed in 37 N. Y. 568;

gentleness is for the jury; but there are exceptions to this rule, and we think the case before us affords an illustration of one of them. The fact that the plaintiff's horse, assuming that he was ordinarily gentle, became frightened, is not the sole test of the city's liability. Whether or not it is liable depends primarily upon the question whether or not the street at that place was reasonably safe for public travel; and this, in turn, brings into view the final inquiry, whether or not the things in the street constituted a nuisance or rendered it unsafe for public travel. The objects at which the horse became frightened were plain, ordinary stones, put there for a lawful purpose, and out of the usual way of travel. We therefore hold as a matter of law that a municipal corporation is not liable in damages because of injuries sustained by the fright of an ordinary gentle horse at objects, not of an unusual character, placed upon the side of a street, out of the traveled way, for the purpose of constructing, improving, or repairing the same, although they may be permitted to remain a longer time than is necessary before being used. As it was not a nuisance to place them there, neither was it a nuisance to leave them a few days. *Farrell v. Oldtown*, 69 Me. 72; *Nichols v. Athens*, 66 Me. 402; *Barrrett v. Walworth*, 64 Hun, 526, 19 N. Y.

Supp. 557; *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048; *District of Columbia v. Moulton*, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840.

We have examined the cases cited by counsel for appellant, as well as others along the same line, and they are not in conflict with the views we have expressed. In *Fugate v. Somerset*, 97 Ky. 48, 29 S. W. 970, the piles of lumber at which the horse became frightened were placed at right angles with the street, covering several feet of the improved part of it and extending upon the metal part. The lumber had been placed there to repair the sidewalk, and a portion of it was permitted to remain some time after the sidewalk had been repaired. In *Nicholasville v. Fain*, 30 Ky. L. Rep. 564, 99 S. W. 275, the nuisance in the street consisted of a pile of rubbish containing scraps of tin, an old bath tub, oil cans, and other things. In *Hazelrigg v. Frankfort*, 29 Ky. L. Rep. 207, 92 S. W. 584, the pile of rock, which was 3 feet high, 8 feet wide, and 11 feet long, was in part on the side of the street and partly in the traveled way.

Upon the whole case, we think the trial judge correctly ruled as a matter of law that the placing and leaving of the stones in the street was not an actionable nuisance.

Wherefore the judgment is affirmed.

Hutson v. New York, 5 Sandf. 289; *Chaplin v. Penn Yan*, 34 Hun, 33, affirmed in 102 N. Y. 680; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Neal v. Marion*, 129 N. C. 345, 40 S. E. 116; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Evans v. Cincinnati*, supra; *Farquar v. Roseburg*, supra; *Batdorf v. Oregon City* (Or.) 100 Pac. 937; *Stevenson v. Phenixville*, 1 Chester, Co. Rep. 113; *Boyle v. Hazleton*, 171 Pa. 167, 33 Atl. 142; *Burns v. Bradford*, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997; *Redford v. Coggeshall*, 19 R. I. 313, 36 Atl. 89; *Dallas v. Strayer* (Tex. Civ. App.) 73 S. W. 980; *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90; *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Noble v. Richmond*, 31 Gratt. 271, 31 Am. Rep. 726; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369; *Lorence v. Ellensburg*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Mischke v. Seattle*, supra; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Hutchinson v. Olympia*, 2 Wash. Terr. 314, 5 Pac. 606; *Griffin v. Williamstown*, 6 W. Va. 312; *Barnes v. District of Columbia*, 91 U. S. 557, 23 L. ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. ed. 446; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. ed. 445; *Nebraska City v. Campbell*, 2 Black, 590, 17 L. ed. 271; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Providence* 20 L.R.A. (N.S.)

v. Clapp, 17 How. 161, 15 L. ed. 72; *Gallagher v. St. Paul*, 28 Fed. 305; *Delger v. St. Paul*, 14 Fed. 567; *Cuzner v. Calgary*, 1 N. W. Terr. 162; *Bathurst v. Macpherson*, L. R. 4 App. Cas. 256.

And this is so even in the absence of an express statute declaring the liability. *Galveston v. Posnainsky* and *Galveston v. Barbour*, supra; *Albrittin v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Bessemer v. Carroll* (Ala.) 45 So. 419; *Carson v. Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862; *Shawnee County v. Topeka*, 39 Kan. 197, 18 Pac. 161; *Bell v. West Point*, 51 Miss. 262; *Evans v. Cincinnati*, 1 Ohio Dec. Reprint, 462; *Noble v. Richmond*, 31 Gratt. 271, 31 Am. Rep. 726; *Shearer v. Buckley*; *Saylor v. Montesano*; and *Sutton v. Snohomish*, supra; *Jacksonville v. Smith*, 24 C. C. A. 97, 41 U. S. App. 657, 78 Fed. 292.

And the rule as generally applied by a large number of cases, and which may be said to be practically universal either under general or special statutes, is that it is the duty of a municipal corporation to use ordinary and reasonable care to keep its streets and sidewalks free from obstruction, and in a reasonably safe condition, so that persons can pass along them in the ordinary methods of travel in safety. *Idlett v. Atlanta*, 123 Ga. 821, 51 S. E. 709; *Harrell v. Macon*, 1 Ga. App. 413, 58 S. E. 124; *Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518; *Massey v. Columbus*, 75 Ga. 658; *Atlanta v. Buchanan*, 76 Ga. 585; *Blume v. New Orleans*,

104 La. 345, 29 So. 106; Stidham v. Delaware City (Del.) 67 Atl. 175; Green v. Newark, 5 Penn. (Del.) 316, 62 Atl. 792; Hogan v. Chicago, 168 Ill. 551, 48 N. E. 210, reversing 59 Ill. App. 446; Purcell v. Chicago, 231 Ill. 164, 83 N. E. 137; Decatur v. Hamilton, 89 Ill. App. 561; Hennepin v. Coleman, 132 Ill. App. 604; Murphy v. Indianapolis, 83 Ind. 76; Crawfordville v. Smith, 79 Ind. 308, 41 Am. Rep. 612; Aurora v. Bitner, 100 Ind. 396; Glantz v. South Bend, 106 Ind. 306, 6 N. E. 632; Rushville v. Adams, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292; Teague v. Bloomington, 40 Ind. App. 68, 81 N. E. 103; Newcastle v. Grubbs (Ind.) 86 N. E. 757; Salem v. Walker, 16 Ind. App. 687, 46 N. E. 90; Ft. Wayne v. Patterson, 3 Ind. App. 34, 29 N. E. 167; Worthington v. Morgan, 17 Ind. App. 603, 47 N. E. 235; Padelford v. Eagle Grove, 117 Iowa, 616, 91 N. W. 899; Nocks v. Whiting, 126 Iowa, 405, 106 Am. St. Rep. 371, 102 N. W. 109; Shinnick v. Marshalltown, 137 Iowa, 72, 114 N. W. 542; Mickey v. Indianola (Iowa) 114 N. W. 1072; Smith v. Leavenworth, 15 Kan. 81; Bellevue v. Genoway, 14 Ky. L. Rep. 304; Louisville v. Bailey, 25 Ky. L. Rep. 6, 74 S. W. 688; Carlisle v. Secrest, 25 Ky. L. Rep. 336, 75 S. W. 268; Flynn v. Neosho, 114 Mo. 567, 21 S. W. 903; Blake v. St. Louis, 40 Mo. 569; Welsh v. St. Louis, 73 Mo. 71; Russell v. Columbia, 74 Mo. 480, 41 Am. Rep. 325; Carvin v. St. Louis, 151 Mo. 334, 52 S. W. 210; Vogelgesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Buckley v. Kansas City, 156 Mo. 16, 56 S. W. 319; Taubman v. Lexington, 25 Mo. App. 218; Fockler v. Kansas City, 94 Mo. App. 464, 68 S. W. 363; Brennan v. St. Louis, 92 Mo. 482, 2 S. W. 481; Sweeney v. Butte, 15 Mont. 274, 39 Pac. 286; Lincoln v. Calvert, 39 Neb. 305, 58 N. W. 115; Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770; Davis v. Omaha, 47 Neb. 836, 66 N. W. 859; Aurora v. Cox, 43 Neb. 727, 62 N. W. 66; Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113; Elliott v. Concord, 27 N. H. 204; Turner v. Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; Pettengill v. Yonkers, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; Todd v. Troy, 61 N. Y. 506; Hutson v. New York, 9 N. Y. 163, 59 Am. Dec. 526; Corcoran v. New York, 188 N. Y. 131, 80 N. E. 660; Wilson v. Watertown, 3 Hun, 508, 5 Thomp. & C. 579; Champlin v. Penn Yan, 34 Hun, 33, affirmed in 102 N. Y. 680; Bradner v. Warwick, 91 App. Div. 408, 86 N. Y. Supp. 935; Kopper v. Yonkers, 110 App. Div. 747, 97 N. Y. Supp. 425, affirmed in 188 N. Y. 592, 81 N. E. 1168; Van Gorder v. Seneca Falls, 104 N. Y. Supp. 299; Gage v. Hornellsville, 2 N. Y. S. R. 351; Bunch v. Edenton, 90 N. C. 431; Kinsey v. Kinston, 145 N. C. 106, 58 S. E. 912; Fleming v. Wilmerding (Pa.) 72 Atl. 624; Archer v. Johnson City (Tenn.) 64 S. W. 474; Sherman v. Williams, 77 Tex. 310, 14 S. W. 130; Tucker v. Salt Lake City, 10 Utah, 173, 37 Pac. 261; Arthur v. Charleston, 51 W. Va. 132, 41 S. E. 171; Colby v. Beaver Dam, 34 Wis. 20 L.R.A. (N.S.)

285; Grand Forks v. Allman, 83 C. C. A. 554, 153 Fed. 532.

And if it fails to do so it is liable for damages for injuries sustained in consequence of such failure. Harrell v. Macon and Americus v. Johnson, supra; Lord v. Mobile, 113 Ala. 360, 21 So. 366; Makepeace v. Waterbury, 74 Conn. 360, 50 Atl. 876; Vandalia v. Huss, 41 Ill. App. 517; Decatur v. Hamilton, 89 Ill. App. 561; Decatur v. Fisher, 53 Ill. 407; Glantz v. South Bend, 106 Ind. 306, 6 N. E. 632; Worthington v. Morgan and Mickey v. Indianola, supra; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200; Bellevue v. Genoway and Carlisle v. Secrest, supra; Fugate v. Somerset, 97 Ky. 48, 29 S. W. 970; Baltimore v. Beck, 96 Md. 183, 53 Atl. 976; Estelle v. Lake Crystal, 27 Minn. 243, 6 N. W. 775; Blake v. St. Louis; Russell v. Columbia; and Vogelgesang v. St. Louis,—supra; Waltemeyer v. Kansas City, 71 Mo. App. 354; Fockler v. Kansas City; Lincoln v. Calvert; and Turner v. Newburgh,—supra; Clemence v. Auburn, 66 N. Y. 334, affirming 4 Hun, 386, 6 Thomp. & C. 633; Todd v. Troy; Hutson v. New York; Wilson v. Watertown; and Gage v. Hornellsville,—supra; Brown v. Towanda, 24 Pa. Super. Ct. 378; Niblett v. Nashville, 12 Heisk. 684, 27 Am. Rep. 755; Knoxville v. Bell, 12 Lea, 157; Baugus v. Atlanta, 74 Tex. 629, 12 S. W. 750; King v. Oshkosh, 75 Wis. 517, 44 N. W. 745; Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435; Colby v. Beaver Dam, supra.

A city having notice of defects or dangerous places in its streets must remove them within a reasonable time, and failure to do so is negligence rendering it liable for resulting injuries. Revis v. Raleigh (N. C.) 63 S. E. 1049; McLemore v. West End (Ala.) 48 So. 663; Benton v. St. Louis (Mo.) 118 S. W. 418.

Where the injury would not have occurred but for the obstruction or defect. McLemore v. West End, supra.

And, where the duty of cities to keep their streets in repair and the consequent liability to travelers injured by reason of the want of such repair are imposed by general laws of the state, they apply to all cities and towns situated in the state, irrespective of their charter provisions. James v. Portage, 48 Wis. 677, 5 N. W. 31.

These rules apply to injuries caused by the neglect or omission of a municipal corporation to keep its streets in a safe condition for travel, as well as to those caused by defects occasioned by the wrongful acts of others, where the corporation has actual or constructive notice of the defect which caused the injury. Aurora v. Bitner, supra.

And the duty of a municipal corporation to keep its streets in repair includes the duty to keep them free from dangerous obstructions; and a corporation is liable for negligence in allowing such obstructions to continue after notice thereof may be imputed to it. Monticello v. Kennard, 7 Ind. App. 135, 34 N. E. 454.

And, if a city undertakes to open and

grade its streets and keep them in reasonable repair for the use of the public, either by itself or its agents, it must accomplish that undertaking or be responsible for its failure. *Tritz v. Kansas City*, 84 Mo. 632.

And a statute prescribing that a municipal corporation shall keep its streets open and in repair and free from nuisances, etc., may properly be read by the trial judge in his charge to the jury in an action for negligence against the city for permitting an excavation to remain unguarded and unlighted in a place used by the public as a sidewalk. *Toledo v. Nitz*, 23 Ohio C. C. 350.

So, the ordinances of a city are admissible in evidence in an action against it for an injury resulting from its neglect in keeping its sidewalks free of obstruction and in a safe condition, when they tend to show that the city has control of the streets and sidewalks. *Rockford v. Hildebrand*, 61 Ill. 155.

The principle of cases of this class is that, when the duty of a city to protect the traveling public from injury liable to happen in consequence of street improvements is not directly and specifically imposed by law, it arises by necessary implication from the primary duty to repair streets and keep them in repair, and keep them, when open to public use, fit and safe for such use. *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369.

The liability of a municipal corporation for neglect to keep its streets in repair and free from obstruction arises from power possessed by the municipality to levy and collect taxes for general revenue purposes, upon property within the limits of the city, and to open and improve streets and make assessments therefor, such powers carrying with them the duty to keep the streets in reasonably safe and convenient condition; and, if it fails to do so, it can be held to respond in damages. *Guthrie v. Swan*, 5 Okla. 779, 51 Pac. 562; *Schigley v. Waseca* (Minn.) 19 L.R.A.(N.S.) 689, 118 N. W. 259; *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306.

And an action for damages resulting from negligence will lie, on principles of common law, against a municipal corporation, if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform the duty. *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Cleveland v. King*, 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90.

When a city or town is incorporated, and is given control over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, the corporation not only assumes this duty, but by implication agrees to perform it for the benefit and protection of all who may have occasion to make use of these public easements; and, for failure to discharge this duty, the corporation is responsible to the party injured. *Wilson v. Wheel-*

ing, 19 W. Va. 323, 42 Am. Rep. 780; *Curry v. Mannington*, 23 W. Va. 14; *Omaha v. Olmstead*, 5 Neb. 446; *Champlin v. Penn Yan*, 34 Hun, 33, affirmed in 102 N. Y. 680; *Weet v. Brockport*, 16 N. Y. 161, note.

And this implied agreement, made with the sovereign power, inures to the benefit of every individual interested in the proper performance of such duties. *Omaha v. Olmstead*, 5 Neb. 446; *Curry v. Mannington*, *supra*.

The grant by the government to the municipality, of a portion of its sovereign power, is to be deemed a sufficient consideration for an implied contract on the part of the corporation to perform the duties which the charter imposes; and the contract made with the sovereign power inures to the benefit of every individual interested in its performance. *Conrad v. Ithaca*, 16 N. Y. 158; *Weet v. Brockport*, *supra*.

Within these rules, a village charter which makes the village a separate road district, and constitutes the trustees commissioners of highways for the village, with the same powers and duties over the road and streets therein as commissioners of streets in towns, and with like powers to appoint overseers of highways having the powers of overseers in towns, and providing for the assessment of highway labor by trustees, imposes a corporate duty, and the trustees, in respect to the care and control of the highways of the village, are the agents of the corporation, and not independent public officers, and for their neglect to perform the duty imposed upon them the corporation is responsible. *Weed v. Ballston Spa*, 76 N. Y. 329; *Hungerford v. Waverly*, 125 App. Div. 311, 109 N. Y. Supp. 438, reversing, 56 Misc. 186, 107 N. Y. Supp. 291; *Clark v. Lockport*, 49 Barb. 580; *McSherry v. Canandaigua*, 35 N. Y. S. R. 432, 12 N. Y. Supp. 751, affirmed in 129 N. Y. 612, 29 N. E. 821; *Stebbins v. Oneida*, 1 Silv. Sup. Ct. 240, 5 N. Y. Supp. 483.

And, although a city charter does not in express terms confer the power or impose the duty of keeping the streets and bridges within the corporate limits in a proper condition and repair, where the charter grants to the corporate authorities the power to impose such taxes upon all the real and personal estate within the corporate limits as they shall deem necessary for the support of the government or for other purposes, and enforce the collection of the same, and the authorities have assumed and exercised corporate functions over the streets, and have negligently constructed or failed to keep in repair a bridge upon one of them, whereby a traveler sustains an injury, the corporation is liable for the injury. *Greensboro v. McGibbony*, 93 Ga. 672, 20 S. E. 37.

So, the duty of a city to keep its streets in repair and free from obstructions is a corporate duty resting upon the municipality, under a charter provision making the common council commissioners of highways within the city, and empowering it to pass ordinances to regulate and keep in repair

the streets of the city and to prevent encumbrances thereon, and making it the duty of the mayor to cause the laws and ordinances of the city to be duly executed, such ordinances prohibiting the placing of any obstructions upon the streets or sidewalks unless duly licensed by the city. *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442; *Diveny v. Elmira*, 51 N. Y. 506; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43.

And, under a city charter conferring upon the municipality full power and authority to keep the streets and sidewalks, etc., in good order, and to remove any obstructions or nuisances, it is the duty of the corporation to exercise the power, and to keep the streets, sidewalks, etc., in such condition that persons passing over or along them may do so with safety and convenience; and it is liable for injury arising from a failure to remove a nuisance. *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486.

And charter provision that, before the city shall be liable for damages to any person injured by any of the streets, avenues, alleys, or sidewalks thereof, the person so injured, or someone in his behalf, shall give the mayor or city council notice within thirty days after the same had been received, constitutes a clear and positive legislative recognition of the principle that the city may be liable for injuries occasioned by defective streets and sidewalks. *Denver v. Williams*, 12 Colo. 475, 21 Pac. 617.

Likewise, for a failure to discharge the duty of a municipal corporation to keep its streets in a reasonably safe and secure condition so that they may be safely used by the traveling public, the municipality is liable to a public prosecution by indictment. *Champlin v. Penn Yan* and *Weet v. Brockport*, supra.

c. Liability under statutes.

Many of the states, including many if not all of those originally holding to the common-law rule of nonliability, have adopted statutes or given charters expressly imposing liability upon municipal corporations to persons injured by reason of defects or obstructions in their streets; the liability under those statutes, of course, depends in each case upon a proper construction of the statute applicable to it.

Where the liability of cities for injuries suffered in their streets is statutory, there is no liability except under the declared conditions. *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; *Reed v. Madison*, 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547.

And, where a city would not be liable in the absence of a statute creating a liability for an obstruction in a street, a statute giving a right of action against a municipal corporation for any injury sustained by reason of defective highways, streets, bridges, cross walks, and culverts does not create a municipal liability for injuries caused by de-

fective sidewalks, since a statute attempting, in derogation of the common law, to create a liability, cannot be carried beyond the clearly expressed provisions of the act. *Detroit v. Putnam*, 45 Mich. 263, 7 N. W. 815.

And a walk crossing a public alley is a cross walk as distinguished from a sidewalk, within the meaning of a statute creating municipal liability in favor of persons sustaining a bodily injury upon any of the public highways or streets by reason of neglect to keep such public highways or streets and all cross walks, etc., in good repair. *Pequignot v. Detroit*, 16 Fed. 211.

Nor does a provision of a city charter requiring the council to see that all ordinances relating to the keeping of sidewalks free from obstruction are strictly enforced make the city liable for the negligence of a contractor in erecting a barrier across a sidewalk, when the contractor was employed by the owner of adjacent property to build the sidewalk. *Thompson v. West Bay City*, 137 Mich. 94, 100 N. W. 280.

And, where the statute gives a municipal corporation power to open and repair streets, but leaves the opening and repairing and keeping in order discretionary with the corporation, if a defect in a street, from which a person received injuries, was not the result of wear and tear, but was left in that condition by the authorities when they opened the street, the city is liable for the resulting injury suffered by a person exercising proper care; but, if the street was, when opened, put in good condition, and the defect occurred afterwards, but not by the direct act of the municipal corporation, it is not liable. *McDonough v. Virginia City*, 6 Nev. 90.

And a statute providing that all the public squares, public grounds, streets, highways, and public walks, within the limits of a borough, shall be under the exclusive direction and control of the borough and the officers thereof; and the expense of maintaining the same shall be borne exclusively by the borough and the inhabitants thereof; enacted for the purpose of giving cities and boroughs the right to determine for themselves what improvements in these respects shall be made,—does not impose upon the cities and boroughs liability for injuries caused by a defect in the street, but leaves it upon the town. *Nead v. Derby*, 40 Conn. 205.

But, where a statute provides that an action may be maintained against an incorporated town or other public corporation for an injury to the rights of the plaintiff arising from some act or omission of such corporation, a municipal or other public corporation is liable for damages occasioned to travelers in consequence of the neglect of its officers to keep its streets and highways in repair, unless exempted from such liability by express provision of its charter. *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925.

And a statutory provision that cities and towns shall have the care and control of public highways and streets, and shall cause the same to be kept in repair and free from

nuisances, imposes a mandatory, and not a discretionary, duty upon municipalities of keeping the streets in repair and free from nuisances and obstructions. *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90.

And a statutory provision that all highways within any town are to be kept in repair so as to be safe and convenient, at the expense of the town under the direction of the surveyors of highways; who are also authorized, when any highway is encumbered with snow, to cause so much thereof to be removed or trod down as will render the road passable, making the town liable for any neglect to keep the highway in repair, —applies to cities as well as towns, and to sidewalks when they are a part of the highway. *Providence v. Clapp*, 17 How. 161, 15 L. ed. 72.

Likewise, a charter provision of a city imposing upon it the duty of repairing all highways within its limits, and authorizing it to assume by contract the maintenance and repair of turnpike roads within its limits, makes the city liable to pay for damages received by reason of defects in any existing highway, and any that shall hereafter be established, whether through the action of its authorities, or through dedication and acceptance. *Makepeace v. Waterbury*, 74 Conn. 360, 50 Atl. 876.

And, where the charter of a municipal corporation gives power to levy a specific tax for the purpose of constructing and maintaining bridges, it is sufficient to impose upon the municipal corporation the duty of keeping in safe condition a public bridge within its limits; and, in an action for a failure to perform such duty when the charter is pleaded by the title, the court will take judicial notice of all its provisions. *Shartle v. Minneapolis*, 17 Minn. 308, Gil. 284.

So, under Me. Rev. Stat. 1903, chap. 23, § 56, declaring that highways legally established shall be open and kept in repair so as to be safe and convenient for travelers, if, through structural defects or want of repair a way is not reasonably safe and convenient, and an injury is received through the defect alone, the person injured is entitled to recover therefor against the city. *Moriarty v. Lewiston*, 98 Me. 482, 57 Atl. 790.

And towns are liable, within the meaning of that statute, to any person who sustains damage through any defect or want of necessary repair, as well as for injuries received in consequence of obstructions placed on, or deposited in, a highway or street, as for inherent defects. *Frost v. Portland*, 11 Me. 271.

So, under N. H. Laws 1893, chap. 59, § 1, providing that towns are liable for damages happening to any person, his team or carriage, traveling upon a bridge, culvert, or sluiceway, or dangerous embankment and defective railings upon any highway by reason of any obstruction, defect, insufficiency, or want of repair of such bridge, culvert, or sluiceway, or dangerous embankment and defective railings, which renders it unsuit-

able for travel thereon, a person injured, to maintain an action against a town, must establish that the matter of which he complains as the cause of his injury, and which he alleges rendered the highway unsuitable, was an obstruction, defect, insufficiency, or want of repair, of one of the highway structures named in the statute. *Wilder v. Concord*, 72 N. H. 259, 56 Atl. 193.

And the obstruction contemplated by the New Hampshire statute with reference to the obstruction of highways is in general one from or by reason of mere matter; and the encumbrances which surveyors of highways are empowered to remove are those by inert matter. *Ray v. Manchester*, 46 N. H. 59, 88 Am. Dec. 192.

And the duty imposed upon towns by N. H. Pub. Stat. chap. 75, enforceable by indictment as therein provided, to keep all highways within their limits suitable for travel thereon, was not affected by the legislation of 1893; but the liability at the private suit of a traveler, for damages happening to him by reason of the unsuitability of a highway as established by N. H. Pub. Stat. chap. 76, §§ 1, 2, was abolished by express repeal of those statutes by N. H. Laws 1893, chap. 59, § 5. *Wilder v. Concord*, 72 N. H. 259, 56 Atl. 193.

So, under Mass. Stat. 1877, chap. 234, §§ 1, 2, requiring towns and cities to keep their ways reasonably safe, it is the duty of a town or city to use reasonable care and diligence not only to remedy defects, but to guard against causes existing within the limits of the way, which are liable to produce such defects. *McGowan v. Boston*, 170 Mass. 384, 49 N. E. 633.

But a statutory provision that highways shall be kept in repair at the expense of the town or city in which they are situated, so that they shall be safe and convenient for travelers; and that any person who receives injury through a defect or want of repair in a highway may recover damages therefor of the town or city by law obliged to repair the same, if such town or city had reasonable notice of the defect, or the defect had existed for twenty-four hours previously to the occurrence of the injury, —does not limit the liability of towns and cities to open and visible defects, but leaves it applicable to all defects. *Burt v. Boston*, 122 Mass. 223.

And provisions of this class give the rule and measure of liability of cities and towns, not making them liable for every defect or want of repair, nor for every object which makes the highway unsafe or inconvenient for travelers; under it, to make them liable the cause of any injury must be both a defect or want of repair and something which makes the highway unsafe or inconvenient, and the injury must be attributable to the defect or want of repair. *Barber v. Roxbury*, 11 Allen, 318.

And a person injured by a defective sidewalk must prove that the town, in the exercise of reasonable diligence, should have ascertained and remedied the defect. *Mason v. Winthrop*, 196 Mass. 18, 81 N. E. 644.

But, where a railroad crossed a highway over the level thereof by means of a bridge, and the highway was lowered for the purpose of having the railroad pass over it, that portion of the highway which was so lowered is included in the approaches to the bridge, within the meaning of Mass. Pub. Stat. chap. 112, § 128, so that the railroad company is liable for an accident happening thereon, and the city is exonerated. *Whitcher v. Somerville*, 138 Mass. 454.

So, S. C. Rev. Stat. 1893, § 1582, providing that any person who shall receive bodily injury or damage in his person or property through a defect in any street or public way, or by reason of defect or mismanagement in anything under the control of the corporation within the limits of any town or city, may recover in an action against the same the amount of actual damage sustained by him by reason thereof, renders a municipal corporation liable not only for neglect in making repairs on the streets, but also for mismanagement of anything under the control of the corporation in making such repairs; but it does not make a municipal corporation liable for any other nonfeasance or misfeasance on its part except such as is connected with the keeping of the streets, etc., in proper and safe repair. *Dunn v. Barnwell*, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 315.

And N. Dak. Comp. Laws, § 4600, makes a city liable for an injury resulting from permitting an obstruction in a street, where the injury is the proximate result of its act, though it was not reasonably anticipated. *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676.

So, a municipal corporation is liable for injuries occasioned by its failure to keep its streets, alleys, sidewalks, roads, and bridges in repair, by statute, in West Virginia, to the same extent that private individuals are liable for the same character of negligence. *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447.

And negligence of a city in failing to keep its streets, alleys, sidewalks, roads, and bridges in repair is presumed, and notice of the defect is not required. *Ibid.*; *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171.

So, the duty of townships, villages, etc., to keep highways in good repair so that they shall be safe and convenient for public travel is made imperative by statute in Michigan. *Malloy v. Walker Twp.* 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012; *Grand Rapids v. Wyman*, 46 Mich. 516, 9 N. W. 833; *Burnham v. Byron Twp.* 46 Mich. 555, 9 N. W. 851; *Campbell v. Kalamazoo*, 80 Mich. 655, 45 N. W. 652.

And such liability, being expressly declared, exists whether, under the provisions of their municipal charters, they would be held so liable or not. *Campbell v. Kalamazoo*, *supra*.

And How. Anno. Stat. (Mich.) § 1442, making municipalities liable for bodily injuries sustained by reason of the neglect to

keep public highways in good repair and in a condition reasonably safe and fit for travel, imposes upon municipalities an obligation to use diligence to keep their highways and streets in a condition reasonably safe and fit for public travel, including an obligation on the part of a municipality to remove obstructions within a reasonable time after it has knowledge or notice of their existence. *McEvoy v. Sault Ste. Marie*, 136 Mich. 172, 98 N. W. 1006.

And, upon the incorporation of a village, and upon its assuming control over the corporate territory, it becomes its duty to take prompt measures to remedy any existing defects in sidewalks by reason of any disconnected system, and to supply the necessary regulations, and to raise the necessary funds; and after having failed, it cannot resist a recovery by a person who has been injured by reason of a defective walk. *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947.

Mich. Pub. Acts 1879, p. 223, How. Anno. Stat. §§ 1442, 1446, giving an action against municipalities for injuries caused by neglect to keep streets and highways in good repair and in a condition reasonably safe and fit for travel, however, was not intended to put villages and cities under any different obligation from townships in regard to the good repair of such ways as are to be kept in order. *McKellar v. Detroit*, 57 Mich. 158, 58 Am. Rep. 357, 23 N. W. 621.

And this statutory remedy is confined to cases in which the want of repair is the immediate cause of injury, as where there are obstructions or defects in a roadway, or bridge, and a vehicle, in passing over it, encounters the mischief complained of. *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383, 21 N. W. 873.

So, the Michigan statutes imposing liability upon cities for neglect to keep their highways in a safe condition fix the liability for injury only to persons and property upon the highway, and impose no liability for injury to abutting lands. *Tatman v. Benton Harbor*, 115 Mich. 695, 74 N. W. 187.

And they confine municipal liability to such defects in streets as arise from their being out of repair, and do not cover objects forming no part of the streets and not affecting their condition as ways kept in proper repair. *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313.

So, while municipal corporations are liable for torts, and in a certain sense all governments are municipal corporations, the rule of liability is applied to corporations supposed to have a private character, as distinguished from quasi corporations, such as counties, townships, etc., consisting of a political subdivision created as an instrument of the state or government; and, in creating the government of the territory of Hawaii, Congress did not intend to create a municipal corporation proper, with the liabilities of such a corporation; and the territory is not liable for injuries from obstructions or defects in streets. *Coffield v. Territory*, 13 Haw. 478.

And the act of Congress creating a board of public works for the District of Columbia, and providing that they shall have entire control of the streets, and shall make all regulations for keeping them in repair, the members of which are to be appointed and paid by the United States, thus empowering them to act independently of the municipal government of the district, confers upon the government of the district no control over the avenues, streets, or alleys thereof, and does not impose upon it any duty to repair or keep them in order; and an action for an injury caused by a defect in one of the streets will not lie against the district. *Barnes v. District of Columbia*, 1 MacArth. 322.

So, the acceptance of a special charter by a city or borough authorizing the corporation to perform a strictly governmental duty, such as the passage and enforcement of ordinances to keep its highways from being rendered unsafe by obstructions or nuisances, does not create a contract between the corporation and the state that the duty shall be performed, and make the city or borough liable for an omission to perform, or a negligent performance of it, constituting an exception to the general doctrine that for the nonperformance or negligent performance of a public governmental duty a municipal corporation is not liable. *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342.

In the above case *Jones v. New Haven*, 34 Conn. 1, *supra*, was distinguished upon the ground that in that case the duty which the city had contracted with the state to perform was a strictly private one.

So, under a statutory provision that a city shall constitute a road district, and every road district shall be responsible for all damages sustained by any person in consequence of any defects in the roads and bridges in said district, action for damages for an injury by reason of a hole or defect in the planks of a bridge, constituting part of a street in a city, is properly brought against the city, and not against the road district. *Rusch v. Davenport*, 6 Iowa, 443.

And, where the duty to keep its streets in repair is imposed upon a municipality by its charter or general statute, of which the court is bound to take judicial notice, no averment in the declaration in an action against the city for an injury due to a defect or obstruction in a street, as to such obligations, is necessary. *Hysell v. Central City* (W. Va.) 61 S. E. 43; *Cronan v. Woburn*, 185 Mass. 91, 70 N. E. 38; *Hayes v. West Bay City*, 91 Mich. 418, 51 N. W. 1067; *Erie City v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87.

So, where the law imposes upon the authorities of incorporated towns the imperative duty of keeping in proper repair the streets and bridges of the town, for a failure to fulfil its requirements they may subject themselves to criminal liability. *Rus-*

sell v. Monroe, 116 N. C. 720, 47 Am. St. Rep. 823, 21 S. E. 550.

Whether it is the duty of a city, under its charter, to keep its sidewalks in repair, is a question of law, and should not be submitted to a jury in an action for an injury caused by a defective sidewalk. *Bonine v. Richmond*, 75 Mo. 437.

d. Exemption from liability by statute.

The liability of a city for injuries resulting from defective streets or sidewalks rests exclusively upon express or implied provisions of the statute; and it is competent for the legislature to limit such liability or remove it entirely. *Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273.

Where the right to recover for injuries arising from want of repair of sidewalks, streets, etc., is a purely statutory one, it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred any limitations it chooses, and whether the limitations imposed are reasonable or unreasonable in such cases are questions for the legislature, and not for the courts. *Moulter v. Grand Rapids* (Mich.) 118 N. W. 919.

And a statute relieving a city from liability for damages for injuries sustained on its streets in consequence of their being out of repair, which affords an ample remedy against those whose acts or negligence were the cause of the injury, is not a violation of the constitutional right of acquiring, possessing, and protecting property. *Parsons v. San Francisco*, 23 Cal. 462.

Nor is a charter provision of a city that it shall never be liable for any damage sustained by any person in consequence of the neglect of any person to keep his sidewalk clear from obstructions invalid as class legislation. *MacLam v. Marquette*, 148 Mich. 480, 111 N. W. 1079.

But a city charter exempting the city from liability for any injury on account of the condition of any street, and not exonerating any officer of the city when the accident is caused by his wilful neglect, gross negligence, or wilful misconduct, practically denies a remedy to a person injured through a defective sidewalk, and contravenes a constitutional provision that everyone should have a remedy for injury done to person or property. *Batdorff v. Oregon City* (Or.) 100 Pac. 937.

So, under a municipal charter declaring the village to be a separate road district of the town, and transferring the duties of executing the highway laws from the town to the village officers, and directing that the trustees of the village shall have the same powers and be charged with the same duties over the roads in the village as commissioners of highways in towns have or possess, the trustees are independent officers so far as their duties as commissioners of highways are concerned, governed by the several acts of legislature concerning high-

ways; and the corporation is not liable for their omissions to perform a duty imposed upon them by statute as commissioners of highways; and it is not liable for an injury sustained by a person in consequence of his falling, in the nighttime, into an open ditch in one of the streets of the village, allowed to remain open without any protection or guard. *Hickok v. Plattsburgh*, 15 Barb. 427.

And, under a statutory provision exempting municipalities from all liability for damages for injuries sustained by reason of an accumulation of snow or ice upon a highway, unless such accumulation shall have existed for three weeks, a municipality is not liable, unless the defect causing the injury existed continuously for three weeks immediately prior to the happening thereof. *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26; *Uecker v. Clyman* (Wis.) 118 N. W. 247.

And, where there was a ridge of snow and ice in the center of a sidewalk 12 inches wide 4 inches high in the center and sloping toward the sides, together with a covering of hard snow on the level portions of the walk, made slippery by having been walked on and roughened in places by footprints made in soft weather and afterwards frozen, and, about two weeks before the accident in question, the walk had been covered with heavy wet snow from 12 to 18 inches deep, and thereafter for some time travel was confined to a narrow path near the center of the walk, the insufficiency which caused the injury complained of had not existed continuously for three weeks prior thereto, within the meaning of such a statutory provision. *Byington v. Merrill*, supra.

So, a statute requiring every superintendent of highways to clear out snow blocking any highway in his district gives no right of action for injuries sustained by reason of a snow blockade in a highway, though the town officers were negligent in failing to remove the blockade as required by such statute, unless such negligence had continued for such a length of time as to be made actionable by another statute providing that the accumulation must have continued for three weeks. *Uecker v. Clyman*, supra.

And, under a city charter declaring the city not to be liable to anyone for an injury resulting from a defective condition of the streets; but an officer thereof who, by his wilful neglect of a duty enjoined by law, causes such injury, is so liable,—the common council is bound to provide by ordinance for the repair of the streets; and if it wilfully neglects to do so, the members thereof are liable personally in damages to anyone who is injured in consequence thereof. *Balls v. Woodward*, 51 Fed. 646.

But the common council of a municipal corporation cannot be said wilfully to neglect to order the repair of a street, so as to be liable personally in damages to anyone injured in consequence thereof, unless 20 L.R.A. (N.S.)

it has actual or constructive notice of its defective condition. *Ibid*.

So, a city having a charter provision authorizing it to compel all persons to keep sidewalks in front of their premises owned or occupied by them clear from obstructions, and providing that the city shall never be liable for any damages for injuries to any person in consequence of the neglect of any person to keep such sidewalk clear from obstruction, is not liable to a person injured by an obstruction in the street, notwithstanding the general law of the state providing a general liability against municipalities in such cases. *MacLam v. Marquette*, 148 Mich. 480, 111 N. W. 1079.

In the above case *Campbell v. Kalamazoo*, 80 Mich. 655, 45 N. W. 652, supra, II. c, was distinguished upon the ground that in that case the charter of the city was silent upon the subject of liability.

And, under a village law providing that the street commissioner of a village shall have supervision of the construction, improvement, and repairs of the streets as the board of village trustees may determine, the street commissioner is not called upon to act, and is not liable for negligence, until the trustees have determined what repairs shall be made, and have directed the commissioner to make them. *Hungerford v. Waverly*, 125 App. Div. 311, 109 N. Y. Supp. 438, reversing 56 Misc. 186, 107 N. Y. Supp. 291.

So, in Canada a municipal corporation is not responsible for an accident which occurs on a road within the limits of the municipality, where the road is under the control of a turnpike company. *Brunet v. St. Joachim de la Pointe Claire*, Rap. Jud. Quebec 14 C. S. 278.

A city is not absolved from performance of its duty to keep its streets and sidewalks free from obstruction and in a safe condition, however, by a charter provision giving it power to cause suitable sidewalks to be made, requiring the lot owners to build them. *Rockford v. Hildebrand*, 61 Ill. 155.

But a charter provision requiring lot owners to keep and maintain sidewalks in front of their premises in a safe, convenient, and effective condition, and giving persons injured by their failure to do so the right to recover against them, and providing that, when an execution upon a judgment against the lot owner shall be returned unsatisfied, the injured party may commence an action against the city, remains in force notwithstanding the subsequent enactment of a provision that, when damage shall happen in a highway by reason of the negligence of a third person, such person shall be primarily liable therefore, but that the municipality may be sued in the same action with the person liable, and the right to sue the city at all remains dependent on the condition precedent that execution shall have been returned unsatisfied on a judgment against the lot owner. *Devine v. Fond du Lac*, 113 Wis. 61, 88 N. W. 913.

And a statutory provision that, when any injury shall happen by reason of any defect in any sidewalk or other cause for which the city would be liable, and such defect or other cause of injury shall arise from the default or negligence of any person, such person shall be primarily liable for such injury; and the city shall not be liable therefor until after all legal remedies against such person have been exhausted,—applies only where the default or negligence of the person was the sole cause of the injury; and, where an abutting owner neglects to keep an opening in the sidewalk properly protected, and this, together with a failure on the part of the city to keep the sidewalk itself in repair, causes an injury, action may be brought in the first instance against the city, or the owner, or both, and, in an action against either, the wrongful act or negligence of the other is no defense. *Papworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431.

So, a village law providing that the streets of a village shall be under the exclusive supervision of the board of trustees does not cast the duty of keeping the streets of the village in repair on the president and trustees of the village individually, or relieve the village from such liability. *Hungerford v. Waverly*, supra.

And a charter provision of a city authorizing it to establish streets and sidewalks, and to compel the removal of obstructions from any street, but providing that the city shall not be liable for any failure to exercise this power, does not exempt the city from liability for injuries occasioned by defects in streets or avenues over which the city had not exercised the powers conferred, but which had otherwise become public highways by use of the public generally, or otherwise. *Bessemer v. Carroll* (Ala.) 45 So. 419.

But a statutory provision for the appointment of sewer, water, and street commissioners for a village, prescribing their powers and duties, and declaring that the street commissioners shall be commissioners of highways, charged to keep the streets in proper repair, and that they shall be a body corporate, and that all actions for any act omitted by them shall be brought against them in their name of office, etc., points to the commission as a defendant in an action for an injury caused by falling over flagstones placed upon a walk during its repair, and left there over night without proper guard, and relieves the village from the burden of occupying that position. *Scott v. Saratoga Springs*, 115 N. Y. Supp. 796.

Nor does a statutory provision authorizing the mayor and alderman of a city to establish streets, and to regulate and control the paving and curbing of streets and sidewalks, and to open and improve them; and that the mayor and alderman shall not be liable for a failure to exercise his power,—exempt the city from liability for establishing a dangerous or defective sidewalk. *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424.

20 L.R.A. (N.S.)

And, where a city charter provided for the construction and repair of sidewalks at the expense of owners of abutting lots, by making the cost a lien on the property, an exemption therein of the city from liability for injury through defects in the walk, not occasioned by the direct act of the city, in the event that, because the same adjoins a homestead, or for any other reason, the city is unable lawfully to compel the owner to construct and repair a sidewalk by fixing a lien on his property for the cost, does not apply to a case of injury through a defect in the grating covering an excavation under the walk, to the repair of which the general police power of the city is adequate and the proceeding by lien inapplicable. *Lentz v. Dallas*, 96 Tex. 258, 72 S. W. 59.

So, where a city charter provides that the cost of constructing all sidewalks, including keeping the same in repair, shall be defrayed entirely by the owners of lots fronting on the sidewalk, and defines the method of procedure upon the part of the city to fix a lien for such costs, and provides that the city shall never be liable for damages to any person or property by reason of any defect in a sidewalk not immediately occasioned by the direct act of the city or some officer for whose act the city is responsible at law, and the provision for procedure in collecting the cost of construction and repairs of sidewalks is declared unconstitutional, the city cannot escape liability for an injury caused by a defective or obstructed sidewalk on the theory that it cannot lawfully compel the abutting property owner to construct and repair a sidewalk, and therefore it is exempted from liability, by the exemption provision of its charter, for damages resulting from defects therein. *Dallas v. Strayer* (Tex. Civ. App.) 73 S. W. 980.

Nor does the remote obligation upon highway surveyors of repairing highways relieve the town from its primary liability for injuries resulting from defective or obstructed highways. *Hardy v. Keene*, 52 N. H. 370.

And a statutory provision that commissioners of a department of public parks of the city shall have exclusive power to locate and lay out and construct and maintain all public parks, streets, roads, and avenues, places the duty as to all the streets upon the park commissioners; but it is a duty which they discharge, not for themselves or for the public generally, but for the city; and the duty is not taken away from the city; it is still bound to discharge it; and the park commissioners are the agency through which it does so. *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622.

Nor do statutory provisions declaring that every city is responsible for injuries to property within its limits by mobs or riots indicate a legislative intent to exempt cities from liability for injuries by obstructions in streets, or for other torts. *May v. Anaconda*, 26 Mont. 140, 66 Pac. 759.

And a city charged by its charter (with

the duty of keeping its streets in a safe condition for public use, and making it responsible for injuries to individuals resulting from its negligent act or omission, is not relieved from such liability by a charter provision declaring that it shall not be liable in damages for any misfeasance or nonfeasance of any officer of the city of any duty imposed upon him; this provision applying only where a duty is devolved, not upon the city, but directly upon some officer or department. *Bieling v. Brooklyn*, 120 N. Y. 98, 24 N. E. 389.

Nor is the duty of a municipal corporation to keep the avenues of travel within its jurisdiction in a reasonably safe condition for the ordinary mode of use to which they are subjected, and the corresponding liability to respond in damages to those injured by a neglect to perform the duty, affected by a statutory provision by which a street commissioner is elected by the people and not subject to removal by the council, charging him with the care of the streets, avenues, sidewalks, and the like, and requiring him to keep the same free from obstructions and defects and to superintend the work of construction and repair, the expenses of such repairs and improvements and changes being required to be provided for by the council, that body alone having authority to levy taxes for these among other municipal purposes, the statute in such case simply designating the duties of the commissioner as a factor in the general administration of the city's affairs. *Denver v. Williams*, 12 Colo. 475, 21 Pac. 617.

So, where the law made it the absolute duty of a city to remove nuisances from its streets within a reasonable time, holding it liable for damages resulting from neglect of that duty; and a city suffered a dead horse to remain in one of the public streets, which caused an injury, the fact that an ordinance prohibited anyone except a contractor to interfere in the matter neither added to nor took from the character of the city's obligation; and the ordinance is inadmissible in evidence in an action by the person injured, against the city, for the injury. *Sallee v. St. Louis*, 152 Mo. 615, 54 S. W. 463.

III. Power to perform duty as affecting liability.

a. Generally.

The duty of a city to remove obstructions or repair defects in its streets depends upon its character and upon the means provided thereby to enable it to perform this duty; and it cannot be liable for neglect in any case where it is not reasonably capable of acting efficiently; but it is responsible for diligence in the performance of any duty which it is capable of performing so far as the means in its power will enable it to act. *Dewey v. Detroit*, 15 Mich. 307.

20 L.R.A. (N.S.)

b. Insufficiency of funds.

The rule has been asserted that the absence of necessary funds and of legal means to procure them will excuse the neglect of a municipal corporation to keep its streets in repair so as to prevent them from becoming dangerous to the public; but this must be shown as a defense. *Hines v. Lockport*, 50 N. Y. 238; *Orth v. Milwaukee*, 59 Wis. 336, 18 S. W. 10.

And that it is within the discretion of the commissioners of highways of a town, where they have not sufficient funds in their hands to make all needed repairs, to apply the funds in making such repairs as, in their judgment, are most urgently needed; and they are not responsible for an error of judgment in doing so. *Monk v. New Utrecht*, 104 N. Y. 552, 11 N. E. 268.

And the legislature may constitutionally reserve to itself the power of levying the taxes of a taxing district including a municipal corporation; and, where the corporation is so restricted in the use of the proceeds of special taxes assessed by the legislature, and is totally deprived of the power of taxation to meet any liability for injuries, the taxing district is not liable in damages to a person whose property is injured by a failure to keep the streets in repair. *Williams v. Taxing Dist.* 16 Lea, 531.

So, under a city charter making specified officers, through whose negligence defects in streets remain unrepaired, liable to a person injured, for damages sustained, such officers are not liable for failure to repair defective sidewalks where they have no means with which to repair them. *Taylor v. Manson* (Cal. App.) 99 Pac. 410.

But it is not necessary, in an action against a municipal corporation for damages for an injury caused by a defective bridge, for the plaintiff to plead in the first instance that the means for repairing the bridge were provided for or placed at the disposal of the defendants, unless, by the terms of the act of incorporation, the possession of such means is made a condition precedent of the municipal corporation's liability. *Shartle v. Minneapolis*, 17 Minn. 308, Gil. 284.

And the *prima facie* presumption that the means provided or placed at the disposal of a city to keep its bridges in repair were sufficient is not affected by the fact that there was a limitation fixed upon the amount of tax to be levied in any one year. *Ibid.*

So, where full control is given to city authorities by charter over the streets and sidewalks, and money can be raised in various ways therein provided, to be expended upon them, that a municipal corporation had no means at hand is not an excuse for failure to keep a sidewalk in repair. *Springfield v. Doyle*, 76 Ill. 202.

And, where a city charter authorizes the common council to raise money by tax to defray the expenses of the city, but prohibits the council from pledging the credit of

the city for such purpose, and the committee on ways and means has borrowed the money with which to repair sidewalks, and there are ample funds in the treasury for such purpose, the city cannot escape liability for an injury due to nonrepair of a city sidewalk while using the funds thus provided, by the claim that sufficient time had not elapsed after the law became operative and before the accident to enable the city to raise by tax the money necessary to put the sidewalk in repair. *Moon v. Ionia*, 81 Mich. 635, 46 N. W. 25.

The general rule has been held however, to be, that the lack of funds by a municipality is not a justification for failure to repair its streets, and is not a defense in an action for damages for personal injuries caused by defects or obstructions in a street. *Dallas v. Strayer* (Tex. Civ. App.) 73 S. W. 980; *McKinney v. Brown* (Tex. Civ. App.) 81 S. W. 88.

And that every municipality is bound at its peril to keep its highways in sufficient repair, or to take precautionary means to protect the public against danger from insufficient highways; and that evidence, in an action against a municipality for an injury caused by an obstructed street, that the municipality had expended all the means at its disposal in repairing its streets,—has no tendency to excuse it, and is inadmissible for that purpose. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

And evidence of a want of means, upon the part of a municipal corporation, with which to keep a street in repair without detriment to more important streets, is irrelevant upon the trial of an action against the corporation for damages resulting from falling into a ditch or gully across one of its public streets along which the plaintiff was walking in the night. *Milledgeville v. Cooley*, 55 Ga. 17.

Nor is evidence that the revenue collected by a municipal corporation for street purposes had all been expended in other necessary repairs admissible in an action against the corporation for an injury caused by a defect or obstruction in a street, to rebut the charge of negligence in omitting to repair the defect complained of, where the village could have discharged its duty in this respect by requiring the owner of the adjacent property to make the necessary repairs, or by causing them to be made upon his default and charging the cost upon the property. *Shelby v. Clagett*, 46 Ohio St. 549, 5 L.R.A. 606, 22 N. E. 407.

Within this rule, the liability of a city for an injury caused by an obstruction in a street does not depend upon whether or not the city has funds in its treasury to pay for making or repairing streets; but upon the question whether or not it had the power to raise funds to defray such expenses. *Peach v. Utica*, 10 Hun, 477.

And a municipal corporation cannot be relieved of responsibility for damages resulting from an unguarded excavation in a street because of the insufficiency of the 20 L.R.A. (N.S.)

means at the disposal of the authorities for the purpose of street improvements or repairs, in the absence of proof that the city authorities had exhausted the means at their command for the performance of their duty. *Birmingham v. Lewis*, 92 Ala. 352, 9 So. 243; *Lord v. Mobile*, 113 Ala. 360, 21 So. 366.

Nor can a city be excused for failure to repair a dangerous place in a street, consisting of a precipitous descent of some 5 or 6 feet, by the fact that it was little used by the public, and it had expended all its available funds on streets in a more populous part of the city, where, by its charter, it is given extensive power of taxation over property, persons, and privileges for such purposes. *Whitfield v. Meridian*, 66 Miss. 570, 4 L.R.A. 834, 14 Am. St. Rep. 596, 6 So. 244.

And a municipal corporation having the right to issue its warrants in anticipation of a levy of taxes will not be excused from repairing its sidewalks because there were no funds in the treasury, if a tax has been levied against which warrants may be issued in anticipation of its collection. *Mt. Vernon v. Brooks*, 39 Ill. App. 426.

And where, by statute, a city is permitted to compel the adjacent owner on a street to maintain the sidewalk, and, in default, to maintain the same and charge the cost on the land, the city cannot set up as a defense in an action for injuries caused by a defective sidewalk that it had no money to keep the sidewalk in repair. *Belton v. Turner* (Tex. Civ. App.) 27 S. W. 831.

Nor is a person who fell into a hole negligently allowed by a city to be in a street, and received personal injuries, prevented from recovering from the city therefor by a constitutional provision that the city shall not be allowed to become indebted in any manner for any purpose to an amount exceeding in any year the income and revenue provided for such year, and by the fact that the city had reached the limit of its power to levy taxes and contract debts, since the liability of a city for allowing its streets to remain out of repair or obstructed so as to render them unsafe for use is a liability imposed by law, and does not depend on contract, and is not in the technical sense a debt. *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256.

And it is no defense to an action against a city for an injury resulting from a perpendicular declivity of 18 inches in a street that it had no money in its treasury with which it could make repairs, and that it was indebted in an amount exceeding the prescribed limit of city indebtedness. *Rice v. Des Moines*, 40 Iowa, 638.

Nor is it a defense to an action against a city for an injury resulting from permitting its streets to remain out of repair that the city had no funds on hand to expend in repairing streets, and that the regular tax levy was exhausted, where the character of the city permitted it, with the con-

sent of a majority of its inhabitants, to levy a larger tax for purposes of general utility. *Erie City v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87.

And a village will not be relieved from liability for an injury received from a defective street on the ground that it had no funds with which to repair them, on the evidence of the village superintendent that he did not have any money in his hands for that purpose, where there was no proof that there were not sufficient funds in the treasury of the village which, under the charter, could have been placed in his hands and used for that purpose if he had applied for it. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43.

So, the mere fact that, at the date of an injury caused by a defect or obstruction in a highway in a municipal corporation, the town had not actually paid over to the corporation its proportion of the highway moneys previously agreed upon for that particular year does not prevent the statutory liability for the obstruction or defect from attaching to the municipal corporation. *Hall v. Norwalk*, 65 Conn. 310, 32 Atl. 400.

Nor does the rule that a private suit cannot be sustained against commissioners of highways for the neglect to repair highways and bridges in their respective towns, unless it be shown that they had the requisite funds for that purpose in their hands or under their control, apply to a municipal corporation in its capacity of commissioners of highways having within its control the funds for repairing the highways, or being in fault for not having them; in such case its duty to repair is absolute, and it is answerable in damages to any person sustaining an injury by reason of its neglect of duty. *Hutson v. New York*, 5 Sandf. 289.

And where, in an action against a city for personal injuries caused by a water shut-off projecting above the traveled part of a sidewalk, it is sought to be shown that a failure to remedy the alleged defect was not want of reasonable care by evidence of the amount of money that could be raised by taxation, it is proper, on cross-examination of witnesses called by the city, to show that the shut-offs were taken care of by the water department, and not by the highway department, of the city, and that the income of the water department exceeded its expenses. *O'Brien v. Woburn*, 184 Mass. 598, 69 N. E. 350.

So, a municipal corporation cannot escape liability to a person injured by the want of repair of a bridge constituting part of a street, on the ground that it was unable, for want of funds, to place such bridge in repair, where, instead of closing the bridge, it kept it open to travel as a part of one of its public highways. *Carney v. Marseilles*, 136 Ill. 401, 29 Am. St. Rep. 328, 26 N. E. 491.

And a statutory provision with reference to territory annexed to a city, that for 20 L.R.A. (N.S.)

twenty years from the passage of the act only such sums as may arise from taxes assessed in the annexed territory shall be expended in maintenance, improvement, and protection thereof, unless, in the discretion of the mayor and council, it may be desired so to expend a greater sum from the general treasury of the city, does not affect the duty of the municipal authorities to keep the streets and sidewalks in the annexed territory in a safe condition for public use; and the fact that they did not have funds available for this purpose, derived from taxes assessed therein, is not a sufficient excuse for failure in this respect. *Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749.

c. Insufficient time or opportunity.

A city charged with the duty of keeping its streets reasonably in repair and free from obstruction is not relieved from its performance by difficulties which may attend it; these will rather have the effect to increase the diligence required in its performance. *Stafford v. Oskaloosa*, 64 Iowa, 251, 20 N. W. 174.

And a city which undertakes to open and grade its streets and keep them in reasonable repair for the use of the public cannot excuse its failure to do so upon the ground that its agents and servants failed to perform this duty because their other duties required their time. *Tritz v. Kansas City*, 84 Mo. 632.

So, a municipal corporation cannot be heard to urge the incompetency of its officers and servants as an excuse for its dereliction in failing to keep a sidewalk in a proper condition. *Anna v. Boren*, 77 Ill. App. 408.

Nor can it be permitted to say that it had so much to do it could not perform its whole duty. *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34.

And it cannot evade its liability because it has laid out more streets, sidewalks, and footways for the use of the public than it could keep in a reasonably safe condition. *Ibid.*

And that the street force of a city was busy in repairing other damages caused by a rain on a previous night is not a good excuse for leaving a highway in a dangerous condition caused by such rain, in the absence of anything to show reasonable diligence in the employment of a street force for the emergency, no warning having been given of the danger. *Bradford v. Anniston*, 92 Ala. 349, 25 Am. St. Rep. 60, 8 So. 683.

So, where the statute imposes the duty to repair and liability for neglect to repair streets upon a city, the city, at its peril, must do whatever is needful to protect itself against actions for injury; and it cannot defend such an action on the ground that there were but two street commissioners for the whole city, and that there was no corporate negligence because these two officers were not able to supervise the streets of the whole city so as to discover at once and

remedy such defects. *Grand Rapids v. Wyman*, 46 Mich. 516, 9 N. W. 833.

And an omission by a village to appoint overseers of highways, or to exercise the powers possessed by it to secure the labor necessary for the reparation and protection of its streets, does not excuse the performance of the duty imposed by charter to keep its streets in repair, or prevent the attachment of liability for injuries resulting from defective streets. *Weed v. Ballston Spa*, 76 N. Y. 329.

And, where a city, in cleaning crossings, created a mound of mud and earth at a crossing, which caused an injury, it cannot escape liability on the claim that the soil of which the streets of the city is composed is of such a character that accumulations of earth of a dangerous nature are liable to occur at every crossing from the ordinary use of the streets at any time when they are muddy. *Stafford v. Oskaloosa*, supra.

So, the extent of the territory covered by a city, and the number of other crossings and streets demanding care, and the number and nature of other duties devolving upon the city and claiming its care and attention, do not affect the question, in an action against the city for an injury caused by an alleged defective crossing, whether, at the time and place of the accident, it was a reasonably safe crossing. *Cincinnati v. Frazier*, 19 Ohio C. C. 604.

But evidence of the number of miles of a city's streets, the value of its taxable property, the amount of money that can be raised by taxation, and the amount appropriated and expended for highways, is competent in an action against a city for personal injuries from a water shut-off projecting above the traveled part of the sidewalk, to show that a failure to remedy the alleged defect was not want of reasonable care. *O'Brien v. Woburn*, 184 Mass. 598, 69 N. E. 350.

IV. Application of rule as to nonliability for governmental and discretionary acts.

a. Generally.

There is a manifest distinction between the political powers of a municipal corporation, by virtue of which it exercises in a subordinate degree the functions of government, and those private and civil duties of a ministerial character, which devolve upon it either as the agency by which it holds its property, or in consequence of duties imposed upon it by the sovereign; so far as it exercises the functions of a government its action is discretionary, but, where a municipal corporation has a fixed and certain duty assigned to it of a merely ministerial character, and the means are placed at its disposal sufficient for its performance, it is under obligation to perform it at the risk of being made to answer for the consequences of its neglect to do so. *Hutson v. New York*, 5 Sandf. 289; *Collier v. Ft. Smith*, 73 Ark. 447, 68 L.R.A. 237, 84 S. W. 480, 20 L.R.A. (N.S.)

And the rule has been asserted by many of the cases that, where power is conferred on a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is quasi judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc.; and for a failure to exercise this power, or an erroneous estimate of the public needs, no civil action can be maintained. *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Hines v. Lockport*, 50 N. Y. 238; *Peck v. Batavia*, 32 Barb. 634; *Clay City v. Abner*, 26 Ky. L. Rep. 602, 82 S. W. 276; *Morris v. Salt Lake City (Utah)* 101 Pac. 373; *Bates v. Rutland*, 62 Vt. 178, 9 L.R.A. 363, 22 Am. St. Rep. 95, 20 Atl. 278; *Kent v. Cheyenne*, 2 Wyo. 6; *Weightman v. Washington*, 1 Black, 39, 17 L. ed. 52.

Within this rule, a recovery can be had against a municipal corporation only where it negligently performs or negligently fails to perform a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. *Anderson v. East*, 117 Ind. 126, 2 L.R.A. 712, 10 Am. St. Rep. 35, 19 N. E. 726.

And the alleged duty must have been absolute and imperative. *Herrington v. Corning*, 51 Barb. 396; *Peck v. Batavia*, supra.

And it has been held that negligence cannot be predicated on a work done by a municipal corporation in its streets in accordance with its design or plan, even though it does not sufficiently protect the public. *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526.

Nor is a municipal corporation liable, either at common law or by statute, for injuries to a traveler on one of its highways occasioned solely by a defect in the plan by which it was constructed. *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051; *Rhinelander v. Lockport*, 38 N. Y. S. R. 567, 14 N. Y. Supp. 850; *Collett v. New York*, 51 App. Div. 394, 64 N. Y. Supp. 693.

Unless the plan was so radically deficient as to leave the highway, immediately upon its completion, in need of repairs in order to make it safe for travel. *Hoyt v. Danbury*, supra.

And, where the determination of the plan of a public work is in the nature of legislative action, there must be something besides the proper execution of the plan.—some negligence in its execution or some other distinct wrong.—before the municipality constructing the work can be held responsible as for a tort, for an injury from an excavation or obstruction in a street resulting therefrom. *Lansing v. Toolan*, 37 Mich. 152.

And a mere defect in the plan adopted and followed by a municipality in the construction of a highway is not a neglect to keep the highway in repair, within the meaning of a statute imposing upon the municipality the duty to keep it in repair. *Hoyt v. Danbury*, supra.

Nor are motives or malice of members of

a city council in refusing to repair streets material or relevant in an action against a city for damages resulting from alleged neglect to repair streets. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

The functions of a common council of a city having power to adopt suitable regulations for the prevention and removal of encroachments upon its streets are those of a local legislature within certain limits, and are not of a character to render the city responsible for the manner in which the authority is exercised. *Griffin v. New York*, 9 N. Y. 456, 61 Am. Dec. 700.

To determine whether there is a municipal responsibility for a defect or obstruction in a street, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a duty primarily resting upon the municipality. *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. R. v. 622; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095.

In the enactment of ordinances and in the appointment of officers and agents for their enforcement, a municipal corporation exercises a governmental authority, and, within its limits, acts as the representative of the state, and its officers are regarded as agents, not of the municipal corporation, but of the state; and the municipal corporation cannot be held liable for negligence in appointing and maintaining in office negligent and inefficient officers, and knowingly permitting the violation of a city ordinance requiring the streets to be kept free from obstruction by them. *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L.R.A. 789, 46 Am. St. Rep. 760, 54 N. W. 1044; *Stillwell v. New York*, 17 Jones & S. 360.

And municipal corporations may, by the exercise of their police power, prohibit such an adjustment of the modes of transportation in their streets as would endanger life; but their failure to exercise that power would not render them liable to respond in damages; and the violation of a prohibitory ordinance, and consequent injury, does not involve them in liability. *Kennedy v. Lansing*, 99 Mich. 518, 58 N. W. 470.

When the discretion of a municipal corporation to make improvements has been exercised, and the street or other improvement has been made, however, the duty of keeping it in repair so as to prevent it from becoming dangerous to the public is ministerial, and for a negligent omission to perform this duty an action lies by the party injured. *Hines v. Lockport*, 50 N. Y. 238; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131; *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894.

A municipal corporation, in the ordinary 20 L.R.A. (N.S.)

and usual care of its streets, both as to repairs and cleanliness, acts in the discharge of the special power granted by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions, when it acts as a sovereign. *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744.

And a municipal corporation is liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk which it suffers to remain after reasonable notice of its existence, though it arose in the construction or alteration of the street or sidewalk in accordance with a plan adopted by the municipal authorities. *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788; *Hand v. Brookline*, 126 Mass. 324.

In planning a public work a municipal corporation must determine for itself to what extent it will guard against possible accidents; but in the construction of its works after the plans are fixed upon, and in their management afterwards, due care must be observed, though negligence is not to be predicated of the plan itself. *Lansing v. Toolan*, 37 Mich. 152; *McDonough v. Virginia*, 6 Nev. 90; *Augusta v. Little*, 115 Ga. 124, 41 S. E. 238; *Morris v. Salt Lake City* (Utah) 101 Pac. 373.

A municipal corporation acts judicially when it selects and adopts a plan for the construction of a public improvement, such as a sewer in a street; but in carrying out such plan it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner. *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244.

The grant by the legislature to a municipal corporation of power to do the work of grading streets necessarily implies a condition that the work is to be done in a skillful and proper manner; and, if the work is not done with ordinary skill and caution, the corporation has not acted in pursuance of the power vested in it, and its act is not lawful, and it is liable for damages caused by it. *Meares v. Wilmington*, 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412.

And the liability of a municipal corporation for negligence with reference to powers and privileges which are to be exercised for the improvement of the territory within the corporate limits, and as to which the pecuniary and proprietary interests of individuals are represented, as the construction of a bridge or placing water mains in a street, is largely, if not entirely, measured by the liability of individuals for similar acts. *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857.

So, while a municipality is not to be held liable for damages resulting from mere performance of governmental functions, such exemption applies only against those toward whom the act is governmental, and not against those toward whom the city's attitude and relation is that of a proprietor; and, when a municipality is performing a

function of general state government in making highways, it becomes an owner of property in so doing, and is bound to govern its management of such property by substantially the same rules as other proprietors similarly situated. *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280.

And, while a village corporation is not liable for nonfeasance or misfeasance committed by independent corporate officers, it is liable for injuries arising from an omission to repair streets when the duty is due from it and absolutely imposed upon it as a corporation. *Hickok v. Plattsburgh*, 15 Barb. 427.

Nor is the liability of a city for a defect or obstruction in a street affected by the fact that the executive duty of enforcing the ordinances of the city by inspection of streets and reporting violations of them is vested by law in the police, which is an independent body and not subject to the authority or control of the city; since the general control of all public streets is vested in the city by law, and the right which it has to pass ordinances and appoint officers to enforce them carries with it the power to make these ordinances effectual. *Reinhard v. New York*, 2 Daly, 243.

And the rule that a municipality is not responsible for the acts of policemen, who are acting under the orders of the police department and within the scope of their police duties, based upon the principle that the police are appointed by the municipality in obedience to a statute, to perform a public service, not local or corporate, and to perform a service in which the municipality has no pecuniary interest, has no application to a service performed by the police officers without authority of law in the pecuniary interests of the corporation; in such case, when the police officer acts it is outside of his public duties, and he becomes the servant of the municipality whose pecuniary interests he serves. *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131.

So, the position has been taken by many of the late cases, and seems to be growing in favor, that the duty of a municipal corporation to keep the avenues of travel within its jurisdiction in a reasonably safe condition for the ordinary modes of use to which they are subjected is municipal or ministerial, and not governmental, in its nature. *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273.

And that it requires the removal from such ways of all dangerous defects and obstructions from whatever cause arising, when brought to the notice of the corporation; and it is no defense or excuse that a defect or obstruction was caused by a work done in conformity with a plan adopted by the municipal authorities, with reference to which its action was discretionary. *Circleville v. Sohn*, supra. 20 L.R.A. (N.S.)

And that the making, improving, and repairing of streets by a municipal corporation relates to its corporate interests only; and it is liable for its failure to perform such duty. *Goodrich v. University Place* (Neb.) 115 N. W. 538; *Wilson v. Atlanta*, 60 Ga. 473; *Sutton v. Snohomish*, supra.

And that a municipal corporation is liable for an injury caused by an unsafe public structure in a street, such as a bridge, although the defect exists in the plan adopted for its construction, if there is no reasonable necessity for the existence of the defect. *McDonald v. Duluth*, 93 Minn. 206, 100 N. W. 1102.

And that, where a street as planned or ordered by the governing board of a city is so manifestly dangerous that a court, upon the facts, can say as matter of law that it is dangerous and unsafe, the city should generally be held liable for any resulting injury to individuals. *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822; *Teager v. Flemingsburg*, 109 Ky. 746, 53 L.R.A. 791, 95 Am. St. Rep. 400, 60 S. W. 718.

Under this theory, a city has no more right to plan and create an unsafe and dangerous condition of one of its streets than it has to plan or create a common nuisance. *Gould v. Topeka*, supra; *Hinds v. Marshall*, 22 Mo. App. 208.

The principle that actionable negligence cannot be predicated on the plan itself of the work in question does not exempt a city from liability for work done in a street, if the plan leaves the street in an unsafe and dangerous condition for public use. *Hinds v. Marshall*, supra.

If, in adopting the plan of a sidewalk, there is such gross error of judgment upon the part of the municipal corporation as to show that in fact no intelligent judgment at all was ever exercised, as where there were no obstacles to be overcome which would furnish any reason or excuse for the dangerous condition complained of, the city is liable for constructing and maintaining the sidewalk on such defective plan. *Conlon v. St. Paul*, 70 Minn. 216, 72 N. W. 1073.

And that a defect in a street is a part of the original plan of construction does not relieve the city from liability for injuries to travelers, caused by it, the doctrine that municipal liability does not exist for any defect in a street being inapplicable in a state where there is an implied liability for unsafe streets. *Stone v. Seattle*, 30 Wash. 65, 67 L.R.A. 253, 70 Pac. 249; *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808.

The judgment of the common council of a city is not conclusive of the sufficiency of a street; and evidence, in an action against the city for an injury caused by an obstructed highway, that the authorities of the city, upon actual view, were satisfied with the condition of the highway, is inadmissible to excuse the municipality. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

And evidence, in an action for such an

injury, that other sidewalks were built upon the same plan of construction, is inadmissible. *Stone v. Seattle*, supra.

But, when the plan is one that many prudent men might approve, or where it would be so doubtful upon the facts whether the street as planned or ordered is dangerous or not that different minds might entertain different opinions on the subject, the benefit of the doubt should be given to the city, which should not be held liable. *Teager v. Flemingsburg*, 109 Ky. 746, 53 L.R.A. 791, 95 Am. St. Rep. 400, 60 S. W. 718; *Carroll v. Louisville*, 117 Ky. 758, 78 S. W. 1117; *Gould v. Topeka*, supra; *McDonald v. Duluth*, 93 Minn. 206, 100 N. W. 1102; *Conlon v. St. Paul*, supra.

In such case the decision of the municipality on the question cannot be reviewed by the courts. *McDonald v. Duluth* and *Conlon v. St. Paul*, supra.

Where such a work as a street or sidewalk is planned, ordered, or accepted by the governing authority of a city, and is so manifestly dangerous and unsafe that the court can say as a matter of law that it is so, the city should be held liable for a resulting injury, but not otherwise; and it should not be left to a jury to say whether the city was negligent in the plans or methods thus ordered or accepted. *Healy v. Chicago*, 131 Ill. App. 183.

But, before a municipal corporation can claim exemption from liability for a defect in a highway or street because of a fault in the plan, it must be made to appear not only that the work was done precisely in accordance with the plan, and that the injury resulted because of it, but also that, if the defect is such as to make the street dangerous, some steps have been taken so far as possible to remedy the defect, or to advise persons using the highway of the existence of the defect so that they may protect themselves against it. *Collett v. New York*, 51 App. Div. 394, 64 N. Y. Supp. 693.

b. In particular classes of cases.

Municipal authorities have been held to be the exclusive judges of the time, place, and manner in which streets shall be opened, graded and paved, and made into highways. *Hughes v. Baltimore*, Taney, 243, Fed. Cas. No. 6,844; *Clay City v. Abner*, 26 Ky. L. Rep. 602, 82 S. W. 276.

And the omission of a city to grade and improve a street at a point where an accident happened, and to place a rail on the side along an uncovered drain, or to cover it so as to make it a thoroughfare for public travel, is not of itself such negligence as will render it liable to a person injured. *Hughes v. Baltimore*, supra.

And, under a statutory provision or charter of incorporation of a village giving power to open and improve streets within the corporate limits and maintain sidewalks therein, and to require the owners or occupants of land on the streets to construct sidewalks in front of their premises, and, in case of their default, to make the improvements

and charge the expense upon the land, the exercise of the power to lay out and open streets is quasi judicial and discretionary, and no private action lies for the omission by the village to exercise the power, although it may be that the public interest requires its exercise. *Seymour v. Salamanca*, 137 N. Y. 364, 33 N. E. 304; *Cole v. Medina*, 27 Barb. 218; *McDonough v. Virginia*, 6 Nev. 90.

And, under charter power given to a municipal corporation to open, grade, and pave streets as in its judgment the public convenience may require, and to repair the same whenever needed, the power is discretionary, and the municipal authorities cannot be compelled thereunder to open, widen, or extend streets, or adopt a particular grade or any particular plan of improvement; but any particular plan that may be adopted must be a reasonable one, and its manner of execution becomes, with reference to the rights of the citizen, a mere ministerial duty, for any negligence or unskillfulness in the execution of which or the construction of the work, whereby injury is inflicted upon private right, the municipality will be held responsible. *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422, 11 Atl. 826.

So, a city may establish the grade of its streets, and may make the streets and sidewalks conform thereto, subject only to an action for damages to abutting property in particular cases. *Morris v. Salt Lake City* (Utah) 101 Pac. 373.

The rule has been asserted, however, that a city which, by grading a street, diverts water from its natural course and carries it where it had not previously run, is bound to take care of it. *Beach v. Scranton*, 5 Lack. Leg. News, 25; *Kensington v. Wood*, 10 Pa. 93, 49 Am. Dec. 582.

And, under a constitutional provision that no person's property shall be taken, damaged, or obstructed, or applied to public use, without adequate compensation being made, a city is liable for damage to private property resulting from the overflow of water caused by its raising the grade of a street above the adjoining lots and its failure to provide a sufficient sewer to carry off the water, notwithstanding its authority by its charter to grade its streets and lay sewers therein. *Cooper v. Dallas*, 83 Tex. 239, 29 Am. St. Rep. 645, 18 S. W. 565.

And if any work of public improvement in a street can be carefully done without detriment to the owner of abutting property, and it is negligently performed so as to injure the same, such owner is entitled to compensation. *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894.

And, if a municipal corporation, in the exercise of its authority to grade a street, including the sidewalk, proceeds with the work in a negligent and unskillful manner, by reason of which the property of an abutting owner is injured, he is entitled to recover damages for the injury simply because the town did not act in pursuance of its rightful authority to change the grade of

the street, but exceeded it by doing the work in a negligent and unskilful manner. *Ibid.*

And, where a municipal corporation has caused the natural flow of surplus water to be interrupted by the elevation of the grade of a street, and the water has been concentrated in a gutter and made to flow to the mouth of a sewer and thence flow back upon private property, this constitutes a nuisance, and as such it is the duty of the municipal corporation to remove it, and for the neglect of such duty it is liable to the private owner. *Hitchins Bros. v. Frostburg, supra.*

And a complaint alleging that the work of grading a street was not carefully done, and that consequently the property of an abutting owner was injured by obstructing his right of ingress and egress is sufficient as against a demurrer. *Jones v. Henderson, supra.*

So, when the work of grading a street and constructing gutters, culverts, and drains is left in such an unfinished condition as to cause water to flow upon and injure private property, the municipal corporation is liable for the injury caused. *Beach v. Scranton, supra.*

And, where the outlet of a stream of water passed under a bridge, and the bridge was removed and the street filled up, and two small iron pipes were used for the purpose of carrying the water of the stream under the street, and a wooden grating or crib placed above the entrance of the pipes was carelessly and negligently permitted to be obstructed with brush, dirt, and debris so as to clog up the pipes and dam back the water upon the premises of an adjoining owner, a case for a jury appears on the question of negligence in the manner in which the pipes are cared for. *Rife v. Middletown, 32 Pa. Super. Ct. 68.*

And where, in such case, there was evidence that the damage took place at the time of an unusually high flood, the rule of law is that, although an act of God entails no injury upon anyone in contemplation of law, yet, if man contributes toward it, it is the man alone that is responsible. *Ibid.*

So, a village the trustees of which are empowered to repair and maintain its streets, and who in so doing construct ditches along a highway, and a tile drain extending some 8 feet over and upon the premises of an abutting landowner, through which the surface water is collected and discharged upon such premises, is liable for the damages sustained if it suffers the drain to continue in that condition after notice; and knowledge of its trustees will be its knowledge. *Whipple v. Fair Haven, 63 Vt. 221, 21 Atl. 533.*

And, where a city graded a street, and on complaint of an abutting owner that a necessary embankment would extend over onto her property, filled in the street to only about one half its width, leaving a hole 150 to 200 feet long and about 15 feet wide, and provided no gutter to carry the water around this hole, and the water flowed into it and so on over to the abutting owner's property, for any changes to the property necessitated by 20 L.R.A. (N.S.)

the plan of the street as so made the remedy was by proceedings under the statute for compensation, but as to the injuries caused by water flowing onto the premises by reason of the condition in which the street was left, the city was liable in trespass for damages. *Beach v. Scranton, 5 Lack. Leg. News, 25.*

A municipal corporation is not liable for injury from surface water, however, which results to property abutting on a street by reason of its being below grade, where this occurs without negligence upon the part of the municipality. *Ibid.*

And, if a lot abutting on a street is left too low by reason of grading the street, which is carefully done, the owner must submit to the inconvenience under the elementary principle that individual interest must give way to the public convenience, and cannot recover damages for the injury. *Jones v. Henderson, supra.*

Nor is the grade of a street established with a view to enable adjoining proprietors to turn surface water upon it, and city authorities may rightfully prevent surface water from escaping to the highway from the land of an adjoining owner without being liable to such owner for injury to his property by surface water. *Keith v. Brockton, 136 Mass. 119.*

And to hold a city liable for grading a street by a fill having insufficient culverts, and thereby obstructing the flow of surface water and causing it to be discharged on abutting property, it is necessary to show that the work was directed by an ordinance of the city. *Gleason v. Kirksville (Mo. App.) 118 S. W. 120.*

And a city not originally responsible for the erection of a nuisance consisting of a fill in a street with insufficient culverts, thereby obstructing the flow of surface water and discharging it over abutting property, is not liable to the owner of such adjoining property for its continuance in the absence of notice or request to abate it. *Ibid.*

So, whether the whole or a portion of a street in a city shall be prepared and then opened to public use is a governmental question, action upon which imposes no liability upon the city. *Ruppenthal v. St. Louis, 190 Mo. 213, 88 S. W. 612.*

Nor is error in judgment on the part of municipal authorities in establishing the grade of a street negligence. *Betts v. Gloversville, 29 N. Y. S. R. 331, 8 N. Y. Supp. 795; Augusta v. Little, 115 Ga. 124, 41 S. E. 238; Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168.*

And a city cannot be held liable for a mistake in judgment in the capacity of a gutter, whereby it overflows and causes damage to an abutting property owner. *Beach v. Scranton, supra.*

And the principle that an action will not lie at the instance of an individual having suffered a special damage, from neglect of a corporate body in the performance of a public duty, applies where city authorities authorized water commissioners to build a sewer in a street, and, in performing the

work, holes were left to permit men to go into the sewer when necessary, which holes were coped with stone and one of them was raised above the surface of a street in consequence of the neglect of the city to fill the street to its proper grade, and injury resulted to a traveler from the impediment. *Pray v. Jersey City*, 32 N. J. L. 394.

But when a city, in grading a street, leaves a high and steep embankment in the street without railing, light, or other guard or warning to prevent travelers from falling off such embankment, it may be adjudged guilty of negligence, although the width of the cut and the height of the embankment were established by the council, and although the work of grading was done in a proper and careful manner, since in such case the negligence consists, not in the plan of the work or the manner in which it was done, but in the failure to provide suitable protection against accident after the work of grading had been finished. *Wyandotte v. Gibson*, 25 Kan. 236.

Though if a city should order that a high and narrow embankment with precipitous sides should be made in a public street, intending that travel should pass over it, and should say nothing concerning railings, guards, or other barriers, and nothing concerning street lamps or other lights to prevent persons from falling or driving off the embankment in the nighttime and thereby being injured, it should not be held that the city had planned or ordered that no such railings, guards, barriers, lamps, or lights should be used, but it should be held that the city had made no order with reference thereto; and, if no such railings, barriers, guards, lamps, or lights were used, and thereby injury resulted, the city should be held liable. *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822.

Nor can a municipality be held liable solely for a failure to construct a walk or a part thereof. *Shietart v. Detroit*, 108 Mich. 309, 66 N. W. 221.

And a city which is the successor of a borough in which there was a defect in a sidewalk is not in fault in allowing the sidewalk to remain in the same condition, provided it is free from negligence in respect to its repair. *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051.

So, whether, at the outer side of an alley crossing in a city, there shall be a perpendicular step or a gradual slope from the sidewalk down to the inclined plane below, is ordinarily a question for the city officials, and not for the courts. *Conlon v. St. Paul*, 70 Minn. 216, 72 N. W. 1073.

Nor is the authority of a municipal corporation to determine how a sidewalk shall be built abridged because it happens to own the land upon which the walk is laid. *Hoyt v. Danbury*, supra.

But, where a traveler slipped on an ice-coated slope of an alley approach and was injured, evidence, in an action against the city for the injury, that the city had provided in specifications for grading and paving the alleys and streets, including the

street in question, that approaches should be graded as directed by the city engineer, does not show the adoption of a plan of a competent engineer so as to relieve the city of responsibility for a dangerous method of construction. *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523.

And a municipal corporation is liable for a wrongful act committed by its street commissioner while performing his duties in improving a street, the work being a ministerial function and relating to corporate interests only. *Barree v. Cape Girardeau*, 132 Mo. App. 182, 112 S. W. 724.

And, where a plank walk which had been used by the public for eight years became out of repair and in a condition liable to injure a foot traveler on the street, it was the ministerial duty of the city to abate the nuisance or repair the walk after notice; and no question arises in an action against it for an injury caused thereby, of a failure of the corporation to exercise its discretionary or quasi judicial powers. *Lehn v. Brooklyn*, 46 N. Y. S. R. 548, 19 N. Y. Supp. 668, affirmed in 143 N. Y. 674, 39 N. E. 21.

So, the duty of a municipal corporation to adopt a system of drainage rests with the legislature; and it is not *prima facie* responsible for an injury caused by a flow of rain water from the streets upon adjacent lands. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

And whether or not the plain of a sewer in a street is such as to guard the public sufficient against accidents is one for the municipal authorities, and cannot be referred to the jury. *Toolan v. Lansing*, 38 Mich. 315.

But construction and regulation of sewers built upon the adoption of a general plan are ministerial duties, and the municipal corporation is responsible for damages caused by the careless or unskilful manner of performing such work. *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. W. 244.

And the liability of a city for damages resulting from the negligent construction of a grating in a street, constituting a part of its drainage and sewer system, is not affected or taken away by the fact that the system was authorized by its charter. *Dallas v. Webb*, 22 Tex. Civ. App. 48, 54 S. W. 398.

And, while appliances for drainage are necessary in a city, and the manner in which drainage may be accomplished is peculiarly within the discretion of the municipality, and it cannot be called to account by the courts respecting its errors of judgment in the plan of a public improvement, if, after the construction of an improvement according to a plan and specifications adopted by the municipal authorities, notice should be brought home to the municipality that the street was not reasonably safe for use under ordinary circumstances by reason of a faulty construction of the improvement, it would become a ministerial duty of the corporation to remove the defect, and a failure or refusal to do so after such notice would make it liable to respond in damages for

an injury resulting from the defect. *Dayton v. Taylor*, 62 Ohio St. 11, 56 N. E. 480.

So, the right, duty, and power of a city to erect safety gates at the intersection of a street with a railroad carries with it a discretion to determine where such gates shall be erected and the character of the gates to be erected; and this discretion is not subject to judicial review or control unless it is so exercised as to amount to a practical obstruction of the street for street purposes, or to a virtual withdrawal of the street from public use. *Seibert v. Missouri P. R. Co.* 188 Mo. 657, 70 L.R.A. 72, 87 S. W. 995.

And, though a city has power to compel a railroad company whose railroad crosses a street to erect, maintain, and use such proper and suitable safeguards as seems best, the power is legislative or governmental,—one to be exercised or not, in its discretion; and for the nonexercise of such power the city cannot be held liable in damages for an injury resulting from the absence of such safeguards. *Kistner v. Indianapolis*, 100 Ind. 210.

So, where a railroad company had a statutory right to maintain a turntable in a street, and the city was called upon to exercise a discretion of a judicial nature as to the place where the obstruction should be, the exercise of such discretion cannot be reviewed by the court; and the city cannot be held liable to a person who dismounted from a car upon a sidewalk and was struck by it when it was turned, before she could get out of the way. *Fitch v. New York*, 23 Jones & S. 494, 2 N. Y. Supp. 700, affirmed in 119 N. Y. 608, 23 N. E. 1143.

And, where municipal authorities adopted a plan of construction of a railroad crossing by which the space between the tracks intersecting the street and those between the rails was to be filled by placing parallel therewith iron or steel rails about 3 inches apart, between which was to be placed cement or some concrete substance; and this plan was followed by the railroad company; and a traveler, while riding horseback at night at a rapid pace, was thrown by his horse slipping on the crossing, and sustained fatal injuries; and there was testimony in the action for the injury that such a crossing was more durable than a wooden one, and less liable to get out of repair, but also that horses were more liable to slip thereon,—no recovery can be had against the city for the injury. *Carroll v. Louisville*, 117 Ky. 758, 78 S. W. 1117.

So, to prohibit bicycle riding on sidewalks is legislative and discretionary on the part of municipal corporations; and failure to exercise the right creates no liability for an injury caused by a bicycle on a sidewalk. *Custer v. New Philadelphia*, 20 Ohio C. C. 177; *Tarbutton v. Tennille*, 110 Ga. 90, 35 S. E. 282; *Howard v. Brooklyn*, 30 App. Div. 217, 51 N. Y. Supp. 1058; *Rogers v. Binghamton*, 101 App. Div. 352, 92 N. Y. Supp. 179, affirmed in 186 N. Y. 595, 79 N. E. 1115.

And the same rule applies to failure to enact an ordinance prohibiting horse racing in the streets, and to failure to enforce such 20 L.R.A. (N.S.)

an ordinance after it is enacted. *Marth v. Kingfisher (Okla.)* 18 L.R.A. (N.S.) 1238, 98 Pac. 436.

And the failure of a city to enforce a police regulation making it unlawful to cast nails and other refuse in public alleys, whereby persons might be injured, and requiring red lights to be placed at night on loose material in alleys, does not impose on the city liability for injuries to a boy falling over a pile of boards with projecting nails in them, which was left in a public alley without a red light thereon. *Mehan v. St. Louis (Mo.)* 116 S. W. 514.

So, where the setting of a lamp-post by a gas company having a contract with a municipal corporation for lighting its streets was in the prosecution of a public improvement which the municipality had power to authorize, the manner of the exercise of the power is committed to municipal discretion; and negligence on the part of the city cannot be predicated of the manner in which the lamp-post was set. *Van Wie v. Mt. Vernon*, 26 App. Div. 330, 49 N. Y. Supp. 779.

And a statute providing a penalty of a specified amount for setting off fireworks in a city without the governor's special license applied only to individuals, and not to a city acting in its corporate capacity, so as to make it an unlawful act of a city to contract for firing of such fireworks on a public bridge of the city. *Heidenwag v. Philadelphia*, 168 Pa. 72, 31 Atl. 1063.

Where a village maintains a water system for the double purpose of supplying the inhabitants with water for private purposes and for providing against fire, however, the village is liable for any negligence in its construction and maintenance as to that portion of the system supplying individuals for hire. *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. 735.

But to make available the exception to the general rule that a municipal corporation is not liable for negligence in the exercise of its governmental power which exists when it attempts to perform a service for both public and private benefit, authority to perform the service for private benefit must be shown. *Palestine v. Siler*, 225 Ill. 630, 8 L.R.A. (N.S.) 205, 80 N. E. 345.

Municipal liability for a defective plan of street construction as distinguished from other defects is considered in note in *Stone v. Seattle*, 67 L.R.A. 253.

V. Delegation of duty.

a. Right and effect of generally.

Where a municipal corporation has the duty cast upon it, either by express statute, or implication of law, to keep its streets in a reasonably safe condition for public travel, that duty cannot be delegated to another in whatever form it may be attempted, so as to free the corporation from liability for any injury occurring to another on account of a failure to observe such duty and keep the streets in proper condition free from obstruction. *Sterling v. Schiffmacher*, 47 Ill.

App. 141; Springfield v. Scheevers, 21 Ill. App. 203; Anna v. Boren, 77 Ill. App. 408; Louisville City R. Co. v. Louisville, 8 Bush, 415; Birmingham v. McCary, 84 Ala. 469, 4 So. 630; Jacksonville v. Drew, 19 Fla. 106, 45 Am. Rep. 5; Betz v. Liming, 46 La. Ann. 1113, 49 Am. St. Rep. 344, 15 So. 385; Baker v. Grand Rapids, 111 Mich. 447, 69 N. W. 740; Blake v. St. Louis, 40 Mo. 569; Welsh v. St. Louis, 73 Mo. 71; Russell v. Columbia, 74 Mo. 480, 41 Am. Rep. 325; Davis v. Omaha, 47 Neb. 836, 66 N. W. 859; Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770; Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; Scanlon v. Watertown, 14 App. Div. 1, 43 N. Y. Supp. 618; Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437; McAllister v. Albany, 18 Or. 426, 23 Pac. 845; Williams v. Tripp, 11 R. I. 447; Watson v. Tripp, 11 R. I. 98, 23 Am. Rep. 420; Nashville v. Brown, 9 Heisk. 1, 24 Am. Rep. 289; Patterson v. Austin (Tex. Civ. App.) 29 S. W. 1139; Morris v. Salt Lake City (Utah) 101 Pac. 373; McCoull v. Manchester, 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379; Drake v. Seattle, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231.

Unless authorized by statute. Watson v. Tripp, *supra*.

The legal basis of liability of a municipal corporation for an injury sustained by the negligence of an independent contractor constructing a public improvement for such corporation is not based upon the doctrine of *respondent superior*, but upon the doctrine that a municipal corporation charged by law with the performance of a public duty, when sued for an injury, and for its failure to perform such duty, is estopped from alleging that it had delegated the performance of such duty to another, or had, by contract, exempted itself from liability for such injury resulting from its failure to perform such duty. Beatrice v. Reid, *supra*.

Nor is the liability of a municipal corporation for failure to keep its streets in a reasonably safe condition affected by the fact that a company or individual had undertaken to keep the same in a reasonably safe condition, or the portion thereof in question, with respect to the injury complained of. Chicago v. Kubler, 133 Ill. App. 520.

And a city cannot escape responsibility for neglect to repair a sidewalk so as to make it reasonably safe for use by persons passing along it exercising ordinary care, on the plea that it is expressly made the duty of the department of public works to have general supervision over it and keep it in repair, the cost of the repairing to be paid out of the general fund of the city. Evansville v. Frazer, 24 Ind. App. 628, 56 N. E. 729.

b. Imposition on railway in street.

Where a street is permitted to remain open for travel, the duty of the city to take proper precautions to make it safe for travelers extends to the portions of the street occupied by the tracks of a street railway, 20 L.R.A. (N.S.)

though the railway company is bound by statute to keep the surface of the portions of the street occupied by its tracks in repair. Hyde v. Boston, 186 Mass. 115, 71 N. E. 118; Elliot v. Concord, 27 N. H. 204; Binner v. New York, 80 App. Div. 438, 81 N. Y. Supp. 226; Morristown v. Moyer, 67 Pa. 355; Watson v. Tripp, 11 R. I. 98, 23 Am. Rep. 420; Galveston, H. & S. A. R. Co. v. White (Tex. Civ. App.) 32 S. W. 186.

A statutory provision making a railway corporation using a street answerable for obstructions maintained by it therein does not relieve the municipal corporation from liability for an injury to a citizen by an obstruction maintained by the railway; and a citizen injured by such obstruction may maintain an action against either the railway or the municipality, at his election. Zanesville v. Fannan, 53 Ohio St. 605, 53 Am. St. Rep. 664, 42 N. E. 703; Hawks v. Northampton, 116 Mass. 420; Philadelphia v. Weller, 4 Brewst. (Pa.) 24; Warren Bros. Co. v. Taylor (R. I.) 69 Atl. 303; Watson v. Tripp and Galveston, H. & S. A. R. Co. v. White, *supra*.

A municipal corporation is, in the first instance, responsible to persons who sustain damage by a defect in a road, though the defect is caused by the construction of a railroad in it, except where the defect in the highway is the necessary result of the building of a railroad. Willey v. Portsmouth, 35 N. H. 303.

But, where a railroad company occupying the streets of a city is bound by charter to restore all streets through which it lays its tracks to a good condition, and maintain them in repair, and is made liable for loss or damage occurring through its negligence in restoring or repairing such streets, and liable over to the city for all money which the latter is compelled to pay by reason of the nonrepair of such streets, when an injury is caused by work done upon a railway track in a street by the railroad company the liability of the railroad company is a matter which may be considered by the jury in an action for an injury against the city, in determining whether or not the city had been guilty of any culpable neglect or want of reasonable care. Watson v. Tripp, *supra*.

Nor is a city under duty to keep its streets in a safe condition absolved from its responsibility therefor by a contract whereby a street railway undertakes to keep in order the streets traversed by its railway. Aiken v. Philadelphia, 9 Pa. Super. Ct. 502.

And, although a municipal corporation, by virtue of the right vested in it of control over its streets, can legitimately grant to a railroad company the privilege to build its tracks and run its cars on the same, imposing upon it the burden of keeping them from curb to curb or rail to rail in good order and condition so as to prevent injury, as it is itself bound to do, the concession of the grant and the imposition and acceptance of the burden do not relieve the corporation from liability should the railroad company fail to comply with its obligations, and by

its negligence and default inflict injury to one using due care and precaution and not guilty of contributory neglect. *Cline v. Crescent City R. Co.* 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122.

And a city is not relieved from liability to a person injured in one of its streets by the fact that by ordinance it authorized a railroad company to lay a track in the street, and the company left open a ditch between its tracks, which was left unlighted at night and into which the person injured fell, since the city's supervision of and responsibility for the street continued subject only to the use by the company as granted. *Steubenville v. McGill*, 41 Ohio St. 235.

Nor can the primary duty of a city, with respect both to the general public and occupants of premises along the streets, of keeping the streets free from permanent or long-continued nuisances, be evaded by urging the right and duty of a railway company to bridge its line at street crossings and maintain the bridges and crossings in proper condition. *Bentley v. Atlanta*, 92 Ga. 624, 18 S. E. 1013.

And, where a railroad company was authorized by the legislature to lay its tracks in the streets of a city with the permission of the city, and was charged with the duty of restoring the streets, and was granted permission by the city to build a track across a certain street, and, in doing so, it raised an embankment in it from which an injury resulted, the liability of the city for the injury cannot be avoided on the theory that, the railroad company being authorized by law to do what it did, and being charged with the duty of restoring the street, the control of the city over the street was suspended, and its duty in respect thereto was superseded to a corresponding degree. *Wilson v. Watertown*, 3 Hun, 508, 5 Thomp. & C. 579.

It has been held, however, that a city, in granting a franchise pursuant to authority received from the state to a railroad company to use its streets for the necessary plant for a street railroad, exercises a public function from which it derives no benefit; and it is not liable if the railroad company, in laying its tracks and erecting its plant, negligently obstructs the gutter so as to overflow adjoining lands and injure goods in the basement of a building thereon. *Tatman v. Benton Harbor*, 115 Mich. 695, 74 N. W. 187.

And the Massachusetts statute which gives a right to recover for injuries caused by defects or obstructions in streets limits it to cases in which the dangerous condition might have been remedied by reasonable care and diligence on the part of the county, city, town, or person by law obliged to repair the same; and, when railroad corporations construct their tracks across highways, and are required by law to keep that part of the highway in repair, the city or town is left with no duty to keep that part of the way in repair, and is not liable for an accident that happens at such a place. *Cam-* 20 L.R.A. (N.S.)

mett v. Haverhill, 197 Mass. 76, 83 N. E. 331.

c. Imposition on abutting owner.

The duty to use ordinary care to keep city sidewalks in repair and free from holes or obstructions is ordinarily on the city, and not on the abutting owner. *San Antonio v. Wildenstein* (Tex. Civ. App.) 109 S. W. 231.

And a statutory or charter provision making it the duty of real-estate owners and occupants to keep sidewalks in repair, and making them liable for injuries caused by defective sidewalks, does not relieve the city from the duty to keep sidewalks in repair and fit for use, and the consequent responsibility. *Lincoln v. O'Brien*, 56 Neb. 761, 77 N. W. 76; *Lincoln v. Pirner*, 59 Neb. 634, 81 N. W. 846; *Betz v. Limingi*, 46 La. Ann. 1113, 49 Am. St. Rep. 344, 15 So. 385; *Dallas v. Myers* (Tex. Civ. App.) 55 S. W. 742; *Webster v. Beaver Dam*, 84 Fed. 280.

And this is so though the municipality is required to give the property owner notice to make the improvement, and it is itself, only authorized to make it if the property owner fails to do so within the time fixed by the council. *Dallas v. Jones* (Tex. Civ. App.) 54 S. W. 606.

Nor does a charter provision that the cost of constructing and keeping sidewalks in repair shall be borne by the owners of lots fronting on such sidewalks relieve the city of its duty to construct, maintain, and keep sidewalks in repair, or relieve it from liability for injuries by defective sidewalks. *Dallas v. Meyers*, supra; *Lord v. Mobile*, 113 Ala. 360, 21 So. 366; *Manchester v. Hartford*, 30 Conn. 118; *Niven v. Rochester*, 76 N. Y. 619; *Russell v. Canastota*, 98 N. Y. 496; *Wallace v. New York*, 18 How. Pr. 169; *Fife v. Oshkosh*, 89 Wis. 540, 62 N. W. 541; *Cuthbert v. Appleton*, 22 Wis. 642.

In the absence of proof that the city had made any requisition upon the lot owner, or taken any steps whatever to repair the sidewalk in question. *Niven v. Rochester* and *Russell v. Canastota*, supra.

And in such case it cannot be said as matter of law that the mere service of a notice upon an abutting owner or occupant to repair a sidewalk released the village from any further responsibilities for injuries resulting from the unsafe condition of the street or sidewalk. It was still the duty of the village to keep them in such condition that they might be safely traveled, and, after notice of existing danger, to cause immediate reparation, or, if delay was necessary, then by some guard or barrier to close it against the public so that no harm should happen from the repair being delayed. *Russell v. Canastota*, supra.

For a neglect of duty of a citizen to keep the walks in front of his premises free from obstruction, the city may impose such a penalty as would be calculated to secure its performance if it has power to impose such a burden; but it cannot create a liability to damages for a civil action by a private individual against one who failed to discharge

the city's duty in that behalf. *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242.

And, where an ordinance provides that certain improvements shall be made by abutting property owners, the performance of the work by the city upon the failure of the property owner to do it does not make the city the agent of the property holder; and the liability for an injury resulting therefrom is as great as if the city had undertaken it in the first place without reference to any duty of the property holder. *Lancaster v. Walter*, 25 Ky. L. Rep. 2189, 80 S. W. 189.

And an ordinance requiring repairs of a sidewalk and notice to the owner constitute an admission of a necessity for the work, and, upon lapse of the time provided under the notice, on default of the owner, the duty to repair becomes imperative on the municipality, and it is liable for injuries happening from neglect to repair. *Haskell v. Penn Yan*, 5 Lans. 43.

Nor does permission granted by a municipal corporation to a private citizen to build a sidewalk absolve it from the duty of seeing that the same is kept in proper repair. *Flora v. Naney*, 31 Ill. App. 493, affirmed in 136 Ill. 45, 26 N. E. 645; *Griider v. Jefferson Realty Co. (Ky.)* 116 S. W. 691; *Lambert v. Pembroke*, 66 N. H. 280, 23 Atl. 81.

And a municipal corporation is not relieved from liability for injuries resulting from defects in a sidewalk, provided such defects are known to the municipal authorities, or could have been known by the exercise of ordinary care, in time to have been repaired by them before the accident, by the fact that the sidewalk was constructed by the owner of abutting property, and the authorities of the municipality had never required property owners to build sidewalks. *Bromley v. Bodkin*, 25 Ky. L. Rep. 1245, 77 S. W. 696.

So, a charter provision of a municipal corporation giving it power over its streets, and power to establish the width and grade of the sidewalks and determine the kind of material of which they shall be constructed, and to cause them to be constructed and repaired by abutting lot owners at their own expense, and, in case of their failure to construct and repair them as desired, to order the same to be done, and cause the expense thereof to be assessed upon and enforced against abutting lots, imposes upon the municipality the duty of keeping the sidewalks in repair, and liability for neglect to do so. *Young v. Waterville*, 39 Minn. 196, 39 N. W. 97.

And the power conferred upon a municipal corporation by a charter provision giving its warden and burgesses control over sidewalks, cross walks, and footpaths in the street, but not of the construction and repair of highways, and empowering them to order landowners abutting upon the streets to make and repair such walks along their respective fronts, is exclusive, and carries 20 L.R.A. (N.S.)

with it the commensurate duty of maintenance and repair. *Hillyer v. Winsted*, 77 Conn. 304, 59 Atl. 40.

So, while municipal authorities may justly and lawfully require citizens to keep sidewalks in front of their premises free from snow and ice, the duty of the municipality remains, and it must see to it that its ordinances on the subject are obeyed; but it is entitled to a reasonable time within which to perform the duty, and it is not guilty of contributory negligence if, observing that the work is being generally done, it awaits for a reasonable period the action of the citizens. *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642.

Nor can the liability of a city for injuries resulting from an accumulation of ice and snow upon a sidewalk be removed by a mere notice thereof to the owner of abutting property. *Wyman v. Philadelphia*, 175 Pa. 117, 34 Atl. 621.

So, charter provisions authorizing assessments for local improvements, including repairs to highways, do not relieve the city from the duty of keeping its highways in repair so as to prevent their becoming dangerous to the public. *Hines v. Lockport*, 50 N. Y. 238.

Where the duty to build sidewalks rests upon the owner or occupant of adjacent premises, however, and the performance of it is in no sense the act of the city,—the city cannot be held liable for injuries resulting from the plan of constructing the walk, as where a step was left at one end of it. *Marquette v. Cleary*, 37 Mich. 296.

Duties of a municipal corporation to maintain its streets free from defects and obstructions, once imposed, and liabilities incurred by accepting and acting under an act of incorporation, cannot be divested unless the right to alter or amend is expressly reserved, or secured by the Constitution: and after such acceptance a statute making the abutting landowner solely responsible for damages resulting to persons or property from defects in or obstructions on streets or footways, unless caused by the city or its agents, is unconstitutional and void. *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451.

VI. Cause of obstruction or defect as affecting liability.

a. Generally.

Municipal corporations are bound to keep the public traveled streets and the sidewalks in a reasonably safe condition without regard to who constructed them, or whether the city had ordered their construction. *Hill v. Sedalia*, 64 Mo. App. 494.

And one which carelessly and negligently permits defects to exist in one of its sidewalks after notice thereof, or for so long a time that notice is presumed, becomes liable if a person is injured thereby without fault or negligence on his part, no matter how

the defect was caused. *Kansas City v. Bradbury*, 45 Kan. 381, 23 Am. St. Rep. 731, 25 Pac. 889; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Munger v. Marshalltown*, 59 Iowa, 763, 13 N. W. 642; *Pace v. Webster City*, 138 Iowa, 107, 115 N. W. 888.

The liability of a city for an injury resulting from an obstruction in a street is not affected by the question of the way or means by which the obstruction got there. *Waltemeyer v. Kansas City*, 71 Mo. App. 354; *McCarroll v. Kansas City*, 64 Mo. App. 283.

And if dangerous excavations are made in a sidewalk, no matter by whom, the municipality must fill them up or cause them to be filled up; and if, in constructing a building, it is necessary to make excavations in a pavement, the municipality must, if they are dangerous, guard them, or cause the owner of the building, or his contractor, to guard them, and light them in the nighttime, or otherwise warn travelers against them. *Walker v. Springfield*, 3 Ohio Dec. Reprint, 567.

And the reasonable presumption is that, when an excavation several feet deep was made in a street to receive a curb wall within the limits of a city, it is done by the proper authority of the city; and, when the city is sued for an injury caused thereby, it cannot escape liability because of the absence of proof that the work was ordered by the common council or other authority of the city. *Chicago v. Johnson*, 53 Ill. 91.

Nor is there any distinction on the question of the liability of a town for injuries resulting from defects or obstructions produced by natural causes and one produced by the agency of man, either with or without his fault. *Palmer v. Portsmouth*, 43 N. H. 265; *Fry v. Mercer*, 4 Pa. Co. Ct. 604.

And the essential fact in an action for an injury sustained by a person stepping through an aperture in a sidewalk where the boards had apparently been removed therefrom is that the boards were missing; and it is immaterial whether they had fallen through the stringers upon which the sidewalk was laid, or had been broken and fallen to the ground, or had been removed. *Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887.

And the fact that a sidewalk was injured by teams and wagons does not relieve the municipality from its duty. *Munger v. Marshalltown*, supra.

Nor can a town escape liability for an injury from an obstruction or excavation in a street upon the ground that the street was put in that condition by the road supervisor. *Clark v. Epworth*, 56 Iowa, 462, 9 N. W. 359.

So, a municipal corporation is under as great an obligation to remedy a defect or remove an obstruction placed in a street by nature as one placed there by artificial means. *Lamb v. Cedar Rapids*, 108 Iowa, 629, 79 N. W. 366.

And the liability of a city for an injury 20 L.R.A. (N.S.)

resulting from an obstruction or defect in a street is not affected by the fact that the defect which made the street unsafe was caused by surface water. *Murphy v. Indianapolis*, 83 Ind. 76.

So, the duty of a municipal corporation having reasonable time and opportunity to at all times keep a cross walk in such state of repair as to be reasonably safe and convenient for public travel is just as imperative in the case of defects originating in individual misconduct as in the case of defects resulting from wear or decay. *Dotton v. Albion*, 50 Mich. 129, 15 N. W. 46.

And, under a statute declaring that highways legally established shall be open and kept in repair so as to be safe and convenient for travelers, making the city liable to whoever receives any bodily injury or suffers any damage through any defect or want of repair in any highway, it is immaterial whether such defect arose from negligence on the part of a town officer, or from causes which could not be controlled by the exercise of ordinary care and diligence on its part. *Moriarty v. Lewiston*, 98 Me. 482, 57 Atl. 790.

Municipal corporations are only under duty to provide roads suitable for ordinary travel conducted in an ordinary manner, and such safeguards as may be needed to meet the risks of such travel, however; and they are not bound to provide against extraordinary incidents or accidents of travel. *Herr v. Lebanon*, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 603, 24 Atl. 207; *Schrunk v. St. Joseph*, 120 Wis. 233, 97 N. W. 946.

And a highway that is in suitable condition for ordinary travel conducted in an ordinary manner does not become defective because some extraordinary, unforeseen condition arises, in consequence of which it is momentarily too rough or too narrow to meet the exigencies of the situation; whatever is so much out of the ordinary course as not to be naturally foreseen as a probable result of the condition of the highway the municipality is not bound to provide against, and its neglect to make such provision can be neither the proximate, nor the concurrent, cause of an injury received in consequence of such extraordinary event or accident. *Herr v. Lebanon*, supra.

And municipal corporations are not liable for any injury caused by defects or obstructions in their streets resulting from the act of God, such as washouts by sudden storms, provided they have not had reasonable time to repair. *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451.

But, though a defect and obstruction in a street was the result of a washout by a sudden storm, if, after a reasonable time and notice, the municipality failed or neglected to repair the same, it is liable for an injury resulting therefrom. *Ibid*.

b. By act of city itself.

If the city, by its direct act or authority, causes or permits a street to be obstructed, or to get out of repair, it is liable for re-

sulting injuries. *Springfield v. Scheevers*, 21 Ill. App. 203; *Kankakee v. Linden*, 38 Ill. App. 657; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Davenport v. Ruckman*, 37 N. Y. 568; *Milwaukee v. Davis*, 6 Wis. 377.

It has no more right generally than a natural person to create and maintain a nuisance in a street or elsewhere, and is liable for injuries occasioned thereby in any case when a private person would be liable under like circumstances. *Harper v. Milwaukee*, 30 Wis. 365.

And it is immaterial whether a city charged with the duty of keeping its streets in a good conditions does, or neglects to, discharge this duty through one officer or another. *Masters v. Troy*, 50 Hun, 485, 3 N. Y. Supp. 450.

The general rule is that a city has no power to place, or to cause or permit anyone to place, a nuisance or obstruction upon a public highway which renders the highway dangerous to travelers thereon. *Seibert v. Missouri P. R. Co.* 188 Mo. 657, 70 L.R.A. 72, 87 S. W. 995.

And the city has no right so to obstruct a street as to deprive the adjacent property holders of its use as such. *Barrows v. Sycamore*, 150 Ill. 588, 25 L.R.A. 535, 41 Am. St. Rep. 400, 37 N. E. 1096.

So, a city the streets or sidewalks of which are out of repair through the neglect of the corporation is liable to an action for such neglect at the suit of a person injured, whether the injury arises from some act done by the corporation, or from an omission of duty on its part. *Davenport v. Ruckman*, supra.

And, if a municipal corporation, instead of leaving the repair of its streets to the public officers designated by statute, undertakes to make the repairs by its own agents, it is liable for injuries caused by their negligence in operating a stone crusher to prepare material to be used in constructing a new street. *Butman v. Newton*, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401.

Nor does omission of a municipal corporation to make ordinances or by-laws in reference to repairing its streets relieve it from liability for an injury resulting from an obstruction therein. *Nelson v. Canisteo*, 100 N. Y. 89, 2 N. E. 473.

And, if a sidewalk and sewer of a city were dangerous to the traveling public, and remained so, the municipal corporation was bound to change and repair them; and, if it neglected to do so, it is answerable in damages to persons injured by such neglect. *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90.

Municipal authorities possessing general control over the streets, however, have the power to put and may authorize and render lawful obstructions and erections therein for a public purpose, which otherwise would be deemed nuisances, on the ground that such erections or structures merely constitute putting the street to a new and improved use as demanded and required by the necessities of the times and modern con-

veniences and appliances. *Savage v. Salem*, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

And the rule, which requires municipal corporations to exercise a reasonable degree of care to keep their walks and streets unobstructed and in such condition that travelers may pass over them without incurring risk of personal injury, does not absolutely inhibit such corporation from permitting certain portions of its walks and streets to be devoted to such purposes as are necessary and useful to the occupants of abutting premises, provided an ample and unobstructed passageway is left for the purposes of the public. *Tubensing v. Buffalo*, 51 App. Div. 14, 64 N. Y. Supp. 399.

So, a city has the right to determine which part of a nominal highway shall be devoted to the various purposes of passage, and to set apart various parts of the space to sidewalks, gutters, streets, and other suitable uses, and upon this subject municipal discretion must prevail; and the plan adopted is beyond judicial review, unless some distinct legal duty has been imposed and violated. *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313.

And, in determining what improvements are necessary for the purpose of keeping streets in condition for public use, the municipality acts judicially, and its failure to act does not render it liable in damages; but, where a municipality determines the necessity and commands the building of a street or sidewalk, it is thereafter bound to see that what it has judicially decided as necessary shall be done, and the street kept in a reasonably safe condition, and if, through its negligence, it is unsafe, and persons are injured thereby, it is liable to them. *Van Gorder v. Seneca Falls*, 104 N. Y. Supp. 299.

So, in compact populous and much-frequented business parts of our larger towns and cities foot passengers may reasonably require to be accommodated and protected by the erection of suitable sidewalks, curbstones, posts, and railings, to the exclusion of teams and carriages from a part of a public highway. *Hall v. Manchester*, 40 N. H. 410.

But, though the law authorizes the construction of electric-light lines, power lines, and telephone lines, and similar structures, along the streets and highways, this does not relieve the municipality from its duty to see that the streets and highways are kept reasonably safe and secure for the public use. *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A. (N.S.) 474, 75 N. E. 1116.

And a city owning and operating a telegraph wire for the use of its fire department is liable to a person injured by coming in contact with the wire, where the injury was caused by the negligence of the city in removing the wire, or authorizing it to be removed, from its original position, for a purpose not connected with the fire department. *Neuert v. Boston*, 120 Mass. 338.

c. By act of agent or servant.

Municipal corporations, when they act in the exercise of powers or in the discharge of duties in no wise discretionary or governmental, but purely ministerial in their character, like individuals, are liable for the neglect or unskilful acts of their servants and agents whenever those acts occasion special injury to the person or property of another. *Weightman v. Washington*, 1 Black, 39, 17 L. ed. 52; *Boswell v. Wakley*, 149 Ind. 64, 48 N. E. 637; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481; *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744; *Orme v. Richmond*, 79 Va. 86.

And they are liable for injuries to individuals arising from their negligence in the construction of a work which they are authorized to construct and maintain, and for those arising from a defective condition of their streets and sidewalks, without regard to the manner of appointment of their officers. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990; *District of Columbia v. Sullivan*, 11 App. D. C. 533.

Nor has a city any right through a servant or agent to leave a dangerous obstruction in a street for the sole convenience of such agent or servant, and without any necessity therefor so far as his work at that particular point is concerned; and it is liable for an injury resulting from such obstruction. *Mickey v. Indianola (Iowa)* 114 N. W. 1072.

And, where the board of trustees of a village had the power to remove an obstruction in a street, it was their duty to do so, as soon as they knew of its existence; and their negligence in omitting to do it is, in law, the negligence of the village. *Champlin v. Penn Yan*, 34 Hun, 33, affirmed in 102 N. Y. 680.

And a person injured by the absence of guardrails and insufficient lights at a place where a sidewalk is obstructed is not deprived of his right to an action to recover damages for the injury by a charter provision authorizing an action to be brought against the officer guilty of negligence only in case of wilful or gross neglect or intentional violation of duty, since this would deprive him of all remedy. *Fitzgerald v. Binghamton*, 40 Hun, 332, affirmed in 111 N. Y. 686, 19 N. E. 286.

Nor can a municipality escape liability for an injury resulting from its neglect of duty in not keeping its streets and avenues lighted at night, because of the failure of an electric light company which had contracted to light the streets to perform its duty; in such case the neglect of the company would be the neglect of the city. *Baltimore v. Beck*, 96 Md. 183, 53 Atl. 976.

And a city is not relieved from liability for damages resulting from the use of steam motors upon its streets, by the fact that the action of the city council in granting the right to use such motors was without authority, since corporations are responsible for the acts of their officers and agents, done 20 L.R.A. (N.S.)

in the apparent scope of their authority, and the streets of a city are under the control of the city council. *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706.

So, trustees or other officers of a municipal corporation, made by its charter commissioners of highways, are to be regarded in respect to that function not as independent public officers, but as agents of the corporation, so as to make the latter civilly responsible for their acts or omissions according to the law of master and servant. *Conrad v. Ithaca*, 16 N. Y. 158; *Weet v. Brockport*, 16 N. Y. 161, note; *Mosey v. Troy*, 61 Barb. 580; *Niven v. Rochester*, 76 N. Y. 619; *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418.

And, where a street commissioner placed planks or sticks in a street, and they were negligently allowed to remain there by the city for several days prior to an accident caused thereby, and the city had or should have had notice that they were in the street at the time of the accident, the cause of action for the injury is not based upon the negligence of the street commissioner any more than it is upon that of the city itself; and the city is not entitled to judgment on the ground that the injury was the result of the negligence of the street commissioner. *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653.

And a superintendent of waterworks of a municipal corporation, who improperly fills a trench dug for laying water pipes so as to create a defect in the street, is the agent or servant of the municipality with reference to the work, so far as to make the municipality chargeable with his negligence in what would naturally affect the condition of a street, though his general duty is to attend to another department of a public business, since his work necessarily creates dangers in the streets, and calls for careful attention in restoring them to a safe condition. *Stoddard v. Winchester*, 157 Mass. 567, 32 N. E. 948.

Nor is a city relieved from liability for an injury resulting from a hydrant in a street, constituting a defect, by the fact that the hydrant was placed there by commissioners appointed by the city council where they acted for the city, and under the direction of the city in the construction of works, which had been authorized by a special statute and voluntarily accepted for the purpose of the receipt of profits therefrom. *St. Germain v. Fall River*, 177 Mass. 550, 59 N. E. 447.

And where a statutory provision made an annexed district a part of a city and subject to the same laws, obligations, and liabilities in every respect, and to the same extent, as if such territory had been originally part of the city; and provided that the commissioners of public parks should have exclusive power to locate and lay out the street and maintain all public streets,—the provision with reference to the commissioners of public parks consisted of a desig-

ration of officers of the corporation who, as officers and agents, and not exercising a power directly conferred upon themselves, should lay out and maintain the highways of the annexed district; and their neglect to repair highways would be the neglect of the corporation. *Richards v. New York*, 16 Jones & S. 315.

So, a municipal corporation is answerable for the act of its board of water commissioners in creating an obstruction in a street when such board, though created by special statute, is recognized as a department of the city government in the charter, and charged with the duty of making necessary surveys and preparing a general plan and system of sewers for the city, and of preparing and approving specifications for construction of all sewers, drains, wells, fire cisterns, laying water pipes, and erecting hydrants. *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; *Deyoe v. Saratoga Springs*, 1 Hun, 340, 3 Thomp. & C. 504.

And, where a ditch is dug by the water commissioners of a city in a principal street for the purpose of laying water pipes to supply the inhabitants of the city with water, the water commissioners, in digging the ditch, acting as agents of the city, the city is responsible for their negligence in leaving the excavation insufficiently lighted and guarded. *Fox v. Chelsea*, 171 Mass. 297, 50 N. E. 622; *Grimes v. Keene*, 52 N. H. 330.

So, if the work of laying water pipes in a street is intrusted by the municipal authorities to the superintendent of waterworks, the town is liable for the negligence of the superintendent or that of his servants in failing properly to fill the trench dug for the purpose of laying the pipes. *Stoddard v. Winchester*, supra.

And a board of public works consisting of three members appointed by the governor by and with the advice of the senate, having full and exclusive power to govern, manage, and direct all parks, boulevards, and pleasure ways within the city limits, which appoints and employs all inspectors needed by the city in the construction, repair, and maintenance of public improvements, and the salaries of each individual employee of which are payable out of the city treasury, the city furnishing the board with office stationery, instruments, and all facilities for the performance of its duties, is an agency for carrying out the objects and purposes of the municipality, and not an independent body; and the city is liable for its acts in the management of an article constituting an obstruction in a street. *Denver v. Peterson*, 5 Colo. App. 41, 36 Pac. 1111.

So, the neglect of commissioners to keep the public ways of a city in safe condition is the neglect of the municipal corporation, although they are subject to the permanent authority of Congress. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

And the duties delegated to a commissioner of street cleaning, charged with keep-

ing the streets clean and removing refuse as often as the public health and use of the streets may require, and invested with authority to engage and discharge at discretion all the employees necessary for the performance of the duties of the department, are such as primarily devolve upon the city as a municipal or corporate obligation; and he and his subordinates are agents of the city, and the city is liable for their acts of misfeasance or nonfeasance in the way of obstructing streets or otherwise in the course of their employment. *Barney Dumping-Boat Co. v. New York*, 40 Fed. 50.

Nor can a city which is bound to keep its streets free from nuisances, where a nuisance is placed in a street, escape liability therefor under a plea of *ultra vires*. *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542.

And a city is liable for an injury caused by an obstruction or excavation in a street where the work was done by a city officer whose duty as such was to superintend the digging of all ditches for water pipes, notwithstanding the fact that in this particular instance he was acting without authority, since even in such case he did not cease to be a public officer. *Ironton v. Kelley*, 38 Ohio St. 50.

And, where a city was authorized to construct a road, and the road was constructed but not in the mode prescribed by law, this fact increases rather than diminishes its liability; and the city cannot defend against an action for an injury caused thereby upon the ground that the construction of the road was not the act of the city, but the act of its officers. *Pekin v. Newell*, 26 Ill. 320, 70 Am. Dec. 378.

So, where the trustees of the waterworks in a city authorized and directed the digging of trenches in the streets for the purpose of laying water mains in pursuance of a previous ordinance of council, and it was made the duty of the superintendent to cause such trenches to be dug and mains laid, the city is responsible for his negligent acts in doing the work, causing injury, while such authority and direction remained unrevoked, notwithstanding the trustees, individually, while such work was being done, notified the superintendent that they would have nothing further to do with it. *Ironton v. Kelley*, supra.

And, where by a special statute the commissioners of a county were authorized to levy a tax upon the property of the county, to be expended under the direction of the board of public works of a city in opening, grading, and completing an uncompleted highway wholly within the city limits and under the control of the city, and, by the neglect of the board in the prosecution of the improvements, the premises of an abutting owner were injured, the board is to be regarded as acting as agent of the city, and the city, and not the county, is liable for damages resulting from the injury. *Johns*

v. Cincinnati, 45 Ohio St. 278, 12 N. E. 801, reversing 1 Ohio C. C. 21.

The duties of police officers are of a public nature, however, and their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising the public function, and they cannot be regarded as servants or agents of the city or borough; and the fact that their appointment is so devolved on cities and towns does not render the cities and towns liable for their unlawful or negligent acts. *Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771.

And an incorporated village is not liable for injuries resulting from the negligence of an engineer of its fire department while he was engaged in thawing out a hydrant whereby water escaped, formed into ice on the street, and a traveler fell thereon and was injured, the members of the fire department not being agents of the corporation in the sense which rendered it liable for their acts, but being in the discharge of an official duty as public officers. *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

Nor is a city liable for the negligence of a laborer employed by its superintendent of streets in the construction of a new street which has been laid out by the board of aldermen, and which they have directed the superintendent to build, if, under the charter of the city, the superintendent was acting as a public officer. *Jensen v. Waltham*, 166 Mass. 344, 44 N. E. 339.

And the act of a boy sixteen years of age, employed by a city to light and extinguish street lamps, who had received a general direction from his superior to shut off the gas at midnight, of extinguishing a light at that time just after being told of a defect in the street near by, cannot be deemed the act of the city in such a sense as to carry with it responsibility for the accident which ensued. *Monies v. Lynn*, 119 Mass. 273.

So, a statutory provision making it the duty of a municipality to keep its streets in a condition reasonably safe and fit for travel makes it liable only for its own negligence or the negligence of someone for whose conduct it is legally responsible, and not for the negligence of a contractor who is not its agent nor engaged in performing a duty imposed by law upon the municipality, but who is employed by a lot owner to build a sidewalk in front of his lot. *Thompson v. West Bay City*, 137 Mich. 94, 100 N. W. 280.

And a superintendent of streets under a city charter requiring the board of aldermen to elect three street commissioners, and empowering it to prescribe the duties and direct and control the administrative boards and officers in their performance of duties, but directing that they shall not exercise any authority over the administrative officers, is a public officer when acting as such; and a person injured by his negligence upon a public highway cannot recover of the city therefor. *McCann v. Waltham*, 163 Mass. 344, 40 N. E. 20.
20 L.R.A. (N.S.)

And the granting of a license by a municipal corporation to a plumber to make and connect service pipes for conducting water from the distributing pipes of the city to private houses, and the giving of a special permit to him to connect with a city sewer under the direction of the city inspectors, does not make the plumber an officer or servant of the city when employed by and working for private parties; and, for damages occasioned by his negligence in such case in not guarding an excavation made by him in the street and leaving a pile of earth thereon while doing the work, the city is not responsible. *Dorlon v. Brooklyn*, 46 Barb. 604.

But, where a wire maintained by a city fell upon a trolley wire and became charged with electricity and caused the death of a passer-by, the city cannot relieve itself from responsibility for the defective construction of the line because it was used for the police department of the city, on the theory that, as that department is created by law for the discharge of a public duty, and not for the immediate benefit of the city, the city is not liable for the negligence of the police commissioners in the construction and maintenance of the wire, where the line was not constructed by the police department or its servants, but was constructed by virtue of a contract with the city and by city officers who were empowered to and did represent the city. *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131.

And charter and statutory provisions granting to the common council of a city authority to regulate by ordinance the cleaning of streets and sidewalks, and clothing the department of parks with the control and management of all public parks and streets immediately adjoining, do not transfer from the municipality to the park department the duty of keeping in proper condition the sidewalks bordering upon such parks. *Twogood v. New York*, 11 Daly, 167.

And special provisions of law by which surveyors of highways have the right to regulate sidewalks, and the acceptance by surveyors of sidewalks of a sidewalk with a cellar window occupying a part of the space, do not exonerate the city from liability for an injury resulting from the defect. *Bacon v. Boston*, 3 Cush. 174.

So, where, in the construction of a subway under a street, the surface of the street was excavated with the exception of space occupied by the railway tracks, and there was a depression in the pavement between the tracks, and a person driving an automobile attempted to pass from one track to the other and ran a wheel into this depression, which caused the automobile to swerve and run into the excavation, the city cannot be held liable upon the ground that it was negligent in allowing the existence of the hole between the tracks, and in maintaining an insufficient guard about the excavation for the subway, where the railroad company had built its tracks under legislative

authority, and the subway was being excavated by contractors under like authority, the city having no control over either corporation, and it appears that the surface of the street was being constantly changed by the contractors. *Morris v. Interurban Street R. Co.* 100 App. Div. 295, 91 N. Y. Supp. 479.

d. By permission or license of city.

This subject is covered in a note to *McKim v. Philadelphia*, 19 L.R.A. (N.S.) 506.

e. By independent contractor.

1. General rules where contract calls for obstruction.

A city cannot be allowed to avoid the imperative duty which it owes to the public to keep its streets and alleys and highways in a safe condition for use in the usual manner by travelers, or to escape responsibility for its neglect or failure to perform such duty, upon the plea that it had entered into a contract with another person for the performance of work, which rendered such use of the street or highway dangerous to the traveling public. *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5; *Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395; *Baker v. Grand Rapids*, 111 Mich. 447, 69 N. W. 740; *Ray v. Poplar Bluff*, 70 Mo. App. 252; *Deming v. Terminal R. Co.* 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983; *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *McManus v. New York*, 115 N. Y. Supp. 150; *Nashville v. Brown*, 9 Heisk. 1; 24 Am. Rep. 289; *Patterson v. Austin* (Tex. Civ. App.) 29 S. W. 1139; *Hill v. Tottenham Urban Dist. Council*, 79 L. T. N. S. 495.

The rule that municipal corporations are bound to keep the streets and highways in a proper state of repair and free from obstructions or defects in the roadbed which vigilance can detect and remove applies whether the work or repairs are being done by the city itself or by a contractor, the negligence of whose servants causes the injury complained of. *Wendell v. Troy*, 39 Barb. 329, affirmed in 4 Abb. App. Dec. 563.

And a municipal corporation cannot absolve itself from either its statutory or its common-law duty to keep its streets in a reasonably safe condition for public travel, and from its liability for failure to perform this duty by an attempted delegation of such duty to an independent contractor who is prosecuting a public improvement in the street, by inserting in the contract express provisions for the protection of the public by the contractor. *Scanlon v. Watertown*, 14 App. Div. 1, 43 N. Y. Supp. 618; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 153, 16 N. E. 344; *Pace v. Webster City*, 139 Iowa, 107, 115 N. W. 888; *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381; *Louisville City R. Co. v. Louisville*, 8 Bush. 415; *Moore v. Townsend*, 76 Minn. 64, 78 20 L.R.A. (N.S.)

N. W. 880; *Gable v. Toledo*, 16 Ohio C. C. 515; *Nashville v. Brown*, supra.

Where the work which a city employs a contractor to do in its streets is necessarily dangerous, however skilfully done, the rule that, when the relation of employer and independent contractor exists, the contractor is alone liable for injuries occurring in the progress of the work, has no application; and the city is liable for a resulting injury. *Gable v. Toledo*, supra; *Cincinnati v. Stone*, 5 Ohio St. 38; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 38; *Houston v. Isaacks*, 68 Tex. 116, 3 S. W. 693; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

And the rule is the same where the party causing the work to be done is under a primary obligation imposed by law to keep the subject-matter of the work in a safe condition, as in case of a city directing the grading or ditching of streets. *Jefferson v. Chapman*, supra.

And, where an obstruction or defect in a street, which produces the injury, results directly and necessarily from acts which a contractor agreed with the city and was authorized to do, the city authorizing the contractor and the contractor are equally liable to the party injured. *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Dressell v. Kingeton*, 32 Hun. 533; *Nashville v. Brown and Wilson v. Wheeling*, supra; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427.

The city is primarily liable, although the defect in the highway may be due to the act of some contractor or third person, done by authority of the city. *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270.

Where a city plans a street improvement, and employs a contractor for that work, the danger to the public arises from the nature of the improvement, and can be averted only by special precautions, such as placing guards or lighting the street, and the city authorizing the improvement is bound to take these precautions; the contractor may properly be bound by his agreement to take such precautions, but the municipal corporation cannot, by so appointing him, avoid either indictment on behalf of the public, or its liability to individuals. *Glasgow v. Gillenwaters*, supra.

And a complaint against a city and a construction company charging that the city had charge of an alley, and that it was within the city limits and was largely traveled by day and night, and that the construction company, under authority of the city, placed an obstruction in the alley by which the plaintiff was injured in the nighttime while it was not lighted, states a good cause of action for negligence at common law. *Mehan v. St. Louis* (Mo.) 116 S. W. 514.

And, where a city contracted with a contractor for the grading of a street, the work to be done under the direction and to the satisfaction of named city officers; and it was stipulated that the contractor should adopt and take all necessary precautions for the prevention of accidents during its prog-

ress, and this requirement he omitted to observe by having his servants blast a hole in the sidewalk near a footpath for the purpose of setting a curbstone, which he left uncovered and unguarded by light or otherwise, and an injury resulted,—the city is liable therefor, since the performance of the work necessarily rendered the street unsafe for night travel, and this is a result which does not at all depend upon the care or negligence of the laborers employed by the contractor. *Dressell v. Kingston*, *supra*.

2. Application in particular cases.

The fact that a city has placed the work of repairing a street in charge of an independent contractor does not relieve it of the duty to see that proper precautions are taken to warn travelers of the danger. *Glasgow v. Gillenwaters*, *supra*.

And, where contractors obtained a permit to occupy not more than one third of the carriage way of a street, and under it occupied more than half of it and continued to do so for several weeks, and a teamster was killed by driving upon an obstruction in the night when no lantern was placed on it, the jury, in an action for the injury, is justified in finding both the contractors and the city guilty of negligence. *Rommeney v. New York*, 49 App. Div. 64, 63 N. Y. Supp. 186.

Nor can a municipal corporation escape liability for injuries caused by refuse left piled in the street upon the completion of the work of resetting a curb, upon the theory that the work, being done by the abutting owner at its direction, was by an independent contractor for whose acts it was not responsible. *Meyers v. Philadelphia*, 217 Pa. 159, 10 L.R.A.(N.S.) 678, 66 Atl. 251.

And a contract between a city and a contractor for the performance of street work is competent in an action by a person injured by colliding with a pile of stones placed in the street by him, for the purpose of showing the relation existing between the city and the person who caused the obstruction. *Godfrey v. New York*, 104 App. Div. 357, 93 N. Y. Supp. 899.

So, if a scaffolding erected on a bridge under a contract with the city for the firing off of fireworks, from which a timber fell and killed a passer-by, was an unlawful structure, the city was guilty of negligence in authorizing its erection, and cannot shield itself from liability by showing that the death of the passer-by was due to the negligence of an independent contractor. *Heidenwag v. Philadelphia*, 168 Pa. 72, 31 Atl. 1063.

And, if a city contracting with contractors for the construction of waterworks in its street finds that in the progress of the work blasting is dangerous and unnecessary its duty to its inhabitants and the public requires that it shall prevent it; and, if the blasting is necessary, but, though dangerous, the danger can be averted by the use of proper precautions, its duty is to re-

quire the contractor to take such precautions. *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166.

And, where a city employed an independent contractor to lay a sidewalk, and the contractor cut the roots of trees standing in the street and left them without support, and, five or six days thereafter, the trees were blown down and against the dwelling of the abutting owner, causing damage, the city is liable for the damage to the dwelling, whether the contractor negligently cut the roots, or necessarily did so in the construction of the walk. *Morris v. Salt Lake City (Utah)* 101 Pac. 373.

So, where an excavation is made in a public street under contract of the city authorities, the city cannot shift to the contractor the responsibility for keeping its streets in a safe condition, and thus relieve itself from liability for neglect to erect proper barriers to prevent accidents by falling into the excavation. *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; *Pettengill v. Yonkers*, 39 Hun. 449; *Gable v. Toledo*, 16 Ohio C. C. 515; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845; *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Harper v. Milwaukee*, 30 Wis. 365.

And in such case the city must exercise a continuing duty to see that the same is carefully guarded and made reasonably safe for travel, whether the actual work is performed by the city workmen or by workmen of an independent contractor. *Newman v. New York*, 57 Misc. 636, 108 N. Y. Supp. 676.

So, where a wayfarer is injured by falling into an open sewer in a public street, the city is not relieved from liability for the injury by reason of the fact that the opening was left unguarded by a contractor engaged in the construction of the sewer. *Hull v. Kansas City*, 54 Mo. 598, 14 Am. Rep. 487; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Springfield v. Le Claire*, 49 Ill. 476; *South Bend v. Turner*, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; *Williams v. Tripp*, 11 R. I. 447.

And this is so although it may have had no immediate control over the workmen. *Birmingham v. McCary*; *Jefferson v. Chapman*; *Drake v. Seattle*; and *Wilson v. Wheeling*,—*supra*.

And though the municipality had not yet accepted the work of the contractor. *Turner v. Newburgh*, *supra*.

And though it had stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public. *Jefferson v. Chapman* and *Drake v. Seattle*, *supra*.

Nor is a municipality constructing a sew-

er in a public street relieved from liability for injuries to persons using the street by the fact that it was in the exclusive possession of a contractor, if it had notice, or might have had notice, by the exercise of proper oversight, that its licensee had acted in a negligent manner and left the street in an unsafe and dangerous condition. *South Bend v. Turner*, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271.

And the fact that a contractor may be liable for negligence in making an open ditch across a street will not relieve the city authorities of liability for an injury resulting therefrom, if they are in law fixed with knowledge of such negligence. *Kinsey v. Kingston*, 145 N. C. 106, 58 S. E. 912.

Nor is a city relieved from liability for an injury resulting from a ditch across a sidewalk, made to connect a sewer with the city's main sewer, because the excavation was made by a contractor who was doing the work for a citizen. *Ibid*.

So, a city which contracted for the construction of a cistern in a street is liable for the loss of a horse which fell into it and was killed for want of sufficient protection around and over the excavation to guard animals in the proper use of the street from danger, although it did not reserve or exercise any control or direction over the manner of doing the work except to see that it was done according to specifications which were a part of the contract. *Circleville v. Neuding*, 41 Ohio St. 465.

And, where a municipal corporation under statutory authority let a contract for grading and graveling a road within its limits, and the contractor took gravel from a point on adjacent private property and undermined a large tree standing close to the roadway, which fell upon and killed a traveler, the corporation was responsible for the act of the contractor in undermining the tree. to the same extent as if he had been a laborer acting under the orders of the road inspector or board of works. *Stevens v. South Vancouver*, 6 B. C. 17.

So, where a contractor made an excavation in a street, and a person fell into it and was injured, the fact that at the time of the accident the contractor had failed to comply with certain of the provisions of the city charter, compliance with which was required to make the contract binding upon the city, does not relieve the city from liability for the injury. *Groves v. Rochester*, 30 Hun, 5.

And a city is not absolved from its statutory duty to keep its streets, including bridges, open, in repair, and free from nuisances, so as to relieve itself from liability for an injury caused by falling into an excavation left unguarded in the night, by the fact that it was the duty and the right of the county commissioners to build the bridge in building which the excavation was made, and notwithstanding the fact that the county commissioners had jurisdiction 20 L.R.A.(N.S.)

and had let the contract to a contractor. *Newark v. McDowell*, 16 Ohio C. C. 556.

3. Injury collateral to contract work.

Where a municipal corporation contracts to have work done, and the contractor in doing the work creates an obstruction or defect in a street, which causes an injury, the municipal corporation is not liable for the injury where the obstruction or defect causing it is wholly collateral to the contract work, and entirely the result of the negligent or wrongful acts of the contractor or his servants. *Wilson v. Wheeling*, supra; *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35; *Ray v. Poplar Bluff*, 70 Mo. App. 252; *McManus v. New York*, 115 N. Y. Supp. 150; *Dressell v. Kingston*, 32 Hun, 533; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427.

The rule that a person, either natural or artificial, is not liable for the acts or negligence of another unless the relation of master and servant, or principal and agent, exists between them; and that, when an injury is done by a party exercising an independent employment, the party employing him is not responsible to the person injured,—applies with full force to municipal corporations. *Painter v. Pittsburgh*, 46 Pa. 213; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845.

And a municipal corporation is not responsible for an injury occurring to a traveler through an obstruction in a public street, placed there by the negligence of a contractor exercising an independent employment, unless by the terms of the contract with the contractor he is under the management of the city. *Erie v. Caulkins*, 85 Pa. 247, 27 Am. Rep. 642.

Or unless the officers of the municipality have interfered with the conduct of the work so as to control its methods and become the responsible masters notwithstanding the contract. *Eby v. Lebanon County*, 166 Pa. 632, 31 Atl. 332.

So, where a city adopted in good faith a reasonable plan for a sidewalk in a street, and the execution of the work was not inherently dangerous, and injury would not necessarily result from laying the sidewalk, and the city employed an independent contractor to do the work, it is not liable for the negligent acts of the contractor. *Morris v. Salt Lake City (Utah)* 101 Pac. 373.

Nor does a city sought to be held liable for an injury caused by an obstruction in a street, placed there by an independent contractor, incur any additional liability by reason of taking a bond to indemnify it against any loss or damage resulting from a failure of the contractor to perform his duty. *Erie v. Caulkins*, supra.

And, when blasting is done in a city, not by the city, but for it and under a contract with a private citizen; and such blasting is done in violation of express directions given by city officers, or without their knowledge,—the city is not responsible for an injury caused by it. *Joliet v. Seward*, supra.

So, if the negligent act of blocking one half of a roadway with stones and leaving them without a light or proper means to warn travelers at night of the danger was the work of a contractor, over whose act the municipal corporation retained and had no control, the municipal corporation should not be called upon to answer in damages for an injury resulting from the contractor's negligence. *Hookey v. Oakdale*, 5 Pa. Super. Ct. 524.

And, if a public work like a sewer in a street is constructed under an independent contract lawfully entered into by the city, the municipal authorities having no control of the mode of performing the work, the contractor alone, and not the city, will be liable for injuries resulting from an obstruction or nuisance placed in a street in the progress of such work. *Harper v. Milwaukee*, 30 Wis. 365.

And a person whose horse was frightened by an explosion produced by blasting done in the construction of a sewer, and who was injured thereby, cannot recover of the city for the injury, where the city had no control over the workmen of the contractor who was building the sewer, and the work contracted for was not a nuisance either in its performance or in its result. *Herrington v. Lansingburgh*, 36 Hun, 600.

Nor is a city liable where a person fell into a excavation in a street, made by a contractor, where the accident was caused entirely by the negligence of the contractor, or of his agents or servants. *Painter v. Pittsburgh*, supra; *Deming v. Terminal R. Co.* 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983.

And a city is not liable for an injury to a person, sustained by the negligence of a contractor for the construction of a sewer in not putting up sufficient barriers to warn or guard persons against the danger of attempting to pass down a street in the neighborhood of the excavation; the contractor alone should be held responsible. *Barry v. St. Louis*, 17 Mo. 121.

The burden rests upon a municipal corporation sought to be held liable for an injury resulting from an obstruction in a street, however, to establish the fact that the injury was caused by the act of an independent contractor. *Hookey v. Oakdale*, supra.

And if, in the performance of the work of repairs or improvements on a sidewalk, an obstruction is created by a contractor, and the obstruction is unnecessary and wrongful and merely collateral, the city, having knowledge of the obstruction, is under duty to remove the obstacle or, at least, to see that the public is properly notified and guarded against its danger. *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576.

And it has been held that a municipal corporation, by contracting with a person to construct an improvement for it, does not and cannot thereby abdicate its control over the streets of the corporation, or exonerate itself from liability for an injury resulting from the negligence of the contractor in the 20 L.R.A. (N.S.)

manner of the performance of his contract. *Beatrice v. Reid*, 41 Neb. 214, 59 N. W. 770.

A city, by contracting with a contractor for the erection of a building, does not necessarily give him license to obstruct the street, and certainly not to leave obstructions therein at night unguarded and unlighted in violation of the ordinances with reference thereto. *Rochester v. Montgomery*, 72 N. Y. 65, affirming 9 Hun, 394.

In the above case *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550, supra, VI., e. 1, was distinguished upon the ground that there the contractor was employed by the city to dig up the street itself for the purpose of constructing a sewer, while in this case the obstructions were not made in pursuance of any contract with the city, nor necessarily involved any performance of any such contract, but were made for the convenience of the contractor.

And, where a person was injured while lawfully using a road, by an obstruction placed in the road for the repair and maintenance thereof, which obstruction was neither lighted nor guarded, the obstruction was not due to the contractor's casual or collateral negligence, and, therefore, one for which the municipal corporation is not responsible, but was caused by negligence and misfeasance in doing the very act which the contractor was engaged for, and should have been foreseen and guarded against in the natural course of things. *Clements v. Tyron* [1905] 2 Ir. Ch. 542.

So, a municipal corporation which employs a contractor to do work not necessarily a nuisance, but which becomes so by reason of the manner in which the contractor performs it, which it accepts in that condition, becomes responsible for the nuisance. *Steves v. South Vancouver*, 6 B. C. 17.

Where injury is done by an obstruction in a street upon which work is being done for the city by an independent contractor, it is a question for the jury whether the injury results from the city's negligence, or whether it is the result of tortious acts of the contractor's servants. *McManus v. New York*, 115 N. Y. Supp. 150.

4. Effect of retention of control.

The liability of a city for an injury resulting from obstructions in its streets, caused by making necessary or proper repairs thereof or by constructing public improvements, which obstructions had not been sufficiently guarded, is not affected by the fact that the temporary obstruction was made by contractors who contracted with the city to do the work, where the contractors were directed by officers of the city authorized to give direction to do the work. *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Augusta v. Cone*, 91 Ga. 714, 17 S. E. 1005; *Beatrice v. Reid*, supra; *Cincinnati v. Stone*, 5 Ohio St. 38.

In such case the contractor becomes, by virtue of the contract, the agent of the corporation; and it is liable for an injury re-

sulting from the negligence of the contractor in the manner of constructing the improvement. *Beatrice v. Reid*, *supra*.

So, under a contract made pursuant to a charter provision giving the board of public works full control of the mode of performing any public work by a contractor, and requiring him to reserve in the contract the right finally to determine all questions as to the proper performance thereof, and, in case of an improper performance, to order a reconstruction of the work or relet it to some other party, the city is liable for injuries resulting from negligence or misconduct of the contractor in constructing or permitting an obstruction or nuisance in a street. *Harper v. Milwaukee*, *supra*.

And, where the flagstones were piled up in a street by a person under contract with the city, and they were left there for a considerable period of time and afterwards caused an accident, if they remained there in the possession of the city until the contractor for laying them should be ordered by the highway department at some subsequent period to proceed with the work, then the length of time during which they were permitted to encumber the street is evidence of negligence upon the part of the city, which should be left to the jury in an action against the city for the injury. *Farley v. Philadelphia*, 11 W. N. C. 136.

So, where a municipal corporation having statutory power to enter lands and take without payment gravel for its roads let a contract for grading and graveling a road within its limits which contained no provision as to where the gravel was to be obtained; and the contractor entered adjacent private property and took gravel from a pit thereon in such manner as to undermine a large tree standing close to the roadway, which, by reason thereof, afterwards fell upon and killed a traveler, the taking of the gravel having been superintended by the municipal road inspector,—the city is liable for knowingly maintaining a dangerous nuisance which caused an injury. *Stevens v. South Vancouver*, *supra*.

And, where a trench was dug in a street, and had existed for at least two days at a prominent corner near the center of the city where the streets were much traveled; and it was dug under the supervision of an inspector appointed by the commissioner of public works; and the trench, in connection with a heavy rain, caused damage to an abutting owner,—the inspector represents the city, and his negligence is the negligence of the city; and a jury is warranted in finding, in the absence of evidence to the contrary, that he saw or should have seen the danger. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773, affirming 40 App. Div. 320, 57 N. Y. Supp. 968.

The liability of a municipal corporation where an independent contractor, in performing his contract with it, makes holes or excavations in a street, or places obstructions therein, by reason of which a traveler is injured, however, depends upon whether 20 L.R.A. (N.S.)

the municipal authorities had the right and power to interfere so as to prevent it; if so, it is liable. *Koontz v. District of Columbia*, 24 App. D. C. 59.

And vague testimony that county commissioners directed that certain things should be done and certain changes made, without specifying what the changes were, is not sufficient to fix liability upon a county for an injury caused by the act of a contractor in leaving a heap of dirt upon a pavement unguarded and unlighted during the night, as an interference with and control over the contractor. *Eby v. Lebanon County*, 166 Pa. 632, 31 Atl. 332.

Nor is a stipulation in a contract between a city and a contractor that the city's engineer shall have power to direct changes in the time and manner of conducting the work such a reservation of power as will make the city liable for an injury occasioned by the negligence of the contractor. *Erie v. Caulkins*, 85 Pa. 247, 27 Am. Rep. 642.

And the fact that a city had an inspector on the ground watching the progress of the work of a contractor placing a street railroad in a street, and that the inspector pointed out from time to time what he considered to be unsafe or dangerous places, whereupon the contractor would give the matter such attention as seemed to be needed, does not render the city liable for an injury resulting from an excavation caused by the contractor where the city had no control whatever over the manner of doing the work, and the contractor was not bound to adopt the inspector's suggestions. *Cox v. Philadelphia*, 165 Fed. 559.

So, under a city charter providing that the street commissioners shall have power to order a contract for the making, grading, repairing, and cleaning of streets within their respective wards, and to direct and control the persons employed therein, where the street commissioners made a contract for the grading stipulating what the character, appearance, and extent of the work when completed should be, and containing the clause, "the work to be done under the direction of the street commissioners," the employees of the contractor are not servants of the city so as to make it liable for any damages caused by their negligent manner of doing the work. *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753.

And, where county commissioners entered into a contract with a firm of contractors to place a stone curb upon a line dividing a park from the pavement of a much-used public street, the fact that the commissioners of the county directed that the dirt should not be thrown upon the grass, in accordance with the terms of a provision in the contract, and furnished boards upon which the dirt might be deposited, does not render the county liable for negligence in heaping the dirt upon the pavement, and leaving it unguarded and unlighted during the night. *Eby v. Lebanon County*, *supra*.

Nor does the fact that the expense of an improvement in a street is chargeable upon

adjoining lots render the contractor an agent of the lot owners, rather than of the city, so as to relieve the city of liability for an obstruction or nuisance created by him. *Harper v. Milwaukee*, 30 Wis. 365.

5. Particular contract required by law.

Where the law compels a municipal corporation to give out a contract for a street improvement to the lowest bidder, it takes away from it the responsibility arising from the acts of the person taking the contract. *James v. San Francisco*, 6 Cal. 528, 65 Am. Dec. 526.

And a person who was injured by falling at night into an excavation made by grading a street of a city under a contract which the city was by law required to make, owing to the failure to put lights or guards about the place, may hold the contractor liable for the injury; but the city is not liable. *Ibid*.

So, when a city charter requires sewers to be constructed under contracts to be let by the city, the contractor in performing the work is not the agent or servant of the city, and any negligence in performing the work is his negligence, and the city is not liable for injuries caused thereby. *O'Hale v. Sacramento*, 48 Cal. 212.

And, where an injury resulted from falling over a hydrant in the night because of the absence of sufficient light; and the city had entered into a contract with an electric light company for the lighting of the street, it having no power but that of entering into contracts with persons able to supply the light which, in the exercise of their discretion, the council should think necessary, —the relation between the city and the lighting company was not that of master and servant or principal and agent, but of employer and independent contractor; and the rule of law that, if anyone inflicts injury from any negligence in the execution by a contractor of the work he has undertaken, the contractor alone is responsible, is applicable; the negligence claimed to have existed being the improper management of the lights in the street in question and defective machinery for producing the light. *Halifax v. Lordly*, 20 Can. S. C. 505.

It has been held, however, that the statutory duty imposed upon a city to keep its streets in good repair is one which the city is required to perform, and it continues although the city is obliged under its charter to enter into an engagement with an independent contractor for grading and paving such streets, through whose fault the injury occurred. *Southwell v. Detroit*, 74 Mich. 438, 42 N. W. 118.

And that, where a municipal corporation has under its charter the care and control of public streets, and has general authority to make or cause to be made improvements therein, such as sewers or drains, it is liable for injuries to its employees or others, resulting from the negligence of its employees or agents acting under its authority in making such improvements, and having the charge and supervision thereof, though in 20 L.R.A. (N.S.)

the particular instance, in strict conformity to its charter, the work is required to be done by contract, and not directly by the corporation. *Welter v. St. Paul*, 40 Minn. 400, 12 Am. St. Rep. 752, 42 N. W. 392.

1. By wrongdoer.

A municipality is not relieved from liability for failure to perform its duty to keep its streets reasonably safe and fit for travel by the fact that a street is made unsafe by the act of a third person. *Davis v. Adrian*, 147 Mich. 300, 110 N. W. 1084; *Centerville v. Woods*, 57 Ind. 192; *Elkhart v. Ritter*, 66 Ind. 136; *Aurora v. Bitner*, 100 Ind. 396; *Bromley v. Bodkin*, 25 Ky. L. Rep. 1245, 77 S. W. 696; *Bourget v. Cambridge*, 159 Mass. 388, 34 N. E. 455; *Caton v. Sedalia*, 62 Mo. App. 227; *Alliance v. Campbell*, 17 Ohio C. C. 595; *Huffman v. Bayham Twp.* 26 Ont. App. Rep. 514.

Without its license or authority. *Centerville v. Woods and Elkhart v. Ritter*, *supra*.

And it is liable for an injury done by an obstruction placed in a street by a third person, regardless of whether it could be deemed dangerous or likely to become dangerous. *Whittall v. New York*, 64 N. Y. Supp. 250.

And a municipal corporation may be liable for an injury caused by an obstruction placed in its streets by a mere trespasser or wrongdoer. *Davis v. Omaha*, 47 Neb. 836, 66 N. W. 859; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Ironton v. Kelley*, 38 Ohio St. 50; *Castor v. Uxbridge Twp.* 39 U. C. Q. B. 113.

And a road is out of repair when, by the existence of obstructions placed there by wrongdoers, it is rendered unsafe or inconvenient for travel. *Castor v. Uxbridge Twp.* *supra*.

The rule that municipal corporations are under duty to keep their streets in safe condition for public travel, and must exercise reasonable diligence to accomplish that end, is equally applicable whether the act or omission complained of is that of the municipality, or of some third person. *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; *Tiers v. New York*, 74 Hun. 452, 26 N. Y. Supp. 688; *Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277.

And it is immaterial on the question of the liability of a city for an injury caused by an obstruction in a street, who placed the obstruction; if it has remained there so long that the corporation is presumed to have had notice, it is bound to remove it and remedy the defect. *Ploedterll v. New York*, 55 N. Y. 666; *Davenport v. Ruckman*, 10 Bosw. 20; *Scranton v. Catterson*, 94 Pa. 202; *Merrill v. Portland*, 4 Cliff. 138, Fed. Cas. No. 9,470.

And a complaint in an action against a city, alleging negligence in excavating a dangerous hole or trench, and throwing up a dangerous embankment therefrom on the streets, and suffering the trench and embank-

ment to be without protection or notice to travelers, warrants evidence to show either a dangerous obstruction created by the city and left unguarded, or a like obstruction created by a third person and left unguarded by the city after notice of its existence. *Pettengill v. Yonkers*, supra.

Nor does the fact that a party injured by an obstruction or nuisance in a highway may sustain an action against the person who placed the nuisance upon the highway affect his right to proceed against the municipality for his damages if it was in fault. *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Philadelphia v. Smith*, 1 Monaghan (Pa.) 147, 16 Atl. 493.

And the fact that an excavation in a street was undertaken for private use and benefit does not discharge the city from the duty of oversight and direction, and the responsibility for proper construction. *Wendell v. Troy*, 4 Keyes, 267, 4 Abb. App. Dec. 569.

And a city ordinance providing that the mayor, a member of the city council, the city commissioner, any street commissioner, street inspector, or the police of the city, shall be authorized to order any obstruction removed from the streets; and, in case of the person causing such obstructions failing to remove the same, it shall be the duty of such officer to cause it to be removed,—is properly admitted in evidence in behalf of the plaintiff, in an action against the city for an injury resulting from an obstruction in a street. *Kane v. Troy*, 16 N. Y. S. R. 341, 1 N. Y. Supp. 536.

So, under the provisions of the North Carolina Code that commissioners of towns and cities shall provide for keeping in proper repair the streets and bridges in the town in the manner and to the extent they may deem best, and that they may pass laws for abating or preventing nuisances of any kind and for preserving the health of the citizens, if any person shall unlawfully erect an obstruction or nuisance in the streets of a city, and the town authorities shall permit it to remain an unreasonable length of time, the town and the person erecting the obstruction or nuisance are jointly and severally liable to the traveler for an injury resulting therefrom without fault on his part. *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548.

Where an obstruction is placed in a street, not by the city or its officers or agents, but by the act of a third party, however, the liability of the city for a resulting injury must be predicated upon its negligence in not causing the removal thereof within a reasonable time after it had notice, or by the exercise of proper care and diligence might have known the condition of the street. *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817; *Royal Center v. Bingaman*, 37 Ind. App. 626, 77 N. E. 811; *Davis v. Omaha*, 47 Neb. 836, 66 N. W. 859; *Weed v. Ballston Spa*, 76 N. Y. 329; *Dorlon v. Brooklyn*, 46 Barb. 604. 20 L.R.A. (N.S.)

And its negligence should be alleged. *Royal Center v. Bingaman*, supra.

Where the unsafe condition of a street occurs through some other agency or instrumentality than that of the city, negligence is not imputable to the city until a sufficient time has elapsed to charge the city officials with notice. *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344.

Nor is a municipal corporation liable for damages to property resulting from the act of a private individual in dumping dirt in a street where it appears that the municipal corporation neither authorized such act before it was done, nor ratified it afterwards. *Nyhart v. Taylor*, 31 Pa. Super. Ct. 635.

But whenever a dangerous obstruction appears in the streets of a city it is its duty to use reasonable diligence to remove it though it was unauthorized. *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532.

g. By abutting owner.

This subject is covered by a note to *McKim v. Philadelphia*, 19 L.R.A. (N.S.) 506.

h. By act of railroad occupying street.

This subject is covered by a note to *McKim v. Philadelphia*, supra.

VII. Ways as to which the duty exists.

a. Generally.

The duty of a municipal corporation to repair highways is not dependent upon the manner in which the highways may have been established; it applies to all existing highways whether established through proceedings by court or municipal authorities, or through dedication. *Makepeace v. Waterbury*, 74 Conn. 360, 50 Atl. 876; *Hillyer v. Winsted*, 77 Conn. 304, 59 Atl. 40.

When a municipal corporation has actually opened a street or avenue for the public accommodation, and, by its acts, has invited the public to travel over it, the duty to keep it in repair becomes absolute. *Hutson v. New York*, 5 Sandf. 289.

And to establish the character of a locality where an injury occurred as a part of a public street nothing more is essential than to show that it was in the actual possession of the city and opened and used by the public as a thoroughfare at the time. *Garnett v. Slater*, 56 Mo. App. 207; *Boyd v. Springfield*, 62 Mo. App. 456; *Golden v. Clinton*, 54 Mo. App. 100.

And, if a street on which a sidewalk was constructed, a defect in which caused an injury, was a public street of the city, it will be presumed, in the absence of evidence to the contrary, that the city was in possession and control of it, and built and maintained the sidewalk. *Anna v. Boren*, 77 Ill. App. 408.

It is not necessary to prove any formal dedication or appropriation of the street.

Boyd v. Springfield and Golden v. Clinton, *supra*.

And a street may be shown to be a public thoroughfare, for the condition of which the city is responsible, by evidence of dedication, acceptance, and user, as well as by evidence that it has been formally laid out by ordinance. Garnett v. Slater and Golden v. Clinton, *supra*; Beaudan v. Cape Girardeau, 71 Mo. 392; Phelps v. Mankato, 23 Minn. 276; Sweeney v. Newport, 65 N. H. 86, 18 Atl. 86.

And records of a city showing that a report of the mayor and alderman that common convenience and necessity require the laying out of a certain street was accepted and approved by the board of aldermen, and that the report was accepted by the common council, and the board of aldermen concurred with the common council in accepting the report, show a laying out of the street in accordance with law, and its establishment as a public way, for the care of which the city is responsible. Baker v. Fall River, 187 Mass. 53, 72 N. E. 336.

So, a statute requiring towns and cities to keep public ways in repair, though it mentions only highways, town ways, streets, causeways, and bridges, includes all ways authorized by general or special statutes to be laid out by municipal authority for any kind of public travel, and charges the city or town for injuries occasioned by want of repair therein, to any traveler lawfully using them for the purpose for which they are intended and appropriated. Gould v. Boston, 120 Mass. 300.

And such a statute applies alike to the city and to the town. Drake v. Lowell, 13 Met. 292.

And the term "public highway," used in a statute releasing a city and county from all liability for injuries sustained by reason of its streets or public highways being out of repair, includes all kinds of thoroughfares in which the public has a right of way or passage, whether graded or ungraded, finished or unfinished. Parsons v. San Francisco, 23 Cal. 462.

So, where it is declared by statute that all streets, roads, and alleys in a particular village, which have been worked and improved, and which are used as such, shall be deemed public highways, the character of the streets, roads, and alleys, and whether highways or not, is to be determined, not by the rules of the common law or the general statutes relating to highways, but by inquiring simply whether as a matter of fact any particular street or alley comes within the provision of the statute. Ilickok v. Plattsburgh, 41 Barb. 130.

A city is not liable for accidents on streets, caused by defects or obstructions therein, however, until its officers do something evincing an intention to assume jurisdiction over such streets. Johnson v. St. Joseph, 96 Mo. App. 663, 71 S. W. 106.

And municipal corporations are bound to keep only such streets and parts of streets in repair as may be necessary for the use 20 L.R.A. (N.S.)

and convenience of the traveling public. Craig v. Sedalia, 63 Mo. 417.

So, in order to fix liability upon a municipal corporation for an injury caused by a defect or obstruction in a street, it must be proved that the place where the injury was sustained was upon a street or sidewalk which had been opened and improved by the town, or which had been used and treated by the town authorities as a public street or sidewalk. Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22.

And that a street, at the time when and the place where an accident occurred, was treated and controlled by the municipality as a public thoroughfare, must be alleged and proved in an action against the municipality to recover damages for injuries sustained by reason of an obstruction upon the sidewalk thereof. Parrish v. Huntington, 57 W. Va. 286, 50 S. E. 416.

And a person injured by the breaking of a plank placed across a gully in a public street by the residents of a neighborhood without the authority of the city and at a place where the gully was not a part of the sidewalk or traveled way cannot recover damages from the city for such injury. Fortune v. St. Joseph (Mo.) 1 S. W. 287.

But, where a binding instruction is given for the plaintiff in an action against a municipal corporation for injuries sustained because of an obstruction on a sidewalk, its omission to tell the jury that the plaintiff must prove that the street was controlled and treated by the authorities of the corporation as a public street or thoroughfare is not erroneous, where the evidence upon that point is without conflict, and the fact is clearly established, and not disputed by the evidence of the defendant. Parrish v. Huntington, *supra*.

The question whether the statutory liability of a town or city has come into existence in case of a public way which has been laid out and at least substantially completed is one of notice, express or implied. Jones v. Collins, 188 Mass. 53, 74 N. E. 295.

b. The question of title, locality, etc.

Where a city owns the fee of land held in trust for the public as a street with a franchise in itself conferred for public purposes, authorizing it to maintain and keep the same in repair and to defray the expenses thereof by assessment upon the adjacent owners or occupants, it is its duty to see that the street is kept in repair. Hutson v. New York, 9 N. Y. 163, 59 Am. Dec. 526.

And, though the fee of a street is in the city, it is held in trust for the use of the public for the purposes of a street; and the city has no power to close it or obstruct it, so as to deprive the public of its use as a highway. Stack v. East St. Louis, 85 Ill. 377, 28 Am. Rep. 619.

So, the liability of a municipal corporation for injury to an individual arising from negligence in the construction of a work authorized by it, and for an injury arising from a defective condition of its

streets, is not affected by the fact that the fee of the streets is not in the municipal corporation. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Still v. Houston*, 27 Tex. Civ. App. 447, 66 S. W. 76.

And the fact that the fee-simple title of the streets of a city is in the United States does not affect the city's liability for negligence in permitting obstructions or defects in its streets. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

Nor is a city relieved from liability for an injury from an obstruction in a street by the fact that the land upon which the street was located belonged to the state, and not to the city, where the land had been appropriated by the city, graded, paved, and sidewalked by its authority, and was used as a public street in such a manner as to hold out ostensibly to the public that it was such a street, and as to invite them to travel upon it. *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418; *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220.

And this is so although the city had no right to lay out the street. *Taake v. Seattle*, supra.

The seashore between high and low water mark, however, is a part of the ocean, which is a public highway for vessels; but it is not a highway for public travel upon foot, or with vehicles, and the city cannot be held liable for causing or permitting a hole so near to high-water mark that a person fell into it while exercising his lawful rights. *Murphy v. Brooklyn*, 98 N. Y. 642.

So, a city cannot accept a grant from another state to operate a toll road beyond its limits or the limits of its state, or be held for defects in such road if operated by it when it is not authorized to do so by the laws of its own state, although the toll road is made to connect with a city toll bridge which the city has constructed under lawful authority. *Becker v. LaCrosse*, 99 Wis. 414, 40 L.R.A. 829, 67 Am. St. Rep. 874, 75 N. W. 84.

And an ordinance by a city directing the construction of a highway outside its corporate limits is *ultra vires* of the city, and does not estop the city from denying, in an action against it for an injury caused by stepping into a hole in the sidewalk, that the walk was a public sidewalk of the city. *Stealey v. Kansas City*, 179 Mo. 400, 78 S. W. 599.

And a statute giving the city power to cause to be graded all streets, and to construct and reconstruct all sidewalks, within the city limits, gives a pedestrian no right to recover damages for injuries from stepping into a hole in a sidewalk outside of the legal limits of the city. *Ibid.*

But a complaint in an action against a municipal corporation, charging that the plaintiff had to pass the intersection of two streets in the city, and that he was injured at a bridge over a gutter between one of the streets and the sidewalk on the southeast corner of said streets, sufficiently 20 L.R.A. (N.S.)

charges that the injury occurred within the limits of the city. *Indianapolis v. Scott*, 72 Ind. 150.

Nor is a city rendered liable for an injury to a person, caused by stepping into a hole in a sidewalk outside of the city limits, by the fact that the city supposed at the time the walk was constructed that the city limits had been legally extended to include the street, when in fact that extension had been declared to be illegal and void prior to the accident. *Stealey v. Kansas City*, supra.

But a complaint in an action against a city, charging that it had exclusive authority and jurisdiction over its alleys and sidewalks, and negligently permitted one of its said sidewalks on a named side of a named street to get out of repair, sufficiently shows that the sidewalk where the injury occurred is within the city and under its jurisdiction. *Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65.

So, a statute providing that it shall be lawful for the municipal authorities of cities, towns, and villages to work, grade, or macadamize all roads, streets, and highways leading to and from such cities, towns, or villages; but this privilege shall not extend to a greater distance than 5 miles from the corporate limits of such city, village, or town, merely confers a license to work, grade, or macadamize thoroughfares leading to or from such cities, towns, or villages, and does not make them responsible for the manner in which the work is done, or for failure to keep any such thoroughfare in good condition or free from obstruction, unless the action is given by statute. *Stealey v. Kansas City*, supra.

But a defect in a petition in an action for an injury from an obstruction in a street, in failing to allege that the street was within the city, and that it had assumed control over it, is cured by a verdict for the plaintiff, rendered on evidence introduced without objection that the street was within the city limits and maintained by it, and on an instruction that the jury could not find for the plaintiff unless they found the city was negligent in failing to keep the street in a safe condition. *Henderson v. Sizemore*, 31 Ky. L. Rep. 1134, 104 S. W. 722.

And a complaint in an action against a town for personal injuries caused by an obstruction in its streets is not necessarily insufficient because it does not in terms show that the obstruction was within the corporate limits, particularly where it is evident from the whole complaint that it was within such limits. *Royal Center v. Bingaman*, 37 Ind. App. 626, 77 N. E. 811.

Nor is a municipal corporation liable for an injury caused by an obstruction in a way where it was a mere driveway across private property, and had never been accepted or used by it as a street. *Sweet v. Poughkeepsie*, 75 App. Div. 274, 78 N. Y. Supp. 60; *Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Clay City v. Abner*, 26 Ky. L. Rep. 602, 82 S. W. 276.

And, if individuals build a sidewalk of

their own motion outside the limits of the road, they do not thereby render the municipal corporation liable for its defects, though they might render themselves liable; and this is so though the land was taken by the road commissioners, where the taking was illegal. *Doyle v. Vinalhaven*, 66 Me. 348.

And, where a fence is built across land used as a way by the owner of the surrounding land, and a person attempting to pass and climb the fence is injured thereby, the city will not be held liable for the injury where the right of the city to the use of the street at the locality in question is doubtful, and the owner of the land denies the existence of any highway across his premises. *Aurora v. Pulfer*, 56 Ill. 270.

But all of the streets of a city are presumed, in the absence of a showing to the contrary, to be public streets, for the safe condition of which the city is responsible; and, if it is a fact that the street in question is not a public street, the objection must be taken by answer, and cannot be raised by a general demurrer. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978.

And a town may be liable for an injury resulting to a traveler from falling into a hole in a highway, although the hole is within the location of a railroad which crosses the highway on a level therewith. *Pollard v. Woburn*, 104 Mass. 84.

And, if a way was a public way by prescription, which the city was bound to keep in proper condition, the fact that it was widened by agreement between the city owning the land on one side and a private owner of land on the other side does not alter its character. *Gould v. Boston*, 120 Mass. 300.

So, if the traveled portion of a highway is obstructed or dangerous, making it necessary for a traveler to deviate therefrom, and in doing so he uses ordinary care, the municipality will be liable for damages accruing to him from an accident caused by any defect or obstruction in that portion of the highway over which he thus necessarily passes. *Larsen v. Sedro-Woolley*, 49 Wash. 134, 94 Pac. 938.

And, where the part of a highway prepared for travel becomes impassable by reason of snowdrifts, and a passageway outside and over the gutter of the road is used instead of it, the town is liable for damages sustained by travelers over such outside passageway using ordinary care. *Savage v. Bangor*, 40 Me. 176, 63 Am. Dec. 658.

Nor can a village wrongfully suffer its highways to remain obstructed, thus forcing the public to adopt and use a way around the obstruction, and knowingly permit this latter way also to become dangerous, and take no measures either to remove the obstruction or to warn or guard the public against impending danger, and then escape liability for an accident on the theory that the accident happened on private premises, by reason of an obstruction placed thereon by the owner of the premises. *Finkle v. 20 L.R.A. (N.S.)*

Valatie, 114 App. Div. 251, 99 N. Y. Supp. 715.

And, where a railroad company supplied a road or street in lieu of one which it had prepared for the bed of its road, it was the duty of the municipal authorities to see that the substituted highway, including the bridge and approach to it, were kept in such condition as to be reasonably safe for public travel; and, if they failed to do so, and a person, without fault on his part, fell over an unguarded embankment and was injured in consequence of their neglect, the municipal corporation is liable for the injury. *Dalton v. Upper Tyrone Twp.* 137 Pa. 18, 20 Atl. 637.

But, where municipal authorities lay out a street and direct it to be improved, but the land remains in its natural condition, having a pond upon it, the customary travel being over private property around the edge of the pond, and a person passing through it falls into the pond while passing over the private property, the city cannot be held liable for the injury without proof that, under the circumstances, it was its duty to have prepared the street and thrown it open for travel before the accident; ordinarily, the location of the street being settled, the time when its surface is to be put in proper condition for public travel is necessarily committed by the sovereign authority to the discretion of the municipal agents. *Heckler v. St. Louis*, 13 Mo. App. 277.

So, in *Hickok v. Plattsburgh*, 41 Barb. 130, the question whether a cul-de-sac, or a road which is closed at one end and only communicates with the public road or street at the other, can be a highway for the condition of which a municipal corporation is responsible, was discussed with an apparent leaning toward the position that it could be a highway; but the question was not decided.

c. Opening and improvement of ways.

There is no municipal liability as a matter of course as to a way which is neither opened nor improved.

To hold a city liable for an injury caused by a defect in a street or sidewalk, it is not sufficient that it be a public highway or street; it must also be open to the public for use; and the fact that it was so open must be alleged in the complaint. *Clark v. North Muskegon*, 88 Mich. 308, 50 N. W. 254.

And a city is not to be held liable for an obstruction or defect in a way because it has permitted the public to use a beaten track across a private lot as an ordinary street. *Sweet v. Poughkeepsie*, 75 App. Div. 274, 78 N. Y. Supp. 60.

And a village proposing to open a street, which had constructed no walk for foot passengers thereon, and had created no condition inviting passage of the roadway, there being nothing in the surroundings from which an invitation by the authorities to attempt passage along the street could be implied, is under no obligation and owes no

duty to use precautions for the protection of persons in that locality; and it is not liable where a foot passenger, on a stormy night, attempted to cross this street and fell into a furrow which a contractor had run in connection with the proposed grading. *McNish v. Peekskill*, 22 App. Div. 631, 48 N. Y. Supp. 210.

Nor is a city under duty to see that a path or driveway made upon private property by the public in walking or driving across the same is safe from an obstruction existing upon private land, but so near to the path or driveway as to constitute a source of possible danger, since in such case there would be no right upon the part of the city to remedy the defect or fence, or guard it from the driveway. *Sweet v. Poughkeepsie*, supra.

And, a town is not liable for an injury occasioned to a traveler, passing from a public highway to a railroad station through a road opened by the proprietors of the railroad for that purpose but never dedicated to the public, by a block of stone lying within the limits of the highway, as located, obstructing the entrance to the road to the station, if it does not obstruct the roadbed of the highway. *Smith v. Wendell*, 7 Cush. 498.

And one who lives upon and is acquainted with the condition of a way which has never been formally dedicated to the public, or accepted or treated by the city in which it lies as a public way, but which was constructed by a private corporation upon its own land for its own use and convenience and the use and convenience of tenants occupying its houses upon both sides thereof, and who had seen a sign "private way" at one end thereof, cannot recover of the city for an injury sustained by reason of an obstruction therein while in the use of ordinary care, although the way opens into a public street and has been open to the public travel more than twenty years, without interruption, and the city has not closed up the entrance to the same or in any way given notice that it was dangerous. *Durbin v. Lowell*, 3 Allen, 398.

So, the duty of a municipal corporation to put a street in order and render it safe for the passage of travelers does not attach to a street at once upon its dedication; if, in its natural condition, it is dangerous, it is not the fault of the city; it is for the city authorities to determine how and to what extent they will improve it. *St. Paul v. Seitz*, 3 Minn. 297, Gil. 205, 74 Am. Dec. 753.

And a municipal corporation is not liable for an injury sustained by an individual in consequence of its neglect to put one of its public ways in repair. *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212, 5 N. W. 668.

And an instruction in an action for an injury received from falling into a ditch in a street, assuming that the street had been dedicated to and accepted by the city, and that it was the duty of the city to keep it

in a reasonably safe condition for travel by the public, is erroneous where the evidence shows that the city had not accepted or improved the street. *Clay City v. Abner*, 26 Ky. L. Rep. 602, 82 S. W. 276.

The duty of a city to keep its streets free from obstruction and in a reasonably safe condition for ordinary travel exists with reference to any streets within the limits of the city, in common use by the public, however, whether improved or not. *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474; *Murphy v. Indianapolis*, 83 Ind. 76; *Benton v. St. Louis (Mo.)* 118 S. W. 418.

And a municipal corporation is liable for defects and obstructions in a street left in its natural condition, which has been opened to public use. *Lamb v. Cedar Rapids*, 108 Iowa, 629, 79 N. W. 366.

So, where, by ordinance, a street is ordered to be opened, graded, etc., for public use, the city has taken a step which it is bound to exercise with reasonable diligence, and for the neglect of which it is responsible to the public. *Tritz v. Kansas City*, 84 Mo. 632.

And, where a city has platted a street as a part of the city, and it has been used as a highway, it is liable for injuries received by a traveler thereon where, without fault, he falls into an excavation made by the city in the street, although the city may never have assumed to improve the street, but has allowed it to remain in its natural condition aside from the excavations made therein for gravel to use elsewhere. *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321.

Nor does the liability of a city for injuries received by a traveler on one of its streets from an obstruction therein depend on whether it has changed the natural grade of the street so as to make it conform to the grade established by its ordinances. *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637.

And a city which allows the rim and cover of a manhole to project an unnecessary and improper distance above the surface of a thoroughfare used as a street is not relieved from liability for an injury resulting therefrom by the fact that the street had never been regularly paved and graded. *Schafer v. New York*, 12 App. Div. 384, 42 N. Y. Supp. 744.

So, overseers of highways acting under the general authority of the trustees of a village, who are by law commissioners of highways, and without directions as to the specific application of labor under their warrants, may create a liability on the part of the trustees by applying the labor to the improvement of a particular street. *Hickok v. Plattsburgh*, 41 Barb. 130.

And, where a city grades and fills a public street so as to level it with and include as part thereof the top of a high wall erected by owners of adjoining real estate, and allows it to be used by the traveling public without erecting guards or railings to prevent accidental driving or falling over the wall, its liability to a person who falls over

the wall is not affected by the fact that the wall was erected upon private property, the city having adopted it and used it as a part of the street. *Aurora v. Colshire*, 55 Ind. 484.

A statutory provision that every highway hereafter to be laid out that shall not be opened and worked within a period of six years shall cease to be a road for any purpose whatever requires a highway to be made passable as a highway for public travel; it need not be finished and a first-class road, but it must be sufficient to enable the public to pass over it. *Horey v. Haverstraw*, 124 N. Y. 273, 26 N. E. 532, reversing 47 Hun, 356.

d. Dedication and acceptance.

A way may become a public street or highway, so as to render the city responsible for obstructions therein, by a dedication on the part of the owner in the manner prescribed by statute, or by prescription; and it is not necessary in such case to make any proof of acceptance. *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; *McCann v. Bangor*, 58 Me. 348.

And, if a private way has been opened from a public way, and has been dedicated to public use and become a public way, the municipal corporation is liable for a defect in the public way between the part wrought for public travel and the entrance of the private way, unless it has cautioned the public against entering such private way. *Paine v. Brockton*, 138 Mass. 564; *Steel v. Huntingdon*, 191 Pa. 627, 43 Atl. 398.

So, a way may become a public street, so as to impose upon the city the duty of keeping it free from obstruction, by a common-law dedication; that is, by deed or acts in pais of the owner. *Meiners v. St. Louis*, supra.

And the act of the owner of lands within the limits of a city, in constructing a street over them and the necessary bridges suitable for public travel, and in throwing them open for public use, will be held to indicate an intention to dedicate the street to public use, in the absence of evidence showing a contrary intention. *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196.

But in such case it is necessary that a street should not only be dedicated to, but accepted by, a city, before the city can be charged with the duty of keeping it in repair. *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37; *Manderschid v. Dubuque*, supra; *Cochran v. Shepherdsville*, 19 Ky. L. Rep. 1192, 43 S. W. 250; *Meiners v. St. Louis*, supra; *Benton v. St. Louis (Mo.)* 118 S. W. 418; *Atkinson v. Nevada*, 133 Mo. App. 1, 112 S. W. 1022; *Imperial v. Wright*, 34 Neb. 732, 52 N. W. 374.

While any individual may lay out a thoroughfare through his lands, such a dedication does not impose upon the municipality the duty of improving or keeping it in repair or free from obstruction; there must be an acceptance of the dedication before this duty can arise. *Kennedy v. Cumberland*, 65 Md. 514, 57 Am. Rep. 346, 9 Atl. 234; *Ogle v. Cumberland*, 90 Md. 59, 44 Atl. 1015.

land, 65 Md. 514, 57 Am. Rep. 346, 9 Atl. 234; *Ogle v. Cumberland*, 90 Md. 59, 44 Atl. 1015.

And a city is bound by no obligation in consequence of the action of other persons in dedicating land for public use as a street, though the rights of the public may have attached thereto. *Milwaukee v. Davis*, 6 Wis. 377.

Nor does the mere dedication of a street to public use by means of a recorded plat alone render the city liable for the negligent failure to keep the street in repair and free from obstruction. It is necessary to show further that the street has been accepted and its use as such invited or sanctioned by the city; but such invitation or sanction may be given by the acts of the city's proper officers as well as by ordinances. *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717.

And the adoption of an ordinance establishing the grade of a street dedicated by the owner of the soil to public use is insufficient to show an acceptance thereof by the corporation. *Atkinson v. Nevada*, supra.

Nor is the fact that a municipal corporation has laid drains in a private lane within the corporate limits equivalent to an acceptance of such lane as a public street; and the city does not thereby incur any responsibility for an accident caused by a person falling on the sidewalk of such lane. *Tougas v. Montreal*, Rap. Jud. Quebec 12 C. S. 532.

Acceptance by a municipal corporation of a street laid out by a private individual on his land, which will render the corporation liable for personal injuries for defects in it, can be shown only by an ordinance, or by repairs directed by it to be made or by ratification of repairs made. *Steel v. Huntingdon*, 191 Pa. 629, 43 Atl. 398.

So, where an individual dedicates land to a city for a street, to impose the duty upon the city of taking care of it the person dedicating it must have done such acts as would have enabled the city to accept the dedication at the time, and have allowed it to remain in a position to be enabled to accept it from that time on. *Morse v. Troy*, 38 Hun, 301.

And, when a city, by its public authorities, accepts a dedication made by an owner of land, and assumes control of the land dedicated as a street on behalf of the public, then its responsibility attaches. *Milwaukee v. Davis*, 6 Wis. 377.

It has been held, however, that the establishment of a street cannot be proven by parol; this can be shown only by record. *Beaudan v. Cape Girardeau*, 71 Mo. 392.

But the general rule seems to be that a dedication of land as a street is not within the statute of frauds, and need not be by deed or other writing, but may be effectually done by verbal declaration, and may be express or implied, and will be implied from long use by the public of the land claimed to be dedicated. *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37; *Benton v. St. Louis (Mo.)* 118 S. W. 418.

Within this rule, acts of the owner of land implying his assent to its use as a highway and indicating an intention that it be so used when accompanied by user on the part of the public authorizes an inference of prior dedication without regard to the time during which the way has been used. *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep 196.

And acceptance of a highway by a municipal corporation, to which it has been dedicated by the owner, may be sufficiently shown by public use of the road as a highway, and work done thereon by the proper authorities to repair the same. *Ibid*.

And to show an acceptance of a street by the public, binding upon the city, it is not necessary to show any formal action of the city council to that effect. *Shartle v. Minneapolis*, 17 Minn. 308, Gil. 284; *Dunn v. Oelwein* (Iowa) 118 N. W. 764.

Nor is it necessary to prove by record evidence that the board of trustees of a village had formally adopted or recognized a footway as a public way in order to hold the village liable for damages resulting from defects therein, where the avenue including the footway thereon was a public street in fact, and had been long recognized as such by the village through its legally constituted officers or agents. *Cronin v. Delevan*, 50 Wis. 375, 7 N. W. 249.

And, where an ancient public footway 2 feet wide, lying upon lands of a city and of an individual owner, was, by agreement between the city and such owner, widened to 12 feet, each party contributing a strip of land for that purpose, with mutual covenants that it should be used only for foot passengers; and it was subsequently used by the public and kept in repair by the city,—the city is liable, as for a highway, for a personal injury to a foot passenger occasioned by a defect or obstruction therein. *Gould v. Boston*, 120 Mass. 300.

And that a city expended money in the repair of a bridge, and assumed and exercised control and supervision over it, and it was upon a public thoroughfare in the city, is evidence tending to show an acceptance and assumption of the bridge by the city. *Shartle v. Minneapolis*, *supra*.

So, a dedication and acceptance of a public street may be implied from a general and long-continued use by the public as of right. *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904; *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; *Willey v. Portsmouth*, 35 N. H. 303.

And a city, by working a street dedicated by a landowner to the public use, thereby accepts it, and renders itself liable for an injury resulting from an excavation in it near the traveled way. *Greenberg v. Kingston*, 2 N. Y. Supp. 511.

And, where a way had been used as a street by the public from the earliest recollection of the oldest inhabitants, and it had been known in the plan of the city under a designated street name, and houses fronting on it had been numbered, water mains had

been laid, electric wires hung on poles along its curbing, and it had been guttered, lighted, and cleaned at public expense, and the property owners and city had jointly paved portions of the sidewalk, and it was under police supervision and under the control of the superintendent of streets and within the territorial limits of the city, its dedication and acceptance as a street were established. *Winchester v. Carroll*, *supra*.

And an averment in an action against a city for an injury caused by an alleged defective bridge, that the city council used the means necessary to prevent the public from using the bridge, and that the council had taken measures for rebuilding the bridge, constitutes an admission of assumption by the city of the care and control of the bridge in question. *Shartle v. Minneapolis*, *supra*.

So, the adoption by a city and the acceptance of an amended charter providing that whenever any street, alley, or lane shall have been opened to, or used as such by, the public for the period of five years, the same shall thereby become a street, alley, or lane for all purposes; and the common council shall have the same authority and jurisdiction over and right and interest in the same as they have by law over the streets, alleys, or lanes laid out by it, constitutes an acceptance of a street of which there had been no formal act of acceptance, but which was dedicated to the public more than twenty years before and opened to public use and was in fact used by the public. *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

Nor is any specific length of possession necessary to constitute a valid dedication of a street, so as to impose responsibility upon the city for its condition; the assent of the owner to the public use and the actual acknowledgment by the public for such time that public accommodation and private rights would be materially affected by an interruption of the acknowledgment are sufficient to constitute a dedication. *Hill v. Sedalia*, 64 Mo. App. 494.

And the user of a way as a city street for a period corresponding with the statutory limitation applicable to real actions in the jurisdiction where the question arises will ordinarily suffice as an acceptance by the city of the street, so as to impose upon it the duty of keeping it in repair. *Winchester v. Carroll*, *supra*; *Guthrie v. New Haven*, 31 Conn. 308; *Manderschid v. Dubuque*, *supra*.

And acceptance by the public of a highway, resting on dedication, may be proved in an action against the municipal corporation for an injury resulting from a neglect to repair, by the same character of evidence that is sufficient to establish it in a case in which a citizen is charged with obstructing a highway, or the owner is required to surrender his land under an alleged dedication to the public use. *Manderschid v. Dubuque*, *supra*.

So, a city to which lands are dedicated for use as a street is not under duty imme-

diately to work, grade, and put in passable condition the street thus dedicated; but, in doing the work of grading and putting in condition, it should be done with ordinary skill, and ordinary care should be observed to prevent accidents. *Milwaukee v. Davis*, 6 Wis. 377.

And a municipal corporation possessing reasonable notice of a defect or obstruction in one of its streets is liable for any injury arising therefrom after it is constructed and open for travelers, although the time in which it was allowed by law to build it, after its acceptance had not elapsed. *Blaisdell v. Portland*, 39 Me. 113.

And a city is liable for death by drowning of a small child in a large hole filled with water, knowingly left open and exposed in one of its unimproved public streets, which street had been accepted by the city as one of its public streets, and was in daily use by a large number of people with the city's knowledge and acquiescence. *Newport News v. Scott*, 103 Va. 794, 50 S. E. 266.

Nor can a city which has accepted the dedication of a street defend an action against it for an injury resulting from an obstruction therein, on the ground that the person making the grant or dedication was not the owner of the land. *Golden v. Clinton*, 54 Mo. App. 100.

And, where land is dedicated by the owner to a public use, as for a street, such dedication divests the wife of the owner of her right of dower. *Benton v. St. Louis*, (Mo.) 118 S. W. 418.

So, a statute declaring that, when buildings or fences have existed more than twenty years, fronting upon any way or street or land appropriated to public use, the bounds of which cannot be made certain by record or monuments, such buildings or fences shall be deemed the true bounds thereof, applies to a street dedicated to a city; and a person injured by a depression or obstruction in the street may establish the limits of the way in the manner referred to in the statute. *Hutchings v. Sullivan*, 90 Me. 131, 37 Atl. 883.

And, under a statute providing that, where a private way is opened and dedicated to public use, the municipality shall, when public safety demands it, either close the entrances of such way, or by other sufficient means caution the public against entering upon such way; and, if any such way is not closed, or sufficient notice is not given that it is dangerous, the city or town shall be liable in damages arising from defects therein,—if a private way in a city is opened and dedicated to public use the city is not liable for an injury caused to a person by a defect therein if it has posted a conspicuous and legible notice at the point where the person enters the street that the way is private and dangerous, whether the notice is seen or not. *Smith v. Lowell*, 139 Mass. 336, 1 N. E. 112.

So, a provision in a city charter prohibiting individuals from opening a public way within the limits of the city, except

under an order from the common council, does not prevent the creation of a street therein by dedication and acceptance, though such dedication might violate the law; and the city cannot resist an action for an injury caused by a defective or obstructed sidewalk on the plea that the street had not been laid out as a highway by the city authorities in accordance with the city charter. *Makepeace v. Waterbury*, 74 Conn. 360, 50 Atl. 876.

But a highway already dedicated to the public, which it is the duty of a city to keep in proper condition, cannot be dedicated by the city to a town; the easement being already in the public, there is nothing which the city can dedicate; the transfer of its duty to repair can be made only by contract. *Guthrie v. New Haven*, 31 Conn. 308.

Whether a sidewalk was constructed apparently for public travel along a thoroughfare in general use by the public for travel, though such thoroughfare had not been formally accepted as a street so as to require the city to exercise reasonable care in keeping the sidewalks safe for public travel, is a question of fact. *Dunn v. Oelwein* (Iowa) 118 N. W. 764.

e. Improvement, repair, and other acts of recognition as affecting.

1. Generally.

A municipal corporation which suffers the public to treat land as an ordinary street is bound to keep it in a reasonably safe condition. *Schafer v. New York*, 154 N. Y. 466, 48 N. E. 749; *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418; *Leavenworth v. Laing*, 6 Kan. 274; *McCann v. Bangor*, 58 Me. 348; *Walker v. Point Pleasant*, 49 Mo. App. 244; *Golden v. Clinton*, 54 Mo. App. 100; *Hill v. Sedalia*, 64 Mo. App. 494, 2 S. W. 1019; *White v. San Antonio* (Tex. Civ. App.) 25 S. W. 1131; *Gallagher v. St. Paul*, 28 Fed. 305.

In such case it is chargeable with the same duties as though it was legally laid out; and it is liable for damages by reason of neglect to keep the same in safe condition for travel. *Golden v. Clinton*; *Hill v. Sedalia*; *Sewell v. Cohoes*, supra; *Schafer v. New York*, 12 App. Div. 384, 42 N. Y. Supp. 744; *Taake v. Seattle*, 18 Wash. 178, 51 Pac. 362.

And this is so although there has been no official action, resolution, or ordinance opening it as a public street. *Gallagher v. St. Paul* and *Walker v. Point Pleasant*, supra; *O'Malley v. Lexington*, 99 Mo. App. 695, 74 S. W. 890; *Taake v. Seattle*, supra.

Ancient user is evidence of a public highway and of its limits, and ancient repairs are evidence of the obligation of the municipal corporation to repair. *Wiley v. Portsmouth*, 35 N. H. 303.

And the city's acceptance need not be shown by dedication or condemnation. *O'Malley v. Lexington*, supra.

So, making repairs and improvements, and inviting the public to travel upon a way, may be considered as evidence of the adop-

tion of the highway by a municipality; and it may be thereby estopped to deny that the way is a public one and under its control. *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904; *Higert v. Green Castle*, 43 Ind. 574; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

And, where a city or other municipality grades or otherwise improves any portion of a street for the purpose and with the result of inducing public travel thereon, there is a resulting duty to keep such portion of the street in repair, and a consequent liability for failure to do so. *Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *Treise v. St. Paul*, 36 Minn. 526, 32 N. W. 857; *Lindholm v. St. Paul*, 19 Minn. 245, Gil. 204.

And the continuity or apparent oneness of a way, and the distance from the place of injury to the place of repairs, and the length of time the way has been used, and the locality, and whether there are intersecting roads or streets, are all proper elements to be considered in deciding the question whether or not the way upon which repairs had been made is the same way as the one in which a defect or obstruction caused an injury. *Gilpatrick v. Biddeford*, 51 Me. 182.

And, evidence of repairs made by municipal authorities subsequent to the injury complained of is proper to go to the jury in an action for damages for injuries for an alleged negligent failure to repair a highway resting upon dedication, as a circumstance tending to show a previous recognition and adoption of the street as a highway. *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196; *Benton v. St. Louis (Mo.)* 118 S. W. 418.

And evidence that the former and the present supervisor of roads within a city, who are officers under the control of the common council, had repaired a sidewalk several times, both before and after an alleged injury thereon, is admissible in an action for the injury, upon an issue as to whether or not the street on which the walk was located was a common thoroughfare maintained by the city, though it did not show that the council had expressly directed it; and such evidence is sufficient to authorize the submission of the question to the jury. *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925.

And, where a person was injured by a defective street, and, about five months afterwards, the city repaired the street, such subsequent repair is not inadmissible as tending to show that the city recognized the *locus* as a public street, because of remoteness, the remoteness affecting the force of the evidence, but not its competency. *Benton v. St. Louis*, *supra*.

Nor can a city which allows a street to be used continuously for many years as a public highway, and assumes charge of it as such, evidenced by the expenditure of money and labor upon it, under the supervision and direction of the proper village officers, escape liability for an injury caused by a defect therein, on the ground that it 20 L.R.A. (N.S.)

has never formally adopted the street by recorded resolution or vote. *Cronin v. Delavan*, 50 Wis. 375, 7 N. W. 249; *Leavenworth v. Laing*, *supra*.

And the fact that a highway was used by the public, and that it was within the limits of a municipal corporation, is sufficient to render the corporation liable for the consequences of an excavation made under the direction of the corporation and left unguarded, whether it was one of the public streets of the city or not. *Brusso v. Buffalo*, 90 N. Y. 679.

And, if a road apparently, though not in fact, a public highway, is commonly used by the public; and a municipality, in the exercise of its right in improving an intersecting street, leaves the approach from the road in a dangerous condition, the duty of the municipality to the public requires the exercise by it of reasonable care to prevent such accidents as may reasonably be anticipated to happen to those traveling upon the private road with due care and in ignorance of the danger. *Dennis v. Elmira Heights*, 59 App. Div. 404, 70 N. Y. Supp. 312.

Nor can a municipal corporation which has treated a place as a public street, taking charge of it and regulating it, when an individual is injured in consequence of the negligent manner in which this is done, when it is sued for such injury, throw upon the other party the burden of proof of the irregularity of the proceedings by which the land became a street, or of the authority by which the street was established. *New York v. Sheffield*, 4 Wall. 189, 18 L. ed. 416.

And, where a city, by ordinance, authorized the construction of an embankment not only for the use of a street railway, but also as a public thoroughfare, it becomes the duty of the city to keep the same in reasonable and good traveling condition; and whether it neglected to perform such duty, in consequence of which a person was injured, is a question of fact for the determination of the jury in an action for the injury. *Golden v. Clinton*, 54 Mo. App. 100.

So, a statutory rule that the repairing of a way or bridge within six years before a cause of action accrues estops the town to deny the location of the way or bridge on which the accident occurred, applies to a sidewalk. *McCann v. Bangor*, 58 Me. 348.

And a charter provision of a city that all streets and avenues in the city opened or hereafter to be opened to public use, which shall be used as such for five years continuously, shall be deemed and taken to be public streets and avenues, does not contemplate any official action on the part of the city as being necessary to confer upon the streets and avenues referred to therein the character of public streets and avenues, so as to render the city liable for injuries caused by obstructions or defects therein. *Corbett v. Troy*, 53 Hun, 228, 6 N. Y. Supp. 381.

Nor does a charter provision of a city requiring all streets which have been opened and graded to be kept open and in repair

make the duty of the city to keep open and in repair dependent upon the establishment of what is known as the grade of the street, or upon the final completion of the grading in conformity to such established grade, or upon a formal opening of the street by resolution of the common council. *Lindholm v. St. Paul*, supra.

And, where it is provided by statute that the fee of streets shown on a city plat shall be vested in the city for the use of the public, a city which, by ordinance, has accepted and improved such a street, when sued for injury resulting from an obstruction or defect in it, cannot escape liability by denying that the locality is a street. *May v. Anaconda*, 26 Mont. 140, 66 Pac. 759.

Mere use by the public of a portion of a street which has never been prepared for public use by the city, and which the traveling public have not thereby impliedly been invited to use, however, does not cast upon the city the duty of keeping such portion of the street in repair. *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612; *Garnet v. Slater*, 56 Mo. App. 207; *Downend v. Kansas City*, 156 Mo. 60, 51 L.R.A. 170, 56 S. W. 902.

There must in addition, be recognition or the exercise of jurisdiction over it. *Garnet v. Slater*, supra.

And a statute providing that if, in an action for damages for an injury received by reason of a defect in a highway, it appears that the municipality has at any time within six years before such injury made repairs on such way, such municipality shall not deny the location thereof, provides merely that the existence of such a way *de jure* shall not in that proceeding be denied; but it does not assert that the liability of the party charged to keep it in repair shall not be denied. *Rouse v. Somerville*, 130 Mass. 361; *Gilpatrick v. Biddeford*, supra.

And he may deny that the place where the injury occurred is the same way. *Gilpatrick v. Biddeford*, supra.

And the question whether a town had made repairs on a street within six years, so as to be responsible for personal injury resulting from a defect therein, is properly submitted to the jury in an action for the injury, where it appears that work had been done to facilitate travel on the street within six years prior to the accident, by a servant of the town, who was paid by the town for doing it. *Taylor v. Woburn*, 130 Mass. 494.

Nor does the fact that people were accustomed to use an embankment along which the tracks of a railway ran in a street longitudinally, as a path, of itself, constitute it a public highway which the city is required to maintain in a safe condition. *Kaseman v. Sunbury*, 197 Pa. 162, 46 Atl. 1032.

And, where there was a strip of land on one side of a highway as located, and between it and a row of buildings, which was not a part of the highway, the use of this strip by the public for twenty years would 20 L.R.A. (N.S.)

not make it a highway, for defects or obstructions in which the town would be liable. *Stockwell v. Fitchburg*, 110 Mass. 305.

Aside from statutory requirement, the length of time that the user of a highway should continue to raise a presumption of adoption as a highway is usually twenty years. *Beaudean v. Cape Girardeau*, 71 Mo. 392.

And, where a street permitted to be obstructed, from which an injury resulted, had not been laid out in accordance with law, to hold the city for the injury it must be established that it had been used by the public for twenty years, though, if the public were not cautioned against traveling upon it, the town would be liable for an accident to persons coming out of it, as well as those entering upon it. *Taylor v. Woburn*, supra.

And it has been held that, where user or prescription is relied upon to establish a public highway for a defect or obstruction in which the municipal corporation is liable, there must be an uninterrupted user by the public for at least twenty years. *Kennedy v. Cumberland*, 65 Md. 514, 57 Am. Rep. 346, 9 Atl. 234; *Taylor v. Woburn*, supra.

2. Sufficiency of recognition.

The fact that a way was generally used by a great many people does not make it a public way, and an allegation to that effect, in an action for an injury caused by an alleged defect therein, charges a defect in a private way. *Goodin v. Des Moines*, 55 Iowa, 67, 7 N. W. 411.

Nor does the fact that other persons use the same route in going to a particular place make it a way in the sense that would impose upon the city the duty of keeping it clear. *Baltimore v. Brannan*, 14 Md. 227.

And no action against a municipality can be maintained for the death of a pedestrian who was killed by falling into an open space in an embankment erected longitudinally in a public street by a railroad company, either on the ground that in effect the embankment as constructed was a substitute highway, or that the permissive use of it by all persons passing along the street made the city responsible for its proper maintenance. *Kaseman v. Sunbury*, 197 Pa. 162, 46 Atl. 1032.

So, where a road was not a city street or highway, and no obligation rested upon the city to repair it, the city is not made liable for injuries resulting from its defective condition or obstruction by the fact that a public official of the city exercised some authority with respect thereto, where it appears that the exercise of such authority was not authorized by the city. *Chicago v. Hannon*, 94 Ill. App. 143.

And the fact that a city has laid drains in a private lane within its territory is not equivalent to an acceptance of such lane as a public street; and the city does not thereby incur any responsibility for an ac-

cident caused by a defective sidewalk in such lane. *Tougas v. Montreal*, Rap. Jud. Quebec 12 C. S. 532.

Nor do leaving an opening from a city street to a strip of land used by the public as a street, but not accepted by the city, and placing a light at the point of opening, constitute an adoption of the alleged street as a public highway which the city is bound to keep in proper condition. *Downend v. Kansas City*, 156 Mo. 60, 51 L.R.A. 170, 56 S. W. 902.

And the fact, that after an injury occurred caused by the defective condition of a bridge over a drain crossing a street, the city appropriated and expended a sum of money in repair of the street, is not admissible in evidence in an action against the city for damages for the injury, in the absence of other acts of acceptance, as tending to show that the city had previously recognized and adopted the street. *Kennedy v. Cumberland*, 65 Md. 514, 57 Am. Rep. 346, 9 Atl. 234.

So, a city cannot be held to have undertaken to make repairs upon and keep in good condition a driveway to a dumping ground over private lands, not in its possession or under its control, because one of its employees directed a few teamsters to fill up holes upon such land, over which they had chosen to drive for their own convenience. *Chicago v. Hannon*, supra.

And, where the officers of a municipal corporation, in construction or repairing a public way, disposed of the waste rocks or earth for the benefit of an individual in such a way as to improve a private way belonging to him, the repairs so made upon the private way are made for the owner of it, and not for the municipality; and the municipality is not thereby estopped from denying its location in an action to recover for injuries sustained in consequence of defects in the way. *Gilpatrick v. Biddeford*, 51 Me. 182.

And, where a county owned a bridge one end of which abutted upon a city; and the city end of the bridge was connected with a public street of the city over 90 feet distant by an approach over private land; and the county paid rent to the private owner for the use of the land; and the city street commissioner had filled in a few loads of gravel at the end of the bridge on the approach, and had rebuilt or repaired the sidewalk thereon at or near the place of the accident in question, but this was done without express direction from the city authorities,—it cannot be held as a matter of law that the city had adopted the approach as one of its highways. *Bishop v. Centralia*, 49 Wis. 669, 6 N. W. 353.

Nor is a way constructed and kept in repair by a private corporation upon its own land for its own use and convenience and the use and convenience of tenants occupying its houses upon both sides thereof opening into a public street, having a sign "Private way" upon the corner, but left open to public travel for more than twenty 20 L.R.A. (N.S.)

years, without interruption, thereby dedicated to the public; and it does not become a public way by prescription so as to render the city liable for injury from an obstruction therein. *Durgin v. Lowell*, 3 Allen, 398.

So, where a railroad company was allowed in condemnation proceedings to use the lands of a corporation part of which had been used by the public but was not a street; and it was stipulated that the railroad company should provide another road; and the new road passed under the tracks of the railroad and across a ditch, which was occasionally cleaned by the city employees; but there had been no formal acceptance of the same by the city,—the municipality is not liable for an injury caused to a person by falling into a ditch or sewer at the point where it crossed this road. *Ogle v. Cumberland*, 90 Md. 59, 44 Atl. 1015.

If the authorities of a city, or those having the city market in charge, have indicated a specified way as a way to the market, however, the city would be chargeable with negligence, if any, in permitting the way to be obstructed by nuisances. *Baltimore v. Brannan*, supra.

And the existence of sewers or water mains, or of a curb line established in a street, or of paving, is evidence which may conclusively show acceptance of a dedication of the ground for street purposes. *Benton v. St. Louis* (Mo.) 118 S. W. 418.

So, a much-traveled thoroughfare used as a public street for many years in a part of a city compactly built up, relative to which an ordinance was passed fixing its grade and extending it over other lands, is a public street which the city must keep free from obstructions and in a reasonably safe condition, even in the absence of proof of dedication. *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637.

And the enactment by a city of an ordinance providing for the construction of an embankment in a street, and the manner in which it shall be constructed, constitutes a legislative declaration of the fact that the city was in the actual possession of the street, and that it was a public thoroughfare which it was its duty to keep in proper condition for travel. *Golden v. Clinton*, 54 Mo. App. 100; *Byerly v. Anamosa*, 79 Iowa, 204, 44 N. W. 359.

And this is so though it had never accepted the street by special ordinance. *Byerly v. Anamosa*, supra.

And, where a street was dedicated, and the city so far recognized it as a public street as to change its name by ordinance and lay sewer along it, and suffer and permit it to be used without objection by vehicles of all kinds for a period long enough to establish a highway by prescription, the city is bound to maintain a reasonably safe way along it sufficient to accommodate travel, and is liable to one who, without fault, is injured because of defects therein, while using it for a lawful purpose, though the city had never graded it or otherwise

attempted to improve it or prepare it for public travel. *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365.

And, where street lamps and poles of public-service corporations have been in existence for a long time on a strip of land claimed to be embraced in a public street, the city will be held to have acquiesced in such public use of the strip, whether they were so placed in strict accordance with city charter regulations or not. *Benton v. St. Louis*, supra.

So, a way in which a defective sidewalk caused an injury is a public street for which a city is responsible, where it appears that it had not only been accepted, but had been improved and treated as a public street of the city, and public work had been done on it from year to year, and it was in use as a public street for a long time before the accident, and the sidewalk in question had been there for several years, and the city has assumed jurisdiction to cause it to be repaired and to reconstruct it, though for several blocks in the street there were few houses. *Neff v. Cameron*, 213 Mo. 350, 18 L.R.A. (N.S.) 320, 111 S. W. 1139; *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106; *Waxahachie v. Connor*, (Tex. Civ. App.) 35 S. W. 692.

And, where a street had been open to its full width for about forty years, and it was extensively used by the public, and the sidewalk had been laid out and used during all that time, and water mains had been laid through the street, and the village had assumed jurisdiction over it, and curbstones had been placed along the sidewalks at the expense of the village, a finding by a jury, that for its whole width it had been dedicated to and accepted by the public, and that it was legally and lawfully one of the streets of the village, is warranted. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43.

And an avenue in a city, laid out as such by commissioners appointed for that purpose, and over which the mayor and common council have exercised their power by regulating it, and causing the curb and gutter to be set, defraying the expenses by assessment, is under their jurisdiction and control as a municipal corporation; and the corporation is bound to keep it in repair. *Hutton v. New York*, 5 Sandf. 289.

So, a city is liable for an injury caused by defects or obstructions in a street where it had cut the weeds and filled holes in it, and thus invited the public to use it, although no order had been made by the city council for the improvement of the street. *Henderson v. White*, 20 Ky. L. Rep. 1525, 49 S. W. 764.

And, where a street had been in public use for twenty years, and men had been employed by the city to clean the walks in case the owners did not do it, and notice was served on the owner of property where an accident occurred to clean the sidewalk, the city will be deemed to have adopted the street as a public street, and assumed au-

thority over it, and recognized its obligation to exercise care in respect to its condition, though it had never been opened by the city or accepted as a public street, and no grade line had ever been established thereon. *Stapleton v. Newburgh*, 9 App. Div. 39, 41 N. Y. Supp. 96.

And, where a street had been dedicated to public use and accepted by the city as one of its public streets, and was in daily use by numbers of people with the full knowledge and acquiescence of the city, and was lighted at the expense of the city and underlain by a sewer owned, controlled, and maintained by the city, and was under the supervision, management, and control of the city, it was sufficiently open to the public to render the city liable for an injury resulting from leaving a large hole open and exposed in it, although it was not improved with sidewalks. *Newport News v. Scott*, 103 Va. 794, 50 S. E. 266.

And the facts that people of the neighborhood, or abutting owners on a street, built a sidewalk along the side of it, and from time to time repaired it without ordinance of the city or order from its officers, and constructed a manhole over a sink hole on the land at private expense, and turned local drainage into it, do not relieve the city from liability for defects in the street or sidewalk, or for a dangerous condition arising from combination of the defects and the unguarded sink hole. *Benton v. St. Louis*, supra.

So, a street in a city which has a well-defined roadway and footpath or sidewalk, and a sewer laid through it, and a water main, and which is lighted by lamps for which the city paid, and which has had work done upon it which the city paid for, and upon which in the neighborhood of one hundred people reside, and which has been used for highway purposes for more than twenty years, is a street for which the city is responsible, and for injuries from obstructions or defects in which the city is liable. *McCormick v. Amsterdam*, 43 N. Y. S. R. 604, 18 N. Y. Supp. 272.

And a street which has for years been used by the public as such, and graded, ditched, and sidewalked under the immediate supervision of the city street commissioner, and upon which the city has by ordinance granted a railway company authority to lay switch tracks and to construct a culvert, will be deemed a public street of the city, for the condition of which the city is responsible, though no ordinance can be shown directing the commissioner to do the work. *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256.

And, where the public had traveled over a way as a public highway for from twelve to fifteen years, and the city had placed and leveled the dirt upon it for years for highway purposes, and a cross walk was constructed across it near the place of injury under the immediate direction of the street commissioner of the town, the town paying therefor, it is for the jury to determine, in

an action for an injury caused by an obstruction therein, whether the place was within a public street. *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904.

So, evidence that a city had previously sold improvements on property where a street was situated, and authorized their removal preparatory to opening the street, and had opened the street, is sufficient to go to the jury in an action for an injury caused by a defect or obstruction in the sidewalk, on the question whether or nor the city had assumed ownership and control of the property for street purposes. *Still v. Houston*, 27 Tex. Civ. App. 447, 66 S. W. 76.

And, where the witnesses on both sides speak of the street in question as a street, and ordinances for levying special tax bills for construction of the sidewalk in question are introduced by both sides, and the evidence is uncontroverted, it is sufficient to show that the place is on a public street. *Taylor v. Springfield*, 61 Mo. App. 263, 1 S. W. 383.

And, where an order laying out a proposed street was made; and the land embraced in it was open, uninclosed ground; and houses were erected adjoining it on both sides; and the owners were notified to build sidewalks in front of their premises, which they did; and the road commissioner was notified by the board of trustees to remove all obstructions in the street and open up the same; and the street was used so far as the houses extended; and the public was accustomed to use the sidewalks,—the jury, in an action against the village for an injury caused by a hole in the sidewalk, is justified in finding for the plaintiff, since the public had a right to assume that the street, so far as the houses extended, was in use by permission of the village as a public street. *Seymour v. Salamanca*, 137 N. Y. 364, 33 N. E. 304.

So, where the platform of a set of wagon scales situated in the middle of a city market building, to which sidewalks were laid from opposite sides of the street, making the platform accessible to pedestrians from every direction, had been used as a common thoroughfare by people generally both day and night for a great many years with the city's knowledge, it is properly considered a public street, and as such a person walking upon it is entitled to the protection of one using any other public street. *Nitz v. Toledo*, 22 Ohio C. C. 454, s. c. on subsequent appeal. 23 Ohio C. C. 350.

And in such case the city is not relieved from liability for an injury to a pedestrian, caused by the removal of the scales by the city or with its knowledge, leaving an opening which was left unguarded and unlighted, into which the pedestrian fell, by the fact that the platform was used for market purposes, and originally intended for that use only. *Nitz v. Toledo*, 22 Ohio C. C. 454.

So, a city which deposits a large water pipe opposite the gate of an abutting owner opening on the street, which causes an injury, is liable for the injury whether the 20 L.R.A. (N.S.)

street had or had not been established as a public highway, where, with its consent, permission, and knowledge, it had been used for about thirty years by the general public as a driveway or thoroughfare for the use of all kinds of teams, and for about twelve years by the occupants of the abutting property in question for ingress and egress through this gate. *May v. Brooklyn*, 46 N. Y. S. R. 552, 19 N. Y. Supp. 670, affirming 44 N. Y. S. R. 368, 17 N. Y. Supp. 348.

And the facts that land on which sheds and stalls were erected and used as market stands had been used as a public street or highway for more than fifty years prior to such erection, and at the time of such erection continued to be so used; and that the city, more than fifty years prior to such erection, granted land bounded on such land, describing the same as lately laid out and surveyed by a city surveyor, such grant requiring the grantees to erect a continuation of a slip thereon of a specified width, to be and remain for the free and common passage of the inhabitants of the city in like manner as the other public streets of the city then were or lawfully ought to be; and that the city thereafter directed the slip or street to be repaved, and assessed the expenses thereof upon the owners of land contiguous thereto,—are sufficient evidence, in an action against the corporation for damages caused by obstructing the same, that such slip was in fact and in law a public street or highway, and regularly established as such. *St. John v. New York*, 3 Bosw. 483.

So a city, which had made a contract with a corporation by which the corporation was bound to keep a certain street in good repair and permit the public to use it, and which had, during a continuous period of thirty years, held out said street as suitable for the accommodation of the public, when a person relying upon such holding out and using the street as a highway sustained an injury by reason of its defective and insufficient condition, is estopped to deny that the street was a highway, for defects and insufficiencies in which it was liable. *Gilbert v. Manchester*, 55 N. H. 298.

And that a city was informed at a meeting of its council, through the report of its committee, that some slight repairs had been made on a ravine in a street, is admissible, in an action for an injury resulting from an alleged neglect to repair the street, as tending to show a recognition of the street as a city street, and that the corporation was informed of the character of the repair of the street which was claimed to be insufficient. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

f. Particular ways and classes of ways.

1. Sidewalks.

(a) Generally.

The rule that a municipal corporation charged with the duty of keeping its streets

in repair, and of exercising a general oversight in regard to their condition and safety, is bound to maintain them free from all defects or obstructions which, by the use of ordinary vigilance and care, they can detect and remove, is applicable to sidewalks. *Furnell v. St. Paul*, 20 Minn. 117, Gil. 101; *Manchester v. Hartford*, 30 Conn. 118; *Giffin v. Lewiston*, 6 Idaho, 231, 55 Pac. 545; *Bloomington v. Bay*, 42 Ill. 503; *Pfeifer v. Lake*, 37 Ill. App. 367; *Mt. Carmel v. Blackburn*, 53 Ill. App. 658; *Brown v. Chillicothe*, 122 Iowa, 640, 98 N. W. 502; *Bacon v. Boston*, 3 Cush. 174; *Bullock v. New York*, 99 N. Y. 654, 2 N. E. 1; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Wall v. Pittsburg*, 205 Pa. 48, 54 Atl. 497; *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474; *James v. Portage*, 48 Wis. 677, 5 N. W. 31.

No distinction exists between sidewalks and carriage ways in respect to the duty of a municipal corporation to keep them in repair. *Davenport v. Ruckman*, 10 Bosw. 20.

And, when a municipal corporation builds a sidewalk, so long as it remains open to the public there is an implied invitation to all travelers to use it; and one is not in the wrong who accepts the invitation in the absence of knowledge of dangers incident to the proper use thereof. *Templin v. Boone*, 127 Iowa, 91, 102 N. W. 789; *Monmouth v. Sullivan*, 8 Ill. App. 50.

And there is an implied warranty on the part of the municipality that it is reasonably safe for travelers using due care for their own safety. *Monmouth v. Sullivan*, supra.

Nor does the fact that a sidewalk was carefully constructed originally absolve the municipal corporation from its duty of exercising continuous oversight to keep it free from defects or obstructions, or from its liability for failure to do so. *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250.

And evidence that sidewalks are constructed in the same way in other cities is not admissible in an action against a city to recover for an injury caused by an alleged defective construction of a sidewalk, for the purpose of showing that such a construction was not a defect. *George v. Haverhill*, 110 Mass. 506; *Champaign v. Paterson*, 50 Ill. 61.

And, where a town or city attempts to keep up a street by working and repairing it, and voluntarily allows it to remain with dangerous holes or excavations, with knowledge that that part of the street is being used as a walk way generally, the municipality is negligent and liable for a resulting injury. *Neal v. Marion*, 129 N. C. 345, 40 S. E. 116.

So, if a town from time to time repaired the part of a street where a person was hurt, and the public generally had used it as a footway, with the knowledge of the town

authorities, then it was the duty of the town to keep it in a safe condition; and a person injured had the right to walk along it, unless she knew or had reason to believe, that it was unsafe or had been abandoned. *Ibid.*; *Anna v. Boren*, 77 Ill. App. 408.

And, where the law imposes upon a city the duty to take charge of sidewalks and exercise control thereof, the law presumes that the city had actual control over a sidewalk a defect in which caused an injury. *Shannon v. Tama City*, 74 Iowa, 22, 36 N. W. 776.

So, a charter provision of a city that the city shall be liable to anyone for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of any street or public ground therein is broad enough to and does include the sidewalks on the street; and under it a city is liable for an injury to a person, caused by his being precipitated through an open cellar door in a sidewalk. *McLean v. Lewiston*, 8 Idaho, 472, 69 Pac. 478.

And, where, in its charter, a village is made one separate road district under the direction and supervision of the trustees of the village, free from any interference or control by any other officers or persons, it cannot be claimed that a sidewalk in a street is not a part of the street, and that the trustees have no duty in regard to the sidewalk. *Koch v. Edgewater*, 18 Hun, 407.

And a sidewalk constructed under the superintendence of the warden of a borough, and accepted, paid for, and maintained by the borough for eight years or more, must ordinarily be regarded as authorized by the municipal authorities. *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051.

Nor is it necessary, to hold a city liable for an injury caused by a hole or obstruction in a sidewalk, to show that the municipality either constructed, or ordered the construction of, the walk in question; it is its duty to see that its walks are in a reasonably safe condition for travel irrespective of the construction. *Argus v. Sturgis*, 86 Mich. 344, 48 N. W. 1085; *Hillyer v. Winsted*, 77 Conn. 304, 59 Atl. 40; *Shannon v. Tama City*, supra; *Streeter v. Breckenridge*, 23 Mo. App. 244; *Klein v. Dallas*, 71 Tex. 250, 8 S. W. 90.

And, when a city is sued for personal injuries caused by a defect or obstruction in a sidewalk, it is not necessary to prove title to the property in the city; it is sufficient to show that the city has assumed ownership and control of it for street purposes. *Still v. Houston*, 27 Tex. Civ. App. 447, 66 S. W. 76.

And a city is not relieved from liability for injury sustained on a defective sidewalk by reason of the fact that the sidewalk was constructed by the county and originally platted as part of a public square, where the city recognized the sidewalk by constructing a gutter and placing curbstones along the side thereof, and such sidewalk was in gen-

eral use by the public. *Huntington v. McClurg*, 22 Ind. App. 261, 53 N. E. 658.

Nor is it necessary to prove any formal dedication of the street; it is enough to show that it was in the actual possession of the city and public, and was used as a street. *Schenck v. Butler*, 50 Mo. App. 106; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630.

And it is not necessary to allege in the complaint that the sidewalk had been accepted by the authorities of the corporation, or to allege the name of the street; a charge that it was a public sidewalk of the town which had been obstructed is sufficient. *Rosedale v. Ferguson*, 3 Ind. App. 596, 30 N. E. 156.

And an ordinance of a city which shows that the city had taken a sidewalk and street crossing under its cognizance and control is admissible in evidence in an action against the city for damages resulting from a defect therein, as tending to show that it was its duty to keep them in repair. *Champaign v. Patterson*, *supra*.

Nor is it necessary, to render a city liable for failure to keep a sidewalk in repair and free from obstruction, that it should have been built under a formal ordinance, or have been so recognized as a walk by the city. *O'Malley v. Lexington*, 99 Mo. App. 695, 74 S. W. 890.

But the passage of ordinances reciting that the common council of the city deemed it necessary that a particular sidewalk should be constructed, and providing for its construction, amounts to an admission by the city that the public interests require it. *Oliver v. Kansas City*, 69 Mo. 79.

And an ordinance of the common council of a city directing a sidewalk to be prepared is admissible in evidence in an action against the city for an injury caused by a hole in the sidewalk, as tending to show that the city had recognized and taken charge of that sidewalk. *Niven v. Rochester*, 76 N. Y. 619.

So, an allegation in a complaint in an action against a city for an injury caused by a defective or obstructed sidewalk, that the sidewalk was on the north side of a named street, and that the street was in the city, sufficiently shows that the sidewalk was within the city limits. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978.

But failure to allege that a sidewalk upon which an injury occurred in such an action was within the city is not fatal where proof was admitted without objection showing the sidewalk to be within the city limits. *Ibid*.

So, it is the duty of a city to keep a sidewalk in front of property belonging to it, but in charge of the police commissioners, who were appointed by the governor of the state, in repair; and such duty is not lessened by the fact that the lot is occupied by agents of the state. *Osborne v. Detroit*, 32 Fed. 36.

To recover in an action against a city or town for damages for injuries received

on account of an obstruction or hole in a sidewalk, however, the person injured must allege and prove that the street or sidewalk upon which the injury occurred was, at the time and place where the injury was sustained, controlled and treated by the town authorities as a public street or sidewalk, and opened as such. *Childrey v. Huntington*, 34 W. Va. 457, 11 L.R.A. 313, 12 S. E. 536.

And mere use by the public of a way as a footpath of a part of a street which has not been thrown open to public use does not cast upon the city the duty of keeping it free from obstruction and in good repair. *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612.

And a city, which in improving the condition of a highway, and in grading it, cut off a part of a hill so that the highway passed through a cut from 4 to 7 feet deep, leaving the bed of the highway in a fit condition either for vehicles or pedestrians, is not liable to a person injured who attempted to use the top of the bank at one side of the cut as a sidewalk, and fell into a transverse ditch, and sustained injuries, where the city had done nothing to improve the condition of the top of the bank, and no sidewalk had been laid out or built there, and the surface of the ground was rough and in a condition due to nature and to the work which had been done on the roadway. *Stadelmann v. New York*, 126 App. Div. 352, 110 N. Y. Supp. 682.

In the above case *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409, *infra*, VII., f. 1, (c), was distinguished upon the ground that in that case there was no visible boundary of the city street, and nothing to induce the belief in anyone passing and exercising reasonable care that he was not within the line thereof; while in this case there was not only nothing to indicate that the place where the plaintiff was walking was part of the street, but the presence of the embankment itself was some indication that the place for travel was at the bottom instead of at the top of it.

So, if a sidewalk has been constructed in accordance with the plans of competent engineers, and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's negligence in its construction. *Ince v. Toronto*, 27 Ont. App. Rep. 410.

Nor is a city rendered liable for an injury caused by a want of a guard or end rail along an elevated sidewalk by the mere fact that it had permitted the use of the sidewalk by the public for several years, where the same was not within the limits of any recognized city highway. *Bishop v. Centuria*, 49 Wis. 669, 6 N. W. 353.

And a statute limiting the liability of a municipal corporation for injuries sustained by reason of defective highways to those which have been in use for ten years applies only to public highways in townships; and a city is bound to keep a sidewalk in safe

condition for public travel from the time it is built and open for travel. *Fuller v. Jackson*, 92 Mich. 197, 52 N. W. 1075.

A city which lawfully exercises its governmental discretion to grade and prepare for use only the wagon roadway in part of a street, however, and omits to build sidewalks on it, is not liable for not having done so, where the uneven surface is such as to notify people that they are not invited to use it at the city's expense. *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168.

But where, for a number of years, there has been a general use by foot passengers of a part of the public street lying outside the improved roadway, the city may be deemed to have recognized such use and assumed responsibility for its being made safe, although no artificial sidewalk has been constructed. *Atchison v. Mayhood*, 69 Kan. 672, 77 Pac. 549; *Beardstown v. Smith*, 150 Ill. 169, 37 N. E. 211.

So, where a section of a public sidewalk 50 feet in length had been removed, leaving a drop in the walk of some 15 inches on either side of such space; and a pedestrian stepped off the end of the walk and was injured,—the city cannot escape liability therefor on the ground that there was no walk at the place of the accident, and it was not bound to construct any. *Belyea v. Port Huron*, 136 Mich. 504, 99 N. W. 740.

And, where a street has been in common use for twenty-seven years; and occupants of lots abutting thereon have paid water taxes; and the sidewalk, although constructed only of coal ashes with a plank curbing, is suitable for its purpose,—it is a sidewalk for which the city is responsible though it has never accepted it as a street, or assumed to improve or maintain a sidewalk upon it. *Deufel v. Long Island City*, 19 App. Div. 620, 46 N. Y. Supp. 355.

So, if a portion of a street intended for the use of foot passengers becomes unsuitable for that purpose; and the public makes constant use of another part of the street between the curb line and the lot line for foot passage,—the portion thus used is a sidewalk within the usual meaning of that term, which the city is bound to keep in repair and free from obstruction. *Rea v. Sioux City*, 127 Iowa, 615, 103 N. W. 949.

Nor does the keeping up of a sidewalk on one side of a street relieve a town or city from liability to a person injured by falling into a hole negligently allowed to remain in another part of the street, though that part is not a sidewalk, where people generally pass over it on foot with the knowledge of the municipal authorities. *Neal v. Marion*, 129 N. C. 345, 40 S. E. 116.

And a surface of rock in a street naturally fitted for a sidewalk, which has been used by the public for many years as part of a continuous sidewalk, other portions of which have been constructed by the municipal corporation, which needs the removal of small irregularities upon its surface to make it reasonably safe, which removal the corpora-

tion has the power and means to do, is none the less a sidewalk because it is a natural and not an artificial one; and the municipal corporation is liable for injuries resulting from a fall of a passer-by, caused by such irregularities in its surface. *Higgins v. Glens Falls*, 33 N. Y. S. R. 111, 11 N. Y. Supp. 289, affirmed in 124 N. Y. 666, 27 N. E. 855.

So, where, within the limits of a highway as laid out, there was a smooth, level sidewalk about 4 feet in width and about a quarter of a mile long, separated from the carriage way only by a narrow water course or gutter, and, about on a level with the carriage way and over it, there was a large amount of travel by foot passengers and had been for a number of years, it is a mistake to rule as matter of law that the injury did not happen on a part of the street which the town was bound to keep in repair, though the footway had not been constructed or repaired by the town, and was not laid out by the town in conformity with the statute; it was a question for the jury whether the footpath was not so connected with the wrought part of the road, or with the carriage way, and so used for travel, as to make the town liable for its condition. *Weare v. Fitchburg*, 110 Mass. 334.

(b) *Sidewalks made by citizens.*

The duty of a city, under its charter, to supervise and take care of sidewalks and cause them to be kept in good repair and free from obstruction is not dependent upon the fact that such sidewalks were constructed or caused to be constructed by the city. *Furnell v. St. Paul*, 20 Minn. 117; *Flora v. Naney*, 136 Ill. 45, 26 N. E. 648; *Colby v. Beaver Dam*, 34 Wis. 285.

And a municipal corporation which permits a walk to be used for public travel is liable for an injury caused by an obstruction thereof, no matter how the walk came into existence. *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144, 37 N. W. 609.

Where the charter of a city gives it control over sidewalks in the public streets, when a sidewalk is once laid, no matter by whom,—whether by a landowner or the city,—it becomes the duty of the city to see that it is kept in proper repair and in a safe condition for travel. *Fuller v. Jackson*, 82 Mich. 480, 46 N. W. 721; *Champaign v. McInnis*, 26 Ill. App. 338; *Saulsbury v. Ithaca*, supra; *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998.

And a charter provision that, whenever the street commissioner shall deem it necessary to repair any sidewalk constructed by the city within its limits when it is out of order, the commissioner shall direct the owner or occupant of the lot adjoining the walk to repair it; and, if the repairs are not made within the time and according to the manner prescribed, the commissioner must cause them to be made at the expense of the lot,—applies to all sidewalks which

the city has ordered to be built and over which it exercises care and control. *Colby v. Beaver Dam*, *supra*.

So, if an individual voluntarily puts down a sidewalk in front of his premises, the municipal corporation may, by acquiescence in the act for a sufficient length of time, and by other acts, accept the sidewalk; and with it the corporation must take the obligation to keep it in repair and free from obstruction. *Hiller v. Sharon Springs*, 28 Hun, 344; *Hutchings v. Sullivan*, 90 Me. 131, 37 Atl. 883; *Graham v. Albert Lea*, 48 Minn. 201, 50 N. W. 1108; *Plattsmouth v. Mitchell*, 20 Neb. 228, 29 N. W. 593; *Ponca v. Crawford*, *supra*.

And such acquiescence or recognition sufficiently appear, where, after the construction of the walk, the city assumes jurisdiction over it and orders repairs to be made; or where the walk is in a public street and in constant use, and in the line of other sidewalks constructed by direction of the city or over which it has control. *Plattsmouth v. Mitchell*, *supra*.

And, where a child between seven and eight years old fell through a hole in a platform erected by the owner of a store building on the side of a street, the street having no other sidewalk than the platform on that side, the child was not a trespasser; and contributory negligence cannot be imputed to him in an action by his father against the city for the injuries received. *Bradford v. Downs*, 126 Pa. 622, 17 Atl. 884.

Nor is it of any consequence that such way or walk was built of earth instead of the usual materials. *Graham v. Albert Lea*, *supra*.

So, where landowners construct sidewalks though in the absence of direction by the municipality conforming to regulations prescribed by it, the municipality must use reasonable care to prevent them from becoming dangerous, and cannot escape liability for an injury caused by a defect or obstruction in them on the ground that it did not build the walks or direct their construction. *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947.

And the fact that a sidewalk had been constructed by an abutting owner as a continuation of a city sidewalk does not prevent the city from being liable when a person traveling along the same and having reason to believe that it was a continuation of the city sidewalk and therefore in a safe condition was injured by a failure of the city to cause a proper barrier to be erected to prevent persons from passing by mistake along said sidewalk in the night, and falling into a creek at which it terminated. *Kinney v. Tekamah*, 30 Neb. 605, 46 N. W. 835.

So, a city which permits a citizen to construct a platform over a gutter in front of his place of business is bound to exercise the same degree of care toward keeping it in a safe condition for pedestrians as if it had itself constructed it, though it is not

an insurer of its safe condition. *Bell v. Henderson*, 24 Ky. L. Rep. 24, 34, 74 S. W. 206.

And, where an apron used as a continuation of a sidewalk from the curb to the roadway had been used for so many years that the city was bound by lapse of time to know that it was being used as a part of the sidewalk; and it permitted the apron to remain in place after the expiration of a reasonable time for removing it,—it is wholly immaterial on the question of the liability of the city for an injury caused thereby whether it was placed there in the first instance by the city or by private individuals. *Chicago v. Loebel*, 228 Ill. 52, 81 N. E. 796, affirming 130 Ill. App. 487.

And evidence that a sidewalk was built by an individual out of material furnished him by the city authorities for that purpose, and with knowledge on their part that he would build the walk in front of his premises; and that from the time it was built it was suffered to remain without repairs until an injury occurred from a defect therein; and afterwards the city authorities put in a new sidewalk at that place,—warrants a finding that the city had exercised authority and control over the street so as to render it liable for the injury. *Flora v. Naney*, 31 Ill. App. 493, affirmed in 136 Ill. 45, 26 N. E. 645.

If the plaintiff in an action for damages for injuries received on account of a hole in a sidewalk seeks to prove that the city authorized and directed the property owner to construct a sidewalk at the point of injury, the records of the city council are the best evidence as to what its action was, unless no such record was made as required by law; and parol evidence should not be received as to such action when such record books are accessible and can be produced. *Childrey v. Huntington*, 34 W. Va. 457, 11 L.R.A. 313, 12 S. E. 536.

(c) Walks outside of highway.

A municipal corporation is liable for injuries caused by defects or obstructions in sidewalks constructed on private property, where they have been treated by the municipality as public walks, and permitted to be used as such. *Chicago v. Baker*, 195 Ill. 54, 62 N. W. 892, affirming 95 Ill. App. 413; *Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246, affirming 21 Ill. App. 326; *Roodhouse v. Christian*, 55 Ill. App. 107, affirmed in 158 Ill. 137, 41 N. E. 748; *Harrison v. Ayrshire*, 123 Iowa, 528, 99 N. W. 132; *Will v. Mendon*, 108 Mich. 251, 66 N. W. 58; *Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62; *Badams v. Toronto*, 24 Ont. App. Rep. 8.

In such cases the municipality is bound to use the same degree of diligence as it is called upon to exercise in reference to other sidewalks within the corporate limits. *Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246.

If a city assumes jurisdiction over a walk by constructing, maintaining, and supervis-

ing it, it is responsible for its safe condition, whether the walk is or is not on a public street. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978.

And statutes making municipalities liable for injuries caused by defective sidewalks do not require that such walks shall be wholly within the line of the street. If the municipality causes the sidewalk to be built, or assumes control of it, it is its duty to keep it in repair whether the particular place where the injury occurred is wholly within the line of the public street or not. *O'Neil v. West Branch*, 81 Mich. 544, 45 N. W. 1023.

And a narrow strip of land on the border of a platted block will, for the purpose of an action against the city for injuries caused by an obstruction or defect in the walk thereon, be treated as a part of a street formed adjacent to it in the platting of adjoining property, where it has been so treated by the persons interested, and it appears on the plat in such a form that it might be considered as dedicated to public use. *Downend v. Kansas City*, 156 Mo. 60, 51 L.R.A. 170, 56 S. W. 902.

So, where a traveler stepped into a hole in a sidewalk caused by the breaking off of the end of a plank thereof, and was injured, the city cannot escape liability upon the ground that the hole was not in the walk proper, but in an extension of boards of the walk over a portion of the adjacent lot, where the walk was of uniform construction, and was apparently situated upon land devoted to the use of the public. *Deland v. Cameron*, 112 Mo. App. 704, 87 S. W. 797.

And, where the place where a walk was laid had been within the apparent boundary of the street for more than thirty years; and for more than ten years the walk had been laid and used by the public as the only thoroughfare for pedestrians; and it connected directly with a crossing leading over to another walk on the opposite side of the street,—the city cannot deny responsibility for the walk thus recognized and permitted to be used by its citizens, though it was laid on what was originally, at least, the end of the lots of abutting owners, a few inches outside of the street line. *O'Malley v. Lexington*, 99 Mo. App. 695, 74 S. W. 890.

So, where a city council erected an iron fence around a common, placing the same back from the line of the street so as to widen the street; and the city built a sidewalk on the street adjoining the common, running by the fence, which to all appearances was a part of the street, and which was constantly used by the public for more than forty years, not as a part of the common, but as a part of the street,—the jury, in an action for an injury caused by an obstruction thereon, would be justified in finding that the sidewalk in question had become a part of the street by prescription. *Veale v. Boston*, 135 Mass. 187.

And, where a hotel was set back 6 feet 9 inches from the line of the lot, and the 20 L.R.A. (N.S.)

sidewalk extended from the hotel 10 feet 10 inches into the street, the portion of the sidewalk within the lot line being constructed or paid for by the proprietor of the hotel, but the whole being open to the public to pass and repass at pleasure, that within the lot line will be deemed a part of the streets of the city, which the city is bound to keep in proper condition. *Foxworthy v. Hastings*, 25 Neb. 133, 41 N. W. 13..

Where a sidewalk is built by an abutting owner along a street but outside of it, and on his own land, however, the city cannot be held to any liability for a defective condition of the walk outside of the line of the street, founded upon any duty to repair such walk, where it never assumed control over it, and did not own and had no legal right to go upon the land where the injury occurred. *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409.

And an obstruction left or permitted in a walk built in front of a building by the owner to communicate with the street is not one for which a city is responsible, the walk being a private way. *Knowlton v. Pittsfield*, 62 N. H. 535; *Hebbard v. Berlin*, 66 N. H. 623, 32 Atl. 229.

Nor is a municipality liable for injuries occurring upon lands of adjacent owners because of the icy condition of such lands, in the absence of proof that the municipality had exercised authority or supervision over them, merely because there was no fence between such lands and the street. *Allison v. Middletown*, 27 N. Y. Week. Dig. 21, 10 N. Y. S. R. 421.

And, where a highway was relocated, and between one side of the highway as relocated and a row of buildings, was a strip of land, the use of that strip by the public for twenty years would not make it a highway, for defects and obstructions in which the town would be liable, unless the twenty years were subsequent to the relocation. *Stockwell v. Fitchburg*, 110 Mass. 305.

So, a strip of land between a schoolhouse and the line of the sidewalk on a street, laid out, graded, and paved uniformly with the sidewalk, in accordance with plans of the architect of the schoolhouse and grounds and with the contract under which the schoolhouse was built, is not within the limits of a highway located and laid out by the city, so as to render the city liable for an injury from an obstruction therein. *Sullivan v. Boston*, 126 Mass. 540.

And the fact that the space in question was not separated from the sidewalk by a fence is not sufficient to show that it was dedicated generally to public use as a part of the system of highways of the city. *Ibid.*

And such a space is not a way entering on and uniting with a public highway, within the meaning of a statute requiring municipal corporations to close up such ways or caution the public against entering upon them under penalty of being liable for defects or obstructions therein of they failed to do so. *Ibid.*

2. Bridges.

Where a canal or stream of water crosses a street it is the duty of the municipal corporation to use reasonable care to furnish and maintain a bridge over it which is reasonably safe for public use. *Caddagan v. Chicago*, 130 Ill. App. 472; *Jordan v. Hannibal*, 87 Mo. 673; *McDonald v. Ashland*, 78 Wis. 251, 47 N. W. 434.

And this is so though it was built by a private citizen with lumber furnished by the town. *McDonald v. Ashland*, *supra*.

Bridges within the limits of a corporation are parts of the streets within or upon which they are erected, and are consequently under the control of the municipal authorities in the same manner and to the same extent as are other portions of the streets. *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5; *Chicago v. Powers*, 42 Ill. 169; *Eudora v. Miller*, 30 Kan. 494, 2 Pac. 685.

And a city having the power to levy taxes to defray the expenses of lighting the street has also power to furnish lights in its bridges; and it is its duty, in the exercise of such power, to do so in such a manner as to afford protection to those passing, against dangers which may be incident to their use; and it is liable for injuries resulting from a neglect of that duty. *Chicago v. Powers*, *supra*.

The rule that a municipal corporation acts judicially in selecting a plan upon which a public improvement is to be constructed, and that no private action will lie for lack of judgment in that respect, has no application to an injury resulting from its negligent construction of a bridge. *Jordan v. Hannibal*, 87 Mo. 673.

And, where a city constructs a viaduct over a river and railroad tracks for the use of the people and the convenience of public travel, it assumes the duty to maintain it, and is bound to keep it in a reasonably safe condition for the use of the public. *Denver v. Baldasari*, 15 Colo. App. 157, 61 Pac. 190.

And a city which permits a private bridge erected in a public street by the side of a public bridge to remain as an apparent and continuing invitation to the public generally to travel over it is charged with the duty of keeping it in a reasonably safe condition for such travel. *Detwiler v. Lansing*, 90 Mich. 484, 55 N. W. 361.

Nor is the liability of a city which maintains a slip crossed by a bridge much narrower than the street, with no protection in the course from the sidewalk to the bridge to prevent persons proceeding in that direction from falling into the slip, for an injury to a person who thus fell, affected by the fact that the slip is a natural channel, or one made before the limits of the city were extended so as to embrace it, the duty to render it safe to the public being the same in either case. *Chicago v. Gallagher*, 44 Ill. 295.

And a city is not released from its duty and liability, with reference to a bridge situated wholly within its limits, to keep it in 20 L.R.A. (N.S.)

repair, by the fact that the bridge was in the first instance built by the county,—especially when the circumstances and conditions under which it was built and its size and cost are not shown, or that it was not built prior to the incorporation of the city and while there was no town, village, or other collection of inhabitants in the vicinity. *Eudora v. Miller*, *supra*.

So, the duty of a city to keep a bridge situated within its limits, with its approaches, in a safe condition, and its responsibility for the performance thereof, are not affected by the fact that the city contains a population of less than 600 and forms a part of two road districts in the township. *Ibid*.

But cities, in the construction of bridges across their streets, in providing against such casualties as a cautious and prudent man should foresee and anticipate, must take into consideration the size and nature of the stream, the character and features of the adjoining grounds, the relative position and formation of the abutting land, its liability to overflow, and the probable extent and duration of such overflow. *Bradford v. Anniston*, 92 Ala. 349, 25 Am. St. Rep. 60, 8 So. 683.

A municipal corporation cannot be held liable, however, for an injury caused by a defect in an approach to a bridge maintained at a railway crossing, which is not a place which the city is bound to keep in repair; and does not become liable therefor by the fact that, knowing of the existence of the defect, it suffered it to remain without notice or warning to the public after it was dangerous. *Rouse v. Somerville*, 130 Mass. 361.

And, until the city assumes control over a bridge erected in a street without its assent or authority, it is not liable for its not being kept in repair. *Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342.

Nor can the trustees of a canal, by building a bridge over their canal within the limits of a city, impose upon the city the burden of keeping it in repair; and the city is not under any obligation to make approaches or passageways to a bridge so erected for the convenience of its citizens; its obligation in this respect is the same as that in relation to opening a new street. *Ibid*.

And the duty of building, maintaining, and operating a suitable drawbridge constituting a part of a public highway over a navigable river is a public, governmental duty; and no liability to an individual for negligence in the construction or operation of the draw attaches to a municipal corporation charged with this duty, unless imposed by statute. *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397.

But, where a bridge is erected across a canal within the corporate limits of a city without the authority of the city, if the trustees of the canal do not object the city has authority to make approaches to the bridge and exercise control over them, and where it does so it is under obligation so to

exercise authority as not to endanger persons using them. *Joliet v. Verley*, supra.

So, an approach to a bridge over the tracks of a railroad built pursuant to a statute providing that at the crossing of a highway the crossing shall be by means of a bridge over the railroad, and that the approaches are to be made and kept in repair by the railroad corporation, giving the city no right to interfere with the construction and repair of the approaches; a person having been injured by falling into a hole in a sidewalk within the limits of the approach,—is not a way which the city is bound to keep in repair, and for injuries from defects in which it is liable. *Rouse v. Somerville*, supra.

And in such case the city has no power to agree with the railroad company to keep such approaches to the bridge in repair. *Ibid*.

And, in an action against a city for an injury to a person, occurring by reason of its negligence in regard to protecting the sides of an elevated approach to a bridge, the question whether the city had assumed such control of the approach as to make it responsible is an inference of fact to be drawn from all the testimony by the jury, and not a question of law for the court. *Manchester v. Ericsson*, 105 U. S. 347, 26 L. ed. 1099.

So, where a county purchased of private owners a bridge one end of which abutted upon a city, and the approach of the bridge on the city side was constructed over land not included in any city highway, the county, and not the city, is under obligation to keep the approach to the bridge free from obstruction and in repair, unless the city adopts such approach as one of its highways. *Bishop v. Centralia*, 49 Wis. 669, 6 N. W. 353.

And a plank walk built upon the approach to a bridge, connecting the sidewalk on the street leading to the bridge with the walk on the side of the bridge for foot passengers, is a sidewalk in fact and in law, and not a part of the approach proper to the bridge, or of the bridge; and, in the absence of a statutory provision making municipalities liable for defective sidewalks, an action will not lie for injuries sustained by reason of defects in such walk. *Saunders v. Gun Plains Twp.* 76 Mich. 182, 42 N. W. 1088.

3. Crossings.

It is the duty of a city to exercise reasonable diligence to keep its crossings in reasonably safe condition for persons to travel. *McLeansboro v. Trammel*, 109 Ill. App. 524; *Gallagher v. Tipton*, 133 Mo. App. 557, 113 S. W. 674.

In the light of the plan adopted by the city. *Gallagher v. Tipton*, supra.

And a city which has built and maintained a cross walk, and thereby invited people to use it, cannot tear it up and make an excavation in its place and leave the same unguarded by barriers or lights in 20 L.R.A. (N.S.)

the nighttime, and then escape responsibility for a resulting injury on the ground that there was no longer any cross walk there. *Alexander v. Big Rapids*, 76 Mich. 282, 42 N. W. 1071.

Nor is a municipal corporation at liberty, where a street crossing has been established *de facto* by public use, merely because no artificial crossing has been constructed, to intersect the crossing which the public have established for themselves with dangerous ditches and pitfalls. *Beardstown v. Smith*, 150 Ill. 169, 37 N. E. 211.

And a city is under legal obligation to maintain in a reasonably safe condition for pedestrians that section of a highway at a street crossing which lies within the lines of the sidewalk if extended, where it appears from the existence of a beaten footpath at such point that the same is used for public travel, even though the city had constructed a cross walk on the opposite side of the street. *Comiskie v. Ypsilanti*, 116 Mich. 321, 74 N. W. 487.

And, where a footpath was worn by persons entering a street from another street abutting on, but not crossing, it, between the sidewalk and the wrought part of the street, through a grass plat; and this path has been known and recognized by the city as a part of the regular line of travel,—it is not relieved from liability for an injury resulting from an obstruction therein by the fact that it had not itself prepared the crossing at that place, where it has provided no other means of crossing, and erected no barrier and given no warning. *Aston v. Newton*, 134 Mass. 507, 45 Am. Rep. 347.

So, where a city is made responsible for injuries occasioned by defects in the carriage way or street proper and in the cross walk, but not for those occasioned by defects in the sidewalks, it is liable for an injury caused by a defect or obstruction at the intersection of two streets a little outside of the line which bounds lots on one street extended across the other, the place being upon the corner and not directly in front of the lot with reference to either street, the sidewalk at that point being regarded as a part of the cross walk. *O'Neil v. Detroit*, 50 Mich. 133, 15 N. W. 48.

And, while a city is under no obligation to construct a crossing over an alley connecting the walks of the street, if it elects to leave the alley in its natural state it is its duty to keep it free from obstruction; and, if it permits persons to place loose boards there, which become warped and shifted about, rendering it dangerous for persons having occasion to cross the alley, it will be liable to the same extent that it would be had it undertaken to construct a crossing and allowed it to become out of repair. *Springfield v. Tomlinson*, 79 Ill. App. 399.

So, where a sidewalk of a street crosses another street, and the crossing habitually used by foot passengers is a bridge over a drain, there being no stepping stones or other convenient crossing, such bridge so

used is to all intents and purposes part of the sidewalk; and the city is liable for damage sustained by foot passengers on the bridge because of holes or defects therein, to the same extent as if the injury occurred on the sidewalk itself; and, if the injury arose from a defect of the bridge of which the city had notice, it is liable in damages for the injury sustained. *Atlanta v. Champe*, 66 Ga. 659.

Nor does the fact that a usual street crossing in a city constitutes a covering for a drain deprive a traveler of the right to use it, if the inhabitants of the city and others use it for a crossing; and, if he receives injuries by reason of its unsafe condition, which the city might have obviated, it must respond in damages. *Champaign v. Patterson*, 50 Ill. 61.

And, where an apron crossing a gutter in a city street was built by the owner of adjoining property without consent of the city, and the city never formally adopted it or made any repairs upon it, but there was evidence that it had existed there and been actually used as a part of the public thoroughfare for a considerable length of time with knowledge of the city and without objection on its part, a presumption arises that the city had adopted the apron as a part of the street crossing, and had become liable for injuries caused by a defective condition thereof of which it had notice; and the continuance of such condition for several weeks would create a presumption of notice. *Johnson v. Milwaukee*, 46 Wis. 568, 1 N. W. 187.

Nor can a city escape liability for an injury to a pedestrian who fell and broke her arm in consequence of an obstruction in a cross walk upon one of its streets, upon the theory that it does not appear that the cross walk in question was ever built or accepted by the city, where it was in a public way under the charge of the city authorities and had existed there for some years, since in such case presumptively it was constructed by and under the authority of the city; and, even though it was an obstruction in a public highway, the duty to keep it in proper and safe condition devolves upon the city. *Walker v. Lockport*, 43 How. Pr. 366.

And the neglect of other cities in the construction or management of their crossings is not an excuse or justification for a particular neglect of a particular city; and, in an action against it for damages for injuries alleged to have resulted from a defective street crossing, evidence of the manner in which other cities and towns of similar character and size in the immediate section of the country constructed their crossings is incompetent. *Champaign v. Patterson*, *supra*.

A city cannot be held liable, however, for an injury caused by stepping off a cross walk into a gutter at night, on the ground that a guard was necessary, where it appears that the person injured got into the gutter in a way which a guard or railing would not have prevented. *Gallagher v. Tipton*, *supra*.
20 L.R.A. (N.S.)

And, where the negligence charged against a city was not in failing to construct a proper crossing, but in maintaining an open ditch across a path in a street, which was used by the public, an instruction with reference to the discretionary power of cities to construct street crossings is properly refused as being inapplicable to the case. *Beards-town v. Smith*, 150 Ill. 169, 37 N. E. 211.

And a city is not liable for an injury caused by a defective bridge extending from the street to the sidewalk over a drainage ditch not at a regular public crossing or street intersection, which was built solely for the convenience of an owner of abutting land, and was not in general use by the public, and was of no public utility, though, prior to the injury, the city, after taking up the bridge for the purpose of deepening the ditch, had replaced the same, and had subsequently made some repairs upon it. *Crawford v. Griffin*, 13 Ga. 562, 38 S. E. 988.

But an instruction in an action for injuries caused by a defective sidewalk, based on the supposition that the place of injury was not a regular crossing for foot passengers, is properly refused, where the evidence shows that it was in the heart of the city, and was used by the general public as a pass way. *San Antonio v. Talerico* (Tex. Civ. App.) 78 S. W. 28.

Negligence respecting the construction of a cross walk over a gutter is a question of fact for the jury, in an action for an injury to a pedestrian who stepped off of it at night. *Gallagher v. Tipton*, 133 Mo. App. 557, 113 S. W. 674.

4. Alleys, tunnels, and passageways in public buildings.

No duty upon the part of cities to keep alleys in good repair or in a safe and reasonable condition for public travel existed at common law. *Face v. Ionia*, 90 Mich. 104, 51 N. W. 184.

And a public alley, the travel upon which was the same as is customary in the use of alleys, is not a public street or highway, in contemplation of a statute giving a remedy for injuries received upon defective or obstructed streets or highways. *Ibid*.

A municipal corporation is not bound to the same degree of care over its alleys as over its streets until the alleys by their use in fact become public streets; the care bestowed on each must be measured by the public use, and is proportioned to its character and the public needs. *Musick v. Latrobe*, 184 Pa. 375, 39 Atl. 226.

And an alley not open for public use, or used in fact as an alley, and which exists only on a recorded plat of a city addition, is not within ordinances prohibiting uncovered excavations near an alley or other public place. *Hunter v. Weston*, 111 Mo. 176, 17 L.R.A. 633, 19 S. W. 1098.

But an alley retains its character as an alley which the city must keep clear from obstructions, although the lots on both sides thereof are owned by one person, and it is so intersected by a railroad as to make it

practically impassable. *Osage City v. Larkin*, 40 Kan. 206, 2 L.R.A. 56, 10 Am. St. Rep. 186, 19 Pac. 658.

So, where a tunnel under a river constituted a highway of a city, it was the duty of the city to use reasonable efforts to keep it in a safe condition for travel, or, if necessary to prevent injury, to close it until it could be put in a safe condition; and, where the tunnel leaked, and large quantities of ice formed on the footway, which had been chipped up and not removed, and could not be seen until a passenger was in the midst of it, it was the duty of the city to have barred all ingress, or to have given notice of the public danger; and, where a person injured was guilty of no want of care, the city is liable for the injury. *Chicago v. Hislop*, 61 Ill. 86.

A flight of stairs in a building belonging to a municipal corporation, leading from the outside of the building to a room in it, however, is not a highway or town way within the meaning of a statute giving remedies for death, injury, or damage caused by defects in such a way. *McNeil v. Boston*, 178 Mass. 326, 59 N. E. 810.

Nor is it a way entering on or uniting with an existing public highway, within the meaning of a statute in regard to causing the entrance of such ways to be closed when the public safety demands, or cautioning the public against entering them when dangerous. *Ibid.*

And, where a room in the building was used as a polling place by the public, the use of the stairway, like the use of the room, is merely permissive during such time as the public authorities continue to devote the building or the room to that purpose, and may be stopped at any moment, and does not constitute a dedication of the stairs as a way to the public. *Ibid.*

5. *Park paths, bicycle paths, etc.*

A municipal corporation is bound to see that a pathway used by the public as such through a public park is kept in reasonably safe condition for pedestrians. *Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 905.

And a boulevard 150 feet wide, of which 60 feet is graded, while the remainder is occupied by grass plats and sidewalks, and is under the control of park and boulevard commissioners, who constitute a city agency, is a street, for the defective condition of a sidewalk on which the municipality is liable as much as if the boulevard is under direct control of the common council. *Burridge v. Detroit*, 117 Mich. 557, 42 L.R.A. 684, 72 Am. St. Rep. 582, 76 N. W. 84.

And the fact that the control of a city boulevard is vested by the statute in the board of commissioners of parks and boulevards rather than the common council does not make the boulevard any the less a city enterprise for which the city is responsible. *Ibid.*

So, if, in the course of repairing a building, the servants and agents of a city, act-

ing by its authority, negligently suffer adjoining land within its control to be in a dangerous condition without proper notice to persons exposed to the danger, coming there rightfully and using due care, the city is responsible as any private owner would be for an injury sustained by such a person by reason of such negligence, where the place of injury consists of a footpath which had been used by the public for many years and from time to time prepared and cared for by the city, and is within a public common which has long been used by the inhabitants of the city; and it is immaterial whether the title in the land is or is not in the city. *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485.

Where a recovery is sought against a municipal corporation for an injury caused by an obstruction or defect in a highway in a park, however, the existence of the highway must be proved as such. *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042.

And, where a city holds a common for the public benefit, and not for its emolument or as a source of revenue, and has constructed and kept in repair footpaths on the common as a part of the common for the comfort and recreation of the public; and such footpaths have never been laid out as highways or town ways, and are not a part of the city's system of highways or streets,—it is not liable under the statute for any defect or want of repair in them. *Steele v. Boston*, 128 Mass. 583.

Nor are paths marked out, graded, paved, repaired, and kept free from obstruction by a municipal corporation, crossing common ground used by the inhabitants as a place of public resort or recreation, and serving as a means of communication between public streets with which they connect, between posts, such as are usual at the entrance of walks, designed for foot passengers, ways opened and dedicated to the public use within the meaning of a statute providing for recovery of damages for injuries arising from defects or obstructions in the public ways. *Oliver v. Worcester*, *supra*.

So, a city which voluntarily constructs a cinder bicycle path along the side of one of its streets must construct and maintain it so that it will be reasonably safe for the ordinary use for which it is intended. *Prather v. Spokane*, 29 Wash. 549, 59 L.R.A. 346, 92 Am. St. Rep. 923, 70 Pac. 55.

And it cannot escape liability for an injury caused by an obstruction at the entrance of a bicycle path, on the ground that it was not a public highway but a part of one of the parks of the city, where the bicycle path was used by great numbers of people both in the daytime and at night, and that fact was known to the authorities, it being their duty, therefore, to see that the path was reasonably safe for the use for which it was intended. *Collett v. New York*, 51 App. Div. 394, 64 N. Y. Supp. 693.

Nor is the location of a bicycle path so far a governmental function that a city making it will be relieved on that ground from

liability for injuries caused by a location which is unsafe for ordinary travel, for which it is intended. *Prather v. Spokane*, supra.

And a city which locates a turn in a bicycle path at a street corner within 4 feet of the gutter of the cross street, into which persons using it are liable to ride and be injured, without any barriers, signs, or other means of notifying travelers of the danger, is liable to a traveler who, after dark, in the exercise of ordinary care, goes over the curb and is injured. *Ibid.*

g. Streets in annexed territory.

When a city procures the annexation of territory traversed by a country road, it becomes a street of the city, and the city becomes chargeable with all the duties with reference thereto that it owes with reference to any of the public streets and alleys of the city. *Louisville v. Brewer*, 24 Ky. L. Rep. 1671, 72 S. W. 9; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Richards v. New York*, 16 Jones & S. 315; *Hanley v. Huntington*, 37 W. Va. 578, 16 S. E. 807.

Unless it is abandoned as a public road in the manner provided by law. *Hanley v. Huntington*, supra.

And a formal recognition of the fact by act of the governing board or body of the city is unnecessary. *Louisville v. Brewer*, 24 Ky. L. Rep. 1671, 72 S. W. 9.

And this is so whether the road was originally laid out and opened by the board of county commissioners, or had become a public highway by user. *Frankfort v. Coleman*, supra.

Nor is the liability of a city for damages for an injury from an obstruction in a street affected by the fact that the defect or obstruction complained of existed at the time of the incorporation of the village. *Nelson v. Canisteo*, 100 N. Y. 89, 2 N. E. 273.

Approval of a plat of a proposed addition to a city by the governing body, however, does not constitute an acceptance of the streets thereon laid out, or amount to an act of jurisdiction over them, or impose an obligation upon the city to keep them in repair. *Downend v. Kansas City*, 156 Mo. 60, 51 L.R.A. 170, 56 S. W. 902; *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106.

Although such plat vests the fee of the streets therein described in the city, and the charter of the city provides that it shall be unlawful to make or file any such plat without the approval of the common council. *Downend v. Kansas City*, supra.

Nor do such formal acceptance and approval of the plat or addition of land, and user by the public of streets in such addition, of themselves impose on the city the obligation to keep the streets in repair; but they are evidence to go to the jury on the question whether the city has assumed jurisdiction of streets so as to impose the obligation to keep them in repair. *Johnson v. St. Joseph*, supra.
20 L.R.A. (N.S.)

So, where a statute annexes a tract or land to a city, and the selectmen of the city are authorized to lay out streets therein, but provides that the city shall not be obliged to complete the streets sooner than it may deem expedient; and, pursuant to this authority, the city laid out various streets over the annexed tract,—in order to render the city liable for an injury caused by an obstruction or defect in one of the streets thus laid out it is not sufficient to prove merely that the way complained of had been so traveled and used as to become a highway *de facto*; it must appear not only that the way had been laid out, but that the mayor and aldermen, by an official act, had determined upon its completion,—that is, that it should be graded, fitted for travel, and opened for use. *Bowman v. Boston*, 5 Cush. 1.

And, where an injury was caused by a defect or obstruction in a highway in a town, and afterwards a city was incorporated including a part of the territory of the town, the city is not jointly liable with the town for the injury because the electors who resided in the territory which afterwards formed part of the city participated in the election of the commissioners by whose negligence the town was charged, where, at the time of the accident, the town was duly incorporated, and its limits had not since been changed. *Embler v. Wallkill*, 132 N. Y. 222, 30 N. E. 404.

Nor is a city liable for injuries sustained by reason of an excavation or ditch crossing a highway in an annexed district, where the duty of keeping in repair the roads, streets, and avenues in the annexed district is not imposed upon the city by law, but exclusively upon the department of parks without any control by the municipal corporation. *Ergholt v. New York*, 66 How. Pr. 161.

But a statute providing that the commissioners of the department of public parks of a city shall have exclusive power to locate and lay out and construct and maintain all public parks, streets, roads, and avenues, locate all bridges, and tunnels, and shall have exclusive control of the maintenance and construction of all public parks within the territory annexed, and to construct and maintain all bridges, tunnels, sewers, streets, roads, and avenues so laid out, gives to the park commissioners control exclusive of any other officers, and not exclusive of the city; and it does not operate to exempt the city from responsibility for streets in the annexed territory. *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622.

h. Abandonment and closing.

A municipal corporation has power to abandon streets, and thus to exonerate itself from keeping them in repair for public use. *Anderson v. Turbeville*, 6 Coldw. 150.

And, where it is provided by statute that a highway must be open and worked for six years, a highway, although properly laid out, if open and worked for a part of the distance only as described in the survey, ceases, after the lapse of more than six

years, as to the part not open, to be a highway for any purpose. *Horey v. Haverstraw*, 124 N. Y. 273, 26 N. E. 532.

But a city or village seeking to escape liability for an injury on a street caused by an obstruction or defect thereon, on the plea that the street had been abandoned, must prove such abandonment. *Hanley v. Huntington*, 37 W. Va. 578, 16 S. E. 807; *Horey v. Haverstraw*, 124 N. Y. 273, 26 N. E. 532, reversing 47 Hun. 356.

And, where a street is shown to have been legally laid out as a highway, a presumption of its continuance as such arises; and the burden of establishing that a portion of it had ceased to be a highway, so that the city would not be responsible for an injury from an obstruction or defect therein, rests upon the party asserting it. *Horey v. Haverstraw*, supra.

And, where a street was laid out legally as a highway, it does not follow that, because a portion of it remains a highway, that all of it does. *Ibid*.

And, where no vote was passed to close a highway or street, and the obstruction or excavation was lawfully placed or made in it, the city or town is liable if it had notice, or might have had notice, of the defect, unless it used reasonable care and diligence to protect the traveling public from the obstruction or excavation. *Jones v. Collins*, 188 Mass. 53, 74 N. E. 295.

So, where a public way has been closed to public travel by vote of the proper public authorities, it becomes the duty of the municipality to give proper notice thereof if it wishes to put an end to its statutory liability for failure to keep it in proper condition. *Ibid*.

And, where a city street had been discontinued, but was continually in use by the public, and no other road was opened for travel between the same points, and no notice was posted and nothing done to indicate that the road was not to be used, and the road to be substituted for it was not completed, the city is liable for an injury caused by a defect or obstruction in the old way without notice of the obstruction. *D'Amico v. Boston*, 176 Mass. 599, 58 N. E. 158.

And, though a highway or street has never been established as such, and though the city has the power to close it up, it is bound to use reasonable care in doing so to prevent injury to those who, as is well known to the city, will continue to use it as usual until they are notified that it is closed, by actual notice from the city, or by obstructions placed on or across it. *May v. Brooklyn*, 46 N. Y. S. R. 552, 19 N. Y. Supp. 670, affirming 44 N. Y. S. R. 368, 17 N. Y. Supp. 348.

Nor can a city absolve itself from the obligation to keep a street in proper condition for travel by merely adopting a public resolution vacating it, where the sidewalks are permitted to remain and be used as they were before the vacation. In such case the city's duty to repair is the same as it 20 L.R.A. (N.S.)

is with respect to other walks under its control. *Fritz v. Watertown* (S. D.) 111 N. W. 630.

So, where a city charter provides that the common council shall designate on the city map all such streets as cannot be put in proper condition for general travel without too great expense, after which the city shall not be liable for accidents or injuries to persons caused by their defective condition; if the city desires to escape responsibility for a street it must comply with the requirements of the charter, and the burden of proof rests with it to show that it has done so. *McCormick v. Amsterdam*, 43 N. Y. S. R. 804, 18 N. Y. Supp. 272.

Where a public way has been closed to public travel by a vote of the proper public authorities, however, and it gives proper notice thereof, its statutory liability is ended for the time being. *Jones v. Collins*, supra.

And, where a street is closed under and pursuant to a statute authorizing it for the purpose of separation of the grades of the street and a railroad crossing it, the city can give notice to the public by signs or a barrier that the street has been closed; and, if this is properly done its responsibility for excavations or obstructions in the street is suspended during the time the notice or barrier is maintained, and until the street is reopened to travel. *Torphy v. Fall River*, 188 Mass. 310, 74 N. E. 465.

So, a statute providing that all highways that have ceased to be traveled or used as highways for six years shall cease to be highways for any purpose applies to a road which for six years is not only not used and traveled, but is impassable for conveyances of any kind, is fenced off, and the public travel by another route, so that its legal character as a highway is destroyed; and the city is not liable for an injury by an obstruction or defect therein. *Horey v. Haverstraw*, supra.

And the destruction of the legal character of a road as a highway by its being so fenced off is not prevented by the fact that at the beginning the road was rendered impassable, and fenced off by a trespasser. *Ibid*.

But the power conferred on a city to regulate or abolish streets and alleys does not empower it to authorize an individual to close any part of a public highway and appropriate it to his own use. *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288.

And a city cannot grant a right to use a street for purposes other than that of travel, because it has so used it for more than twenty-one years, when such use had been for only three days in each week and for only one half of each day so used, and, when not being thus used, the street has been used for public travel the same as other streets of the city. *Herrick v. Cleveland*, 7 Ohio C. C. 470.

Nor can the dissolution of a municipal corporation be inferred from the fact that unauthorized persons repair the roads in

the corporate limits; and a municipal corporation sued for an injury happening on a defective bridge cannot defend by proving that the highway commissioners of the township had for two years prior to the date of the accident caused the road upon which the bridge was located to be worked by labor of the township, and township taxes had been levied for that purpose. *Mechanicsburg v. Meredith*, 54 Ill. 84.

The question whether the statutory liability of a municipal corporation is in existence in the case of a public way, when it has been closed by vote after it has once been opened, is one of notice, express or implied. *Jones v. Collins*, supra.

VIII. The degree of diligence or care as affecting liability.

a. General rules.

A municipal corporation is not responsible for every accident that may occur on its streets within its corporate limits. *Vandalia v. Huss*, 41 Ill. App. 517; *Centralia v. Krouse*, 64 Ill. 19; *Streator v. Liebendorfer*, 71 Ill. App. 625; *Aurora v. Pulfer*, 56 Ill. 270; *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51; *Cammatt v. Haverhill*, 197 Mass. 76, 83 N. E. 331; *Vicksburg v. Hennessy*, 54 Miss. 391, 28 Am. Rep. 354; *Hunt v. New York*, 109 N. Y. 134, 16 N. E. 320; *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *Parrish v. Huntington*, 57 W. Va. 286, 50 S. E. 416; *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878.

The mere existence of obstructions in a street or on a sidewalk is not alone sufficient to charge the municipality with liability for injury to a traveler, caused thereby. *White v. New Bern*, 146 N. C. 447, 13 L.R.A. (N.S.) 1166, 59 S. E. 992; *Kenyon v. Indianapolis*, *Wilson*, Super. Ct. (Ind.) 129; *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256; *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712; *Hunt v. New York*, supra.

And this is so though the obstruction may cause injury. *Van Pelt v. Clarksburg*, supra; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Dayton v. Glaser*, 76 Ohio St. 471, 12 L.R.A. (N.S.) 716, 81 N. E. 991.

Nor is a municipal corporation an insurer against all injury which may result from obstructions or defects in its public streets. *Stidham v. Delaware City* (Del.) 67 Atl. 175; *Anderson v. Wilmington* (Del.) 70 Atl. 204; *Colbourn v. Wilmington*, 4 Penn. (Del.) 443, 56 Atl. 605; *Taylor v. Manson* (Cal.) 99 Pac. 410; *Hennepin v. Coleman*, 132 Ill. App. 604; *Nokomis v. Farley*, 113 Ill. App. 162; *Chicago v. Apel*, 50 Ill. App. 132; *Joliet v. Meaghan*, 22 Ill. App. 255; *Chicago v. Glanville*, 18 Ill. App. 308; *Chicago v. Watson*, 6 Ill. Rep. 344; *Chicago v. McGiven*, 78 Ill. 347; *Lockport v. Licht*, 221 Ill. 35, 77 N. E. 581; *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Gos-*

port v. Evans, supra; *Franklin v. Harter*, 127 Ind. 446, 26 N. E. 882; *Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454; *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460; *Lindsay v. Des Moines*, 74 Iowa, 111, 37 N. W. 9; *Fugate v. Somerset*, 97 Ky. 48, 29 S. W. 970; *Elam v. Mt. Sterling* (Ky.) 117 S. W. 250; *Vicksburg v. Hennessy*, 54 Miss. 391, 28 Am. Rep. 354; *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210; *Burnes v. St. Joseph*, 91 Mo. App. 489; *Reed v. Mexico*, 101 Mo. App. 155, 76 S. W. 53; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *O'Shaughnessey v. Middleport*, 93 App. Div. 93, 86 N. Y. Supp. 944; *Gorham v. Cooperstown*, 59 N. Y. 660; *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712; *Stratton v. New York*, 190 N. Y. 294, 83 N. E. 40, reversing 117 App. Div. 887, 103 N. Y. Supp. 358; *Sevestre v. New York*, 15 Jones & S. 341; *Dayton v. Glaser*, supra; *Dayton v. Taylor*, 62 Ohio St. 11, 56 N. E. 480; *Walker v. Springfield*, 3 Ohio Dec. Reprint, 567; *Durbin v. Napoleon*, 21 Ohio C. C. 160; *Oak Harbor v. Gallagher*, 52 Ohio St. 183, 39 N. E. 144; *Murphy v. Dayton*, 8 Ohio S. & C. P. Dec. 354; *Burns v. Bradford*, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997; *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096; *Archer v. Johnson City* (Tenn.) 64 S. W. 474; *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57; *Galveston v. Dazet* (Tex.) 19 S. W. 142; *Ringelstein v. San Antonio* (Tex. Civ. App.) 21 S. W. 634; *Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753; *Parrish v. Huntington*; *Yeager v. Bluefield*; and *Wilson v. Wheeling*,—supra; *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

Nor it is required to employ the utmost care and exertion to the end that the traveler shall be immune from injury or accident. *Chicago v. McGiven*; *Centralia v. Krouse*; and *Streator v. Liebendorfer*,—supra; *Struble v. DeWitt* (Neb.) 116 N. W. 154.

And municipal corporations are not bound to anticipate every emergency. *O'Shaughnessey v. Middleport*, supra.

They are not liable where the accident was one that no human foresight could have anticipated. *Harrigan v. Brooklyn*, 42 N. Y. S. R. 625, 16 N. Y. Supp. 743.

And they are not required to furnish the best possible method of passing around natural obstacles. *Vicksburg v. Hennessy*, supra.

Reasonable or ordinary care and diligence on the part of the municipal corporation to put and keep its streets and sidewalks in a reasonably safe condition is the requirement. *Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518; *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 356; *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986; *Colbourn v. Wilmington* and *Anderson v. Wilmington*, supra; *Daytona v. Edison*, 46 Fla. 463, 34 So. 954, 4 A. & E. Ann. Cas. 1000; *Rockford v. Hildebrand*, 61 Ill. 155; *Centralia v. Krouse* and *Chicago v. McGiven*, supra; *Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246; *Lincoln v. Hein-*

zel, 134 Ill. 439; *Warren v. Wright*, 3 Ill. App. 602; *Monmouth v. Sullivan*, 8 Ill. App. 50; *McLeansboro v. Lay*, 29 Ill. App. 478; *Brownlee v. Alexis*, 39 Ill. App. 135; *Mt. Vernon v. Brooks*, 39 Ill. App. 426; *Vandalia v. Ropp*, 39 Ill. App. 344; *Vandalia v. Huss*, 41 Ill. App. 517; *Streator v. Liebendorfer*, supra; *Rock Island v. Drost*, 71 Ill. App. 613; *Nokomis v. Farley* and *Hennepin v. Coleman*, supra; *Murphy v. Indianapolis*, 83 Ind. 76; *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250; *Monticello v. Kennard*, supra; *Evansville v. Frazier*, 24 Ind. App. 628, 56 N. E. 729; *Hall v. Manson*, 99 Iowa, 698, 34 L.R.A. 207, 68 N. W. 922; *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270; *Jones v. Collins*, 188 Mass. 53, 74 N. E. 295; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; *O'Rourke v. Monroe*, 98 Mich. 520, 57 N. W. 738; *Moore v. Minneapolis*, 19 Minn. 300, Gil. 258; *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255; *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763; *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 So. 452; *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709; *Smith v. Brunswick*, 61 Mo. App. 578; *Struble v. De Witt*, supra; *Anderson v. Albion*, 64 Neb. 280, 89 N. W. 794; *Pettingill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712; *Hume v. New York*, 47 N. Y. 639; *Bradner v. Warwick*, 91 App. Div. 408, 86 N. Y. Supp. 935; *O'Shaughnessey v. Middleport*, supra; *Van Gorder v. Seneca Falls*, 104 N. Y. Supp. 299; *Meares v. Wilmington*, 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Dayton v. Taylor*; *Walker v. Springfield*; and *Oak Harbor v. Kallagher*,—supra; *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *Rick v. Wilkes-Barre*, 9 Pa. Super. Ct. 399; *Johnston v. Charleston*, 3 S. C. 232, 16 Am. Rep. 721; *Poole v. Jackson* and *Shelley v. Austin*, supra; *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95; *Morris v. Salt Lake City* (Utah) 101 Pac. 373; *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387.

After the unsafe condition thereof is known, or sought to be known, to it, or to its officers having authority to act. *Dayton v. Edson*, supra.

And this is so though a sidewalk where an injury took place may not have been reasonably safe. *Warren v. Wright*, supra.

A municipal corporation is not rendered liable by the fact that a sidewalk was not in ordinarily safe repair and condition, where it exercised ordinary care for the purpose of keeping the same in safe repair and condition, and the unsafe condition thereof could not have been known to it by the exercise of reasonable care. *Streator v. O'Brien*, 103 Ill. App. 85.

And it is not the duty of a city to use ordinary care to keep its pavements safe for the use of pedestrians; the duty goes 20 L.R.A. (N.S.)

no further than to use ordinary care to keep its pavements in a reasonably safe condition for use. *Midway v. Lloyd*, 24 Ky. L. Rep. 2448, 74 S. W. 195; *Rock Island v. Gingles*, 217 Ill. 185, 75 N. E. 468; *Salem v. Webster*, 192 Ill. 369, 61 N. E. 323; *Dallas v. Moore*, supra.

But an instruction in an action against a city for an injury alleged to have been caused by a defective street, that the law imposes upon municipalities the duty of ordinary care in maintaining their streets in safe condition for ordinary travel, is not erroneous on the ground that the law merely requires the exercise of reasonable care in such case, there being no distinction between "ordinary care" and "reasonable care." *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143.

And, where a person stepped into a hole in a sidewalk and was injured, the town may not complain, in such an action, that the jury are told that the town is charged with the duty of keeping its sidewalks in a reasonably safe condition, instead of being told that its duty is to use reasonable care to keep them in such condition, the distinction being too fine for practical use. *Witt v. Latimer* (Iowa) 117 N. W. 680.

And error in instructing the jury in such an action, for an injury to a person who stepped into a hole in a sidewalk, that the city must keep its sidewalks in a reasonably safe condition, instead of requiring the use of reasonable care to keep them in a reasonably safe condition, is not ground for reversal where the sidewalk was old and much out of repair, and the city had notice of its condition. *Beardstown v. Clark*, 204 Ill. 524, 68 N. E. 378, affirming 104 Ill. App. 568.

Nor is an instruction, in an action against a city for an injury caused by a horse stepping into a hole in the floor of a viaduct, that it was the city's duty to keep the viaduct in a reasonably safe condition, erroneous where the jury was told in another instruction that the city was bound to use only reasonable care to keep its streets in a safe condition. *Denver v. Baldasari*, 15 Colo. App. 157, 61 Pac. 190.

And an instruction that a town is not an insurer against all accidents on its streets, but is responsible only when it fails to use ordinary care to keep its streets in a reasonably safe condition, and the resulting injury is not due to want of ordinary care of the person injured, is not open to the objection of suggesting the inference that the town is an insurer against some accidents. *Witt v. Latimer*, supra.

But it is "ordinary care" which a person traveling on the streets must use to avoid accident and not "due care." The two terms are not equivalent, and an instruction requiring due care is improper. *San Antonio v. Talerico* (Tex. Civ. App.) 78 S. W. 28.

So, the rule has been held to be that the duty of a city to keep its streets in a safe condition for public travel is absolute; and it is bound to exercise reasonable diligence and care to accomplish that end. *Turner v.*

Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; Kirk v. Homer, 77 Hun, 459, 28 N. Y. Supp. 1009; Newcastle v. Grubbs (Ind.) 86 N. E. 757.

But this rule has been qualified by some of the courts holding that the duty to make a street reasonably safe in its original construction is absolute; but the duty to discover and repair defects afterwards occurring, not by acts of the municipality, is one involving only ordinary and reasonable care and diligence. *Peake v. Superior*, 106 Wis. 403, 82 N. W. 306; *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162.

And it has been held that the absolute liability of municipal corporations for injuries from defects and obstructions in their streets does not refer to the cause of action; the cause of action must exist before the absolute liability arises; such cause of action raises the liability. *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752.

And that the rule that cities and towns are absolutely liable for injuries by reason of the streets being out of repair means absolutely liable when the basis or cause of the liability exists, the liability being absolute in the sense that no want of notice or other excuse for the defect in the street will exonerate the municipality; but the idea of absoluteness does not refer at all to the cause of liability, but only to the liability when it exists. *Yeager v. Bluefield*, supra.

So, a statutory provision that a city or town shall not be liable for defects in streets unless the defects could have been remedied by the exercise of reasonable care and diligence upon the part of the city or town does not change the rule of law as to what constitutes reasonable care and diligence. *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113.

Gross negligence upon the part of a municipal corporation with reference to keeping in repair its streets and crossings, however, is not necessary to a recovery for an injury caused thereby. Want of reasonable care on the part of the officers of the city with reference thereto warrants a recovery. *Olney v. Riley*, 39 Ill. App. 401.

And an instruction in an action against a city for an injury from an obstruction in a street, that, if the city knew of the condition of the street, or, by the exercise of ordinary care or caution, could have known thereof, in time to have had reasonable opportunity to repair the defect, or have had reasonable opportunity to cause the same, if any, to have been repaired in time to have prevented the accident in question, but failed and neglected to do so, then the plaintiff should recover, is not subject to the objection that it makes the city an insurer of the safety of its streets and sidewalks. *Smart v. Kansas City*, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709.

And the fact that the grade of a street increased the likelihood of pedestrians falling does not lessen the city's responsibility for 20 L.R.A.(N.S.)

the condition of its streets, but imposes upon it the duty of exerting vigilance commensurate with the danger, and requires it to exercise care to prevent dangerous accumulations of ice from any cause upon its street. *Kopper v. Yonkers*, 110 App. Div. 747, 97 N. Y. Supp. 425, affirmed in 188 N. Y. 592, 81 N. E. 1168.

b. Necessity of negligence to liability.

A municipal corporation is liable only when injuries are incurred without fault of the person injured, and because of negligence on its part. *Lindsay v. Des Moines*, 74 Iowa, 111, 37 N. W. 9; *Colbourn v. Wilmington*, 4 Penn. (Del.) 443, 56 Atl. 605; *Daytona v. Edson*, 46 Fla. 463, 34 So. 954, 4 A. & E. Ann. Cas. 1000; *Monmouth v. Sullivan*, 8 Ill. App. 50; *Aurora v. Brown*, 12 Ill. App. 122, affirmed in 109 Ill. 165; *Ryan v. Chicago*, 79 Ill. App. 28; *Cammett v. Haverhill*, 197 Mass. 76, 83 N. E. 337; *Weed v. Ballston Spa*, 76 N. Y. 329; *Gorham v. Cooperstown*, 59 N. Y. 660; *McGinity v. New York*, 5 Duer, 674; *Heiss v. Lancaster*, 203 Pa. 260, 32 Atl. 201; *Holbert v. Philadelphia*, 221 Pa. 266, 70 Atl. 746; *Ringelstein v. San Antonio* (Tex. Civ. App.) 21 S. W. 634.

Or upon the part of its servants or agents. *Gorham v. Cooperstown* and *Ryan v. Chicago*, supra.

Its liability to persons injured by reason of obstructions or defects in a street is based on negligence. *Anderson v. Wilmington* (Del.) 70 Atl. 204; *Columbus v. Ogletree*, 96 Ga. 177, 22 S. E. 709; *Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098; *Chicago v. Watson*, 6 Ill. App. 344; *Rushville v. Poe*, 85 Ind. 83; *Gottsberger v. New York*, 9 Misc. 349, 29 N. Y. Supp. 592; *Hunt v. New York*, 109 N. Y. 134, 16 N. E. 320; *Herndon v. Salt Lake City* (Utah) 95 Pac. 646; *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

That is upon the fact that it has omitted to exercise due care under the circumstances in the maintenance or reparation of its streets. *Hunt v. New York*, supra; *Bloomington v. Read*, 2 Ill. App. 542.

The corporation must in some way be in fault in connection with the obstruction or defect. *Kenyon v. Indianapolis*, *Wilson*, *Super. Ct.* (Ind.) 129.

It must have done or omitted to do something which, in the exercise of ordinary care, it should not have done or omitted to do. *Herndon v. Salt Lake City* and *Columbus v. Ogletree*, supra.

There must have been substantial negligence or wrong on its part in regard to its action or nonaction, such as a reasonably prudent man would not allow to exist when applied to his own affairs. *Aurora v. Brown*, supra.

And a person injured by an obstruction or defect in a street cannot recover of the city therefor if the city's negligence does not contribute to the injury. *Wilson v. Atlanta*, 63 Ga. 291; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

The rule that, before negligence can be imputed to any party, a duty, the breach of which duty constitutes the tort in question, must be shown, applies to actions for personal injuries resulting from defective sidewalks. *Fritz v. Watertown* (S. D.) 111 N. W. 630.

And it is essential to establish facts which show negligence on the part of the corporation, and a mere general allegation that the corporation negligently suffered the street or sidewalk to remain out of repair, without alleging knowledge of the defect, the time it was permitted to remain out of repair, or other facts showing negligence on the part of the municipality, is not sufficient. *Daytona v. Edson*, supra.

And, under a statutory provision requiring a complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action, an allegation in a complaint in an action against a city, that the city placed a sidewalk in an unsafe, dangerous, and defective condition, and permitted it to remain in such condition, is improper as constituting but the statement of the bare legal conclusion of the pleader. *Pullen v. Butte* (Mont.) 99 Pac. 290.

But a complaint in an action against a city for injuries sustained by falling over loose boards with projecting nails in them, placed in a public alley, is sufficient in the absence of a motion to make it definite and certain, and especially after verdict, if the negligence is charged in general terms. *Mehan v. St. Louis* (Mo.) 116 S. W. 514.

And a complaint in an action against a city, alleging that the plaintiff, solely by reason of the negligence of the city in stretching and maintaining a rope across a street, was forced, in order to avoid the rope, to run his bicycle which he was riding against a wagon standing in the street, whereby, without negligence on his part, he was injured, sufficiently charges that the alleged negligence was the cause of the injury complained of. *Kleopfert v. Minneapolis*, 90 Minn. 158, 95 N. W. 908.

Nor is a municipal corporation liable for injuries not traceable to any negligence upon its part, or upon the part of the person injured, but which are relatively to them the result of accident. *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318; *Johnson v. Haverhill*, 35 N. H. 74; *Sutphen v. North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128.

And, if the consequences to a person injured by an obstruction or defect in a street would, under all the circumstances, have been the same had the city not been negligent, he cannot recover for the injury though he is in no default. *Wilson v. Atlanta*, supra.

So, a person seeking to recover of a city for an injury alleged to have been caused by a defective or obstructed sidewalk has the burden of proving by a preponderance of the evidence the negligence charged. *Tucker v. Salt Lake City*, 10 Utah, 173, 37 Pac. 261; *Streator v. Liebendorfer*, 71 Ill. App. 625; *Franklin v. Harter*, 127 Ind. 446, 20 L.R.A. (N.S.)

26 N. E. 882; *Murphy v. Worcester*, 159 Mass. 546, 34 N. E. 1080; *Murphy v. Dayton*, 8 Ohio S. & C. P. Dec. 354; *Richmond v. Leaker*, 99 Va. 1, 37 S. E. 348; *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447; *Pumorlo v. Merrill*, 125 Wis. 102, 103 N. W. 464.

The burden of proof rests with the plaintiff, in an action against a city for an injury caused by stepping into an opening in a sidewalk, to establish by a preponderance of the evidence the affirmative of every issue involved in the case, except as to the question of contributory negligence of the plaintiff. *Pumorlo v. Merrill*, supra.

And, if the jury, by its determination, finds that the facts are not sufficient to sustain the charge of negligence, the court cannot disturb the verdict even though it is of a different opinion. *Gibson v. Huntington*, supra.

But an obstruction placed in a street is presumed to have been wrongfully placed and permitted to remain there. *Senhenn v. Evansville*, 140 Ind. 675, 40 N. E. 69.

And the burden rests with the city to show an excuse for the maintenance of the obstruction. *Ibid*.

And it will be presumed that a city is chargeable with the defective condition of a walk in a public street in the city in the absence of evidence to the contrary. *Smith v. Des Moines*, 84 Iowa, 685, 51 N. W. 77.

But the mere fact that a person was injured by a defective street or sidewalk is not evidence of itself that the city was negligent in keeping its sidewalks in repair. *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532; *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210; *Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182.

Nor is the fact of the existence of a private cesspool within the limits of a public way decisive of negligence upon the part of the municipal corporation. *Hoey v. Natick*, 153 Mass. 528, 27 N. E. 595.

And a complaint in an action against a municipal corporation, charging that the municipality, while grading a street, caused the digging of a hole which it negligently permitted to remain in the street for ten days uncovered and unguarded; and that, while walking along the street, the plaintiff, without negligence on her part, stepped into the hole and was injured,—is insufficient in failing to show that the injury was caused by some specific act of negligence or omission of duty on the part of the municipality. *Rushville v. Poe*, 85 Ind. 83.

So, a municipal corporation is required to guard against only such dangers in its streets as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care. *Spencer v. Mayfield* (Ind. App.) 85 N. E. 23; *Cammatt v. Haverhill*, 199 Mass. 76, 83 N. E. 337; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Galveston v. Dazet* (Tex.) 19 S. W. 142.

And to render it liable for an injury it must appear that it was the duty of the city to have removed the obstruction or repaired the defect which occasioned the injury; and that the person complaining was at the time in the exercise of ordinary care. *Tritz v. Kansas City*, 84 Mo. 632; *Craig v. Sedalia*, 63 Mo. 417.

And a municipal corporation is not answerable for an action of nature by which dirt or sand is washed from a higher to a lower level and deposited in ditches or drains in its streets, by reason of which injury is caused. It is only where this occurs by reason of some neglect on the part of the municipal authorities, or, having occurred, is negligently allowed to continue, that a liability occurs. *Beach v. Scranton*, 5 Lack. Leg. News, 251.

So, liability attaches only where there has been a failure to remedy such defects in its street as may be detected and removed by the exercise of ordinary care and diligence; mere knowledge on the part of a few private citizens of a latent defect in a sidewalk is not sufficient to charge the city with notice. *Kenyon v. Indianapolis*, *Wilson*, Super. Ct. (Ind.) 129.

The ground of action against a municipal corporation for injury resulting from defects or obstructions in its streets is either positive misfeasance on the part of the corporation, its officers, or servants, or of others under its authority, in doing acts which cause the streets to be out of repair, or neglect of the corporation to put the streets in repair, or to remove obstructions therefrom; or to remedy causes of danger occasioned by the wrongful acts of third persons. *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

And a municipal corporation is not liable in damages for personal injuries caused by an obstruction of a street, in the absence of a showing that it negligently caused such obstruction, or that, not having caused the obstruction, it had actual notice of its existence and failed to remove it within a reasonable time, or that, in the absence of actual notice, such obstruction continued for such length of time prior to the injury that notice was fairly to be inferred. *Groveport v. Bradfield*, 2 Ohio C. C. 145.

And, under a charter provision that no liability shall attach unless the injury occurred after the defect had been called to the attention of the city council, or after the same had existed for such an unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the city council, the city is not liable for injuries suffered by reason of a defect in a sidewalk unless it was guilty of negligence. *Montgomery v. Comer* (Ala.) 46 So. 761.

A municipal corporation is liable, however, for such injuries as are the result of its negligence or default, or negligence or default of its duly authorized agents, in the performance of a duty imposed upon it by law. *Stidham v. Delaware City* (Del.) 67 Atl. 175; *Vandalia v. Huss*, 41 Ill. App. 517; 20 L.R.A. (N.S.)

McLaughlin v. Corry, 77 Pa. 113, 18 Am. Rep. 432; *Burns v. Bradford*, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997.

And, if city authorities are negligent in allowing a dangerous obstruction to exist in a public highway which they could have removed, and a person is injured thereby without fault on his part, the city is liable for the damages suffered. *McLaughlin v. Corry*, supra.

And a municipal corporation is expected to use reasonable care and prudence in detecting and remedying any defect that may be fairly anticipated will be dangerous and liable to cause accident. *Stratton v. New York*, 190 N. Y. 294, 83 N. E. 40, reversing 117 App. Div. 887, 103 N. Y. Supp. 358; *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451.

Nor can a municipal corporation shield itself from liability for the nonperformance of its duty to keep its highways in a reasonably safe condition for travel thereon, by the plea that the defects in its highways are of such a character that ordinarily careful and circumspect persons might think that accidents would not be liable to happen by reason of such defects to persons traveling with ordinary care. *Draper v. Ironton*, 42 Wis. 696.

And the existence of obstructions in a street is such evidence of negligence upon the part of the city as requires of the authorities explanation in order to escape liability. *New York v. Sheffield*, 4 Wall. 189, 18 L. ed. 416.

Before the enactment of Mass. Stat. 1877, chap. 234, towns were liable if a defect in a street which caused an injury had existed for twenty-four hours, without regard to the question whether the town was negligent in permitting or not removing the defect. *Flanders v. Norwood*, 141 Mass. 17, 5 N. E. 256.

But, under that act, a town is liable only for an injury caused by a defect in a street which might have been remedied, or for an injury which might have been prevented by reasonable care and diligence upon the part of the town. *Ibid*.

c. What constitutes reasonable diligence.

What constitutes reasonable diligence upon the part of a municipal corporation to remove a dangerous obstruction from its streets depends upon the facts of each case. *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532.

And whether or not the streets and roads of a municipal corporation are in a reasonably safe condition for travel in ordinary modes with ordinary care is a practical question, to be determined in each case by its particular circumstances. *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Parrish v. Huntington*, 57 W. Va. 288, 50 S. E. 416.

The care and diligence required of a mu-

municipal corporation in keeping its streets free from dangerous obstructions are reasonable care and diligence, proportioned to the danger or mischief liable to ensue from the omission of such care and diligence. *Colbourn v. Wilmington*, 4 Penn. (Del.) 443, 56 Atl. 605; *Carswell v. Wilmington*, 2 Marv. (Del.) 360, 43 Atl. 169; *Bieber v. St. Paul*, 87 Minn. 35, 91 N. W. 20.

And ordinary diligence upon the part of a city is that care which every prudent municipality takes to put its streets in safe order and to keep them so. *Wilson v. Atlanta*, 63 Ga. 291; *Peake v. Superior*, 106 Wis. 403, 82 N. W. 306.

The same rule of diligence is exacted from a city with reference to excavations or obstructions in streets that is expected from private persons in the control of any business involving a like danger to others. *Walker v. Springfield*, 3 Ohio Dec. Reprint, 567; *Kent v. Wilmington*, 7 Houst. (Del.) 397, 32 Atl. 464; *McDonough v. Virginia City*, 6 Nev. 90.

Cities are under the duty to exercise such care in respect to the safety of their streets as persons of ordinary prudence would have used under the same or similar circumstances, and no more. *Kaiser v. St. Louis*, 185 Mo. 366, 84 S. W. 19; *Carswell v. Wilmington*, supra; *Rhyner v. Menasha*, 107 Wis. 201, 83 N. W. 303.

And not such care and prudence as are exercised by the masses of mankind in their daily affairs. *Rhyner v. Menasha*, supra.

The degree of diligence required is such and no more as a good business man would have shown under like circumstances. *Kent v. Wilmington*, supra.

The words "ordinary care," with reference to the duty of a municipal corporation in keeping its streets free from obstructions or defects, means such prudence and care as an ordinarily careful person would use under the same or like circumstances; and the reasonable diligence required of public officers of a city having charge of its public streets and walks means such diligence as like officers with like responsibility usually and ordinarily employ in the discharge of their duties. *Pumorlo v. Merrill*, 125 Wis. 102, 103 N. W. 464.

And it has been held that the negligence of a municipal corporation which will make it liable for an injury from a dangerous condition of a highway must be such as would have made it liable to an indictment. *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

So, what constitutes reasonable diligence upon the part of a city to remove a dangerous obstruction from its streets depends especially upon the fact whether the existence and dangerous character of the obstruction was known, or in the exercise of reasonable supervision and diligence should have been known, by the city, in time to have caused its removal before it produced the injury complained of. *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532.

Municipal corporations must use such rea-

sonable care to protect travelers in their streets from danger and accident, however, as is adapted to the time, place, and circumstances under which the duty is to be performed. *Burnham v. Boston*, 10 Allen, 293.

It is the duty of a city, by the exercise of all the ordinary means in its power, to keep its sidewalks free from obstruction and in a convenient and safe condition for public use. *Newport v. Miller*, 93 Ky. 22, 18 S. W. 835; *Sevestre v. New York*, 15 Jones & S. 341.

And it is bound to exercise active vigilance to prevent and remove obstacles of a dangerous character from its streets. *Kunz v. Troy*, 16 N. Y. S. R. 459, 1 N. Y. Supp. 596.

The duty of keeping a highway in a safe condition for public travel involves the duty of a reasonable supervision of the highway. *Cusick v. Norwich*, 40 Conn. 375.

And a municipal corporation is under a continuing duty to remove defects from its sidewalks, and to guard against causes which are likely to produce defects therein or obstructions thereon. *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250.

And it is the duty of a municipal corporation charged with the repair of streets and sidewalks not only to put them in repair when it has actual notice of defects, but to exercise reasonable care and diligence to know whether or not they are in proper condition; and, where injury is caused by a defect, evidence of neglect of this duty by the corporation where the performance would have led to knowledge of the defect is competent to charge the corporation with liability. *Gude v. Mankato*, 30 Minn. 256, 15 N. W. 175.

But no inflexible rule can be laid down with reference to the frequency of inspection of sidewalks which will constitute reasonable diligence; and a request, in an action against a city for an injury caused by a defective sidewalk, for an instruction that inspection of the sidewalks once in two weeks by the street commissioner, followed by repairs found necessary, is reasonable diligence, is properly refused. *Kellogg v. Janesville*, 34 Minn. 132, 24 N. W. 359.

The duty is an imperative one, involving the duty of providing all that is necessary to that end, including not only the necessary ordinance regulating their construction, but a full complement of officers and employees, as well as the necessary funds for that purpose. *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947.

And the duty of a municipality to exercise for the public good the powers conferred on it by its charter to prevent nuisances, and to protect persons and property, is not discharged by merely passing ordinances; a vigorous effort to enforce them must be made, and it must prevent the nuisances, if it can do so by ordinary and reasonable care and diligence. *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; *Hagerstown v. Klotz*, 93 Md. 437, 54 L.R.A. 940, 86 Am. St. Rep. 437, 49 Atl. 836.

And a city does not perform its whole duty in respect to keeping its streets in safe condition for travel by instructing its subordinates to ascertain the facts and report; dangerous conditions must be remedied. *Goodfellow v. New York*, 100 N. Y. 15, 2 N. E. 462.

The liability of a municipal corporation for an injury occasioned by a neglect to keep its streets in repair or free from obstruction is the same whether the neglect was wilful or otherwise. *Erie v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87.

And it is no excuse for an obstruction in a street that the city improperly allowed other unnecessary and dangerous obstacles to remain therein. *Newport v. Miller*, supra.

But, while ordinary care upon the part of a municipal corporation to keep its street crossings in good repair is required in all cases, the fact that the crossing in question was on a street in a remote part of the city and but little used may be considered by the jury in determining whether ordinary care was exercised. *Bunker Hill v. Pearson*, 46 Ill. App. 47.

d. Reasonable diligence, how determined.

Whether a municipal corporation has used ordinary and reasonable care in the construction of its roads, and in keeping them free from obstructions, is a question of fact for a jury. *Hall v. Lowell*, 10 Cush. 260; *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414; *Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518; *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 So. 452; *Sauthof v. Granger*, 19 R. I. 606, 35 Atl. 300; *Richmond v. Pemberton*, 108 Va. 220, 61 S. E. 787; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34.

And so, also, is the question whether a municipal corporation has taken proper precautions to guard the traveling public against danger from obstructions in its streets. *Jones v. Collins*, 188 Mass. 53, 74 N. E. 295; *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336; *Hyde v. Boston*, 186 Mass. 115, 71 N. E. 118.

And the opinion of a witness on the question of what is ordinary care is inadmissible as a usurpation of the functions of the jury; and a witness in an action against a city for an injury cannot be asked if a person exercising ordinary care could not have seen the hole in the sidewalk and avoided stepping into it. *Roanoke v. Shull*, supra.

So, whether city authorities have been guilty of negligence in failing to exercise reasonable care and diligence in preventing obstructions or defects in its streets, depending upon considerations with reference to which evidence is given on both sides, is a question of fact for the jury in an action for a resulting injury, and not a question for the court. *Philbrick v. Niles*, 25 20 L.R.A. (N.S.)

Fed. 265; *Aurora v. Cox*, 43 Neb. 727, 62 N. W. 66; *McDowell v. Auburn*, 126 App. Div. 173, 110 N. Y. Supp. 941.

And so is the question whether a municipality, acting through its officials, failed to exercise such reasonable care and diligence in not ascertaining the existence of a nuisance or obstruction in a street, and in not removing it prior to an injury sustained therefrom. *Fritsch v. Allegheny*, 91 Pa. 226; *Wedderburn v. Detroit*, 144 Mich. 684, 108 N. W. 102; *Craig v. Sedalia*, 63 Mo. 417; *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243.

So, where a nuisance existed in a street, and an injury resulted therefrom, the question in an action for an injury, as to whether or not the city had made a vigorous effort to enforce its ordinances designed to prevent such nuisance, is one of fact for the jury. *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027.

And, where a city grants a right to use its streets for particular purposes, the dangerous condition of obstructions caused by such use, and the knowledge of the city, are questions of fact for the jury. *Decatur v. Hamilton*, 89 Ill. App. 561.

The law does not prescribe specifically what shall be done to protect travelers from an obstruction in a highway, but it does prescribe generally that highways shall be kept reasonably safe and convenient for travelers at all times, thus leaving the method of discharging the duty with the city or town authorities, subject to the judgment of a jury in case an accident happens as to whether the method adopted or the thing done was a sufficient discharge of its statutory liability; and the judgment of the jury, unless so clearly wrong that fair-minded men could not honestly differ upon the question, shall prevail. *Sauthof v. Granger*, 19 R. I. 606, 35 Atl. 300.

IX. The degree of perfection required.

a. General rules.

A reasonably safe condition is the rule of perfection required of municipal corporations in the maintenance of streets; and a municipal corporation is bound by law to use ordinary care and diligence to keep its streets and sidewalks in a reasonably safe condition for public use in the ordinary modes of travel. *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *McLemore v. West End* (Ala.) 48 So. 663; *Taylor v. Manson* (Cal. App.) 99 Pac. 410; *Thunborg v. Pueblo* (Colo.) 101 Pac. 399; *Atlanta v. Buchanan*, 76 Ga. 585; *Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246; *Chicago v. McGiven*, 78 Ill. 347; *Rockford v. Russell*, 9 Ill. App. 229; *Bloomington v. Read*, 2 Ill. App. 542; *Vandalia v. Ropp*, 39 Ill. App. 344; *Brownlee v. Alexis*, 39 Ill. App. 135; *Powell v. Bowen*, 92 Ill. App. 453; *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460; *Evansville v. Frazer*, 24 Ind. App. 628, 56 N. E. 729; *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893; *Atchison v. Acheson*,

9 Kan. App. 33, 57 Pac. 248; Grider v. Jefferson Realty Co. (Ky.) 116 S. W. 691; Louisville v. Johnson, 24 Ky. L. Rep. 685, 69 S. W. 803; Stinson v. Gardiner, 42 Me. 248, 66 Am. Dec. 281; Magaha v. Hagerstown, 95 Md. 62, 93 Am. St. Rep. 317, 51 Atl. 832; Vicksburg v. Hennessy, 54 Miss. 391, 28 Am. Rep. 354; Nesbitt v. Greenville, 69 Miss. 22, 30 Am. St. Rep. 521, 10 So. 452; Carthage v. Garner, 209 Mo. 688, 108 S. W. 521; Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89; Beaudean v. Cape Girardeau, 71 Mo. 393; Buckley v. Kansas City, 156 Mo. 16, 56 S. W. 319; Smith v. St. Joseph, 45 Mo. 449; Brennan v. St. Louis, 92 Mo. 482, 2 S. W. 481; Bowie v. Kansas City, 51 Mo. 454; Tritz v. Kansas City, 84 Mo. 632; Loewer v. Sedalia, 77 Mo. 431; Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96; Burnes v. St. Joseph, 91 Mo. App. 489; Kling v. Kansas City, 27 Mo. App. 231; Anderson v. Albion, 64 Neb. 280, 89 N. W. 794; Smith v. New York, 17 App. Div. 438, 45 N. Y. Supp. 239; Wallace v. New York, 18 How. Pr. 169; Garrett v. Buffalo, 26 N. Y. Week. Dig. 257, 7 N. Y. S. R. 96; Dayton v. Glaser, 76 Ohio St. 471, 12 L.R.A.(N.S.) 916, 81 N. E. 991; Monroeville v. Wehl, 13 Ohio C. C. 689; Holbert v. Philadelphia, 221 Pa. 260, 70 Atl. 746; Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096; Tucker v. Salt Lake City, 10 Utah, 173, 37 Pac. 261; Van Pelt v. Clarksburg, 42 W. Va. 218, 24 S. E. 878; Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Baltimore v. Maryland, 166 Fed. 641.

And, if it fails to do so, it is liable for injuries sustained by reason of such negligence, provided the party injured exercises ordinary care to avoid the injury. Norman v. Teel, 12 Okla. 69, 69 Pac. 791; Rockford v. Russell and Evansville v. Frazer, supra; Jansen v. Atchison, 16 Kan. 358; Carthage v. Garner, 209 Mo. 688, 108 S. W. 521; Tucker v. Salt Lake City, supra.

It must guard against such dangers as can or ought to be anticipated, or foreseen, in the exercise of reasonable care and prudence. Smith v. New York, supra.

And no distinction exists between sidewalks and carriage ways, in respect to the duty of a municipal corporation to keep its streets free from obstruction and in proper repair. Davenport v. Ruckman, 10 Bosw. 20, 16 Abb. Pr. 341, affirmed in 37 N. Y. 568.

And an incorporated town is bound to exercise ordinary care and diligence in constructing and maintaining its sidewalks in a reasonably safe condition, the same as an incorporated city. Beazan v. Mason City, 58 Iowa, 233, 12 N. W. 279.

Nor will any usage or custom justify an encroachment on a public highway, or the presence therein of an obstruction which renders it unsafe for the use to which it is dedicated. McNeerney v. Reading, 150 Pa. 611, 25 Atl. 57.

And the fact that an obstruction on a sidewalk had existed for a long period of time does not render it sacred in the eyes 20 L.R.A.(N.S.)

of the law; the long period of its existence is of no significance except as it speaks to the point of notice and knowledge of its existence. Fischer v. St. Louis, 189 Mo. 567, 107 Am. St. Rep. 380, 88 S. W. 82.

And a complaint plainly and directly averring that the place where the plaintiff was injured was a public street in the city, and he was at the time a traveler thereon, sufficiently charges the duty of the municipality to keep its public streets in a reasonably safe condition for travel. Laporte v. Osborn (Ind. App.) 86 N. E. 995.

It is not the duty of a municipal corporation, however, to make its streets absolutely perfect. Smith v. New York, 17 App. Div. 438, 45 N. Y. Supp. 239; Taylor v. Manson (Cal. App.) 99 Pac. 410; Denver v. Moewes, 15 Colo. App. 28, 60 Pac. 986; Rockford v. Hildebrand, 61 Ill. 155; Hennepin v. Coleman, 132 Ill. App. 604; Bloomington v. Read, 2 Ill. App. 542; Aurora v. Brown, 12 Ill. App. 122, affirmed in 109 Ill. 165; Chicago v. Glanville, 18 Ill. App. 308; Rock Island v. Drost, 71 Ill. App. 613; Hall v. Manson, 99 Iowa, 585, 58 N. W. 881; Emporia v. Schmidling, 33 Kan. 485, 6 Pac. 893; Magaha v. Hagerstown, 95 Md. 62, 93 Am. St. Rep. 317, 51 Atl. 832; St. Louis v. Kansas City, 110 Mo. App. 653, 85 S. W. 630; Smith v. Brunswick, 61 Mo. App. 578; Wallis v. Westport, 82 Mo. App. 522; Struble v. DeWitt (Neb.) 116 N. W. 154; Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309; Heiss v. Lancaster, 203 Pa. 260, 52 Atl. 201; Kawiecka v. Superior (Wis.) 118 N. W. 192.

They are required to use only proper and reasonable care to keep their streets and sidewalks in a reasonably safe condition. Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246; Lincoln v. Heinzl, 134 Ill. App. 439; Joliet v. Walker, 7 Ill. App. 267; Aurora v. Brown, supra; Lyon v. Logansport (Ind. App.) 32 N. E. 582; Alexander v. New Castle, 115 Ind. 51, 17 N. E. 200; Scurlock v. Boone (Iowa) 120 N. W. 313; Covington v. Manwaring, 113 Ky. 592, 68 S. W. 625; Midway v. Lloyd, 24 Ky. L. Rep. 2448, 74 S. W. 195; Fugate v. Somerset, 97 Ky. 48, 29 S. W. 970; Shippy v. Au Sable, 65 Mich. 495, 32 N. W. 741; McArthur v. Saginaw, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; Wallis v. Westport, 82 Mo. App. 522; St. Louis v. Kansas City, 110 Mo. App. 653, 85 S. W. 630; Kawiecka v. Superior (Wis.) 118 N. W. 192.

And they can be held responsible only for failure to exercise ordinary care and prudence in that regard. Mansfield v. Moore, supra.

And what is a reasonably safe condition must depend upon circumstances. Magaha v. Hagerstown, supra.

They are not answerable for injuries resulting from defects that reasonable care and diligence on the part of the city authorities could not have discovered and remedied. Emporia v. Schmidling, supra.

And, where a city builds a sidewalk elevated above the ground on posts, leaving

openings underneath, or permits the owners of lots abutting on a street to excavate areas under the sidewalk, it does not become an insurer of the strength and sufficiency of the sidewalk above such openings and areas. Its undertaking is to use reasonable care and diligence reasonably with reference to the risk and danger in placing and maintaining a sufficient plank or other cover over such openings and areas; and it is responsible only in case of a failure to use such care and diligence. *Atchison v. Jansen*, 21 Kan. 560.

Nor can a recovery be had against a municipal corporation for an injury resulting from a defect or obstruction in a street where it was of such a trifling character that it was not naturally dangerous, and must almost inevitably occur in many of the streets. *Gastel v. New York* (N. Y.) 86 N. E. 833; *Gottsberger v. New York*, 9 Misc. 349, 29 N. Y. Supp. 592.

And no recovery can be had where it appears that the obstruction was made for a highly useful public purpose, and had fulfilled this purpose for years. *Gottsberger v. New York*, supra.

And a municipality is not liable in damages for injuries resulting from extraordinary accidents which would not be anticipated or foreseen or guarded against in the exercise of reasonable care and prudence. *Nieholls v. New York*, 128 App. Div. 532, 112 N. Y. Supp. 795; *Kieffer v. Hummelstown*, 151 Pa. 304, 17 L.R.A. 217, 24 Atl. 1060.

The specific duty resting upon municipal corporations with regard to the streets under their control is that they shall exercise reasonable care to see that they are safe for lawful use by any member of the public for any of the purposes for which a public street is designed. *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Murphy v. Dayton*, 7 Ohio N. P. 227.

And a municipal corporation is not liable for injuries caused by a defective or obstructed sidewalk, unless the sidewalk was in such a condition as to endanger persons of ordinary health and strength in using it. *Taylor v. Manson* (Cal. App.) 99 Pac. 410.

So, a statute requiring cities and towns to keep their ways safe and convenient for travelers means reasonably, and not absolutely, safe. *Morgan v. Lewiston*, 91 Me. 566, 40 Atl. 545; *Moriarty v. Lewiston*, 98 Me. 482, 57 Atl. 790.

And the question of liability of a town under such an act is not whether in a given case the town used ordinary care and diligence in the construction and repair of the way, but whether, as a result, the way as constructed and maintained was in fact reasonably safe and convenient for travelers. *Moriarty v. Lewiston*, supra.

But an instruction in an action for an injury from a defect or obstruction in a street, which speaks of the duty of the village "to keep in repair the sidewalks," is not erroneous because not qualified by the word "reasonable," where other instructions

show the duty to be to keep the walks "in reasonably safe" condition or state of repair. *Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246, affirming 21 Ill. App. 326.

And error in charging the jury, in an action against a city, that it is the duty of the defendant to keep the streets in question in good order and condition, its duty being to keep them in a reasonably safe condition for travel in ordinary modes, is cured by another instruction expressly telling the jury that the city is not liable if the street complained of was at the time of the accident in a reasonably safe condition for travel in ordinary modes with ordinary care. *Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986.

But, while a charge to the effect that a walk must not be in an unreasonably dangerous condition means the same as that it must be kept in a reasonably safe condition, the language cannot be commended, though its use does not constitute error. *Lindsay v. Des Moines*, 74 Iowa, 111, 37 N. W. 9.

It is no defense, however, in an action against a city under Mass. Gen. Stat. chap. 24, § 22, requiring that highways shall be kept safe and convenient for travelers, to recover for an injury caused by a defect in a highway, that the city or town used ordinary care in repairing the way, if in fact it was not reasonably safe and convenient. *George v. Haverhill*, 110 Mass. 500.

And, in order to hold a municipal corporation responsible on the ground of implied notice of a defect in a road, there should be such a condition of things as fairly to indicate that there may be at any time danger in using the road. *Miller v. North Adams*, 182 Mass. 569, 66 N. E. 197.

But, in order to impose liability upon a city, it is not necessary that its streets or sidewalks should have been unreasonably dangerous; and an instruction to that effect is erroneous. *Anderson v. Albion*, 64 Neb. 280, 89 N. W. 794.

b. As affected by locality and uses.

In determining what obstructions or other inconvenience will render a highway defective so as to make the town liable if an injury is thereby occasioned, the location of the street, the amount of travel to be accommodated, and such other circumstances as may bear upon the question of reasonable safety in that place, must all be considered; the way must be safe and convenient in view of such casualties as might reasonably be expected to happen to travelers. *Moriarty v. Lewiston*, 98 Me. 482, 57 Atl. 790; *Smith v. New York*, 17 App. Div. 438, 45 N. Y. Supp. 239.

And regard must be had to the questions whether the street is newly opened, or had been in existence for some time, whether the municipality is small and poor, or populous and wealthy, and whether the street is a frequented thoroughfare or a remote passageway. *Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518.

The rule of responsibility of a municipality for the condition of its streets is the removal or abatement of obstruction so as to render the highway, street, or sidewalk at all times safe and convenient, regard being had to its locality and uses. *Providence v. Clapp*, 17 How. 161, 15 L. ed. 72; *Larmon v. District of Columbia*, 5 Mackey, 330; *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281.

And the jury, in an action for an injury caused by a defect or obstruction in a sidewalk, may consider, on the question of whether the sidewalk was in a defective condition, the nature of the alleged defect, the amount of travel over the place where the accident occurred, its nearness to the business portion of the town, and such other circumstances as tend to throw light upon the questions at issue. *Welsh v. Amesbury*, 170 Mass. 437, 49 N. E. 735; *Rockford v. Hollenbeck*, 34 Ill. App. 40.

Greater diligence on the part of the city is required in looking after the condition of a sidewalk where the street is much traveled than where it is little used. *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96.

And a condition of a sidewalk which might constitute negligence when permitted in cities and larger towns might be sufficient in villages and small country towns. *Foraker v. Sandy Lake*, 130 Pa. 123, 18 Atl. 609.

And, where an injury results from an obstruction in a street, and action is brought against the municipality therefor, whether it was a much-used street or a little-used street are facts which, together with all the other facts and circumstances in evidence, should be submitted to the jury, to be considered by them in determining whether the street was reasonably safe for public travel. *Hennepin v. Coleman*, 132 Ill. App. 604.

And where, in the suburbs of a city, where the population is sparse, and the municipal authorities, in view of public future growth, believe that a street 80 feet wide would become necessary, but are of the opinion that for the time being a roadway 30 feet wide in the 80-foot street is all that the public good requires, their action in passing an ordinance for the improvement to that extent only is an act in their governmental capacity, and does not impose liability upon the municipality to an individual as for neglect of duty. *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168.

But the law requires that reasonable care shall be given to streets and sidewalks, and makes no distinction between localities except as circumstances affect the question of what is reasonable; and it is not the law that sparsely settled or small communities must have better or more carefully guarded walks or ways than large cities. *Moore v. Kalamazoo*, 109 Mich. 176, 66 N. W. 1089.

And the duty of municipal corporations to exercise ordinary care and prudence in keeping sidewalks in their limits in a reasonably safe condition is not lessened or changed by the fact that the sidewalk in question is located in the suburbs of the city, and, for

that reason, was not so much in use as the sidewalks in the more frequented streets. *Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Decatur v. Besten*, 169 Ill. 340, 48 N. E. 186; *Normal v. Bright*, 223 Ill. 99, 79 N. E. 90.

A municipal corporation is required to exercise reasonable care and diligence in keeping its streets in a safe condition for travel and free from obstruction, even though the street may not be one frequently used by the public. *South Omaha v. Powell*, 50 Neb. 798, 70 N. W. 391; *Mt. Morris v. Kanode*, 98 Ill. App. 373; *Wall v. Pittsburgh*, 205 Pa. 48, 54 Atl. 497.

And it may not entirely or substantially ignore its outside walks, and give them little or no attention. If there is travel enough to justify the building of a sidewalk, then the city cannot allow it to go into decay or become dangerous. *Rockford v. Hollenbeck*, *supra*.

And it is not saved from liability for a defect in a sidewalk consisting of a step of a few inches in height from an old sidewalk to a new one, which caused an injury, because the municipal corporation contains a population of only 500 or 600 people. *Graham v. Oxford*, 105 Iowa, 705, 75 N. W. 473.

And it has been held that the size of a city and the extent and number of its streets are not relevant evidence on the question of its negligence in a suit against it for an injury resulting from a defect in a street. *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483.

So, a municipal corporation is bound only to keep its streets in such a condition as to make them safe for ordinary travel in the usual mode. *Norwalk v. Jacobs*, 29 Ohio C. C. 123; *Jansen v. Atchison*, 16 Kan. 358.

It is not chargeable with negligence when an accident which, according to common experience, was not likely to occur, happens to a traveler by reason of a defect in a sidewalk. *Beekman v. New York*, 18 Misc. 509, 41 N. Y. Supp. 990.

And in curbing and guttering a street it is sufficient if the city so does it that no damage would occur from an ordinary rain,—such a one as is to be expected and anticipated in the climate of the place where the city is situated. *Haney v. Kansas City*, 94 Mo. 334, 7 S. W. 417.

And where, pursuant to a contract, contractors erected a temporary bridge over an excavation under a sidewalk and a portion of the street necessary to construct a vault, authorized by the permit of the city, and there was a parade on the street, and a large number of people gathered upon the bridge while the parade was passing, and a portion of the bridge collapsed, throwing a number of people into the excavation, the city will not be held liable for the injury where there is nothing to show that such an unusual crowd could have been anticipated, or that the city could have done any more than it did to prevent the accident. *Coolidge v. New York*, 99 App. Div. 175, 90 N. Y. Supp. 1078, affirmed in 185 N. Y. 529, 77 N. E. 1192.

But, where an elevated sidewalk approaching a street bridge, and which was virtually a part thereof, gave way under an unusual strain to which it was subjected by a crowd, it cannot be said as a matter of law, in an action for the injury occasioned thereby, that the city was not required to construct the same with a view to such a contingency, where such crowds frequently assemble in the streets. *Leggett v. Watertown*, 55 App. Div. 321, 66 N. Y. Supp. 910.

So, a city need not keep its streets in a condition to be safe for extraordinary emergencies, conditions, or circumstances, such as riding behind a runaway horse or a horse beyond the control of his driver. *Norwalk v. Jacobs*, 29 Ohio C. C. 123; *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Hungerman v. Wheeling*, 46 W. Va. 761, 34 S. E. 778.

Nor is it required to have them in such condition as to secure the safety of reckless drivers. *Walker v. Vicksburg*, 71 Miss. 899, 15 So. 132.

But it is incumbent upon a municipal corporation to maintain its highways in a condition of reasonable safety for the driving of spirited as well as docile animals. *Akers v. New York*, 14 Misc. 524, 35 N. Y. Supp. 1099.

And it is required to keep its streets in such a condition that even skittish horses may be employed without danger. *Pittston v. Hart*, 89 Pa. 389.

A borough or township is not liable for injuries to a person on a public road, unless it is shown that the ordinary needs of public travel conducted in the ordinary way had not been anticipated and provided for, and that the injury was the natural and probable consequence of the neglect of duty on the part of the borough or township officers. *Kieffer v. Hummelstown*, 151 Pa. 304, 17 L.R.A. 217, 24 Atl. 1060.

Where the use of a highway is one that reasonable care and prudence could never have anticipated, there is no duty on the municipality at all with reference to it; and it makes no difference that the injury in such case is the result of defects in the highway for which the municipal corporation would be responsible in case of injury to individuals in the lawful and proper use of it. *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51.

But a city which fails to perform its duty to take such care of its streets as is reasonably necessary for the security of travelers, in consequence of which an injury occurs, cannot escape liability therefor on the ground that an accident and injury of that particular kind could not be foreseen. *Byerly v. Anamosa*, 79 Iowa, 204, 44 N. W. 359.

So, a municipal corporation vested by law with the control of the streets and sidewalks of the city is under duty to keep them in such condition that they may be safely traveled at all hours. *Reinhard v. New York*, 2 Daly, 243; *Griberd v. Jefferson Realty Co.* (Ky.) 116 S. W. 691; *Ball v. Independence*, 20 L.R.A. (N.S.)

41 Mo. App. 469; *Davis v. Omaha*, 47 Neb. 836, 66 N. W. 859.

By night as well as by day. *Massey v. Columbus*, 75 Ga. 658; *Blume v. New Orleans*, 104 La. 345, 29 So. 106; *Harrell v. Macon*, 1 Ga. App. 413, 58 S. E. 124; *Milledgeville v. Cooley*, 55 Ga. 17; *Rome v. Dodd*, 58 Ga. 238; *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451; *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256; *Haniford v. Kansas City*, 103 Mo. 172, 15 S. W. 753; *Flynn v. Neosho*, 114 Mo. 567, 21 S. W. 903; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89; *Ball v. Independence*, 41 Mo. App. 469; *McCarroll v. Kansas City*, 64 Mo. App. 283; *Culverson v. Maryville*, 67 Mo. App. 343; *Reed v. Mexico*, 101 Mo. App. 155, 76 S. W. 55; *Plainview v. Mendelson*, 65 Neb. 85, 90 N. W. 956; *Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *Ironton v. Kelley*, 38 Ohio St. 50; *Monroeville v. Wehl*, 13 Ohio C. C. 689; *Wall v. Pittsburg*, 205 Pa. 48, 54 Atl. 497; *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096; *Musselman v. Hatfield*, 202 Pa. 489, 52 Atl. 15; *McKim v. Philadelphia*, 217 Pa. 243, 19 L.R.A. (N.S.) 506, 66 Atl. 340; *Archer v. Johnson City* (Tenn.) 64 S. W. 474; *Parrish v. Huntington*, 57 W. Va. 286, 50 S. E. 416; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Merrill v. Portland*, 4 Cliff. 138, Fed. Cas. No. 9,470; *Baltimore v. Maryland*, 166 Fed. 641.

And, in the case of failure to do so, it is liable for damages resulting therefrom. *Milledgeville v. Cooley*, 55 Ga. 17; *Rome v. Dodd*, 58 Ga. 238.

It is not sufficient that public streets and sidewalks are kept by a municipality in such a condition as to be reasonably safe in daylight or under strong light; their condition must be such that they will be reasonably safe in all conditions of light in which the public are entitled or required to travel upon or use them. *Larmon v. District of Columbia*, 5 Mackey, 330.

And an instruction that the town was bound at all times to have its highways in a reasonably safe condition for customary travel is proper in an action against the town for injury caused by a defective highway, when accompanied with a proper explanation of the phrase "reasonably safe," and a proper qualification of the expression "at all times," limiting it to all times when the circumstances were such as to admit of the highways being in the reasonably safe condition required. *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

And an instruction, in an action against a city for injuries to a driver in a collision with a fire hydrant, that the city is bound to use reasonable care to keep its streets in a safe condition for ordinary travel includes travel by night as well as by day. *Thumborg v. Pueblo* (Colo.) 101 Pac. 399.

But the obligation resting upon a municipi-

pal corporation to keep its streets and sidewalks in a reasonably safe condition for travel does not impose upon it the duty of insuring those who travel such streets in the darkness of the night from the danger of collision with objects necessarily and properly in the streets, such as ditches and gutters, constructed for the purpose of draining the streets, and curbstones properly connected therewith, and hitching posts properly located in the public streets, or fire plugs or hydrants properly located therein. *Mitchell v. Tell City* (Ind. App.) 81 N. E. 594.

Nor is a municipal corporation bound to provide a safe, or any, way by which the streets may be entered from private property; and a person who attempts to enter a street by a private way passing from private property into the street, and in doing so falls into an excavation made for the purpose of lowering the grade of the street, is not entitled to recover of the city for his injury. *Goodwin v. Des Moines*, 55 Iowa, 67, 7 N. W. 411.

But a city the authorities of which make an excavation in a street so as to cause an abrupt descent from a public alley to the street, and render egress from the alley inconvenient and dangerous, is bound to remedy the evil, since the power conferred upon it to superintend the streets imposes a duty to exercise the power in necessary cases. *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

So, while the sidewalks of a city must be kept in reasonably safe repair for the use of pedestrians, the city is not bound to keep them fit for the use of vehicles, and, if drivers of vehicles use them for the passage of their wagons, they must do so at their peril. *Webster v. Vanceburg* (Ky.) 19 L.R.A. (N.S.) 752, 113 S. W. 140.

And this rule is not affected by the fact that the sidewalk was used by the person injured, as the only practical way for wagons to reach his destination. *Ibid.*

And the fact that a sidewalk had been used by the acquiescence of the city for many years for the passage of vehicles does not affect the freedom from liability of the city for an injury to a person who drives a vehicle upon the sidewalk. *Ibid.*

But streets are required to be kept in such a state of repair that a person using ordinary care in passing over them at a place other than a street crossing may be reasonably secure from injury arising from their defective condition, of which the authorities had notice. *Durbin v. Napoleon*, 21 Ohio C. C. 160; *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452.

So, a municipal corporation is bound to keep only such streets and such parts of streets in good repair as are necessary for the convenience and use of the traveling public. *Henderson v. Sandefur*, 11 Bush, 550.

It is not liable for injuries to horses and carriages, resulting from a failure to improve a street which was not needed. *Ibid.*

And it must be permitted to exercise its discretion as to whether the public interests 20 L.R.A. (N.S.)

require the improvement of the streets in uninhabited or sparsely settled portions of it, and its decision is final. *Ibid.*

Whether a particular use of a highway is an unreasonable use and a nuisance is a question of fact to be submitted to a jury. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649.

So, whether or not a street or sidewalk was in a reasonably safe condition is an issue of fact for the jury to pass on, and not a question for the opinion of a witness. *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96.

And whether the streets of a municipality were in a reasonably safe condition for travel by night as well as by day is a question for the jury in an action for an injury received thereon. *Culverson v. Maryville*, 67 Mo. App. 343.

c. With reference to whole width of street.

1. The roadway.

The position has been taken by a number of the cases that the rule that towns are not obliged to keep the whole of a highway from one boundary to the other free from obstruction and fit for the use of travelers does not apply to the streets of a village; and that the increased traffic upon the streets of a village renders it necessary that such streets be kept free from obstruction throughout their whole extent; and, if an injury occurs from a neglect of this duty, the village is liable for damages resulting therefrom. *Wright v. Saunders*, 65 Barb. 214; *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Maysville v. Guilfoyle*, 110 Ky. 670, 62 S. W. 493; *Norwalk v. Jacobs*, 29 Ohio C. C. 123.

Under this rule, it is the duty of a city to keep its streets in reasonably safe condition for travel, not alone in the center of the street, but from curb to curb. *Odon v. Dobbs*, 25 Ind. App. 522, 58 N. E. 562; *Thuis v. Vincennes* (Ind. App.) 73 N. E. 141; *McLemore v. West End* (Ala.) 48 So. 663; *Wilmette v. Brachle*, 110 Ill. App. 356, affirmed in 209 Ill. 621, 71 N. E. 41; *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381; *Kossman v. St. Louis*, 153 Mo. 293, 54 S. W. 513.

All parts of all highways and streets need not be kept in like repair and alike smooth and free from obstruction; but all parts of all highways must be kept in such a condition as shall be deemed reasonably safe and convenient having reference to the character of the way and the amount of travel over it. *Street v. Holyoke*, 105 Mass. 82, 7 Am. Rep. 500.

And a traveler has the right to rely on the performance of this duty, and to pass along any part of a street in the day or night in the faith that he will find no obstructions therein. *Wright v. Saunders*, *supra*.

This rule has been limited by many of the cases, however, by applying it to streets

opened for travel their whole width, the rule is modified being that a city opening and undertaking to put the whole width of a street in condition for travel, and inviting the public to use the whole width, must exercise ordinary care to maintain the whole width in a condition reasonably safe and free from obstruction. *Herndon v. Salt Lake City (Utah)* 95 Pac. 646; *Pueblo v. Smith*, 3 Colo. App. 386, 33 Pac. 685; *Newcastle v. Grubbs (Ind.)* 86 N. E. 757; *Crystal v. Des Moines*, 65 Iowa, 502, 22 N. W. 646; *Smith v. Hayti*, 130 Mo. App. 321, 109 S. W. 817; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653.

In *Smith v. Hayti*, supra, *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612, supra, VII., e, 1, was distinguished upon the ground that that decision dealt with an accident which occurred in a portion of a street never graded or otherwise improved or thrown open for the use of the public by the municipality.

And, where no part of a street is appropriated to sidewalks for the use of pedestrians, and vehicles are habitually driven by the public over every part of it, the public has the right to use every part of the street. *Burnes v. St. Joseph*, 91 Mo. App. 489.

So, the rule has been stated to be that, where a street is open to travel for its whole width between the ditches, it is the duty of the city to keep it in repair and free from obstruction for the entire breadth thereof between such ditches. *Stafford v. Oskaloosa*, 64 Iowa, 251, 20 N. W. 174.

Within these rules, a city cannot say, after an injury is sustained in consequence of an obstruction in a portion of a street, that part of such street was intended to be used, and part was not. *Pueblo v. Smith*, supra.

And it cannot excuse itself for leaving an unguarded excavation in a street, by showing that there was, as a matter of fact, no travel on it. *Crystal v. Des Moines*, supra.

Nor is a city relieved from liability for an injury resulting from a mound of frozen mud in a street by the fact that it was about 2 feet outside of the beaten track ordinarily followed by vehicles passing along the street. *Stafford v. Oskaloosa*, supra.

And whether a hydrant left projecting 11 feet 4 inches into the street from the property line rendered the street dangerous to those traveling with vehicles over it, either by day or night, is a question of fact for the jury, in an action for an injury by a collision therewith. *Burnes v. St. Joseph*, supra.

So, where a city opens a street, it is not relieved from liability as a matter of law for injuries by obstructions in it because there is sufficient width for ordinary travel, in good repair, on either side of the place of the accident in question. *Taubman v. Lexington*, 25 Mo. App. 218.

But while, in the closely built-up portion of a town or city, the duty of the authorities to keep the entire street or sidewalk in a safe condition is settled where all portions of it are being constantly used by day and by night, in regard to country roads, though within the territorial limits of a city, it is 20 L.R.A. (N.S.)

enough if a sufficient portion of the middle of the highway is kept in smooth condition, and safe and convenient for travel. *Monongahela City v. Fischer*, 111 Pa. 9, 56 Am. Rep. 241, 2 Atl. 87.

And cities and villages are not required to keep the entire width of streets and highways in sparsely settled portions of their territory, or in the outskirts, in suitable and safe condition and repair for the passage of teams and vehicles. *Rankin v. Smith*, 63 Ill. App. 522; *Birch v. Charleston Light, Heat & P. Co.* 113 Ill. App. 229; *Herndon v. Salt Lake City (Utah)* 95 Pac. 646.

They are or' required to improve and make passable such portion of a street as is reasonably necessary for the needs of the public. *Herndon v. Salt Lake City*, supra; *Willey v. Portsmouth*, 35 N. H. 303.

And an instruction, in an action for an injury caused by an obstruction in a street, that a city is bound to use all reasonable care to keep its streets in a safe condition for travel, and, if it fails to do so, it is liable for injuries sustained in consequence thereof if the party injured exercises reasonable care; but the city is not an insurer of the safety of its streets,—properly presents the question whether the city was required to keep the entire width of a street in repair. *Meisner v. Dillon*, 29 Mont. 116, 74 Pac. 130.

So a city opening, working, and undertaking to put into condition only a part of a street is required to maintain only that part in a reasonably safe condition. *Herndon v. Salt Lake City (Utah)* 95 Pac. 646; *Rhyner v. Menasha*, 97 Wis. 523, 73 N. W. 41; *Hannibal v. Campbell*, 30 C. C. A. 63, 57 U. S. App. 484, 86 Fed. 297.

And, where a city had prepared only a part of a street for public travel, and an accident occurred at a place outside of such part, it was the duty of the person injured to pursue the traveled part of the street; and, if he departed therefrom negligently or heedlessly or for his own convenience, he assumed the risk and could not recover. *Herndon v. Salt Lake City*, supra.

And a city has the power to establish a public street 80 feet wide, and then by ordinance to determine that an improvement 30 feet wide therein is for the time being, owing to the sparse settlement, sufficient for the public needs; and it cannot be required to grade and improve more of the street than, in the exercise of its legislative capacity, it deems to be necessary. *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168; *Hannibal v. Campbell*, supra.

And an injury to a traveler occasioned by his driving off the usual traveled portion and falling over the bank of a creek 30 feet from the graveled road creates no liability on the part of the city though the point of the accident may have touched the outer boundary of the highway as laid out. *Hannibal v. Campbell*, supra.

Nor is a city bound, as matter of law, to keep not only the traveled track of a street in good and safe condition, but also to keep a space of a carriage width on each side

of such traveled track free from posts, stones, or other objects large enough to upset vehicles running over them. *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, 1 Pac. 253.

And a city which partially graded the roadway of a street in an outlying district so that the bed of the highway at the point in question was from 4 to 7 feet below the top of the adjoining bank, and it never constructed any sidewalks along the top of the bank, which was rough and in a state of nature, is not negligent in failing to improve the top of the bank, and not liable for injuries to a person who attempted to use the bank on one side of the cut as a sidewalk on a dark night, and fell into a transverse ditch, and was injured. *Stadelmann v. New York*, 126 App. Div. 352, 110 N. Y. Supp. 682.

So, where only a part of a street has been prepared for public travel, and that part is of sufficient width and reasonably safe within that width to permit a traveler to pass over it, and the traveler departs from the traveled part without cause, and receives an injury, he cannot complain that the street was not worked to a wider extent on the ground that others at other times may have required more space in passing over it. *Herndon v. Salt Lake City*, supra.

And a city will not be held liable for an injury on a country road within the territorial limits of a city, resulting from the absence of railings at the end of a culvert over a stream, where the culvert itself and the roadway on the approaches were both in good repair. *Monongahela City v. Fischer*, supra.

So, a city has power to designate portions of the streets of the city to be used by horsemen and vehicles, and to reserve other portions of the streets for the use of pedestrians and where horsemen and vehicles may not go, and to prepare such portions of the streets for such uses respectively; and no greater duty is cast upon the city than that it shall maintain the respective portions of the streets in reasonably safe condition for the purpose for which such portions of streets are respectively devoted. *Kohlhof v. Chicago*, 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446.

And the general proposition that the public is entitled to the free use of any portion of a public street must be accepted with the qualification that a municipal corporation may devote portions thereof to other purposes useful and convenient to the public. *Teague v. Bloomington*, 40 Ind. App. 68, 81 N. E. 103.

Mere partial obstruction of a part of a street when in fact such obstruction does not interfere with the public use does not create a nuisance. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649.

But, while a city, in opening a street for travel, possesses primarily the discretion to determine whether it will prepare the whole width of the street for travel or merely a part of it, in the business portions of a city, 20 L.R.A. (N.S.)

or where the travel and convenience of the public require it, the whole width of the street must generally be made passable and kept in a reasonably safe condition, while in the outlying portions it may determine what portions of the street it will prepare for travel. *Herndon v. Salt Lake City (Utah)* 95 Pac. 646; *Beach v. Scranton*, 5 Lack. Leg. News, 25.

And, where a city opens for travel only a portion of the full width of a street, whether or not it opens a sufficient part may be a question of fact for the jury. *Herndon v. Salt Lake City*, supra.

And the complaint in an action against a city for a personal injury caused by a defective street because of the failure of the city to prepare a sufficient part of the street for public travel should allege such fact as a ground or negligence. *Ibid*.

And, where a city opened and prepared for public travel only a part of a street, and an accident occurred upon the part of the street not so prepared, the jury, in an action for the injury, should be instructed with regard to the duty of the city in opening and preparing its streets, and when and for what purpose barriers are required. *Ibid*.

So, whether, in any given case, the public needs are such as to require the whole width of a street to be kept in safe condition, is generally a question of fact for a jury, in an action for an injury received from an obstruction outside the traveled track. *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, 1 Pac. 253; *Bryant v. Biddeford*, 39 Me. 193.

And, a witness cannot be permitted to testify directly that the portion of a street prepared for travel was sufficient for public travel, in an action against the city for damages for an injury caused by an obstruction or defect in the street, since this is a mere conclusion of the witness; the reasonable sufficiency of the street being the ultimate fact to be found by the jury. *Herndon v. Salt Lake City*, supra.

So, where the statute requires the roadway of a street to be kept in a reasonably safe condition, whether such way requires the use of the entire width of the street must depend entirely upon the necessities of travel in any given case; and of this the authorities of a township or city must take notice at their peril. *Sebert v. Alpena*, 78 Mich. 165, 43 N. W. 1098.

But a city charter charging the municipality with the duty of repairing and keeping in order the streets imposes upon it the duty to keep the streets in proper order for their entire width, including the sidewalks. *Mobile v. Shaw*, 149 Ala. 599, 43 So. 94.

And the rule that a city is required to use ordinary care to keep its streets in a reasonably safe condition for travel, and that whether the streets are in such a condition is a question of fact to be determined in each case by the particular circumstances, applies to a street the whole width of which has been opened and worked for public

travel. *Herndon v. Salt Lake City (Utah)* 95 Pac. 646.

And, while a city is not necessarily required to open or put all its streets in condition for public travel, or all parts of such streets in such condition, when it does open and undertake to put a street in condition for public travel as a whole or a part thereof, it must keep such street or such part thereof as it does undertake to open and put in such condition in its entirety reasonably safe for travel; and, where a street is paved from curb to curb, it must be kept in such reasonably safe condition from curb to curb. *Kossman v. St. Louis*, 153 Mo. 293, 54 S. W. 513.

And, where a city opens a bridge for public travel as a part of a street, it must keep it as a whole in a reasonably safe condition for such use; and it will be liable for injuries caused by the defective condition of one side though the other side is safe for travel. *Walker v. Kansas City*, 99 Mo. 647, 12 S. W. 894.

And whether a street is maintained in a reasonably safe condition for travel throughout its entire width, where the whole width is opened, or over that portion which is opened and prepared for travel, is a question of fact to be determined by the jury, in an action against the city for an injury resulting from an obstruction therein, from the facts in the case. *Herndon v. Salt Lake City (Utah)* 95 Pac. 646; *Meisner v. Dillon*, 29 Mont. 116, 74 Pac. 130.

So, while a town or municipal corporation is not bound to work the whole width of a road where the travel does not require it, yet it has the right to control the whole width; and, if it suffers objects to remain deposited on the margin which, by their frightful appearance, make the whole road unsafe, it is liable for such accidents by fright as are the natural result of its neglect. *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

And, if a hole is so near to the traveled path, although outside of it, that, combined with the ordinary accidents of travel, it is liable to result in injuries to passers-by while driving, riding bicycles, or walking, the municipality is liable for resulting injuries. *Birch v. Charleston Light, Heat & P. Co.* 113 Ill. App. 229.

So, a person traveling along a street who does not know and has no reason to believe that it is out of repair has the right to assume that the municipality has performed its duty to keep at least a portion thereof devoted to travel in a reasonably safe condition; and, where the municipality has exercised its discretion and determined to devote less than the full located width of the street to travel, the portion lying between such part and the remainder should in some way be so indicated as to make it apparent to a person using the street. *Ibid.*

Nor does a statutory provision that bridges are parts of the public highways and must not be less than 16 feet wide relieve a municipal corporation from responsibility of keeping a bridge in suitable condition

for crossing for a greater width than 16 feet, convenience and safety being the essential conditions of a well-maintained highway; and, where the bridge is in a highway in a city where there is much traffic, and it was built more than 16 feet wide, the exigencies of travel seeming to require it, it must be kept in good condition for its whole width so as to be in proper shape for crossing upon any part of it. *Rusch v. Davenport*, 6 Iowa, 443.

2. The sidewalk.

There is no traveled way of a proper sidewalk in a city less than its width, outside of which a city will not be liable for obstructions; and a traveler must be safeguarded in crossing such sidewalk the same as traveling lengthwise thereon. *Powers v. St. Joseph*, 91 Mo. App. 55.

And the duty of a city to keep its sidewalks in a reasonably safe condition for travel applies to the whole sidewalk. *Goins v. Moberly*, 127 Mo. 116, 29 S. W. 985; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404; *Denver v. Stein*, 25 Colo. 125, 53 Pac. 283; *Atlanta v. Milam*, 95 Ga. 135, 22 S. E. 43; *Springfield v. Burns*, 51 Ill. App. 595; *Bacon v. Boston*, 3 Cush. 174; *Tucker v. Salt Lake City*, 10 Utah, 173, 37 Pac. 261.

In *Roe v. Kansas City*, *supra*, it was said that *Tritz v. Kansas City*, *infra*, should be no longer followed; and that it was overruled by *Walker v. Kansas City*, 99 Mo. 647, 12 S. W. 894, *supra*, IX., c. 1.

It is not confined to keeping in a safe condition a special part only of the sidewalk, which happens to be most generally used. *Atlanta v. Milam*, *supra*.

And, where the entire space between the curb and the lot line in a street is expressly set aside for sidewalk purposes by ordinance, it is incumbent upon the city to keep that entire space in a reasonably safe condition for pedestrians who may have occasion to use it. *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532.

And the fact that a water plug constituting an obstruction is placed in the portion of the sidewalk leading to a house, and not in the main sidewalk, does not prevent a recovery for an injury caused by it under the sidewalk system of the city of Washington, under which the sidewalks extend from the curb line bounding the carriage way of the street to the building line of the houses, and portions of the sidewalks adjacent to houses and known as parking are withdrawn from general use by the public as sidewalks, and committed to the immediate care and custody of the adjacent owners or occupants, the paths to the houses being a part of the sidewalks of the city. *Dotey v. District of Columbia*, 25 App. D. C. 232.

It has been held, however, where necessity for street improvement exists, a sidewalk may be in a condition which relieves the city from liability, although it is not safe throughout its entire width. *Chicago v. Sutton*, 136 Ill. App. 221.

And that a city is bound to keep only so much of its sidewalk in good condition and repair as is necessary to render it reasonably safe for travel. *Tritz v. Kansas City*, 84 Mo. 632.

And the designation of a portion of a street as a sidewalk for the use of footmen, and the preparation of the same for such use, do not deprive those who may desire to move goods or articles of personal property from a building abutting on the street to or from vehicles in the roadway of the street at the edge of the sidewalk; but loading or unloading goods or articles is not an ordinary use, to accommodate which the city is charged with the duty of constructing and maintaining the walk. *Kohlhof v. Chicago*, 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446.

3. Use of sides of street.

(a) Generally.

While it is the duty of a municipal corporation to use reasonable care to keep its streets in a safe condition, it has the right to devote the sides thereof to other useful purposes provided it leaves an unobstructed way of ample width for travelers. *Teague v. Bloomington*, 40 Ind. App. 68, 81 N. E. 103; *Dougherty v. Horseheads*, 159 N. Y. 154, 53 N. E. 799.

And a city which has rightly set apart and improved a part of a street for a boulevard is not bound to use due care to keep such part free from obvious obstructions which are necessarily incident to its use as a boulevard, although they may endanger the safety of travelers thereon. *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022.

And it is not the duty of a city to keep its streets entirely clear from lamp-posts, telephone poles, water hydrants, hitching posts, etc., so that runaway teams may have a clear way on the street from sidewalk to sidewalk. *Bureau Junction v. Long*, 56 Ill. App. 458.

A city has the right to determine the width of its streets which shall be devoted to lawful public uses, and a part may be devoted to sidewalk, part to lawn and shade trees, a part to necessary poles, part to drainage, gutters, etc., a part to vehicles and street cars; and it is not an unlawful use in itself to devote a part designated for drainage to poles supporting electric street lights. *Norwalk v. Jacobs*, 29 Ohio C. C. 123.

And, in the absence of municipal regulation lot owners, abutting upon a street may, for purposes of necessity, ornament, or convenience, partially obstruct the highway in a reasonable manner so as not to prevent the use of the highway by the public, and the municipal authorities may, by ordinance or otherwise, regulate the manner of this public using and ornamentation with a reasonable discretion, which will depend upon the circumstances. *Com. ex rel. Atty. Gen. v. Beaver*, 171 Pa. 542, 33 Atl. 112, 20 L.R.A. (N.S.)

And that inequalities in the surface of the part of the highway between the sidewalk and the carriage way are of common occurrence in other towns and cities may be shown in an action for damages for an injury occurring from an obstruction in that part of the street, as bearing upon the question of ordinary care; but evidence that such inequalities are not deemed to be a portion of the highway required to be reduced to a level and to be kept in repair the use of foot passengers is inadmissible. *Raymond v. Lowell*, 6 Cush. 524, 53 Am. Dec. 57.

But it is the duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition for travel, and this duty is not fully discharged by making the traveled part of the street safe; if there are dangerous places near the usually traveled part, although outside of it, it is the city's duty to use ordinary care to protect from injury a person lawfully using the street in a reasonably prudent manner. *Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47.

And a city has no right to maintain, or permit others to maintain, on its boulevards, and especially on those at the street corners, anything in the nature of a pitfall, or trap, or snare, or like obstruction, whereby a traveler may be injured. *McDonald v. St. Paul*, *supra*.

(b) Objects outside traveled track.

(1) General rules.

If an obstruction or excavation is permitted in a street, which renders it unsafe or dangerous to persons or vehicles, it is a nuisance which renders the corporation liable, whether it lies immediately in or on the street, or so near it as to produce danger to a traveler. *Niblett v. Nashville*, 12 Heisk. 684, 27 Am. Rep. 755; *Willey v. Portsmouth*, 35 N. H. 303.

The duty of a city or town to keep its streets and sidewalks, etc., safe for foot passengers and vehicles is not met by keeping simply the bed of the highway or the surface of the sidewalk in proper condition; such duty is violated if a dangerous obstruction or excavation is permitted so close to the margin of the sidewalk or highway as to make the use of it dangerous. *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51; *Zettler v. Atlanta*, 66 Ga. 195; *Willey v. Portsmouth*, *supra*; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Niblett v. Nashville*, *supra*.

And, whenever it is discovered by the officers of a city that a structure exists on the side of one of its streets in so unsafe a condition as to endanger persons using the street, it becomes the duty of the city either to remove, or to secure, it. *Grogan v. Broadway Foundry Co.* 87 Mo. 321.

And, where a road is so dangerous by reason of its proximity to a precipice, or from any other cause, that common prudence requires extra precaution in order to

insure safety to travelers, the municipal authorities are bound to use such precaution. *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733.

Nor can a city relieve itself of its duty to remove or secure a structure existing on the side of one of its streets in so unsafe a condition as to endanger the safety of persons using the street, by an ordinance providing that the mayor shall require the owner of such structures to have the same secured or removed within a fixed time, and, on his failure to do so, the city shall perform the duty. *Grogan v. Broadway Foundry Co. supra*.

So, if a person, in the exercise of ordinary care, fell from a sidewalk into an excavation permitted to remain open at the side of a street, and received an injury; and if it was negligence upon the part of the city to allow such excavation to remain so near the sidewalk as to render it dangerous,—she can recover of the city for her injury, though the sidewalk itself was not in a broken condition, or out of repair, or imperfect in construction. *Lincoln v. Beckman*, 23 Neb. 677, 37 N. W. 593.

And where, in an action against a city for an injury caused by falling into an excavation negligently permitted by the city to be made in close proximity to a street, instructions are given with reference to a dangerous excavation in close proximity to a sidewalk, it is not error to instruct generally as to the duty of the city in the care and management of its streets and sidewalks. *Oklahoma City v. Meyers, supra*.

Where the obstruction or defect from which an injury resulted was wholly outside of the traveled sidewalk used by the public for travel, and not connected therewith so as to endanger such public traveling thereon, however, there can be no recovery against the city notwithstanding the same was within the lines of the original survey of the street or highway and in a private walk leading from such traveled track or sidewalk to a private building or private place of business. *Fitzgerald v. Berlin*, 64 Wis. 203, 24 N. W. 879.

And, where the traveled path of a road was from 20 to 30 feet wide, and, in the ditch and 3 feet from the outer edge of the traveled path and about 5 or 6 feet from the fence, a hole had been dug, and there was nothing between the hole and the fence but an elevated sidewalk, and there was some snow upon the sides of the road but none in the traveled track, a person who drove in the ditch in the night on the snow with a sleigh and was injured by the hole cannot recover if he diverged from the traveled road without necessity, but merely for the purpose of having the benefit of the snow, or if the horse took that direction from a natural instinct, or from inability to see the road. *Rice v. Montpelier*, 19 Vt. 470.

Nor is a municipal corporation liable as for misfeasance in extending the bounds of one of its streets by widening it and thereby bringing an existing nuisance within the 20 T.R.A. (N.S.)

street limits. *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212, 5 N. W. 668.

But, while a municipal corporation will not be responsible if a traveler voluntarily diverges from the traveled path and injury results, if he is forced into the ditch by accident, and injury is caused by reason of an obstruction in the ditch, the municipality will be liable. *Cassedy v. Stockbridge*, 21 Vt. 391.

Whether alleged obstructions or defects in a highway render it unsafe although not in the traveled part of it is a question for the consideration of the jury in an action for an injury alleged to have resulted from such obstructions or defects. *Bryant v. Biddeford*, 39 Me. 193.

(2) *Park strips.*

Grass plots and shade trees on the sides of streets serve a useful purpose consistent with the object for which streets are made; and their maintenance and protection, by reasonable means, from encroachments of travel, are within the rights of a municipal corporation. *Dougherty v. Horseheads*, 159 N. Y. 154, 53 N. E. 799; *Bellevue v. Genoway*, 14 Ky. L. Rep. 304.

And, while they may be obstructions in a street, yet, when ample width is left to answer the demands of travel, they are such obstructions as serve a useful purpose, and are not inconsistent with the object for which streets are made and maintained. *Teague v. Bloomington*, 40 Ind. App. 68, 81 N. E. 103.

And shade trees growing in a street or highway do not constitute a nuisance for which the municipality is liable, unless they amount to an obstruction to the traveling public. *Everett v. Council Bluffs*, 46 Iowa, 66; *Com. ex rel. Atty. Gen. v. Beaver*, 171 Pa. 542, 33 Atl. 112.

The right partially to obstruct a street is not limited to a case of strict necessity, but may be exercised for purposes of convenience or ornamentation, provided it does not unreasonably interfere with public travel. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649.

So, a municipal corporation may, under reasonable regulations and conditions, permit private driveways to be built from the lands of abutting owners to the driveway of the street, and, when they pass near trees or grass plots, may protect the latter and confine travel to the driveways by curbing or other suitable barrier. *Dougherty v. Horseheads, supra*.

And a large stone placed in a street not in the driveway, which takes the place of curbing in order to keep people off the grass and away from the trees, though an obstruction to the street, is a lawful one the same as a fence, hydrant, or telegraph pole; and the municipal corporation is not liable for an injury resulting therefrom. *Dougherty v. Horseheads*, 159 N. Y. 154, 54 N. E. 799, affirming 73 Hun, 443, 26 N. Y. Supp. 642.

And, where a person was injured by driv-

ing against a stone placed at the intersection of two streets to prevent driving over the curb and park, an ordinance of the city authorizing the parking and curbing of the street is admissible in evidence in an action against the city for the injury received, as bearing upon the issue whether or not the city was negligent. *Herries v. Waterloo*, 114 Iowa, 374, 86 N. W. 306.

Nor is a city liable for an injury to a pedestrian tripped by a wire stretched across a grass plat adjoining the sidewalk, where, in adopting plans for the improvement of the street, the construction of a sidewalk was provided for, and that adjacent property on the side of the street should remain a grass plat, and the wire erected for the purpose of protecting it was in plain view to pedestrians, and the point where the injury occurred was lighted by electric lights, and persons using the sidewalks could not be injured so long as they remained thereon. *Teague v. Bloomington*, *supra*.

Nor is a city liable for personal injuries caused by a pedestrian stumbling and falling over a railing that an abutting owner had placed along the edge of a sidewalk outside the space of the constructed sidewalk, but within the space of the sidewalk area between the sidewalk and the street, where the sidewalk itself was unobstructed and was of sufficient width to accommodate the travelers in the locality in which it was constructed. *Oliver v. Denver*, 13 Colo. App. 345, 57 Pac. 729.

And the mere existence of a division fence between a bridle path and the walk in one of the public parks of a city gives no cause of action to one who is injured by coming in contact with it, the fence not being out of repair, or negligently constructed, or insufficient for the purposes for which it was erected; the fence being a precautionary measure to prevent equestrians from going upon the walk reserved for pedestrians, and the person injured being an equestrian, and being by mistake not upon the bridle path, but upon the walk reserved for pedestrians, which ran parallel with it. *Platt v. New York*, 8 Misc. 409, 28 N. Y. Supp. 672.

While a park strip between a sidewalk and a roadway is designed for ornamental purposes, and it is not expected that persons will ordinarily travel upon it, however, it is a part of the highway; and it cannot be said that under no circumstances do travelers have a right to pass upon or over it. *Larsen v. Sedro-Woolley*, 49 Wash. 134, 94 Pac. 938.

And a street should be kept in such a condition that foot passengers may be able to cross at any place with a reasonable degree of safety using proper care themselves; and it is the duty of cities and towns to keep that part of the street which lies between the carriage way and the sidewalk in such repair that foot passengers may cross any part thereof with a reasonable degree of safety, using such care and caution as are adapted to the nature of the case. *Raymond* 20 L.R.A. (N.S.)

v. Lowell, 6 Cush. 524, 53 Am. Dec. 57; *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381.

Nor do the facts that safe and convenient crossings are maintained by a city at suitable distances, and that there was a crossing near by, relieve the city of the duty to keep in repair that part of the highway forming the dividing line between the carriage way and the sidewalk, so that it can be safely used by foot passengers for crossing the street, or relieve it from liability for an injury resulting from such failure. *Raymond v. Lowell*, *supra*.

And, where a person was thrown to the ground and injured by a wire stretched along a boulevard at a street corner, placed there for the support of a tree, and fastened to a stake at a point 22 inches north of the cross walk and 3 feet 2 inches inside of the curb, the question of the negligence of the city and of the person who was injured is rightfully submitted, as one of fact, to the jury. *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022.

So, if a city, in repairing a pavement, places obstructions in and across the same, thereby preventing a traveler from using the same, the traveler has the right, in order to get around the obstruction, to leave the pavement, and is entitled to recover of the city where, in doing so, she steps into a hole, over which the grass has grown so as to cover it, and is injured without negligence on her part. *Frankfort v. Chinn*, 28 Ky. L. Rep. 257, 89 S. W. 188.

But, if a foot passenger upon a street, instead of availing himself of a crossing especially prepared, chooses to cross at another place, he must take care and see the actual state of the space between the sidewalk and the street; he has no right to assume that the way from the sidewalk to the street is smooth and even, but must exercise caution and prudence adapted to the nature of the case. *Raymond v. Lowell*, *supra*.

And everyone must take notice that trees for ornamentation, comfort, and health, and other useful things, are placed in the space left between the curbing of the street and the sidewalk; and he who travels therein must expect to encounter them; and he is not entitled to compensation if he is injured thereby. *Fockler v. Kansas City*, 94 Mo. App. 464, 68 S. W. 363.

In the above case it was said that *Tritz v. Kansas City*, 84 Mo. 632, *supra*, IX., c. 2, has been overruled and is no longer authority.

A traveler in a street has no reason to expect to find a pile of stones in the space left between the curbing of the sidewalk and the sidewalk, however, a pile of stones having no place on the street; and, if he falls upon one while he is in the exercise of proper care, the city is liable for the injury which he sustains thereby. *Fockler v. Kansas City*, *supra*.

And the question whether, under all the circumstances, a city should have left an open drain ditch in 12 feet of land beside

a street reserved for parking purposes, without guard or barricade, is a question of fact for the jury, in an action for an injury resulting therefrom. *Parker v. Bedford* (Iowa) 117 N. W. 955.

But, where an order for widening a street to make a boulevard had been made, and houses had been moved back, and the city had done a part of the work of grading, and the surface was left rough with a few large stones upon it, and the only portion of the street which was designed to be used by travelers was the portion wrought for vehicles and the adjacent sidewalks; and a person living in one of the houses that had been moved back passed over this land to reach the sidewalk with a view to travel along the street, when her foot struck a board which stood a little above the surface between the sidewalk and the widened portion and was injured,—this board cannot be regarded as a defect for which the city is liable. *Lynch v. Boston*, 186 Mass. 148, 71 N. E. 301.

The burden of proof rests with the plaintiff, in an action against a city for an injury caused by falling into a ditch in a space reserved beside a street for parking purposes, to establish the negligence of the city in failing to maintain its streets in a reasonably safe condition for public travel. *Parker v. Bedford*, supra.

(3) Obstructions, excavations, etc., outside the right of way.

A city is not bound to fence a highway merely to prevent travelers from straying out of the highway, where there is no unsafe place immediately contiguous to the way. *Sparhawk v. Salem*, 1 Allen, 30, 79 Am. Dec. 700; *Daily v. Worcester*, 131 Mass. 452; *Hudson v. Marlborough*, 154 Mass. 218, 28 N. E. 147; *Herndon v. Salt Lake City* (Utah) 95 Pac. 646.

And this is so although there is a dangerous place a short distance away from the highway, which they might reach by so straying. *Daily v. Worcester*, supra; *Scannal v. Cambridge*, 163 Mass. 91, 39 N. E. 790; *Barnes v. Chicopee*, 138 Mass. 67, 52 Am. Rep. 259; *McIlugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5.

And the fact that a pavement is continuous from a sidewalk on a street over the adjacent lands to the place of danger is not of itself an implied invitation to a person on the sidewalk to go on the adjacent lands, which will render the city liable for a resulting injury. *Kelley v. Columbus*, 41 Ohio St. 263.

To render a municipal corporation liable for an injury from an obstruction or defect in proximity to a highway, it must substantially adjoin the highway; if, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another, there is no breach of duty upon the part of the municipality from which the liability to respond in damages can result. *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369. 20 L.R.A. (N.S.)

Unless a dangerous precipice or pitfall which occasions an injury to a traveler is so near to the usual traveled highway as to endanger his safety while traveling on the used highway, no liability therefor upon the part of the city arises. *Hannibal v. Campbell*, 30 C. C. A. 63, 57 U. S. App. 484, 86 Fed. 297; *Kelley v. Columbus*, 41 Ohio St. 263; *St. John v. Campbell*, 26 Can. S. C. 1.

And where a roadway was in first-rate condition for its entire width of 30 feet, and was bounded on each side by a curb 8 inches in height and separated from an embankment by 10 feet of sidewalk, it cannot be maintained that there was any lack of vigilance demanded from the city in failing to fence this embankment; and the city cannot be held liable for an injury resulting to a person whose horse was frightened at a bicycle and became uncontrollable, and left the road, passed over the gutter and curb, and along the sidewalk, and went over the embankment. *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858.

And, where an injury occurred to a passenger from the backing of a wagon across a road against boulders against the edge of an embankment 6 or 7 feet high, no recovery against the municipal corporation can be had where the edge of the embankment was about 18 feet from the traveled way, and the traveled way itself was in proper condition, and the boulders formed a guard against the edge of the bank. *Waterhouse v. Calef*, 21 R. I. 470, 44 Atl. 591.

Nor does a charter provision of a city, giving it power through its common council to compel or cause the making and repairing of railings at exposed places in the streets, render the city liable for an injury from falling over an embankment near a roadway, which was bounded by a curb 8 inches in height and separated from the embankment by 10 feet of sidewalk, since the "exposed places" must mean dangerous places, and the place in question was not dangerous. *Hubbell v. Yonkers*, supra.

In the above case *Macauley v. New York*, 67 N. Y. 602, infra, XII., v, 5, was distinguished upon the ground that in that case the injury resulted from a cause which might be held to be the neglect of the city to perform its duty, while in this case it cannot be seen that there was any duty to fence the embankment, or that a failure to fence it could be construed as negligence.

Nor can a street built on sloping land, so that it is necessary to leave an excavation on one side and an embankment upon the other, but which is wide enough for three carriages to be driven abreast, and is smooth and level, but which has no railing along the embankment, be regarded as unsafe or out of repair, so as to render the municipality liable for an injury caused by driving over the embankment. *Knowlton v. Augusta*, 84 Me. 572, 24 Atl. 1039.

So, a city is not liable for an injury to a child by the caving in of a sand pit situated by the side of a road, in which the child was playing, unless the situation of the sand pit

was in such close proximity to the street, and the condition of the pit as to its extent and all the surroundings were such as to require the authorities of the city, in the exercise of reasonable judgment, to anticipate that children might be allured to the pit from the street to play there, to such an extent as to endanger their lives. *Talty v. Atlantic*, 92 Iowa, 135, 60 N. W. 516.

And, where a traveler at night in a place not lighted in any manner walked off a platform adjoining a highway at a point unguarded by a railing, between a building in front of which a platform was constructed and a bridge maintained by the village, the person injured cannot recover unless the point at which he fell was near the bridge and within the line of the highway. *Warner v. Randolph*, 18 App. Div. 458, 45 N. Y. Supp. 1112.

So, where a sewer emptying into the ocean was so constructed that at high tide the sewage was driven back up the sewer, and, because of the pressure, forced out of the trunk, thereby creating cavities which at times filled with water, liability for an injury caused by a hole filled with water thus created cannot be imposed upon the city, where the hole or excavation was neither adjacent to a highway, nor so close to it as to make the highway dangerous, but was from 50 to 60 feet away from it, and separated from it by an embankment faced by a wall and surmounted by a fence. *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887.

And a city owes no duty to the general public, aside from that of a sanitary character, with respect to water forming a pond on private property within the limits of a city but not near or in dangerous proximity to a public highway, street, or alley, other than such as devolves on private owners of property similarly situated, even though the city may have created the pond. *Omaha v. Bowman*, 52 Neb. 293, 40 L.R.A. 531, 66 Am. St. Rep. 506, 72 N. W. 316.

If an obstruction or excavation is made so near the line of a public street that one lawfully passing along the street may accidentally fall into it or be injured by it, however, it is the duty of the city to secure the erection of barriers as a protection against such accidents; and, if the city fails to do so, and a person falls into the excavation or runs into the obstruction and sustains injuries, it will be liable for such neglect. *South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930; *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Newcastle v. Grubbs* (Ind.) 86 N. E. 757; *Manderschid v. Dubuque*, 29 Iowa, 75, 4 Am. Rep. 196; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Bunch v. Edenton*, 90 N. C. 431; *Niblett v. Nashville*, 12 Heisk. 684, 27 Am. Rep. 755; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369.

While a municipal corporation is not responsible for the acts of private owners upon their own premises, and is not generally bound to guard against travelers wandering

on adjoining lands along a highway, if, by reason of the condition of the adjoining premises, the way itself is rendered unsafe, and the public authorities may reasonably protect travelers from the danger, it is their duty to do so. *Newcastle v. Grubbs*, supra.

And a city is liable for a failure to guard the boundary of a street under circumstances which render the roadway dangerous on account of such failure, though the injuries were received outside of the legal limits of the highway but at a spot which was apparently within such limits and which was rendered dangerous by an obstruction or excavation, no steps having been taken to guard travelers from running against or into what seemed to be the highway. *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409.

And a street about 2 rods wide in a village, the surface of which is in all respects in good condition, and has been repaired from time to time by the town authorities, but which at a certain point has a cellar beside it about 4 feet deep, the line of the wall of which extends within the line of the street, over which cellar no building has existed for a period of about eight years, and no guard or railing has been erected or maintained along the excavation, is not in such a condition of repair as to be safe and convenient for travelers with teams, horses, and carriages, within the meaning of the Maine statute on that subject. *Nichols v. Brunswick*, 3 Cliff. 81, Fed. Cas. No. 10,238.

And, where a person driving through a street in the night, following the highway, brought his wagon in contact with a stump standing 6 inches outside of the highway line, but with no mark to indicate the line of the street, and he was thrown out and injured, evidence, in an action against the city for the injury, that the streets in the vicinity were largely used, and that this stump had remained exposed for a long time, and that there was no light near enough to show the stump, is sufficient to support a judgment for the plaintiff, finding the city guilty of negligence. *Sweet v. Poughkeepsie*, 97 App. Div. 82, 89 N. Y. Supp. 618.

So, trespass on the case lies against a municipal corporation for nonfeasance in permitting a large ditch, gully, or chasm to remain at one end of a public street, into which a person's horse fell and sustained injuries from which it died. *Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358.

And a city which deposited and permitted others to deposit refuse material in a river at a point where a street terminated, so that the deposit appeared to be a prolongation and part of the street, the same being dangerous to anyone stepping thereon, may be guilty of such negligence in the premises as to render it liable to anyone injured by stepping on the deposit. *Ray v. St. Paul*, 40 Minn. 458, 42 N. W. 297.

And, where a person was driving on a road in a city park, and his horse became frightened by a locomotive and turned and upset the carriage, and, there being no bar-

rier on the road, fell with the carriage into the river and was drowned, the circumstances are evidence of the negligence of the city in not putting up a barrier. *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733.

And, where an elevated sidewalk adjoined the steps and platform to a building fronting thereon, and they were built together so that the platform and steps were adapted to the use of the sidewalk as a thoroughfare and constituted an adjunct thereto, any danger from their insecure condition should be treated as arising from a defective or unsafe condition of the walk itself, for which the municipality would be liable. *Leggett v. Watertown*, 55 App. Div. 321, 66 N. Y. Supp. 910.

So, a municipal corporation is liable for injuries happening to a person from the defective condition of a part of a sidewalk constructed, by it extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway, such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe. *Badams v. Toronto*, 24 Ont. App. Rep. 8.

But, if a traveler unnecessarily and for his own convenience deviates designedly from a highway, and in so doing meets with an accident from an obstruction not in the highway, the city cannot be held responsible, no matter how near the highway the obstruction may be. *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51; *Taylor v. Mt. Vernon*, 58 Hun, 384, 12 N. Y. Supp. 25, affirmed in 129 N. Y. 651, 29 N. E. 1032.

And, where a woman walking in the dark along a village street in a thickly settled part started to cross the road to go across the fields, when she fell into a hole dug some time before by children within 5 feet of one side of the road, the hole cannot be regarded as a defect in the way which the village authorities were bound to remedy if they did not suppose that the needs of public travel required it; and she cannot maintain an action against them for her injury. *Keyes v. Marcellus*, 50 Mich. 441, 45 Am. Rep. 52, 15 N. W. 542.

Under a statute like that of Massachusetts with reference to defects in a highway, however, a municipal corporation is not liable for an injury occasioned by falling upon a defect in a sidewalk of a way which had been located and laid out by it so as to run through the sidewalk in a line parallel with the curbstone and 5 feet from it, leaving a part of the sidewalk outside of the way, where the accident happened outside the location of the way, although there was no monument on the sidewalk indicating the line of location and the whole sidewalk was used by travelers. *Stone v. Attleborough*, 140 Mass. 328, 4 N. E. 570.

And a structure or erection on private property wholly outside the limits of a 20 L.R.A. (N.S.)

street or highway does not constitute an insufficiency of the highway, within the meaning of a statute making cities liable for insufficiency of highways, even though it is maintained or used in such a way as to interfere with the safety of persons traveling over the highway. *Hubbell v. Viroqua*, 67 Wis. 343, 58 Am. Rep. 866, 30 N. W. 847.

So *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295, holds that, to entitle a person injured by an obstruction or defect alleged to be in a public street, it should appear that the defect complained of was within the limits of the street as located and established.

The question whether a dangerous place in a road leading into or from one of the public streets of a municipal corporation was so near a public street as to be dangerous to persons traveling thereon, is a question of fact for the jury. *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196.

(4) Obstructions in proximity to sidewalks.

It is negligence upon the part of a city, for which it is liable, to leave a dangerous obstruction or excavation in a public thoroughfare, close to a much-used walk, without guards, barriers, lights, or danger signals. *Olathe v. Mizee*, 48 Kan. 435 30 Am. St. Rep. 308, 29 Pac. 754; *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Newcastle v. Grubbs* (Ind.) 86 N. E. 757; *Halpin v. Kansas City*, 76 Mo. 355.

And an unguarded and unlighted excavation in close proximity to a cross walk may constitute negligence of a municipality, although the cross walk itself is not defective. *Hall v. Manson*, 99 Iowa, 698, 34 L.R.A. 207, 68 N. W. 922.

And, while a deep area way along the line of the sidewalk on a busy and much-frequented street in a large city is not necessarily an unlawful encroachment, and a nuisance *per se*, its presence when insufficiently guarded is a source of danger to persons on the street; and, where it has so existed for a long period of time, the officers of the municipality are chargeable with knowledge of the danger. *Donnelly v. Rochester*, 166 N. Y. 315, 59 N. E. 989.

So, while a hole in a street close to the sidewalk, 2 feet long and 15 inches wide, apparently caused by the washing of surface water escaping from the street, is not as matter of law such a defect as would make the city absolutely liable for a personal injury caused thereby, where there is a conflict as to the period of its existence the court should submit as part of the special verdict the question as to whether the city authorities ought, under all the circumstances, reasonably to have anticipated that an accident might happen and injury be sustained by travelers in the street therefrom. *Rhyner v. Menasha*, 107 Wis. 201, 83 N. W. 303.

Nor is the liability of a municipal corporation for injuries sustained by a traveler

while crossing a street, by stepping upon an upturned nail in a board at the edge of the sidewalk, affected by the fact that such board was not attached to and did not constitute a part of the walk, where it was so near the traveled portion of the walk or street as to endanger travel thereon. *Pittenger v. Hamilton*, 85 Wis. 356, 55 N. W. 423.

But where, under the corner of the sidewalk at two intersecting streets, there was a hole inside of the curbstone opening into a catch basin, and in front of this on the main surface of the street was an iron plate or lid extending toward the center of the street and sloping from the outer edge to the hole, and the catch basin was full of snow, and water stood in the street to the level of the sidewalk, and in the dark a pedestrian mistook the water for a continuation of the concrete of the sidewalk and stepped off the corner and slipped on the iron plate and fell, receiving injuries, the presence of the snow and water in receptive form, in connection with the darkness, the plate, and the hole, does not constitute a defect in the street for which the city is liable. *Spillane v. Fitchburg*, 177 Mass. 87, 83 Am. St. Rep. 262, 58 N. E. 176.

And, where there was comparatively little traffic on a cross street in a city, and the sidewalk was laid out by the city authorities 7 feet wide, the outside line being within 4½ inches of a block, and the whole space was brick as though the sidewalk extended to the block, excepting in front of a basement window about 9 feet wide, where there was a depression in the brick wall 8½ inches in width from the window and 6½ inches in depth, this depression was not a defect in the highway in a legal sense; and the city is not liable for injury to a person who fell into it while walking along the sidewalk in the daytime. *Witham v. Portland*, 72 Me. 539.

d. What obstructions or defects impose liability.

1. Generally.

Ordinarily any object in, upon, or near, the traveled path of a highway, which would necessarily obstruct or hinder one in the use thereof for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result, constitutes a defect in the highway, for an injury resulting from which the town is liable. *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718; *Swart v. District of Columbia*, 17 App. D. C. 407; *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739.

And a municipal corporation is bound to repair any defect in a sidewalk which endangers the safety of travelers. *Colby v. Beaver Dam*, 34 Wis. 285.

And this is so whether the obstruction is carelessly permitted to be placed in or upon it, or whether it is produced by the operation of natural causes, or by the act of

public officers or private individuals. *Swart v. District of Columbia*, supra.

So, the duty devolving upon cities and villages to keep their streets and sidewalks reasonably safe and fit for travel applies to defects in construction as well as neglect to repair. *Plainview v. Mendelson*, 65 Neb. 85, 90 N. W. 956.

And a road or street may be put out of repair, so as to render the municipal corporation liable for resulting injury, by the deposit of obstructions therein which impede or hinder travel or make it dangerous, as well as by partial destruction of the road-bed itself, producing the like effect. *Fritsch v. Allegheny*, 91 Pa. 226.

Nor is the insufficiency or want of repair of streets and highways, for which municipal corporations are made liable by statute, restricted so as to include only inadequacy of original construction and subsequent deterioration; it also includes such obstacles and defects as render the use of the highway dangerous to one exercising ordinary care, provided the municipality has notice of the defect and opportunity to remove it. *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280.

A statute imposing a liability upon municipalities for damages caused by reason of defective highways applies to highways which are defective because unsafe for public travel; and there is no distinction between a defect in the highway itself and an obstacle upon it. *Whitney v. Ticonderoga*, 53 Hun. 214, 6 N. Y. Supp. 844, affirmed in 127 N. Y. 40, 27 N. E. 403.

And a statute providing that all highways are to be kept in repair and amended from time to time that the same may be safe and convenient for travelers applies as well to obstructions placed upon, as to defects inherent in the structure of, a road. *Davis v. Bangor*, 42 Me. 522.

So, a statutory provision that any person or persons sustaining bodily injury upon any of the public highways or streets in the state by reason of neglect to keep such public highways or streets in good repair and in a condition reasonably safe and fit for travel may recover of the township, village, city, or corporation his just damages, makes a city not only liable for injuries occurring through neglect to keep the streets in repair, but also for such as occur by reason of neglect of the city to keep its streets in a condition reasonably safe and fit for travel. *Joslyn v. Detroit*, 74 Mich. 458, 42 N. W. 50.

And a statute providing that the several towns in the state shall be liable to any person for damages to person or property by reason of defective highways or bridges in such town in cases which the commissioner or commissioners of highways of said towns are now by law liable therefor, instead of such commissioners of highways, uses the term "defective highways" in reference to their condition for public travel upon them; and the impairment of a highway for public use may be no less such by an obstruc-

tion placed in it than by a physical disturbance or injury to the bed of the roadway. *Whitney v. Ticonderoga*, 127 N. Y. 40, 27 N. E. 403.

But a street is not out of repair, within the meaning of a statute making a municipality liable for an injury due to a street's being out of repair, by allowing things which are no part of the highway to stand in it temporarily; the want of repair must relate to the way itself, and not to things disconnected with it. *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383, 21 N. W. 873.

So, any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway without authority of law is a public nuisance. *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; *Simon v. Atlanta*, *supra*; *Ely v. Campbell*, 59 How. Pr. 333.

And the duty of a city to keep its streets open and free from nuisances applies to all obstructions except those which the city is specifically empowered to authorize. *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11, 15 N. W. 573.

Nor is it necessary that an obstruction in a street should endanger all modes of public travel in order to be a defect for which the city is liable; it is enough that it makes any mode dangerous which the public have a right to use. *Powers v. Boston*, 154 Mass. 60, 27 N. E. 995.

It is only against defects or obstructions in streets of sufficient gravity to justify a careful and prudent man in anticipating danger from their existence, however, that the municipality is bound to guard. *Ibbeken v. New York*, 94 N. Y. Supp. 568; *Hamilton v. Buffalo*, 173 N. Y. 72, 65 N. E. 944, affirming 55 App. Div. 423, 66 N. Y. Supp. 990; *Gottsberger v. New York*, 9 Misc. 349, 29 N. Y. Supp. 592; *Beltz v. Yonkers*, 148 N. Y. 67, 42 N. E. 401; *Denver v. Hubbard*, 29 Colo. 529, 69 Pac. 508; *Rhyner v. Menasha*, 107 Wis. 201, 83 N. W. 303.

Cities are not required to keep their sidewalks free from irregularities and trifling defects. *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460; *Hamilton v. Buffalo*, *supra*.

The duty of a city or town to see that all its streets open for travel, including sidewalks as well as carriage ways, are kept in repair and free from obstruction, is performed when the way designated and evidently intended for travel is without obstruction, or such structural defects as would endanger the safety of travelers in the exercise by themselves of ordinary care. *Oliver v. Denver*, 13 Colo. App. 345, 57 Pac. 729.

And, where an injury is alleged to have been occasioned by a defect or obstruction in a street, the inquiry should be, not Was there some defect or obstruction in the street? but, Was the street, in the condition in which it is proven to have been, with the defect or obstruction, in a reasonably safe condition for travel in the ordinary modes at the time the accident happened; and was

the accident the natural and probable result of the use of the street in that condition, and one that should have been foreseen by those charged with the duty of maintaining the street? *Dayton v. Glaser*, 76 Ohio St. 471, 12 L.R.A. (N.S.) 916, 81 N. E. 991.

Nor would the mere fact that an obstruction was permitted to remain in a street for several weeks make the city liable for a resulting injury, unless the street was not reasonably safe on account thereof. *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817.

And nothing is an obstruction, within the meaning of a statute subjecting towns to liability for injuries resulting from obstructions, insufficiencies, or want of repairs in their highways, which the town was not bound to have removed at the time of the injury in question under the circumstances of that particular case; and nothing is an insufficiency which the town was not reasonably, having reference to such circumstances, bound then to have improved; and nothing a want of repairs which it was not bound to have mended. *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

So, a statutory provision that no contract involving the expenditure of money can be entered into by a municipal corporation unless the clerk shall certify that the money required by the contract is in the treasury to the credit of the fund is intended for the protection of taxpayers by checking municipal extravagances and the incurring of indebtedness, and is not intended to attach liability to a city for negligence where the city would not otherwise be liable; and the mere fact that there was no money in the treasury to pay the costs of a sewer at the time of making the contract would not make the city liable, even though there was negligence in its construction. *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274.

As a general rule, a city is liable for injuries resulting from the dangerous condition of a street or sidewalk, only when that condition constitutes a nuisance. *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

And it is not every obstruction in a highway that constitutes a nuisance *per se*; it is any unreasonable obstruction that is a public nuisance. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166.

So, everything which renders a highway unsafe does not make it defective, within the meaning of a statute imposing liability upon a town for injury resulting from a defective bridge or road. *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718.

And, where an injury results from a defect in a sidewalk which might, indeed, result in an accident, but which is not of such dimensions or character as to make an accident probable, it does not justify the submission to the jury, in an action for the injury, of the question of the city's negligence. *Henry v. New York*, 119 App. Div. 432, 104 N. Y. Supp. 440.

And a city is not liable for an injury to a person, received from falling over a pile of pipes in a street, where the pile of pipes did not offer a dangerous obstruction to travel. *Henderson v. Burke*, 19 Ky. L. Rep. 1781, 44 S. W. 422.

So, objects along a highway which have no necessary connection with the roadbed or the public travel thereon, and which may expose a person to danger, not as a traveler, but independent of the highway, do not ordinarily render the road defective so as to make the town liable for an injury resulting therefrom. *Hewison v. New Haven*, *supra*.

A municipal corporation is liable for an injury resulting from work in a street amounting to a nuisance, however, though the work may have been done with care and the structure erected in an apparently proper manner; since its erection was itself unlawful, no amount of care or labor bestowed can legalize the illegal appropriation of the street or highway. *Wendell v. Troy*, 39 Barb. 329, affirmed in 4 Abb. App. Dec. 563.

And it is no answer to a charge of nuisance in a street that, even with the obstruction, there was room for pedestrians, nor that the obstruction itself was not a fixture; if it is permanently, or even habitually, in the highway, it is a nuisance. *Warden v. New York*, 123 App. Div. 733, 108 N. Y. Supp. 305.

So, any unauthorized permanent erection or structure which is a material encroachment upon a public street or highway and impedes or interferes with travel is a nuisance *per se*, and may be abated as such though ample space is left for passage by the public. *Savage v. Salem*, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

And a structure 64 feet long, 12 feet wide, and 6 feet high, erected in a street, although not erected for an indefinite period, is sufficiently permanent in its nature to be a nuisance *per se* as distinguished from the class of temporary obstructions made necessary by the necessities of business. *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345.

To render a municipal corporation liable for injury occasioned by obstructions or defects in its streets or sidewalks, however, they must have been of such a nature that they were in themselves dangerous and could not be readily detected, or such that a person exercising ordinary prudence could not have avoided danger of injury in passing them. *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Aurora v. Pulfer*, 56 Ill. 270.

And a complaint in an action against a municipal corporation in an action for damages for an injury caused by an obstruction in a street, if otherwise sufficient, is not rendered insufficient by the absence of an averment showing that there was no reasonable necessity for so encumbering the street, since the existence of such necessity would constitute matter to be set up by way of defense. *Royal Center v. Bingaman*, 37 Ind. App. 626, 77 N. E. 811, 20 L.R.A. (N.S.)

2. Obstructions authorized by law.

Persons injured by accidents from an authorized public work have no legal remedy. *Jones v. Waltham*, 4 Cush. 299, 50 Am. Dec. 783.

And that a structure in a highway which renders it unsafe and inconvenient for travelers was authorized by the legislature is a good defense in an action against the city for an injury resulting therefrom. *Bedford v. Coggeshall*, 19 R. I. 313, 36 Atl. 89.

But a building or other structure of a like nature, erected upon a street without the sanction of the legislature, is a nuisance; and local corporate authority of a place cannot give a valid permission to thus occupy streets without express power to this end, conferred upon them by charter or statute. *Ely v. Campbell*, 59 How. Pr. 333.

And, while a water company has the right to construct in a city such works as the law-making power has authorized, such a company cannot put a structural obstruction in the public highway; and, if it does, and the attention of the city is called to it, followed by neglect to remove it, the city will be liable for an injury caused by the obstruction, in the absence of concurrent negligence by the person injured. *Scranton v. Catterson*, 94 Pa. 202.

And a city ordinance prohibiting street obstructions is admissible in evidence in an action for damages resulting from such an obstruction, for the purpose of showing structures like those causing the injury to be unlawful, and charging the city with a duty in reference to an improper use of its streets. *Farrell v. Dubuque*, 129 Iowa, 447, 105 N. W. 696.

3. Obstructions for general public convenience.

As a general rule slight obstruction of a street or highway for the sake of general convenience and business does not render a municipal corporation liable for a resulting injury. *Tiesler v. Norwich*, 73 Conn. 199, 47 Atl. 161.

And, where obstructions placed in a street constitute a necessary incident to the use of the street for purposes authorized by law, or where they are intended for the protection of the general traveling public, they do not constitute a nuisance. *Seibert v. Missouri P. R. Co.* 188 Mo. 657, 70 L.R.A. 72, 87 S. W. 995; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590.

The right of the public to use a street is subject to such reasonable and necessary limitations as the city may impose upon it; and, as long as an obstruction placed upon a street is temporary and reasonable in its character, and is intended for the public safety and convenience, its existence furnishes no cause for complaint. *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739.

A municipal corporation has the power to authorize the appropriation of its streets to all such uses as are conducive to the public good, and do not interfere with the un-

restricted use of such streets as highways. *Burnes v. St. Joseph*, 91 Mo. App. 489.

While it is the duty of a municipal corporation to use reasonable care to keep its streets in a safe condition to drive upon, it has the right to devote parts thereof to other useful public purposes provided it leaves an unobstructed driveway of ample width for the passage of teams. *Dougherty v. Horseheads*, 159 N. Y. 154, 53 N. E. 799; *Teague v. Bloomington*, 40 Ind. App. 68, 81 N. E. 103.

Thus, the construction of a sewer or drain in a public street under authority of the municipal corporation is a lawful act, and the corporation is liable only for fault or negligence in the construction of the same, whereby injuries are sustained. *Wendell v. Troy*, 4 Keyes, 267, 4 Abb. App. Dec. 569; *Burnes v. St. Joseph*, supra; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274.

But a municipal corporation is not exempted from the duty of exercising due care in opening and constructing a sewer in a public street, by the fact that it was acting under legislative authority. *Koontz v. District of Columbia*, 24 App. D. C. 59.

And the construction of waterworks by a city in its streets is not *per se* a nuisance; and, where the work is provided for by its act of incorporation, neither the city nor its contractor can be held liable in damages for an injury or death resulting from the construction of waterworks, unless it can be shown that such injury or death was caused by some act of negligence of the contractor or his servants, or some breach of duty by the city, and that no contributory negligence of the person injured existed. *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166.

Nor is a cut in a street for the purpose of putting in water pipes, made pursuant to lawful authority, a nuisance *per se*. *Sevestre v. New York*, 15 Jones & S. 341; *Burnes v. St. Joseph*, supra.

And a person who falls into a ditch in a street and is injured thereby cannot recover of the city for his injury, where the ditch was not a temporary excavation or obstruction in the street, but one constructed to drain the streets, and which was a necessary part of the street; there being nothing to show that the ditch was improperly constructed. *Mitchell v. Tell City* (Ind. App.) 81 N. E. 594.

And water tanks erected by an individual by the authority and permission of a city, at places designated and selected by the city's agent and under his supervision, cannot be held to be public nuisances *per se* if they were erected and maintained for public, and not for private, purposes. *Savage v. Salem*, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

So, a municipal corporation may authorize the erection in its streets of telephone, telegraph, electric-light, or electric street-railway poles. *Burnes v. St. Joseph*, supra; *Bellevue v. Genoway*, 14 Ky. L. Rep. 304.

And objects like water hydrants, hitching posts, telegraph poles, awning posts, or 20 L.R.A. (N.S.)

building stones may be placed in, or exist in, a public street, and cannot be held to constitute a nuisance; they are in some respects incidental to the proper use of the street as a highway. *Robert v. Powell*, 168 N. Y. 411, 55 L.R.A. 775, 85 Am. St. Rep. 673, 61 N. E. 699; *Bellevue v. Genoway* and *Burnes v. St. Joseph*, supra.

And an iron monument or column 4 inches in diameter, with a rim projecting $\frac{1}{8}$ of an inch, projecting at the time of the accident in question from the ground $1\frac{1}{8}$ inches on one side and $1\frac{1}{4}$ inches on the other, which was covered up except when the wind or water took the sand away, placed at the intersection of two streets where there was little travel, used by the city as the basis from which to start in surveying lots, and placed in the center of the intersection of streets at intervals of every two blocks, is not such a defect in a street as to fix on the municipal corporation liability on the ground of negligence for an injury to a person whose carriage wheel caught upon such a monument throwing out the driver. *Galveston v. Dazet* (Tex.) 19 S. W. 142.

So, a good fire department is both necessary and useful to a city, and its efficiency is promoted by parades and practice, and temporarily to obstruct passage of the streets by stretching ropes across them during a parade or practice of the fire department furnishes no ground for damages against the city. *Simon v. Atlanta*, supra.

And a judge has authority to order ropes stretched across a street during the hours while his court is sitting, to prevent travel in front of the courthouse, where the noise of passing vehicles obstructs the proper administration of justice therein. *Belvin v. Richmond*, 85 Va. 574, 1 L.R.A. 807, 8 S. E. 378.

And a city is not liable for damages sustained by a traveler in such case, where the city had no agency in the matter, and had entered its protest against the obstruction without effect; since in such case the city was powerless to remove the rope, and bound by the orders of the court until reversed by some competent tribunal. *Ibid*.

But, while a city has a right to make such excavations in its streets from time to time as, in its judgment, may be necessary and proper to lay down culverts, sewers, and such other subservice conduits as the business, health, convenience, and comfort of the citizens may require, in so doing it must use all reasonable care and take every reasonable precaution to prevent injuries to travelers in its streets. *Carswell v. Wilmington*, 2 Marv. (Del.) 360, 43 Atl. 169.

And, though a structure in a street is not in and of itself a nuisance, and is placed there to be used by the public as a part of a street, it is the duty of the city permitting it to remain and to be so used to see that it is in a safe condition for the public to use it as a part of a street; and this is so though the structure is not in the most-traveled portion of the street. *Estelle v. Lake Crystal*, 27 Minn. 243, 6 N. W. 775.

And, if a structure in a street is of itself a nuisance, dangerous to those using the street, it is the duty of the city having notice to remove it. *Ibid.*

So, there is no necessity for placing a stand pipe or water tower in a street, a stand pipe being but a part of the machinery and appliance with which water is forced into the pipes throughout the city, and when so placed it is an unlawful use of the street, for injuries resulting from which the city is liable. *Barrows v. Sycamore*, 150 Ill. 588, 25 L.R.A. 535, 41 Am. St. Rep. 400, 37 N. E. 1096.

And a city was guilty of negligence for which it is liable, where it caused to be dug along a street a trench or ditch for the purpose of laying water pipe, and negligently suffered it to remain open for an unreasonable length of time, and caused a large volume of water to be turned into it, which had the effect of loosening the sides of the bank, rendering the ground of the street liable to cave in, so that a child standing on the street by the side of the trench fell in and was injured by the sudden caving of the ground. *Aurora v. Seidelman*, 34 Ill. App. 285.

4. Obstructions for private or individual convenience.

This subject is covered by a subject note to *McKim v. Philadelphia*, 19 L.R.A.(N.S.) 506.

5. Obstructions for improvement or repair.

(a) Generally.

The temporary obstruction of a public street for the purpose of improvement, if a reasonable necessity exists therefor, is not unlawful; and the municipal authorities are not answerable in damages for permitting it. *Frazier v. Butler*, 172 Pa. 407, 51 Am. St. Rep. 739, 33 Atl. 691; *Kimball v. Bath*, 38 Me. 219, 61 Am. Dec. 243; *Stephens v. Macon*, 83 Mo. 345; *Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115; *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *McDonald v. Dickenson*, 24 Ont. App. Rep. 31.

Municipal corporations are not only authorized, but required, by law, to repair their public ways, including streets and sidewalks, so that they may be safe and convenient for those who may have occasion to pass and repass upon them, and to do so effectually it may be necessary to break up and remodel both the bed of the street and the sidewalk; and at such times the public is necessarily subjected to some degree of inconvenience, and for such necessary interruption of travel and inconvenience to the public they are not liable. *Kimball v. Bath*, *supra*; *Morton v. Frankfort*, 55 Me. 46; *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538.

This is the rule of *ELAM v. MT. STERLING*, 20 L.R.A.(N.S.)

A legal distinction exists between a hole or pit occasioned by the subsidence of the soil or decay of materials of which a street or sidewalk is composed, and an excavation which is a necessary part of an improvement. *Schweickhardt v. St. Louis*, 2 Mo. App. 571.

And the obligation of a municipal corporation to keep its streets in repair is necessarily suspended while they are actually undergoing such alterations as for the time render them impassable or dangerous. *James v. San Francisco*, 6 Cal. 528, 65 Am. Dec. 526; *South Omaha v. Burke*, 3 Neb. (Unof.) 309, 91 N. W. 562; *Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115; *Guthrie v. Swan*, 5 Okla. 779, 51 Pac. 562; *Williams v. Tripp*, 11 R. I. 447.

Provided the dangerous condition is not maintained for an unreasonable time. *Lincoln v. Calvert*, *supra*.

Thus, if a municipal corporation found it necessary to lay water mains in a street, and a person was injured by a pile or ridge of stones which obstructed the street on account thereof, the city is not liable for the injury where the whole work was done by the employees of the city in a proper manner and with reasonable care and diligence. *Baltimore v. Holmes*, 39 Md. 243.

And the act of a city of piling bricks along the side of its streets for the purpose of repairing the streets, while the repairs are in progress, does not create a nuisance. *Pinnix v. Durham*, 130 N. C. 360, 41 S. E. 932.

So, the work of laying water pipes in a city necessarily involves the digging up of the street and the use of its surface to some extent for the deposit of dirt from the trench, and as a place of temporary storage of water pipes and other materials and implements; and the leaving of a pipe on a sidewalk at such a place, parallel with the curbing and 3 inches from the gutter at a point in the street which was not arranged for travelers so to walk as to come in contact with it, is not negligence for which the city is liable. *Downey v. Boston*, 184 Mass. 20, 67 N. E. 638.

And, when the use of a steam-rolling machine is necessary in the lawful construction or repair of a macadamized roadway upon a highway open for public travel, such use is lawful; and it is not negligence *per se* to permit the machine to stand on the highway at rest over Sunday when a reasonably necessary incident of such use; and no liability attaches where the machine is left in as favorable a location as possible with a view to avoid accidents. *Keeley v. Shanley*, 140 Pa. 213, 31 Atl. 305, 306.

And, while an abutting owner may plant trees in a street in front of his premises, and may acquire an interest in them which the law will protect as against a trespasser, such trees are subject to the right of the public; and where, in making the street conform to an established grade, or in constructing a sidewalk, it becomes necessary to remove the trees or injure them, the own-

er is not entitled to relief. *Morris v. Salt Lake City (Utah)* 101 Pac. 373.

And, where the statutes confer upon municipalities the authority to grade their streets, the city is not liable for consequential damages if the work of grading is performed with ordinary skill and prudence; it is only liable if the work is done in a negligent manner. *Walters v. Marshalltown (Iowa)* 120 N. W. 146.

Whether or not a city which raised a street in grading it, without leaving culverts therein, is liable to a landowner for damages caused by a resulting overflow of his land, depends upon whether, in view of the topography of the neighborhood and the existing improvements and the character of the stream, the city was guilty of any want of ordinary skill and prudence in so grading the street without culverts or other waterways. *Ibid.*

But the duty of a city to improve or repair its streets and keep them in repair is coupled with the duty to protect the public against accidents while the streets are out of repair, or while they are being repaired; and they must be kept in a safe condition or the public must be protected from accident in some proper way while they are unsafe. *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162; *Milwaukee v. Davis*, 6 Wis. 377; *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576; *Kimball v. Bath*; *Morton v. Frankfort*; *Pratt v. Weymouth*; and *Stephens v. Macon*,—*supra*; *Ahlfeldt v. Mexico*, 129 Mo. App. 193, 108 S. W. 122; *Ray v. Poplar Bluff*, 70 Mo. App. 252; *Lincoln v. Calvert*, *supra*; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; *O'Hara v. Buffalo*, 39 App. Div. 443, 57 N. Y. Supp. 367; *Grant v. Brooklyn*, 41 Barb. 381; *Oklahoma City v. Welsh*, 3 Okla. 288, 41 Pac. 598; *Wilson v. Wheeling*, *supra*; *Hill v. Tottenham Urban Dist. Council*, 79 L. T. N. S. 495; *Clements v. Tyrone* [1905] 2 Ir. Ch. 542.

Streets are intended for the public use, and, while municipal authorities are entitled to their use to improve and repair them, they must exercise that use in a way to insure the safety of travelers so far as compatible with the temporary interference of those intrusted with their care; and, when work upon a street is suspended for the day, if there is any obstruction to its unrestricted use, that obstruction should be guarded so that it will not be a menace to a traveler. *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518; *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *O'Hara v. Buffalo*, 39 App. Div. 443, 57 N. Y. Supp. 367.

And it is the duty of the municipality to see that the street or walk is made reasonably safe for night travel; and it cannot escape liability for neglect of this duty by attempting to shift upon others the responsibility for such neglect. *Ray v. Poplar Bluff*, *supra*; *Kimball v. Bath*, 38 Me. 219, 61 Am. Dec. 243.

And, where streets are rendered dangerous 20 L.R.A. (N.S.)

or impassable while undergoing repairs, and the town neglects to adopt such reasonably precautionary measures for the safety of citizens and travelers, it is equally as culpable and as liable as it is when its ways are permitted to become unsafe for want of repairs. *Kimball v. Bath*, *supra*.

It must exercise reasonable care to protect the public from the consequences of the unsafe condition of the street. *Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115; *Ahlfeldt v. Mexico*, *supra*.

So, a statutory duty imposed upon cities to keep their streets which are open to public travel in good repair for that purpose makes it necessary that, while grading and paving a street under a charter power, it shall be closed to public travel so far as it is rendered unfit or unsafe for that purpose. *Southwell v. Detroit*, 74 Mich. 438, 42 N. W. 118.

And, when a town concludes that repairs to a street can be made without interrupting the travel, and proceeds to repair without making known that the way is not in a condition to be used, or that there is danger in using it, it is liable for injuries resulting therefrom, although it may not have been guilty of any other neglect than that of permitting the way to be out of repair. *Jacobs v. Bangor*, 16 Me. 187, 33 Am. Dec. 652.

So, while a city may temporarily place obstructions in a street for the purpose of making repairs, this is permitted only as a matter of necessity and for a reasonable time. *Fugate v. Somerset*, 97 Ky. 48, 29 S. W. 970; *Frost v. Portland*, 11 Me. 271; *Lincoln v. Calvert*, *supra*.

And of this necessity the persons making the repairs are not the exclusive judges; they act at their peril. *Frost v. Portland*, *supra*.

And, if more time is taken than is reasonably necessary, it is a violation of the statutory duty; and any person who is specially injured thereby, in either his person or property, is entitled to indemnification from the city. *Williams v. Tripp*, 11 R. I. 447.

The "temporary" obstruction of a street, for which an abutting owner is not entitled to damages, while a public improvement is being constructed therein, is the opposite of "permanent," and means a period of time commensurate with the reasonable prosecution of the work. *Lefkovitz v. Chicago*, 238 Ill. 23, 87 N. E. 58.

And a city putting an improvement in a street is, in the absence of anything to show the character of the work, presumed to be engaged in a lawful undertaking and acting with reasonable despatch; and it will be presumed that the obstruction will not be maintained for an unreasonable length of time. *Ibid.*

And whether the time occupied by the city in grading and improving a street was reasonable or not is a question for a jury in an action for an injury resulting from its unsafe condition. *Lincoln v. Calvert*, *supra*.

And, while a city and its contractors for

the construction or repair of streets have the right to use a steam roller with due care, and have the right temporarily to leave the roller properly guarded in some appropriate place on the street, after the use of the roller has ceased they may not indefinitely leave it on the streets as a place of storage, with the curtains flapping in the wind, after it has frightened horses and teams and proper officials have had notice of that fact and a reasonable time in which to remove it; and in such case the city is liable for resulting injuries. *Elgin v. Thompson*, 98 Ill. App. 358.

So, it is the duty of a municipal corporation vested by law with authority over the streets, while dangerous works, such as sewers, etc.; are being constructed across a street, to have proper precautionary measures taken to prevent accidents to passers during such construction, whether the same is being done by the corporation through its own servants or by contract, or by subcontractors under a primary contractor. *Savannah v. Waldner*, 49 Ga. 316; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753.

And it is liable for damages caused by such work being left unguarded. *St. Paul v. Seitz*, *supra*.

This duty is not founded upon the principle of *respondet superior*, but is deducible from the authority in the corporation over the streets, and the obligation flowing therefrom to protect the public against nuisances or dangerous obstructions in the highways. *Savannah v. Waldner*, *supra*.

So, a city making repairs or improvements in a street is protected from liability only for such obstructions or unsafe conditions as are reasonably necessary for the purpose of performing the work. *Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115.

And, when a city undertakes to improve a street, it is liable for such dangers as are incident to and consequent upon the nature of the work itself. *St. Paul v. Seitz*, *supra*.

And a municipal corporation which directs a material change in a highway is bound to maintain such a supervision of the work as will protect the public from any danger likely to arise from it. *Canfield v. East Stroudsburg*, 19 Pa. Super. Ct. 649.

So, while a city has the right to construct sewers in its streets, yet in doing so it has no right to leave piles of dirt upon the streets in such a condition that it would be unsafe and dangerous for wagons to pass. *Chicago v. Brophy*, 79 Ill. 277.

And, if a city piles or permits pipes to be piled in a street in such a manner and for such time as to offer a dangerous obstruction to persons passing, the city is guilty of negligence which will render it liable to a person injured thereby without contributory negligence on his part. *Henderson v. Burke*, 19 Ky. L. Rep. 1781, 44 S. W. 422.

And, where the evidence in a case tended to show that lumber had been placed in a street by direction of the city council, and one of the councilmen knew of the obstruction,

and the repairs for the purpose of which the lumber was placed there had been completed for some time before the injury in question, the question, in an action by a person who was injured because his horse had become unmanageable and ran against the pile of lumber, whether the street was so obstructed as to render it dangerous, and whether the person injured was himself guilty of contributory negligence, is one for the jury. *Fugate v. Somerset*, *supra*.

Nor is a city relieved from liability for an injury resulting from a pile of stones in a street by the fact that it was the city's right and duty to repair a bridge, and the stones were necessary and were placed there for that purpose, where the material could have been placed out of sight and in a safe place within a reasonable and convenient distance of the bridge. *Patterson v. Austin*, 15 Tex. Civ. App. 201, 39 S. W. 976.

And, where a city, in causing a sewer to be constructed in a street, knowingly permitted earth to be placed in the street unnecessarily, or to remain for an unnecessary length of time so as to obstruct the proper flow of water in the gutters, the obstruction was a public nuisance; and the city is liable to an adjoining owner for injury done to his property by an overflow of water caused by such obstruction. *Harper v. Milwaukee*, 30 Wis. 365.

Whether a temporary obstruction of a public street for the purpose of improvement is reasonably necessary is a question of fact for the determination of a jury, in an action against a municipal corporation for an injury resulting from such an obstruction. *Frazier v. Butler*, 172 Pa. 407, 51 Am. St. Rep. 739, 33 Atl. 691.

And, where a city closes a street to improve it, the question whether or not it has exercised ordinary care to provide adequate and proper danger signals to warn unsuspecting travelers of danger ahead is a question for the jury. *Ahlfeldt v. Mexico*, 129 Mo. App. 193, 108 S. W. 122; *Stephens v. Macon*, 83 Mo. 345; *Baker v. Grand Rapids*, 111 Mich. 447, 69 N. W. 740.

(b) Barriers, lights, etc.

Municipal authorities which, in the repair of their streets, place an obstruction in them, are under the duty to give appropriate warning of the same. *Carlisle v. Brisbane*, 113 Pa. 544, 57 Am. Rep. 483, 6 Atl. 372; *Alexander v. Big Rapids*, 76 Mich. 282, 42 N. W. 1071; *Joslyn v. Detroit*, 74 Mich. 458, 42 N. W. 50; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Baltimore v. Maryland*, 166 Fed. 641.

And a municipal corporation is liable for injury to an individual through unskillfulness or negligence of persons employed by the city authorities in constructing or repairing street improvements, as, where one is injured by falling into an excavation in a street negligently left unguarded by persons so employed. *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347.

The danger from an opening in a public

street made by a municipal corporation undertaking to construct a sewer arises from the very nature of the improvement; and, if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is bound to take these precautions. *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; *Grant v. Brooklyn*, 41 Barb. 381; *O'Hara v. Buffalo*, 39 App. Div. 443, 57 N. Y. Supp. 387; *Chicago v. Brophy*, 79 Ill. 277; *Streeter v. Marshalltown*, 123 Iowa, 449, 99 N. W. 114; *Moon v. Middletown*, 14 Ohio C. C. 498; *Guthrie v. Swan*, 5 Okla. 779, 51 Pac. 562.

And even more than these should they prove insufficient to prevent disaster. *Grant v. Brooklyn*, *supra*.

And, if necessary to prevent accidents, it should, by some barrier, close the street against the public so that no harm may happen if the work should be delayed. *Pettengill v. Yonkers*, *supra*.

So, while a city has the right to make an excavation across a street for sewer purposes, when the place is left at night it is bound to erect barriers to make it reasonably safe and convenient for travelers. *Prentiss v. Boston*, 112 Mass. 43; *Kimball v. Bath*, 38 Me. 219, 61 Am. Dec. 243; *Lincoln v. Calvert*, 30 Neb. 305, 58 N. W. 115; *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550.

And a city is liable for an injury to a person, sustained by falling into a sewer or other excavation in one of the streets of the city in the process of construction, left open and unguarded. *Springfield v. Le Claire*, 49 Ill. 476; *Americus v. Chapman*, 94 Ga. 711, 20 S. E. 3; *Buffalo v. Holloway* and *Moon v. Middletown*, *supra*.

And, where a city causes an excavation to be made in a street, it is under the duty to take proper precautions to prevent the removal of the lights or barriers, or ascertain the fact and replace them speedily if they are removed; and, where an excavation was made for laying water pipes, and a person going from the sidewalk toward a street car after dark fell into it and was injured, the defendant, in an action for the injury, is not entitled to an instruction that, where barriers have been placed by a city along and about a trench dug in its streets to guard it against travelers falling into the trench, and have been removed by a stranger during the night, and during that night, and before the city has any knowledge or notice of such removal, a traveler on the street falls into the trench and is injured, he cannot maintain an action against the city. *Fox v. Chelsea*, 171 Mass. 297, 50 N. E. 622.

So, the question whether an opening into a sewer in a public street was properly and reasonably guarded and lighted is properly left to the jury, in an action for an injury from falling into it, where a lighted lantern had been left there, and there was evidence tending to show that the lantern did not con-

tain oil enough so that it could be kept lighted; and that persons had tried to light it and keep it lighted, but failed. *Baker v. Grand Rapids*, 111 Mich. 447, 69 N. W. 740.

And a municipal corporation which, in opening a sewer in a street, threw the earth upon the sidewalk, and left it there during the night without any signal light or barrier or protection around or near it to warn or turn passengers away from the danger, is guilty of negligence rendering it liable to a person who, while passing along the sidewalk at night, fell into the hole and was injured in consequence of the obstruction. *Grant v. Brooklyn*, *supra*.

So, although a municipal corporation has legal authority to make a ditch or excavation for laying a water main, in pursuing the work it is required to use reasonable precautions for the security of the public, such as barriers, lights, or otherwise; and for breach of such duty, where a person, in the exercise of ordinary care, is injured through the neglect of such reasonable precautions, an action will lie for the injury. *Lemont v. Rood*, 18 Ill. App. 245.

And when, in grading a street, a deep cut is made below the sidewalk, it is the duty of the city, by barricades or otherwise, to guard all prudent persons against unnecessary danger therefrom; and it is liable for an injury resulting from a failure to perform this duty. *Covington v. Bryant*, 7 Bush, 248.

And, where a municipal corporation made an excavation in a street and placed lights thereon at a curve in the street, and an automobile ran into the excavation, evidence, in an action against the city for the injury, tending to show that to a person approaching there appeared to be a row of lights on one side of the roadway and one light on the other, and that the driver of the car, misled by such appearance, ran between the two and so into the excavation, raises a question for the jury whether the municipality or its servants exercised proper care in placing the lights, or in reasonably safeguarding the place in other ways. *Baltimore v. Maryland*, *supra*.

So, where a pile of stone was placed in a street for construction purposes, by a person engaged in constructing the street, and no light or guard was placed upon it to prevent injury to travelers, the city is liable to a person who drove against the pile and was injured, where the work was under the direction of a servant of the city, and the evidence tends to show that the pile of stone had been there a long time, being diminished by use as the work progressed. *Bauer v. Rochester*, 35 N. Y. S. R. 959, 12 N. Y. Supp. 418.

And where, at the time of an accident, the work of improving a sidewalk along a street had been in progress for a considerable time; and the portion of the sidewalk for which material was being used had been in course of construction for three days; and the material was piled on the street for use in such construction, and was left at night un-

guarded and without lights or signals of any kind to warn the traveling public of its existence; and the place was in the very center of the business district of the city; and a passenger drove his carriage against the pile of materials and was injured,—the question of notice, as well as that of negligence on its part, is one of fact for a jury. *Jones v. Ogden City*, 32 Utah, 221, 89 Pac. 1006.

Nor is a city saved from liability for an injury caused by falling into an opening in a sewer in a street by the fact that the hole or opening was in accordance with a general plan adopted by the city through no error of judgment, unless, if the plan was such that the condition of the street necessarily resulting therefrom was dangerous, reasonable precautions were employed to protect persons using the street in a lawful manner and with due care, against injury. *Chicago v. Seben*, 62 Ill. App. 248, affirmed in 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244.

And a person injured by driving or falling into an excavation in a public street of a city, which was left at night without being sufficiently lighted or guarded, may recover against the city for the injury, although the excavation was made by a company engaged in constructing the public waterworks of the city. *Butler v. Bangor*, 67 Me. 387.

Nor does the fact that it is the duty of a contractor doing the work on a public street under his contract to maintain warning lights at the excavation he has made relieve the municipality from liability for an accident resulting from the negligent omission to maintain such lights. *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095.

And a city responsible under its charter for constructing sewers and their connections is liable for injury to one falling into a trench for a sewer connection, negligently left uncovered, though the work was done by a licensed plumber, who alone had notice of the defect. *Monje v. Grand Rapids*, 122 Mich. 645, 81 N. W. 574.

The ordinary care which a municipal corporation must exercise to keep its streets free from obstruction and defects, however, does not require that a watch be kept during the night over an excavation, unless there are circumstances peculiar to the particular case making it necessary; it is generally sufficient that proper signals or secure guards are placed about the excavation on quitting work, and no liability attaches if a wrongdoer removes the signals during the night. *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566.

And a man injured by a trench in a street, made in the course of the construction of a sewer across it, the earth being piled on the sides of the trench to be used in refilling when the work was done, is not entitled to recover of the city for the injury, where there was no unnecessary delay in the construction of the work and no want of due care in its performance, because no guards

or barriers were placed around the trench and piles of earth as a means of protecting those passing or driving along the street, where it is not shown that this could have been made effective while the work was in actual progress. *Swart v. District of Columbia*, 17 App. D. C. 407.

So, if a traction company chargeable with repairs of a street is in charge of the street and repairs thereon, the city is not liable for an accident caused by a hole or excavation in the street while the work is in progress; but, if the traction company has finished its work and left the street in a dangerous condition, and if that condition has existed long enough to charge the city with notice, it is liable in damages. *Aiken v. Philadelphia*, 9 Pa. Super. Ct. 502.

And, under a charter provision requiring a city to have inserted in contracts for street improvement a stipulation that the contractor should put up and maintain such barriers as will effectually prevent the happening of any accident, when a sufficient barrier has been put up, the absolute liability, if there is any, ceases, and the city is bound to use only common care and diligence in maintaining it; and, if such sufficient barrier is afterwards removed or thrown down by a stranger, or from any cause without the knowledge or fault of the city authorities, and they have no actual notice that it is so removed or thrown down, and a sufficient time has not elapsed under the circumstances to raise a presumption that they had notice thereof before the accident, the city is not liable. *Klatt v. Milwaukee*, 40 Am. Rep. 759, 53 Wis. 196, 10 N. W. 162.

Where a city closes a street to improve it, the standard or test of sufficiency of danger signals to warn or notify unsuspecting travelers of danger therefrom is the question. What would an ordinarily prudent person do under like circumstances toward notifying the wayfarer of impending danger; and what is an ordinarily prudent man to understand by the display of certain signals in a thoroughfare at night? *Ahlfeldt v. Mexico*, 129 Mo. App. 193, 108 S. W. 122.

(c) *By abutting owner.*

Where an improvement like the making or repair of a sidewalk is made by an abutting owner, the absolute liability of the municipal corporation for injuries resulting from obstructions caused or excavations made by him may be suspended during the progress of the work. *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

And, if an excavation is made in a street by an abutting owner or a contractor, the city is liable only for lack of ordinary or reasonable care; it is not an insurer; the same rule of diligence is exacted from it that is expected from private owners in the control of any business involving a like danger to others. *Walker v. Springfield*, 3 Ohio Dec. Reprint. 567.

Thus, a town is not liable for an injury to a person who, without negligence, fell

into an unguarded excavation in a sidewalk in the nighttime, where the excavation was made by the owner of a lot abutting on the street, in accordance with an ordinance requiring him to improve the sidewalk, and the work was left on the night of the injury, by the lot owner using due care and diligence, with a danger signal placed near the excavation, which was disregarded by the person injured. *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566.

And, under a statute authorizing the board of trustees of any incorporated town to compel abutting lot owners to improve the sidewalk, acts of a lot owner who improves a sidewalk under an ordinance adopted in pursuance of the statute cannot be deemed the acts of the town in such a sense as to charge it with his negligence; in order to charge the corporation evidence of the negligence of the lot owner must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous. *Ibid*.

So, a person owning land crossed by a street has the right to use the space under the street the same as any other part of his property, so long as he does no injury to the street as such. *McCarthy v. Syracuse*, 46 N. Y. 194.

It is the duty of a municipality, however, when paving of a sidewalk is being done or excavations to connect with sewers are being made by the owners of adjoining lots, to superintend the work, and to see to it that the obstruction in the street, caused by the collection of material used in the work, is properly lighted at night, and is surrounded by sufficient barriers to protect persons along the way from encountering it. *Lewis v. Atlanta*, 77 Ga. 756, 4 Am. St. Rep. 108; *Masterton v. Mt. Vernon*, 58 N. Y. 391.

And, if due care in the performance of such duty is omitted, the city is responsible; but it is not responsible for the negligence of the servants of the lot owner in the performance of their work; it is responsible only for its own negligence in the care of the street. *Masterton v. Mt. Vernon*, *supra*.

Where general power is confided to a public officer to grant as a favor, and not as a right, the privilege of tearing out the pavement of a street and digging a trench therein, there goes with the power, by implication of law, the right to attach to the grant reasonable conditions for the protection of the public, though the statute is silent on the subject. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773, affirming 40 App. Div. 320, 57 N. Y. Supp. 968.

And when, under authority of municipal legislation, considerable change is made in the grade of a driveway or street, rendering necessary considerable change in the sidewalks, involving peril to the passing public, the municipal authorities are required to exercise close supervision of the conduct of property owners to prevent injury to the traveling public. *Frazier v. Butler*, 172 Pa. 407, 51 Am. St. Rep. 739, 33 Atl. 691.

And, where a pavement is made by an

abutting owner in conformity with the grade established by the city, to escape liability for an injury received by a party walking along the sidewalk in the nighttime without notice of an excavation therein, the work of improvement must not have been conducted negligently by the lot owner while the work was progressing; and the excavation, when the work was completed, must not have been left in such a condition as to cause injury to pedestrians passing along the pavement in the nighttime without notice of its condition. *Bowen v. Huntington*, *supra*.

6. Particular obstructions and classes of obstructions.

(a) Poles, posts, stumps, trees, etc.

The erection of a liberty pole in a street, unless forbidden by the authorities, is the exercise of a lawful license incident to citizenship, and does not constitute the creation of a nuisance. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649.

And a liberty pole erected in a street 60 feet wide, about 8 feet from the curbstone and 4 feet from the gutter, does not create a nuisance *per se*; and, where it fell in a strong gale, and a person was injured by a piece of it, the city is not liable where it was well secured and to all appearances strong and sound. *Ibid*.

And whether a liberty pole erected in a street was in such a place and maintained for so long a time under all the circumstances as to have created reasonable apprehension of danger is a question of fact for the jury, in an action for an injury caused by its fall. *Ibid*.

Nor is a town liable to a traveler injured by the negligence of persons employed by the selectmen in failure to remove a flagstaff which stood near the highway and which had become dangerous to travelers. *Wakefield v. Newport*, 60 N. W. 374, s. c. on subsequent appeal, 62 N. H. 624.

So, whether or not a telephone pole placed in a public street by a telephone company is dangerous or a public nuisance is a question to be submitted to the jury, in an action against the city for an injury resulting therefrom, under proper instructions by the court; and, in deciding the question the jury should consider the situation of the pole, and how it was placed, and whether it was in fact situated in such a position that it was really dangerous. *Norwalk v. Jacobs*, 27 Ohio C. C. 691.

A city has no power to grant permission to erect a telegraph or telephone pole which constitutes a dangerous obstruction to the use of the street by the public, so as to debar recovery by an injured party either against the city or against the party erecting the pole. *Wolfe v. Erie Teleg. & Teleph. Co.* 33 Fed. 320.

And a telegraph or telephone pole placed in the traveled portion of a street is an illegal obstruction in the highway, making the highway out of repair; and, where the

municipal corporation neglects to remove it, it is liable in damages for an injury caused thereby. *Atkinson v. Chatham*, 26 Ont. App. Rep. 521, affirming 29 Ont. Rep. 518; *Castor v. Uxbridge*, 39 U. C. Q. B. 113; *Norwalk v. Jacobs*, *supra*.

And a telephone pole in a city highway which is 60 feet wide, placed near the angle formed by a sharp turn in the street, planted 12 feet from the center line, and so far from the sidewalk that there is a beaten track for carriages between the two, is an obstruction upon the highway rendering it not in good or reasonable repair; and, the city having notice and knowledge of the obstruction and of its dangerous character, is liable in damages, in the absence of contributory negligence, to a person injured who is driving for pleasure before daylight, and his horses run away and the driver loses control when approaching the pole, and in making the turn the sleigh is brought in contact with it. *Atkinson v. Chatham*, 29 Ont. Rep. 518.

But to allow a telegraph pole to be erected in the street of a village or city is lawful; and, where such a pole stood between the sidewalk and the traveled part of the street, where such poles are usually placed, and the distance from the sidewalk was not unusual or shown to be improper, and there was no evidence that the pole was not properly set or properly maintained where it was, the village is not liable for an injury to a traveler resulting from a collision of his horse with the pole. *Gaudin v. Carthage*, 36 N. Y. S. R. 308, 12 N. Y. Supp. 796.

And, to entitle a person whose horse shied at a car and ran against a telegraph pole to recover against the village for the injury, he is bound to show that the village was negligent in permitting the pole in question to remain where it had been placed by those who constructed the telegraph line, that such negligence was the proximate cause of his injury, and that he was free from any negligence which contributed to the injury. *Ibid*.

So, a municipal corporation permitting the maintenance by an electric railway company of a trolley pole in a street in such a manner as to constitute a dangerous obstruction to public travel is liable to a traveler injured thereby. *McKim v. Philadelphia*, 217 Pa. 243, 19 L.R.A.(N.S.) 506, 66 Atl. 340.

And the fact that there is ample space for travel between the curb and a trolley pole set in the middle of a street does not render the pole any the less a dangerous obstruction to travel after dark when no light is maintained near it. *Ibid*.

But the act of a city in permitting the erection of an electric light pole in a street so as to leave a space of from 4 to 5 inches between it and the curb, so that a horse hitched to the post could get his foot fast between the post and the curb only by raising his foot clear over the curbstone and putting it into the space between the curb and the pole on the opposite or further side, 20 L.R.A.(N.S.)

is not negligence upon the part of the city; and no recovery can be had against it for an injury to a horse, thus caused. *Ryther v. Austin*, 72 Minn. 24, 74 N. W. 1017.

So, the act of a city in knowingly suffering a post 8 by 8 inches, firmly imbedded in the ground and projecting above the surface 27 inches, to remain in a public and traveled street, is negligence *per se*. *Pueblo v. Smith*, 3 Colo. App. 386, 33 Pac. 685.

And a stake driven for the purpose of grading a sidewalk, standing about 4 inches above the surface of the walk, which was weather worn so as not to attract attention, and which was allowed to remain after the completion of the walk, and upon which a passenger stepped and was injured, constituted a defect in the way, rendering the city responsible for the injury. *Jones v. Deering*, 94 Me. 165, 47 Atl. 140.

And, where a woman, in passing over a public crossing, fell over a stake which was 2 inches square and protruded above the ground about 6 inches, which stake had been set by the city surveyor to show the line of a sewer, the contractor for which had finished his work and left the street several days prior to the accident, but, under his contract with the city, was prohibited from moving the stake until authorized to do so, the question of the negligence of the city in an action against it for damages for the injury is for the jury; and a judgment for the plaintiff will be sustained. *Rowland v. Philadelphia*, 202 Pa. 50, 51 Atl. 589.

So, a city is liable to an action by a person injured by driving against a post which was near the true line of the highway and within the limits of the general course and direction of travel, and where travelers were accustomed to pass; and there was nothing which reasonably indicated or gave notice to a traveler that the post was not within the way intended for public travel, and it rendered traveling dangerous, and had been suffered to remain an unreasonable time. *Cogswell v. Lexington*, 4 Cush. 307.

And, where, on two intersecting streets, there was a row of trees outside the sidewalk on each street, and there was a post about 6 by 8 inches and 18 inches high, which was weather beaten, in a line with the trees on one street, and just inside of the line of trees on the other in the corner made by the two streets, the usually traveled track of vehicles turning the corner being close to the post, it is a question for the jury, in an action for an injury caused by the post, whether it was negligence for the city to allow it to remain there. *Phelps v. Mankato*, 23 Minn. 276.

So, a municipal corporation which, as a highway and lighting authority, had erected a post in the center of a footpath, near which was placed a lamp intended to be lighted at night, which post injured a person who ran against it when the light was not lighted, is liable to such person for the injury. *Lamley v. East Retford Corp.* 55 J. P. 133.

And whether a grade stake 14 inches high,

standing about 2 feet inside of the location of a highway of a suburban town, outside of the wrought roadway, near or opposite a regular stopping place of an electric car line, is a defect in the highway for which the town is liable, is a question of fact for the jury. *Stanford v. Hyde Park*, 185 Mass. 253, 70 N. E. 51.

The question whether a post in a highway is or is not a defect in the way, however, is one of fact for the jury in an action against a town for an injury caused thereby, where the evidence is conflicting as to the situation of the post in relation to travel. *Taylor v. Woburn*, 130 Mass. 494.

And the existence of a post or other object large enough to upset a buggy or wagon running over it, within a carriage width of the traveled track of a street, is not necessarily as matter of law such an obstruction as renders the city liable for injuries occasioned thereby; it may or may not be an obstruction, depending upon a variety of circumstances, it being a question of fact for a jury. *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, 1 Pac. 253.

And the right of an owner of land abutting upon a street is so to use the portion of the highway in front of his premises for loading and unloading his goods as to enjoy the highway reasonably in common with other members of the public entitled to its use,—and he cannot set up an individual interest in the right to use the highway, which he enjoys in common with other members of the public, against the reasonable use by the municipality with statutory authority given to it to obstruct the highway by lamp-posts thought to be necessary, provided the local authority does not use its power so as to commit a nuisance. *W. H. Chaplin & Co. v. Westminster* [1901] 2 Ch. 329.

So, a peg between a sidewalk and the curbing in a street is a defect or obstruction in the sidewalk if it is near enough to it for a person passing along the sidewalk with reasonable care to stumble against it. *Rea v. Sioux City*, 127 Iowa, 615, 103 N. W. 949.

A hitching post properly located in a street, however, cannot be held to be an unlawful obstruction. *Weinstein v. Terre Haute*, 147 Ind. 556, 46 N. E. 1004.

But a hitching post in a highway, in or so near to the roadway, as to make travel thereon in carriages unsafe, is a defect for which a city is liable to one who, while traveling in the exercise of due care, is injured through the collision of his carriage with it. *Arey v. Newton*, 148 Mass. 598, 12 Am. St. Rep. 604, 20 N. E. 327.

And whether a hitching post is so placed as to be an obstruction to a street is a question of fact in each case. *Weinstein v. Terre Haute*, supra.

A hitching post in a street 50 feet in width, located $6\frac{1}{2}$ feet from the line of the street and within $6\frac{1}{2}$ feet of the property line, the post being $3\frac{1}{2}$ inches square and $3\frac{1}{2}$ feet high, and there being two traveled

tracks along the street, is not so situated as to be an unlawful obstruction. *Ibid*.

And, where a road was 40 feet wide and level and smooth and straight, and it had sidewalks 7 feet wide, not protected by curbstones, railings, posts, or trees, nor indicated by ditches, three hitching posts put up by the owner of abutting land considerable distances apart between the sidewalk and the carriage path, about where trees or railings or a ditch might have been properly placed, is not a defect in the street, and does not render the roadway defective. *Macomber v. Taunton*, 100 Mass. 255.

So, the maintenance for about six years, by a city, of a strip of wood nailed to two electric-light poles standing along the outer edge of a sidewalk around the courthouse square, which did not impede travel along the sidewalk or along the street, nor interfere with those passing from one side of the street to the other at the regular and usual crossings, but which was used as a hitching rack, and was a convenience to persons coming to the courthouse on business, was not negligence upon the part of the city which will charge it with an injury received by a man who was blind and unattended, and who attempted to cross the street at a place other than the regular crossing provided for the public. *Foy v. Winston*, 135 N. C. 439, 47 S. E. 466.

But, where a pedestrian stumbled at night over a hitching post in the sidewalk and was injured; and there is evidence tending to show that the post, although located in a place where it could be properly placed, was not of the ordinary size, was bent, and its condition dangerous, and, although located at a point where most pedestrians did not cross the street, was still where they had a right to cross if they used proper care to avoid obstacles to be expected along the curb,—it is a question for the jury whether the post, in the condition it was then in, was reasonable or safe. *District of Columbia v. Duryee*, 29 App. D. C. 327, 10 A. & E. Ann. Cas. 675.

Nor does a city guarantee the absolute safety of hitching posts set by it; all that is necessary is the exercise of ordinary care in setting such posts as would be reasonably sufficient for the purpose intended, under all ordinary circumstances. *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381.

And, where a team was hitched to a hitching post set in a street by the municipal corporation, and the team became frightened by another horse running away and broke the post and ran, and, after going about 900 feet, struck and injured a pedestrian, the injury is too remote, and is not the proximate consequence of the defect in the hitching post; and the city is not liable for the injury. *Ibid*.

So, whether a stump in the traveled way of a street in a city constituted a defect which the city ought to have removed is properly submitted to the jury in an action for an injury resulting therefrom. *Lamb v. Cedar Rapids*, 108 Iowa, 629, 79 N. W. 386.

And a highway in an old and thickly settled district over which there is much traffic is out of repair, within the meaning of a statute requiring municipalities to keep their highways in repair, when a large stump is allowed to stand in the highway just at the edge of the traveled way. *Foley v. East Flamborough Twp.* 26 Ont. App. Rep. 43.

And that a stump situated within the curbing of a street was left there by the occupant of abutting property for the purpose of making a hitching post of it is no excuse to the city in an action against it by a person injured by the stump, for negligence in permitting it to remain there. *Newport v. Miller*, 93 Ky. 22, 18 S. W. 835.

Nor is a city relieved from liability for an injury caused by colliding with a stump standing so near the traveled part of a street as to make travel by it in the night dangerous, on the theory that the stump, if a defect or obstruction at all, was one pertaining to the construction of the road, and not covered by the statute, as distinguished from a neglect to repair; since the statute applies to defects in construction as well as to neglect in repair. *Sebert v. Alpena*, 78 Mich. 165, 43 N. W. 1098.

So, permitting a large stump to be taken out of a sidewalk and rolled into the street several feet outside of the curb, and allowing it to lie there ten days or two weeks without a light or anything to warn travelers at night of its position, is gross neglect of duty on the part of the borough authorities, rendering the borough liable for damages for a resulting injury. *Trego v. Honeybrook*, 160 Pa. 76, 28 Atl. 639.

And whether a stump which was 3 or 4 inches within the curbing of a street and but 2 feet high and 22 inches in diameter, which a person stumbled on in a dark night when the nearest lamp was 130 feet distant, was an obstruction rendering the public use of the sidewalk inconvenient and unsafe, is a question for the jury in an action for the injury. *Newport v. Miller*, *supra*.

A conductor of a street car, who, while attempting to pass around a superintendent standing on the running board of an open car, came in contact with a shade tree and was injured, cannot recover against the city for the injury, however, where the nearest part of the tree was 38½ inches from the nearest rail of the railway, and 31 inches from the sill or side of the car, and 18¼ inches from the outside of the running board. *Hall v. Wakefield*, 184 Mass. 147, 68 N. E. 15.

But, though a tree standing in a street belonged to the abutting owner and was not a nuisance, if it was blown down by the wind and became a nuisance on the sidewalk after its fall, it was the duty of the city, and not of the abutting owner, to remove it; and a person injured in consequence of its presence on the sidewalk must proceed against the city, and not against the owner, for damages. *Blackwell v. Hill*, 76 Mo. App. 46.

20 L.R.A. (N.S.)

(b) *Rubbish, refuse, etc.*

The duty of repairing and maintaining highways includes the performance of any act which is reasonably necessary to put and keep them in a condition suitable for travel thereon; and this includes the removal of dirt, rubbish, and ashes from the streets and from receptacles on or near the streets. *Connor v. Manchester*, 73 N. H. 233, 60 Atl. 436.

And a person who, while driving along a street at night, was injured by being thrown from his carriage, which came in contact with rubbish obstructing the street, of which he was not properly warned by lights, can hold the city responsible for damages. *King v. Cleveland*, 28 Fed. 835, affirmed in 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90.

And evidence that, as a person was slowly driving up to the curb in a street to permit passengers to alight, he was upset and seriously injured by a pile of rubbish in the street; and that it was after dark and he did not observe the obstruction; and that the street was a frequented one and the pile of rubbish had been there for three weeks, —is sufficient to justify the jury, in an action for the injury, in finding the city guilty of negligence. *Kane v. Troy*, 16 N. Y. S. R. 341, 1 N. Y. Supp. 536.

So, where water washed over a street because of the insufficiency of a culvert intended to carry off water coming from adjacent land, and deposited brickbats and rubbish on the surface of the street, and made a ditch or depression in it; and the rubbish which thus obstructed the street was permitted to remain for such a length of time that its presence must have come to the knowledge of the officers of the city who were charged with the duty of keeping the street in repair,—the negligence of the city was such as to render it liable in damages for injuries to a horse, caused by stepping upon a brickbat thus deposited in the street. *Hazard v. Council Bluffs*, 87 Iowa, 51, 53 N. W. 1083.

And evidence that the curbing of a sidewalk had been removed, and the bricks were loose and some of them set up edgewise; that dirt had worked out from under the bricks, and the loose bricks were not on a level with the bricks that were in place; that there was a drop of 3 or 4 inches, and loose bricks extended from the property line to the end of the walk, and some of the loose ones were on top of others, and the sidewalk was rough and uneven, and some of the bricks were gone, and the street lamp was not lighted at the time of the accident in question,—shows an actionable defect in the sidewalk, rendering the city liable to a pedestrian who stepped upon a brick, which turned under her foot, and threw her to the ground and injured her. *Terre Haute v. Constans*, 26 Ind. App. 421, 59 N. E. 1078.

So, a municipal corporation which negligently piled a large quantity of earth several feet high upon a public street, and negli-

gently placed beside the pile a large open pipe into which a child fell and was injured without negligence on its part, is liable for the injury. *Hunton v. Peekskill*, 119 App. Div. 500, 104 N. Y. Supp. 220.

And proof that a city permitted a pile of dirt or sand about 3 feet high along a sidewalk which the city was paving to be left at night without taking reasonable, and proper precautions to light the street so as to enable persons traveling thereon to observe the obstruction; and that a traveler drove against it and was injured,—is sufficient to warrant a finding of the jury, in an action for the injury, that the city was negligent. *Norfolk v. Johnakin*, 94 Va. 285, 26 S. E. 830.

So, a city is liable for injuries to a horse caused by glass negligently left on the street, over which the horse was driven, when the city had actual or constructive notice that the glass was there. *El Paso v. Dolan* (Tex. Civ. App.) 25 S. W. 869.

And, while the mere presence in a street of a piece of glass by which a person's foot was cut might not be sufficient to establish the negligence of the city, it will be held liable for the injury where the piece of glass was not the only obstruction in the street, but at the place where the glass was lying there were piles of other refuse containing broken glass, etc. *Galveston v. Reagan* (Tex. Civ. App.) 43 S. W. 48.

And, where a woman fell and was injured by stepping on a clinker in a cinder sidewalk, the cinders for which had been taken from a foundry without sifting, the fact that there was a large number of clinkers of large size furnishes evidence to go to the jury, in an action for the injury, on the question of the city's negligence. *Latonia v. Hall*, 31 Ky. L. Rep. 721, 103 S. W. 354.

So, if a municipal corporation has, for a long time, permitted one of its sidewalks to be littered with vegetable refuse and peels or rinds from fruit so as to make travel over it dangerous, it will be held liable to a party who, in using it without fault or neglect on his part, steps on some of this refuse, or some of these peels or rinds, and falls and is injured. *Archer v. Johnson City* (Tenn.) 64 S. W. 474.

And, where a horse died at the intersection of two much-traveled streets in a city, it was the duty of the city to exercise reasonable care and diligence in the removal of the animal after it had actual notice that it was lying in the street, or after the lapse of such a space of time that it should have had knowledge thereof, when actual notice may be presumed, and, in case of its failure to remove it, it was liable for resulting injuries. *Chicago v. Hoy*, 75 Ill. 530.

And, where the carcass of a dead horse had been permitted to lie in one of the streets of a city for about twenty-four hours, and this frightened the horse of a traveler, which became unmanageable and ran away and inflicted injuries upon the traveler, the question whether the city was

guilty of negligence in not removing the nuisance was one for the jury, in an action against the city for the injury. *Fritsch v. Allegheny*, 91 Pa. 226.

Where small heaps of ashes between 5 and 6 inches in height were deposited in a street, however, and, owing to the loose material of which they were composed, they would not ordinarily constitute an impediment or obstruction in the street, but would soon be scattered; but they became hardened by the falling of rain and sleet, and took permanent form,—the inquiry as to the negligence of the municipal authorities in permitting such heaps of ashes to remain in the street should be limited to the period during which alone they could properly be considered as impediments, which is only after they had, by storm and frost, been changed from a harmless heap of soft material into a solid mound in the road; and where a woman, without contributory negligence on her part, stepped on it and fell and was injured, the municipality is not responsible for the injury, unless the municipal authorities were negligent in not discovering and removing the ashes between the time they were transformed into a solid mound by freezing and the happening of the injury. *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851.

So, the failure of a city to keep its streets free from mud, so that they become slippery on account thereof, does not constitute actionable negligence. *O'Reilly v. Syracuse*, 49 App. Div. 538, 63 N. Y. Supp. 520; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752.

And a municipality is not liable to a traveler upon a street who may slip and fall and sustain injury, simply because $1\frac{1}{2}$ or 2 inches of mud are permitted to accumulate upon an asphalt pavement and remain there, when spread evenly over its entire surface. *O'Reilly v. Syracuse*, supra.

But whether a frozen mound of mud in a street was an obstruction which interfered with the safety of travel on the street is a question of fact. *Stafford v. Oskaloosa*, 64 Iowa, 251, 20 N. W. 174.

And, where a cross walk upon a city street has been rendered uneven and slippery because frozen earth, rocks, sleet, snow, and ice have been heaped up into a ridge, the defect in the highway is such as to render the city liable for injuries received by a person from slipping and falling upon it. *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

So, where a sidewalk is covered with dirt liable to be converted into slippery mud by rain, it is a question for the jury whether, at the time of an injury alleged to have occurred thereon, the condition of the walk was not reasonably safe for persons passing over it with the exercise of ordinary care, and whether the city had, or could by ordinary diligence have had, knowledge of its condition in time to have it repaired. *Milledge v. Kansas City*, 100 Mo. App. 490, 73 S. W. 892.

And whether, cleaning a street and piling mud and dirt in the center thereof at a time when it was liable to be frozen solid before it could be removed, and allowing it to remain as a dangerous obstruction to the streets for many days after being so frozen, was an exercise of reasonable care and diligence in keeping a street free from obstructions, are matters of fact to be determined upon a consideration and construction of the evidence by the jury, in an action for an injury resulting therefrom. *Champaign v. Jones*, 132 Ill. 304, 23 N. E. 1125.

(c) Storage of vehicles, lumber, etc.

A street may be rendered unsafe by the improper placing of vehicles therein, and its continued use for that purpose, as well as by being obstructed in any other way. *Radichel v. Kendall*, 121 Wis. 580, 99 N. W. 348.

And the customary use of a street for the purpose of storing vehicles when not in use, so that the draft poles thereof are liable to be located across a pathway customarily used by pedestrians, may render the street unsafe for public use, so as to charge the municipality with the consequences. *Ibid.* *Ladoga v. Linn*, 9 Ind. App. 15, 36 N. E. 159.

And the habitual storing of a wagon in a city street by a private individual, although under a license from the city, is a nuisance where the granting of such license is prohibited by law; and the city is liable for a resulting injury. *Cohen v. New York*, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700.

So, while a disabled vehicle left by the owner in a street does not become a nuisance until the expiration of a reasonable time for its removal, after the expiration of such time it is both an obstruction and a nuisance, rendering the city liable for injuries resulting therefrom, under a statute requiring cities to keep their streets open, in repair, and free from nuisances, and making them liable to persons injured by a violation of such duty. *Cutter v. Des Moines*, 137 Iowa, 643, 113 N. W. 1081.

And a city is not relieved from liability for an injury resulting from permitting a street to be used as a storage place for vehicles when not in use, by the fact that the customary leaving of vehicles in the street was for the convenience of the owners thereof while their horses were being cared for temporarily in a nearby barn, if the vehicles were so left to such an extent as to render the street unfit for public travel. *Radichel v. Kendall*, *supra*.

So, to hold a municipal corporation liable for an injury caused by a collision with a vehicle left standing in a street, it is sufficient to show that it had allowed the street to be customarily used as a storage place for vehicles when temporarily out of use, to such an extent as to render it unsafe for public use, and that the leaving of the vehicle in question which caused the accident was a mere continuance of such custom; it is not essential to show that the

particular vehicle had been customarily left in the particular way and at the particular place as at the time of the accident. *Ibid.*

And evidence of the customary obstruction of streets other than the street in question, by leaving vehicles therein, is inadmissible in an action against a city for an injury resulting from the obstruction of a street by leaving vehicles in it when not in use; but the admission of such evidence is not a ground for reversal where the court directed the jury to disregard it. *Ibid.*

But while, in a large city like New York, it may be negligence amounting to nuisance to permit a wagon to stand permanently upon the side of a street, the act of a village of about 4,000 inhabitants, of permitting two lumber wagons to stand in front of a wagon shop upon the side of a street 3 rods wide, notwithstanding the fact that there was a by-law of the village under which it could have compelled their removal, does not constitute negligence making the village liable to one who was injured through his horse becoming frightened at the wagon while passing in the night. *Studeor v. Gouverneur*, 15 App. Div. 229, 44 N. Y. Supp. 122.

And a carriage of a visitor at the house of a friend, left standing in the street, is not a nuisance *per se*; but it might become one. *Norristown v. Moyer*, 67 Pa. 355.

So, a sleigh standing for ten or fifteen minutes in a street for the purpose of unloading goods would not constitute an obstruction of the street. *Sikes v. Manchester*, 59 Iowa, 65, 12 N. W. 755.

And it is not clear that a village street would, in law, be obstructed, so as to hold the village liable for an injury resulting therefrom, by the fact that one third or one half of it was occupied during the greater portion of the day by the vehicles of farmers while their teams were feeding at an adjoining stable. *Ibid.*

Nor does a wagon loaded with ornamental or other trees, standing negligently in a street with the horse attached and under the care of a driver, constitute a defect or want of repair in the street for which the city would be liable for damages, where the city is given no power of removal. *Davis v. Bangor*, 42 Me. 522.

So, where a plow beam projected over a pavement, and injury resulted therefrom, the jury, in an action for the injury, should be permitted to decide the fact as to whether the extent to which the plow beam projected over the pavement, under all the circumstances, did or did not leave the street at the time and place of injury reasonably safe for pedestrians using it with ordinary care. *Midway v. Lloyd*, 24 Ky. L. Rep. 2448, 74 S. W. 195.

And the piling of lumber and keeping it within the limits of a street is a nuisance and a wrong as against the public, and all suffering private injuries in consequence thereof; and the municipal corporation, having power to prevent or remove the nuisance, is equally liable with the creator of

it for any injury that may result therefrom. *Smith v. Davis*, 22 App. D. C. 298.

And, where a pile of lumber was unlawfully placed in a street and allowed to remain there, and the city was negligent in failing to remove it from the street, the fact that it was carefully and safely piled is immaterial on the question of the city's liability for an injury resulting therefrom, where the fact that it was there was a concurring proximate cause of the injury. *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17, 19 S. W. 284; *Smith v. Davis*, supra.

And evidence that certain lumber was lying in a street, which projected over the edge of the sidewalk; and that a person fell over it and was injured; and that the lumber had been lying in the street for about a week in front of a building which was being repaired; and that, on the night of the injury, the street was not lighted,—is sufficient to support a verdict in favor of the person injured, against the city for the injury. *Hazzard v. Savannah*, 77 Ga. 54.

So, slipping and falling off from a slippery walk, though properly constructed, is not one of those accidents the occurrence of which is so rare, unexpected, and unforeseen as to shut off a municipal corporation's responsibility for negligently leaving dangerous material in such proximity as to cause injury from such accidents. And a person who accidentally slipped on a street crossing and fell among or upon timbers which had been negligently left along the side of or so near the crossing as to be dangerous is entitled to recover of the city for the injury, provided the injury would not have happened but for the presence of the timbers in such proximity to the crossing, though the crossing itself was properly constructed. *Fairgrieve v. Moberly*, 39 Mo. App. 31.

(d) *Machines, tools, etc.*

A machine under the active charge of individuals is not to be treated as a defect in a highway if injury results from its operation, and not merely from its presence there. *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538.

And, where a steam roller is placed in a street for the purpose of repairing the street, which is a duty enjoined upon the municipality; and, in the legitimate and proper use of such machine with reasonable notice to the public of such use, an injury is occasioned to one of the public,—the municipality is not liable for such injury. *District of Columbia v. Moulton*, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840, reversing 15 App. D. C. 363.

So, where a steam roller was lawfully in use in the construction of a macadamized roadway 18 feet wide in the middle of a highway 60 feet wide; and it was left standing over Sunday on the edge of the already macadamized part of the road, leaving a clear space of about 30 feet at one side; and it was covered with canvas tied at the

sides or corners, with no watchman in charge of it; and it was reasonably impracticable to move the machine from the hard road, and the spot on which it stood was the safest one on that section of the road where it could have been placed,—negligence is not imputable to the owner in leaving it there; and he is not liable for an accident occurring in broad daylight through the fright of a horse at the sight of the machine. *Keeley v. Shanley*, 140 Pa. 213, 21 Atl. 305, 306.

And a statute requiring persons using steam machinery upon highways to take certain precautions and perform certain duties upon the approach in either direction of anyone traveling in a vehicle or with horses applies to the operation of the machine, and does not regulate the duties of the owner when his machine is at rest at night or on Sunday. *Ibid*.

Nor does leaving a steam roller close to the curb on a street where it is in use, for two days after it is broken, without any change in its appearance to enhance the danger of frightening animals, except by putting over it the usual canvas cover to protect it from the weather, present a case of negligence for the jury, where a horse becomes frightened by its presence in the street and an injury results. *District of Columbia v. Moulton*, supra.

So, where a derrick standing in a highway and defectively supported falls when in use and injures a passer-by, it being the act of the workmen who employ the machine in lifting weights for which it is not properly constructed that causes it to fall and contributes to the injury, the derrick cannot be considered as a defect in the highway, by reason of which a town is subjected to statutory liability for injury. *Pratt v. Weymouth*, supra.

But a derrick within or upon the margin of a highway, or derrick ropes extending over and across the highway, may be an obstruction or defect, or an insufficiency, of the highway, if the ropes or derrick are improperly or insufficiently placed or fastened. *Hardy v. Keene*, 52 N. H. 370.

The above case was distinguished in *Pratt v. Weymouth*, supra, upon the ground that the rule in New Hampshire is different from that established in Massachusetts.

And, where a derrick stood in a street in close proximity to a schoolhouse, and was attractive to the school children, who were in the habit of playing upon it, a reference to the derrick by the court, in an action against the city for an injury caused by the falling of the derrick, as "said obstruction," is not erroneous. *Denver v. Murray*, 18 Colo. App. 142, 70 Pac. 440.

And, when such derrick was left standing there for at least a year, and it fell injuring a child, the fact that the derrick was tied to a stump by a rope, which was liable at any time to be severed accidentally or heedlessly by the children playing upon it, does not palliate the negligence of the city in failing to have it removed; and an instruc-

tion. in an action for the injury, that it was immaterial whether or not it was tied, is not erroneous. *Ibid.*

So, a gravel heater left standing unused for a week in the gutter of a street of a city with its handle raised and tied to the smoke stack with a rotten and unsafe wire may be found to be a defect in the highway for which the city is liable to a traveler who is injured by the handle falling upon him as he is crossing the street in the exercise of due care. *Griffin v. Boston*, 182 Mass. 409, 65 N. E. 811.

And a road scraper used for working highways, left in the street, is an obstruction to the highway, for an injury from which the municipal corporation is liable, under a statute providing that the several towns of the state shall be liable for all damages to persons or property by reason of defective highways. *Whitney v. Ticonderoga*, 127 N. Y. 40, 27 N. E. 403, affirming 53 Hun, 214, 62 N. Y. Supp. 844.

And, where a complaint in an action against a city charged that the defendant's highway commissioner carelessly placed and left a road scraper in a highway; and that the plaintiff's cart, in which he was traveling in the night, ran against the same; and that he was thrown out and injured,—an answer admitting that the scraper was the property of the town, and alleging that the commissioner of highways used due and proper diligence and care in placing and leaving the scraper to prevent accident or injury to passengers with horses and vehicles, constitutes an admission that the scraper was under the control of, and was left in the highway by, the town's commissioner of highways. *Whitney v. Ticonderoga*, 127 N. Y. 40, 27 N. E. 403.

So, a tool chest habitually in the highway, placed there by a contractor engaged in repairing certain sewers under contract with the city at a point which the parties had stipulated should be free from obstruction except under special permission, which permission was not given, constitutes a public nuisance. *Warden v. New York*, 123 App. Div. 733, 108 N. Y. Supp. 306.

And the jury, in an action against the city for an injury caused by the cover of the box, has no right to consider whether, in the performance of the contract, it was reasonably necessary to have the tool box upon the sidewalk; and it has no right to consider whether the placing of the tool box there was an incident reasonably necessary to the performance of the contract. *Ibid.*

So, a municipal corporation is liable in damages to a person who, while walking after dark along one of its sidewalks at a much-frequented place, collided with the handles of a large tool box which had been left on the sidewalk, and received personal injuries from such collision, there having been no warning or safeguard to notify him of the obstruction. *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576.

And the fact that there was room between the tool box and the opposite limit of the 20 L.R.A. (N.S.)

sidewalk to admit of safe travel by one using the part of the sidewalk thus left open does not *per se* excuse the obstruction of the other portion of the sidewalk, which was equally as much used by the public for travel, and which it was entitled to use. *Ibid.*

(e) Markets and other business or individual enterprises.

Streets and sidewalks are intended for purposes of travel, and are not designed or intended for the display or disposition of merchandise. *Straub v. St. Louis*, 175 Mo. 413, 75 S. W. 100.

And an appropriation by a city of a public street or sidewalk by the erection of sheds thereon and the occupation of the same for vending meats and vegetables and other articles usually sold in public markets, so as substantially to prevent access to or egress from adjoining buildings fronting on the street, and depriving the occupants thereof of the capacity to transact their customary and lawful business therein, is unauthorized by law; and the city is liable for damages directly resulting therefrom. *St. John v. New York*, 3 Bosw. 483.

And the power to build or repair markets, given by a statutory provision that the mayor and council of a city might cause public markets to be erected and kept over the waters of rivers bounding the city adjoining to any of the docks and wharves of the city, provided they did not interfere with the flow of waters, is entirely subservient to the rights conferred upon the public by the dedication and opening of a street by a corporation over its own land; and the occupation of such a street, and obstructing the use and enjoyment thereof for the reparation of a market adjoining it, are unlawful and a breach of the implied contract between the public and the city. *Ibid.*

So, a charter provision of a city authorizing the common council to regulate traffic and sales in the streets and public ways of the city, and another provision that the common council shall not have power to authorize the placing or continuing of any obstruction upon any street or sidewalk except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same, both relating to the same subject, are to be construed together; and the latter so far restrains and limits the former as to prevent the common council from exercising the power to give to individuals the right to occupy the streets of the city for the purpose of selling produce thereon. *People ex rel. O'Reilly v. New York*, 59 How. Pr. 277.

And a milk stand built on a highway by an adjoining proprietor and projecting slightly over the traveled way is such an obstruction to the highway as constitutes want of repair; and, where such an obstruction existed for three years, and the municipal corporation having jurisdiction over the road took no steps to have it removed,

it is liable in damages for an accident caused by it. *Huffman v. Bayham Twp.* 26 Ont. App. Rep. 514.

And booths for use by a fair, maintained in a public street for twelve consecutive days and used for exhibitions calculated to attract large crowds of thoughtless and indiscreet persons, constitute a nuisance in the street. *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345.

Nor has a person occupying abutting premises any right to obstruct a sidewalk with an old counter offered for sale; and, where the city officials permitted such counter to remain there for ten days, it must be presumed that they had notice of its being there; and, where it fell over and injured a boy who jumped or climbed upon it, the city is liable for the injury. *Straub v. St. Louis*, supra.

But, where a counter was placed upon a sidewalk, leaning back against a building, by the voluntary negligence of a third person; and it was so placed that it would be expected only to be dangerous from the act of an intermeddler; and a child tipped the counter over by intermeddling with it or playing upon it,—the omission of the duty imputable to the city in not causing the removal of the counter was neither gross, culpable, nor voluntary, to the degree necessary to attach liability for the injury and excuse the child for intermeddling with the counter. *Kunz v. Troy*. 36 Hun. 615.

And, in estimating the degree of carelessness with which the city is chargeable in such a case, the character of the obstruction sought to be considered is with reference to the proper uses of the street as a thoroughfare of travel and not as a place of recreation for children; and the question is, What was the degree of carelessness in leaving it upon the sidewalk in reference to ordinary uses of the street? *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422.

So, a municipal corporation is not liable for an injury to a child caused by heavy window screens which the owner of a building abutting upon a street was in the habit of leaning unfastened against the front of his building, which fell upon the child on the sidewalk. *McLoughlin v. Philadelphia*, 142 Pa. 80, 21 Atl. 754.

And, where a highway ran along the shore of a lake, the owners of a boat had the right to take the boat to the edge of the lake in the highway for the purpose of launching it, and the boat did not become a nuisance until it unnecessarily impeded or incommoded travel upon the street, the owners having failed to launch it with reasonable promptness; and officers of the village were not required to interfere until, to their knowledge, the delay of the owners to launch the same had become unreasonable; and after that such officers would only be required to launch the boat with reasonable care, promptness, and expedition, and the village would not be liable for a resulting injury unless, after the boat had become a nuisance to the knowledge of its officers, it

failed to abate it with reasonable diligence. *Cairncross v. Pewaukee*, 86 Wis. 181, 50 N. W. 648.

But the fact that a path traversed by the public through a public park skirts the bank of a river where boats are moored does not justify or excuse the city in permitting the mooring of boats by means of a dangerous obstruction across the footway. *Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 905.

And a complaint against a village, which alleges that it negligently authorized and permitted a street to be obstructed by a steamboat placed across the street so that nearly the entire width of the street was rendered impassable for twenty hours, whereby teams were liable to become frightened; and that thereby plaintiff's horse and wagon were injured without fault on his part,—is sufficient, on demurrer, in an action for the damages. *Cairncross v. Pewaukee*, 78 Wis. 66, 10 L.R.A. 473, 47 N. W. 13.

So, authority to locate a voting booth in the traveled part of a highway is not conferred upon public officers by a statute directing them to designate a polling place in a public, orderly, and convenient portion of the precinct, and, if no such place can be found within the precinct, then in an adjoining one; and the location in a public highway pursuant to such authority may constitute a defect therein which will require the municipal corporation to exercise reasonable diligence to protect the public travel. *Haberlil v. Boston*, 190 Mass. 358, 4 L.R.A.(N.S.) 571, 76 N. E. 907.

And a municipal corporation which permits an organization of citizens to take charge of a street for the purpose of giving a public show therein becomes, in legal effect, the creator of the nuisance erected by such organization therein, and is liable as such for injuries thereby caused to travelers. *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A.(N.S.) 146, 108 N. W. 1057.

(f) *Stones and other similar articles.*

Where a heap of stones was left by the side of a road without light, by the negligence of persons employed to repair the roads, the municipality is liable as such for the negligence of its servants, in an action for an injury resulting therefrom. *Foreman v. Canterbury*, L. R. 6 Q. B. 214.

And a person injured on a loose flagstone in a street, although knowing of the defect, while using such reasonable care as the conditions demanded, is entitled to recover of the city for the injury, provided the city had actual or constructive knowledge of the dangerous condition. *Green v. Newark*, 5 Penn. (Del.) 316, 62 Atl. 792.

And a petition charging that a city having more than 1,000 and less than 5,000 inhabitants constructed a cross walk at one of the principal and most frequently traveled intersections, that said cross walk was constructed of brick and stone, and that some of the stones were placed so that they projected to a height of 2 inches above the general surface,—states a cause of action in

this respect; and a verdict founded upon evidence sufficient to establish such allegation is supported by the evidence. *Aurora v. Cox*, 43 Neb. 727, 62 N. W. 66.

Nor does the act of a city of permitting a stone 2 or 2½ feet wide 2 feet long and about a foot high to remain on a sidewalk in such a position that it took about 2½ or 3 feet of the sidewalk, which was about 10 feet wide, for from three to five years prior to an accident, constitute the exercise of due care. *Davis v. Austin*, 22 Tex. Civ. App. 460, 54 S. W. 927.

And evidence tending to show that a person stumbled and fell over a stone in a sidewalk, projecting from 4 to 6 inches above the level of the pavement, placed there to mark the lines of the street at the corner; and that it constituted a dangerous obstruction to the sidewalk; and the city had known of this dangerous condition for years; and that there were no peculiar conditions at that corner requiring the stone to project as it did above the grade of the street,—is sufficient to sustain a finding of negligence upon the part of the city in leaving the stone in question in that condition. *Richmond v. Pemberton*, 108 Va. 220, 61 S. E. 787.

And a person injured by an obstruction in a street, who charges, in an action against the city therefor, that it had negligently and carelessly placed and maintained blocks in the street, and that they constituted a dangerous obstruction therein, and that it allowed them to remain for a long time with full knowledge, and that they rendered the street dangerous to persons traveling thereon, need not, in order to recover, show, also, that the blocks were not necessary and useful for the purpose of crossing the street. *Alexandria v. Liebler*, 162 Ind. 438, 70 N. E. 512.

So when there is evidence that a person stumbled over a flagstone near the middle of the sidewalk on a wide street and was injured, and that the flagstone was an isolated one, and the earth had evidently washed away from the stone during a considerable period, and some of the evidence shows that the stone stood up above the dirt about 3½ inches, and some that it stood as high as 7 inches, the question whether the walk was or was not reasonably safe is properly submitted to the jury. *Williams v. Brooklyn*, 33 App. Div. 539, 53 N. Y. Supp. 1007.

And, if a stone which caused an injury had been in the highway for a period of two or three weeks in various positions, and it was liable to be carried out by children or pushed out by passing vehicles, there is a question for the jury, in an action for the injury, whether the stone was large enough to constitute a dangerous menace to persons lawfully using the highway, and whether its presence loose in the street for that period of time was not enough to give notice to the city. *Orser v. New York*, 127 App. Div. 336, 111 N. Y. Supp. 670.

A pile of stones on a sidewalk 12 feet

wide, which took up from 3 to 5 feet of the width, leaving from 7 to 9 feet clear of obstruction for people to travel over, piled up so that the outside of the pile was a perpendicular wall about 5 feet high, placed there for building purposes and not left an unreasonable or unnecessary length of time, however, was not an obstruction to the sidewalk, for an injury from which the city will be held liable. *Hesselbach v. St. Louis*, 179 Mo. 505, 78 S. W. 1009.

And a number of cobblestones from the size of a goose egg to 6 inches in diameter, left lying in a street, do not constitute a failure to repair the street, within the meaning of a statute, providing that, if any horse shall receive any injury or damage by reason of neglect of any city to keep in repair any public street, the city whose duty it is to keep such street in repair shall be liable for the just damages. *McCool v. Grand Rapids*, 58 Mich. 41, 55 Am. Rep. 655, 24 N. W. 631.

And, where no sidewalk had been laid on a street, and it was sometimes muddy and impassable, and third persons, without the authority of the city, placed, where the sidewalk would naturally be, pieces of flagging stone 1½ feet apart to allow persons to step from one to another, and a person, in stepping from one to another, fell and was injured, the city, though having knowledge of the arrangement, is not liable therefor, where the arrangement of the stepping stones was not dangerous, and they presented the appearance of stepping stones, so that one approaching them would know what they were, and the person injured had herself on several occasions used them and passed in safety having knowledge of their character. *Bullock v. New York*, 19 Jones & S. 36.

So, that a pavement may have become uneven from use, or that bricks therein may have become loose or displaced by the action of the elements, so that persons are liable to stumble or be otherwise inconvenienced in passing, does not necessarily involve the municipality in liability for a resulting injury, so long as the defect can be readily discovered and easily avoided by persons exercising due care, or provided the defect be of such a nature as not of itself to be dangerous to persons using the walk. *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256.

And where, at the intersection of two streets, the city had placed a stone in the neighborhood of 2 feet from the sidewalk for the alleged purpose of preventing people from driving upon or injuring the sidewalk, and a person drove against and was tipped over by the stone, and was injured, the questions, in an action for the injury, whether placing the stone at the street crossing was actionable negligence, and whether the person injured was in the exercise of ordinary care, are questions of fact for the jury. *Pontiac v. Grandy*, 108 Ill. App. 466.

So, a charge, in an action against a city for damages, that a large stone was allowed

to remain unguarded and unprotected along a sidewalk, at the edge thereof, will not bear the construction that the stone was in or upon the sidewalk so as to be an obstruction. *Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277.

And a person who drove against a stone placed beside the traveled track of a street, and was injured thereby, cannot recover of the city for the injury, if the placing of the stone was a part of the plan for improving the street by putting in a drain and protecting the end of it and the traveling public from injury or accident by thus placing the stone. *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 528.

But, whether the act of a city, of leaving for a long time upon a sidewalk which was traveled by a large number of persons a flagstone 3½ inches thick, over which a person stumbled and was injured, was negligence upon the part of the city rendering it liable for the injury, is a question of fact for a jury. *Wedderburn v. Detroit*, 144 Mich. 684, 108 N. W. 102.

And so is the question whether or not the act of agents of a city, of placing and leaving a pile of bricks upon a sidewalk in the city, constitutes negligence upon the part of the city. *Yearneau v. Salt Lake City*, 6 Utah, 398, 24 Pac. 254.

And evidence that a brick sidewalk in front of a lot on which a house was being built had been torn up except about 2 feet near the building; that between that strip and the gutter the ground had been dug out 8 or 10 inches deep; that brick were lying around loose; that it had been in that condition for a month; and that, on the night a pedestrian was injured, it was dark and there were no lights.—affords sufficient support for a finding of the jury, in an action for the injury, that the city was negligent in permitting a defective condition of the sidewalk to continue after it knew, or might by reasonable precaution have known, of that dangerous condition. *Norton v. Kramer*, 180 Mo. 536, 79 S. W. 699.

So, a finding that a city was negligent in permitting an obstruction in a street to continue is justified where a large boulder remained in a city street for many months, and constituted a dangerous obstruction. *May v. Anaconda*, 26 Mont. 140, 66 Pac. 759.

And evidence in an action against a city for damages for personal injuries, showing that stones at a street crossing at which the plaintiff was injured were in a slanting position and projecting one above another, and had been permitted to remain so for several months, warrants a submission of the question of the city's negligence to the jury. *Chilton v. Carbondale*, 160 Pa. 463, 28 Atl. 833.

And where, while a street was being paved, a stone about 4 feet long, 2 feet wide, and 8 inches thick was placed temporarily on an intersecting street to aid passengers passing along the street being paved to step down upon the pavement to cross to the other

street, which stone was not laid flat but blocked up with something under it; and the blocking was improperly done, so that it became loose and tipped when stepped upon; and a traveler fell and was injured; and the stone had been in this condition such a period of time that the city officials had notice, or would have had notice had they properly attended to their duties,—it is a proper case for submission to the jury in an action for the injury. *Joliet v. Fuchs*, 132 Ill. App. 407.

A horse block or stepping-stone of ordinary size, however, placed on the edge of a sidewalk to facilitate access to and egress from carriages in a street, is not an obstruction to the walk which would render the municipality liable for injuries caused by a traveler falling over it. *Wolf v. District of Columbia*, 21 App. D. C. 464, 69 L.R.A. 83, affirmed in 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 A. & E. Ann. Cas. 967; *Robert v. Powell*, 168 N. Y. 411, 55 L.R.A. 775, 85 Am. St. Rep. 673, 61 N. E. 699; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273.

And a statutory provision that no portion of the public street shall be occupied by any private person or for any private purpose whatever does not make such a stepping-stone an unlawful obstruction. *Wolf v. District of Columbia*, 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 A. & E. Ann. Cas. 967.

And the fact that other persons had been injured by falling over a stepping-stone does not of itself establish that it was improperly placed in the location it occupied, or that it was necessarily of such a dangerous character as to require the interposition of the city authorities to remove it. *Dubois v. Kingston*, supra.

Nor is the duty of municipal corporations to maintain such portions of their streets and sidewalks as are designed for the use of vehicles and pedestrians in a condition of reasonable safety for such use violated by permitting a carriage block of usual size within that portion of the street by the curb which, according to common knowledge, is devoted to carriage blocks, lamps, hitching posts, and shade trees; and which was not occupying any portion of the street designed for the use of passing pedestrians. *Cincinnati v. Fleischer*, 63 Ohio St. 229, 58 N. E. 568.

And, before a town can be charged with negligence for not removing a carriage block placed near the outer edge of the sidewalk by the owner of the adjoining premises for his own accommodation, it must appear that the block, by reason of its size and location, or because of its surroundings, unreasonably obstructs or endangers public travel. *Tiesler v. Norwich*, 73 Conn. 199, 47 Atl. 161.

But the character of a stepping-stone in front of a house, consisting of part of a millstone, extending therefrom over into the sidewalk 2½ feet, which was flush with the plane of the walk at the gate but 5 inches above the plane of the walk at the point of

the farthest projection into the footway, presents a case in which the question of negligence upon the part of the city in permitting it to remain is properly sent to the jury in an action for injury thereby caused. *Fischer v. St. Louis*, 189 Mo. 567, 107 Am. St. Rep. 380, 88 S. W. 82.

So, a city has a right to mark its street lines with corner stones; but it has no right to place and leave these stones in such a position and condition as to keep the street from being reasonably safe for travel. *Richmond v. Pemberton*, 108 Va. 220, 61 S. E. 787.

And hub stones are useful, if not necessary, appliances to keep trucks in proper places, and prevent them from sliding into places where they may receive and do damage, and they are not *per se* nuisances, nor do their presence evidence an unreasonable or unwarranted use of the sidewalk. *Jordan v. New York*, 26 Misc. 53, 55 N. Y. Supp. 716; *Bureau Junction v. Long*, 56 Ill. App. 458.

And, where a hub stone about 18 inches high was used to protect trucks from going beyond the end of a bridge and falling into a gutter, and there was a clear passageway of over 8 feet for trucks to pass in and out, and a truck 7 feet wide was driven through the passage way and the horses swerved a little and the wheel struck the hub stone throwing the driver and injuring him, the accident was one of that causal, unexpected character that does not by its mere occurrence prove negligence upon the part of the municipality, or its officials; and no liability exists therefor upon the part of the municipality. *Jordan v. New York*, supra.

So, the question whether a highway obstructed by a stick of wood was "obstructed, insufficient, or out of repair," within the meaning of those terms as used in a statute giving to a traveler a remedy against a town, is for the jury, in an action against the town for an injury resulting from such an obstruction, under proper instruction from the court as to the meaning of the terms. *Johnson v. Haverhill*, 35 N. H. 74.

And, where a stick of timber 6 or 8 inches in length, 4 inches in width, and 8 inches in thickness was left in a street, from the side of which it projected, and was permitted to remain there some seven or eight months; and two of the trustees of the village had ample opportunity to see it nearly every day during that period of time; and it constituted an obstruction liable to interfere with and obstruct public travel upon the street,—it is a question for the jury, in an action against the village for the injury resulting therefrom, to say whether or not the omission of the village to remove it constituted actionable negligence. *Murphy v. Seneca Falls*, 57 App. Div. 438, 67 N. Y. Supp. 1013.

But a 2 by 4 scantling lying flat on the surface of a part of a street designed for vehicles and horsemen cannot be said to render the street dangerous for vehicles or horsemen; and permitting it to lie there is 20 L.R.A. (N.S.)

not actionable negligence. *Brown v. Chicago*, 135 Ill. App. 126.

And failure or omission upon the part of a city to remove boards or other temporary aids crossing an unpaved street, placed there by citizens for convenience in muddy weather, is not negligence. *McConway v. Philadelphia*, 209 Pa. 236, 58 Atl. 358.

And, where a piece of board was placed upon a sidewalk, presumably by the city, to facilitate passage and enable persons passing to keep out of the mud, and a person passing over it was injured, not by stumbling against it, but by its slipping and throwing her over, the question whether this was a negligent maintenance of the walk is one of fact for the jury. *Schively v. Jenkintown*, 180 Pa. 196, 36 Atl. 754.

Nor do 2 inch planks laid lengthwise upon a sidewalk to permit teams to be driven into a vacant lot, the ends of which are raised about 2 inches above the level of the sidewalk, which were permitted to remain there for three years, render the sidewalk not reasonably safe, within the meaning of a statute making it the duty of municipal corporations to keep cross walks in a reasonably safe condition for public travel. *Yotter v. Detroit*, 107 Mich. 4, 64 N. W. 743.

But, where a city was engaged through its water commissioners in laying a water pipe across a river under the sidewalk of a bridge, and, in order to accomplish the work, a number of holes were cut through the planks of the sidewalk, and when night came they were covered by placing a plank over each hole, and no light or warning signal was placed upon the bridge, and a person was injured by falling over one of them, it is a question for the jury, in an action for the injury, whether the city was negligent in leaving the sidewalk near the bridge in the night in that condition without lights or signals. *Fordham v. Gouverneur*, 160 N. Y. 541, 55 N. E. 290.

(g) Unevenness, inequalities.

A mound of earth about 8 inches in height, allowed to remain at the filling over a trench dug across a street to lay a pipe, is not so serious or unusual an obstruction as to indicate negligence upon the part of the municipal corporation. *Messenger v. Bridgetown*, 31 Can. S. C. 379, affirmed in 33 N. S. 291.

And a depression in the surface of a street, not more than 1½ inches deep at any point, into which a person stepped in alighting from a street car at a crossing and was injured, is not an actionable defect in the street, though it is at a point where a multitude of people are constantly getting on and off the cars. *Burroughs v. Milwaukee*, 110 Wis. 478, 86 N. W. 159.

Nor is a municipal corporation negligent in permitting a slight rut to exist in a dirt road, caused by the wheels of heavy wagons slipping off the paving adjoining street-car tracks laid therein upon a grade 5 or 6 inches higher than the dirt way, so as to

render it liable for the injury caused to one falling because of such rut, in attempting to alight from a street car. *Clifton v. Philadelphia*, 217 Pa. 102, 9 L.R.A.(N.S.) 1266, 118 Am. St. Rep. 906, 66 Atl. 159, 10 A. & E. Ann. Cas. 537.

And an excavation made by a municipal corporation in a highway for the purpose of laying a small pipe, which, when filled in, left a projection in the highway from 4 to 5 feet in width, and from 8 to 9 inches above the surface, and upon which a horse stumbled and fell, injuring the driver, is not a negligent construction, and not a more serious obstruction than usual in roads. *Messenger v. Bridgetown*, 33 N. S. 291.

So, where a street had been paved with asphalt, and it had been worn and much broken in many places so that there were many holes from 1 to 4 inches in depth, some of them extending over 3 or 4 square feet of its surface; and it had been for a long time in this condition and was much traveled daily, and no other accident had resulted from its use, the street may properly be regarded as in a reasonably safe condition; and the accident resulting therefrom will not be deemed the natural or probable result of using the street in that condition. *Dayton v. Glaser*, 76 Ohio St. 471, 12 L.R.A.(N.S.) 916, 81 N. E. 991.

Where a street is in constant use in a crowded part of a city, however, it is for the jury to say whether a considerable depression in the pavement thereof creates a condition from which a prudent person would anticipate an injury to one using the street with care. *Smith v. New York*, 17 App. Div. 438, 45 N. Y. Supp. 239.

And where a lamp-post set in the sidewalk near the curb in a city street was removed, and the concrete was cut away, and afterwards the hole was filled with earth, which subsequently settled, leaving an uneven surface; and this condition existed over a year, when it caused an injury,—the question of the city's negligence in permitting it is one for the jury. *Gallagher v. Watertown*, 197 Mass. 467, 83 N. E. 1104.

(h) Slopes or grades.

In a city, upon ground which is not level, it is impracticable to bring all streets and walks to a dead level; and such a slight ascent as 1 inch or so to a foot in a cross walk or gutter crossing a street must of necessity sometimes exist; and such an ascent in the cross walk or gutter does not constitute a defect for which the city is liable. *Baker v. Madison*, 56 Wis. 374, 14 N. W. 289; *De Pere v. Hibbard*, 104 Wis. 666, 80 N. W. 933.

And a decline of about $3\frac{1}{4}$ inches in a distance of $2\frac{1}{2}$ feet in a plank sidewalk in a city of about 800 inhabitants is not such a defect as will render the city liable for personal injuries alleged to have been caused in part thereby. *Schroth v. Prescott*, 63 Wis. 652, 24 N. W. 405.

Nor does a decline or slope in a sidewalk, not exceeding 3 inches in 4 feet, with a

lateral pitch of $\frac{1}{4}$ of an inch to the foot, in connection with an accumulation of snow not unusual or extraordinary, or so rough, lumpy, and uneven as to render the walk unsafe for pedestrians in the exercise of ordinary care, constitute an actionable defect as a matter of law. *Koepeke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238.

And two connecting sidewalks in a city, one a few inches lower than the other, which are joined by a cement apron which has a face of 14 inches, and which at its upper edge rises to the level of the higher walk $1\frac{1}{2}$ inches, does not constitute a defect which will make a city liable for an injury to a pedestrian by falling on account of the difference in the levels, in stepping from the higher to the lower walk. *McIntyre v. Kalamazoo* (Mich.) 117 N. W. 729.

So, a cross walk on one of the principal streets of a city, which at the point where it leaves the sidewalk is $3\frac{1}{2}$ feet above the street, and descends to the street at a distance of only 8 feet from the sidewalk, making a descent of $3\frac{1}{2}$ feet in the distance of 8 feet; which cross walk is about 5 feet 4 inches wide, while the sidewalk from which it starts is 14 feet 9 inches wide; and the cross walk is out of range with the avenue with which it connects and has no rail or other protection to prevent a traveler from falling therefrom or to guide him along it, cannot be said, as a matter of law, to be insufficient and dangerous; and whether it is so is a question for the determination of a jury. *Whitney v. Milwaukee*, 67 Wis. 639, 16 N. W. 12.

And where a city changed the grade of a sidewalk so that the new one should be somewhat higher than the old, and a portion of the new walk was laid, and to connect the new with the old walk the city constructed a piece of wooden walk built upon an incline from the new and higher grade to the lower, the declivity being a slope of from $1\frac{1}{2}$ to $3\frac{1}{2}$ inches to the foot, and, in laying the planks, the upper edge of each was raised to answer the purpose of cleats, the question as to whether or not the walk was dangerous in its construction is one of fact for the jury, in an action for an injury to a person who fell upon it. *Ransom v. Belvidere*, 87 Ill. App. 167.

So, the mere inclination of a stone apron leading from a sidewalk to a cross walk upon a principal street of a city, amounting to a fall of 1 inch in 10, though combined with a slight lateral inclination, is not an actionable defect in the sidewalk. *DePere v. Hibbard*, supra.

And a slope or grade in a sidewalk or crossing of two feet from one side of the street to the other on account of the general topography of the street is not negligence for which the city can be held liable. *Fairgrieve v. Moberly*, 39 Mo. App. 31.

Nor is a city liable for injuries alleged to have been caused to a pedestrian by slipping in daylight upon a concrete incline 5 or 6 feet long, sloping from the top of the curb to the pavement a perpendicular height of

about 6 inches, where it could not be reasonably apprehended that the incline would be dangerous, or that one using reasonable care would be more apt to slip and fall upon the incline than he would be to slip and fall in making the abrupt descent which otherwise would have been left between the sidewalk and the gutter, and especially where there was no evidence of accidents during the time the incline had been in use, except in a few cases which were fairly attributable to other causes than those incident to the construction complained of. *Stratton v. New York*, 190 N. Y. 294, 83 N. E. 40, reversing 117 App. Div. 887, 103 N. Y. Supp. 358.

And, where a driveway was constructed by the owner of premises abutting on a street by lowering the walk between 4 and 5 inches and on one side of the driveway placing a flagstone so as to be on a level with the sidewalk at one end and so as to slope to the bed of the driveway, making a descent of 4 inches in 2 feet; and a person slipped and fell on one of these stones,—there can be no recovery against the city therefor if it merely suffered the landowner to construct the driveway at a negligent or improper grade without affirmatively consenting thereto; but a recovery might be had if the city actually granted a permit to the owner to construct the driveway in that manner. *Garrett v. Buffalo*, 26 N. Y. Week. Dig. 257, 7 N. Y. S. R. 96.

And in such case, in the absence of evidence upon the subject, it will be presumed that the driveway was constructed with the consent of the city. *Ibid*.

So, where a street ran along a hillside and an intersecting street ran up and down the hill, the grade thereof conforming to the hillside; and a sleigh passing along the hillside street and turning into the intersecting one slid down the grade and struck the edge of an open gutter, causing an injury, the city is not liable therefor in the absence of proof that the gutter was improperly constructed or out of repair, and that the trustees of the municipal corporation had omitted any rule of prudence by which the accident could have been prevented. *Lavasseur v. Haverstraw*, 45 N. Y. S. R. 6, 18 N. Y. Supp. 237.

And where, owing to a difference of level, a street where asphalted was made some 7 inches higher than the ground adjoining, and was given a gradual slope toward adjoining property, and an accident was caused by this difference of level, there was no misfeasance on the part of the city; and it is not liable for the accident. *St. John v. Campbell*, 26 Can. S. C. 1.

A sidewalk a section of which about 6 feet in length sloped or pitched so that the upper portion was about 18 inches higher than the lower, which was partially, if not wholly, covered with ice at the time the accident happened thereon, however, was negligently and improperly constructed, so as to render the city liable for the injury, if, when it was built, the contour of the ground on which it was laid, or the sur-

rounding conditions, did not render an incline necessary. *White v. Trinidad*, 10 Colo. App. 327, 52 Pac. 214.

And where a walk sloped 5 feet in 40, and had no cleats or handrail; and it was not constructed according to any plan adopted by the city, but built as a temporary expedient to be used until the street was brought to a grade,—it is a question for the jury, in an action for an injury thereon, whether the city was negligent in constructing and permitting the walk to remain in that condition. *Ford v. Des Moines*, 106 Iowa, 94, 75 N. W. 630.

And, where a gutter had been filled with concrete to enable an occupant of a store to draw his wagon out of the street, the construction extending from the top of the curb arching a little and sloping 18 inches from the curb to the pavement of the street, and this obstruction had existed for over six years, and a person slipped and fell upon it and was injured, the questions whether it constituted a dangerous obstruction, and whether the city was negligent in permitting it to remain, are questions of fact to be submitted to the jury, in an action for the injury. *Stratton v. New York*, 117 App. Div. 887, 103 N. Y. Supp. 358, reversed in 190 N. Y. 294, 83 N. E. 40.

So, where a city lowered the grade of an avenue at a street crossing, but left the sidewalk on one side at the original grade, making a steep incline across the street to the opposite sidewalk; and a pathway was formed leading down the incline; and a traveler, while passing along the pathway, slipped and fell, and was injured,—the negligent failure of the city to keep its streets in a reasonably safe condition contributed to the injury and rendered the city liable. *Muncie v. Spence*, 33 Ind. App. 599, 61 N. E. 907.

Nor is a city which constructs a sidewalk with a grade which is too steep relieved from liability for injuries to a person, sustained by falling upon it, by the fact that the icy condition of the walk, for which the city was not responsible, contributed to the accident. *Ford v. Des Moines*, *supra*.

Where a city builds a walk with a steep grade, and an injury happens thereon, it is a question for the jury, in an action for the injury, whether danger from snow should have been provided for when the sloping walk was built. *Ibid*.

(4) Hydrants and other appliances pertaining to municipal waterworks.

A hydrant answers a useful and necessary purpose, and it is required to be placed somewhere in the street. *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

And municipal corporations have the power and right to construct and maintain them in their streets. *Oklahoma City v. Reed*, 17 Okla. 518, 87 Pac. 645.

And a city is not liable for an injury to a pedestrian caused by falling over a hydrant placed by a city in a sidewalk, where

the hydrant was properly constructed and placed in the usual and proper part of the sidewalk; and was, at the time of the injury, in such a condition as to afford ample, safe, and convenient passage along the sidewalk for pedestrians. *Bellevue v. Genoway*, 14 Ky. L. Rep. 304.

Nor can placing a hydrant in the curb of a street be said to be a negligent act. *Ring v. Cohoes*, supra.

And, where placing a water box upon a sidewalk is a legitimate use of the highway by the city in the construction and maintenance of its waterworks, although the top of the box may project a few inches above the surface of the flagging, and though persons using the sidewalk may possibly be injured by carelessly stepping upon or stumbling over it, it does not necessarily become an unlawful obstruction endangering public travel, which would render the city liable for an injury resulting therefrom. *North v. New Britain*, 78 Conn. 145, 61 Atl. 68.

So, fire plugs are a public necessity, and the municipality is the sole authority to determine as to their location; and a person who falls over one and is injured cannot recover of the municipality for his injury, where it was placed in the usual position and was of ordinary construction and not defective. *Horner v. Philadelphia*, 194 Pa. 542, 45 Atl. 330.

And street sprinkling is a public purpose for which a city may authorize the erection of water tanks in its streets without being liable as for authorizing nuisances. *Savage v. Salem*, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

And a municipal corporation is not guilty of maintaining a nuisance where it does no more than maintain a pump in one of its streets; and it is immaterial whether the pump was put in by the corporation or by an individual. *Lostutter v. Aurora*, 126 Ind. 436, 12 L.R.A. 259, 26 N. E. 184.

But hydrants should not be placed in such a position as to obstruct the streets and be an object dangerous to pedestrians who are traveling upon the sidewalks in accordance with the usual mode of travel. *Oklahoma City v. Reed*, supra.

And, where a fire plug was maintained by a city very near the beaten roadway of a street at a point where vehicles could not pass each other without one of them turning out of the beaten way; and it was permitted to become concealed by growing weeds and vegetation, the city having knowledge of its condition, it was guilty of negligence rendering it liable for injuries to a person caused by his vehicle coming into collision with the fire plug without any negligence on his part, while driving along the street. *Thunborg v. Pueblo*, 18 Colo. App. 80, 70 Pac. 148.

So, where a water box is properly placed, and does not constitute an obstruction to the street; and afterwards the city lowers the grade of the street, causing it to become an obstruction,—this is an inexcusable neglect, rendering the city liable for a resulting injury. *Scranton v. Catterson*, 94 20 L.R.A. (N.S.)

Pa. 202; *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. 735.

And, where a water company, with permission of the city, placed a stop box in a sidewalk, placing it flush with the surface of the sidewalk as required by a city ordinance; and the sidewalk was afterwards removed so that the box projected above the surface of the ground; and a person tripped upon it and was injured,—it was the duty of the city, and not of the water company, to replace the sidewalk; and the water company cannot be held liable for the injury. *Mahoney v. Helena*, 96 Fed. 790.

And whether a valve box attached to an underground water-service pipe placed in a street in violation of an ordinance, which resulted in a personal injury, was such an obstruction as to render the city liable, is a question for the jury in an action for the injury. *Rock Island v. Larkin*, 136 Ill. App. 579.

So, whether a water shut-off box in the middle of a sidewalk much used for foot travel, projecting on one side 1½ inches above the surrounding gravel, was liable to cause travelers, while in the exercise of due care, to stumble and fall, or to turn or sprain an ankle; and whether the city exercised care in suffering the box and sidewalk to remain in that condition,—are questions for the jury in an action for an injury resulting from such box; and it cannot be ruled as a matter of law that the box does not constitute a defect in the highway. *Redford v. Woburn*, 176 Mass. 520, 57 N. E. 1008.

And where, on a sidewalk, was a row of flagging several feet in width, but covering only a portion of the sidewalk, the distance between the flagging and the curb line being about 2 feet; and in this space stood a water pipe, which was originally flush with the surface of the earth, but after a change of grade of the walk the pipe was left projecting 4 inches above the surface; and this condition existed for nine months; and a person got his foot under the projecting cap of the pipe and fell, receiving injuries,—the question whether or not the walk was reasonably safe is properly submitted to a jury. *Archer v. Mt. Vernon*, 57 App. Div. 32, 67 N. Y. Supp. 1040.

And whether a water box situated in a sidewalk, which had sunk so as to create a hole or depression several inches deep, constituted an obstruction in the line of travel for which the city was liable, is a question of fact for a jury. *Reynolds v. Philadelphia*, 221 Pa. 51, 70 Atl. 125.

So, where a water box was placed by a water company at the outer edge of a sidewalk as it then existed; and the city afterwards widened the sidewalk by the construction of a cement addition thereto; and in widening the sidewalk the water box was left more than 2 feet inward from the curb and at a point where people were constantly passing and repassing; and a hole was left in the sidewalk above the rim of the water box, and a person was injured thereby,—the city is primarily liable for the injury if

it did not exercise reasonable or ordinary care. *Denver v. Magivney* (Colo.) 96 Pac. 1002.

And, where a municipal corporation allows one of its sidewalks which is about 10 feet in width to become obstructed by two stop boxes or water boxes placed thereon, standing in the walk 3 feet from the side thereof next to the gutter and projecting above the surface of the sidewalk, one of them 2¾ inches, and the other 1¾ inches, and a few inches apart, each box having a cap thereon larger than the box itself and slightly extending over it, they constitute such an obstruction as to render the walk not in a reasonably safe condition for the traveling public, making the corporation liable in damages to a person sustaining injury by reason thereof. *Parrish v. Huntington*, 57 W. Va. 286, 50 S. E. 416.

And a foot passenger upon a sidewalk, who struck his foot against a water cock, connected with the water pipes leading from the mains under the bed of the street into private premises, which projected some 3 or 4 inches above the level of the pavement, and was thrown down and injured, is entitled to recover therefor in an action against the city, provided he was using such care in the use of the street as would ordinarily be used under similar circumstances. *Baltimore v. Walker*, 98 Md. 637, 57 Atl. 4.

Nor is a municipal corporation exempt from liability for an injury to a person whose carriage came in collision with an iron water plug projecting above the ground more than 1 foot in a city street, where there was no light or signal at or near the water plug to disclose its situation, and it was a dangerous obstruction well known to the city, which permitted it to remain. *Petersburg v. Todd*, 2 Va. Dec. 301, 24 S. E. 232.

And, where a hydrant was so arranged that the wheel of a carriage of a person attempting to pass the hydrant close to the curbing would be likely to come in collision with a projecting nut thereon; and such a collision might result in a serious accident; and the nut was so small and the projection so slight that the danger might escape the attention of a traveler until the moment of contact,—a determination that the hydrant thus placed was dangerous to public travel, and, by reason thereof, the way was defective, is not erroneous as a matter of law. *St. Germain v. Fall River*, 177 Mass. 550, 59 N. E. 447.

Nor is the erection of a water tank in the center of a street, occupying one half of the width thereof, and the erection and operation of a steam engine in connection therewith, even for the purpose of supplying a city and the residents thereof with water, one of the uses of a street as such, for which it may be appropriately used under a dedication thereof as a street; and the city is liable for injuries resulting from such use. *Morrison v. Hinkson*, 87 Ill. 589, 29 Am. Rep. 77.

And, where an iron water shut-off 12 inches high and 3 or 4 inches in diameter

protruded above the portion of a street where a sidewalk laid out over an existing highway was to be constructed; and the contractor was working under a permit from the superintendent of streets called a permit to close; but the street was not closed to travel by a vote of the proper authorities,—it is a question of fact for the jury whether reasonable care and diligence had been exercised to protect the traveling public so as to save the city from liability under the highway act. *Jones v. Collins*, 188 Mass. 53, 74 N. E. 295.

And, where a sluiceway or drain was built to carry off the water accumulating at a street corner; and this had been obstructed by a water company by placing in the middle of it an 8-inch pipe; and the city allowed this to exist for upwards of five years with knowledge of the fact that, by reason thereof, this corner was flooded and the cross walk concealed frequently every year, and, when covered, a condition existed which imperiled the safety of travelers upon the street,—this constituted a want of reasonable care on the part of the village authorities, rendering it liable for a resulting injury. *Lloyd v. Walton*, 57 App. Div. 288, 67 N. Y. Supp. 929.

So, where water tanks when erected in a street were not nuisances *per se*, and could not be abated as such, the question whether they afterwards became in fact nuisances is one of fact for a jury. *Savage v. Salem*, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

(f) *Cellar ways, stairways, and other projections.*

Stairways on street sides, leading downwards to the basements and cellars of buildings on abutting lots, or upwards to the entrances of such buildings, which do not encroach upon the sidewalk, are lawful. *Fitzgerald v. Berlin*, 51 Wis. 81, 37 Am. Rep. 814, 7 N. W. 836.

They are not nuisances *per se* if properly constructed, in good repair, and afford a safe sidewalk for public use. *Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843.

Nor is a violation of an ordinance requiring cellar ways in sidewalks to be constructed even with the sidewalk the basis of a cause of action of a pedestrian who sues a city and an abutting property owner for injuries received by tripping against such a cellar way elevated above the level of the walk, but is simply evidence tending to show that the cellar way was not constructed as required by law. *Perrigo v. St. Louis*, 185 Mo. 274, 84 S. W. 30.

But the existence of stairways on the street sides, leading downwards to the basements and cellars of buildings on abutting lots, or upwards to the entrances of such buildings, imposes upon the municipality in which they are situated the duty of providing proper safeguards for the prevention of accidents, by reason of their proximity to the sidewalks, to persons traveling there-

on with ordinary care. *Fitzgerald v. Berlin*, supra.

And whether a cellar door set in a stone base in a granitoid sidewalk, and extending nearly 6 feet from the building outwardly, and being 4 inches above the sidewalk at the building and 2½ inches at the other end, is a dangerous obstruction to travelers on the sidewalk, is a question of fact to be determined by a jury. *Perrigo v. St. Louis*, supra.

And an ordinance regulating the construction and safeguarding of cellar ways in sidewalks is admissible in evidence in an action based on the city's negligence in allowing a cellar way to remain open and unguarded, as a declaration of the city concerning a matter involved in the action. *McLeod v. Spokane*, 26 Wash. 346, 67 Pac. 74.

But, if the act of a city in allowing a cellar way in a sidewalk to exist for a long time was negligence, then the existence of other cellar ways in the city would be no justification or defense; and evidence that there was a large number of such cellar ways in the city is not competent in an action against the city for injuries received by falling into the open cellar way in a sidewalk. *Ibid*.

So, whether trapdoors in a sidewalk, projecting above the surface and surroundings, are of such a character as to make them unsafe to pedestrians, is a question of fact, in an action for an injury resulting therefrom. *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674.

And so is the question whether an opening in a sidewalk in front of a house and lot, leading into the cellar of the house, covered by a door which is set on and fastened to a stone base or flagging which extends out from the wall of the house 6 or 7 feet into and across the sidewalk, and which projects above the surface of the sidewalk 3 or 4 inches, is a dangerous obstruction to travel on the sidewalk. *Perrigo v. St. Louis*, supra.

And, where a sidewalk is 15½ feet wide, 10 feet of the sidewalk from the street edge consisting of granite slabs and the remaining 5½ feet being an iron frame with circular glass insertions to give light to the basement under the sidewalk, which consists of two flat doors shutting together in the center and opening upward and outward, and having four hinges which project between 1½ and 2 inches above the level of the sidewalk, a rightangle being made between the hinge and the main part of the bulkhead extending upward from the level of the sidewalk, the question whether the projecting hinges constitute defects in the sidewalk, which the city, in the exercise of reasonable care, should have remedied, is properly submitted to the jury in an action for an injury resulting to a traveler from stumbling thereon. *Lamb v. Worcester*, 177 Mass. 82, 58 N. E. 474.

But the existence of hinges on a trapdoor a little more than an inch above the level of the sidewalk in a city, affixed by the owner of abutting premises for convenience

of access to his cellar, and against which a traveler aware of their existence tripped and injured himself, does not constitute such a want of repair as to render the municipal corporation liable for the negligence. *Ewing v. Toronto*, 29 Ont. Rep. 197.

Nor is it actionable negligence upon the part of a municipality to permit the existence of trapdoors in a sidewalk, against which a person stumbled and fell, where the doors were elevated at most but 2 inches above the surface of the walk, and they were placed in close proximity to the front of the building, and between their outer edges and the curb there was an unobstructed passage of nearly 9 feet, and this condition of things had existed for upwards of five years, and was one common to the business quarters of every large city. *Tubising v. Buffalo*, 51 App. Div. 14, 64 N. Y. Supp. 399.

So, the projection of a movable grating of a culvert from 1 to 2 inches above the level of the edge of the sidewalk against which it rests is not a defect which shows such a want of ordinary care on the part of the city as will make it responsible for an injury occasioned by stumbling over the grating. *Raymond v. Lowell*, 6 Cush. 524, 53 Am. Dec. 57.

And, where an injury was caused by a carriage wheel being caught in a grating constructed between the rails of a street railway to carry off water into a catch basin; and the evidence in an action against the city for the injury tended to show that, if the grating had been in the position in which it was originally placed, such an accident could not have happened, and that it had settled a little so as to be below the bottom of the rail,—it is a question for the jury whether the condition of the grating and the rail rendered the street manifestly unsafe. *Cammett v. Haverhill*, 197 Mass. 76, 83 N. E. 331.

So, steps projecting into a highway not more than 3 feet under a statutory authorization do not constitute a nuisance or an illegal obstruction in the highway. *Cushing v. Boston*, 124 Mass. 434.

And such steps are not made a nuisance or an illegal obstruction in the highway by the fact that the treads of the steps project beyond the risers ¾ of an inch, and that there is no railing or guard, there being no evidence that this is an improper or unusual method of construction. *Ibid*.

And a special statute declaring that no doorsteps hereafter erected in any street, lane, or alley in a town shall project into such street, lane, or alley more than 1-12 part of the width, and in no case more than 3 feet, implies authority to occupy the street to the extent indicated, and affords justification to an abutter who may use the privilege; and a structure within these limits does not constitute a defect against which safeguards should be erected or special care taken to protect travelers. *Cushing v. Boston*, 122 Mass. 173.

But charter authority to make such rules and regulations for the erection and main-

tenance of balustrades and other projections upon the roofs or sides of buildings as safety of the public requires, and to make all salutary and needful by-laws, is intended to deal with those parts of a building which may project near or over the line of a highway, and which, if not properly constructed and maintained, may endanger the safety of the public, and is not intended to deal with additions to, or parts of, a building which may occupy the highway itself or obstruct travel thereon, thus constituting a nuisance in the highway, and does not give a city power by ordinance to make rules and regulations with reference to the erection and maintenance of doorsteps within the actual limits of the highway. *Cushing v. Boston*, 128 Mass. 330, 35 Am. Rep. 383.

Nor can a municipal corporation absolve itself from liability for an injury to a pedestrian, caused by the steps of an abutting house encroaching upon a sidewalk in such a way as to constitute a nuisance, by the fact that they had existed for twenty-five years or more. *White v. New Bern*, 146 N. C. 447, 13 L.R.A.(N.S.) 1166, 59 S. E. 992.

So, an iron covering of a manhole constituting a part of the surface of a street situated just outside the sidewalk at the corner formed by the intersection of the cross walk with the sidewalk, need not be kept as smooth and present as perfect a surface as a sidewalk; and a pedestrian about to cross such a point in the street must take notice of the uneven surface and declivities, and use such care as the situation would suggest to an ordinarily prudent person. *Lincoln v. Detroit*, 101 Mich. 245, 59 N. W. 617.

In the above case *Keyes v. Marcellus*, 50 Mich. 441, 45 Am. Rep. 52, 15 N. W. 542, supra, IX., c. 3, (b), (3); was distinguished upon the ground that the street considered in that case in which the defect existed was little more than a country highway; and it was held that it accommodated the public travel conveniently and safely.

But whether leaving a manhole with a cover projecting several inches above the surface of the ground, nearly in the middle of a street, is an obstruction to travel, is a question of fact for the jury, in an action for an injury resulting therefrom. *Schafer v. New York*, 154 N. Y. 466, 48 N. E. 749.

And so is the question of the liability of a city for an injury resulting from stumbling over the top of a sewer manhole, where the sewer was built under an earthen sidewalk, and the top of the manhole stood above the surface 6 inches, 5 inches, or 3 or 4 inches, by various estimates. *Corr v. New York*, 121 App. Div. 578, 106 N. Y. Supp. 280.

And, where an alleged defect in a street consisted of two bolts each $\frac{3}{4}$ inches in diameter, standing vertically $1\frac{1}{2}$ or $1\frac{3}{4}$ inches in height above a perforated iron plate, which formed the cover to a sewer, the bolts being used to hold the sewer plate in place; and an injury was caused by a traveler striking his foot against one of

them and falling upon the other; and there was a conflict in the evidence, in an action for the injury, as to the description and common use of the highway, and as to whether or not the sewer plate was in a proper place,—the question whether it was so situated and of such a character that a traveler using due care might be exposed to injury by stepping against it was properly submitted to the jury. *Dowd v. Chicopee*, 116 Mass. 93.

So, a city which places a manhole in the middle of one of its public streets so that it projects above the surface of the street 6 or 7 inches, in consequence of which a traveler's horse, while being driven along the street at night, strikes his foot against the manhole and is permanently injured, is liable therefor. *Montgomery v. Reese*, 146 Ala. 410, 40 So. 760.

And whether an iron box 4 inches square, constituting part of the usual apparatus of a gas company for distributing gas, set in a sidewalk in a city by the gas company, a few inches from the curbstone and only 1 or 2 feet distant from the junction of a cross walk with the sidewalk, in such a manner that its rim projects an inch above the level of the sidewalk, and left uncovered and empty to the depth of 3 inches, is a defect in the way, for an injury to a traveler resulting from which the city will be held liable, is a question of fact for a jury. *Loan v. Boston*, 106 Mass. 450.

And an instruction, in an action for an injury caused by an obstruction in a street, that, if the city neglected its duty by allowing the covering and lid of a coal hole to remain for a long time in an unsafe condition for travel in the street on account of the covering and lid extending above the level of the sidewalk, the jury should find whether the extension was or was not such an obstruction as would render the street unsafe and dangerous to pedestrians, is proper, and not subject to the objection that it ignores the distance which the covering and lid of the coal hole extended above the surface of the sidewalk. *Smart v. Kansas City*, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709.

(k) *Railways in streets.*

The duty of a city to keep its streets and alleys open and free from all nuisances does not prevent the carrying out of specific authority to permit and authorize the laying down of tracks for railways and street railways on its streets, alleys, and public places. *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11, 15 N. W. 573.

And a municipal corporation may authorize the use of a street by a company engaged in transporting passengers in cars drawn by horses, and, in licensing such a use of its streets, it violates no duty, such use of the streets not being dangerous in itself; and the city is not liable for the negligence of its licensees. *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518.

And a village having authority over the

laying of railroad tracks, water and gas pipes, and the erection of lamp-posts, telegraph and electric-light poles in its streets, is guilty of no wrong in permitting an electric railway to place its tracks in one of its streets. *Lockport v. Licht*, 221 Ill. 35, 77 N. E. 581.

And a complaint in an action for injuries sustained in driving upon a street obstructed with snow and ice, averring that the accident was caused because of turning from one street into another, which was necessary to pass around a street car standing upon its track in the latter street; and that in so doing his horse was frightened by the sudden starting of the car and drew his buggy over the ice and overturned it,—does not charge that the street car was an obstruction in the street, since, in the absence of any further averment on the subject, it will be assumed that the car had merely stopped to take on or discharge a passenger, and therefore it was not necessary to drive around it. *McDonald v. Toledo*, 63 Fed. 60.

But, while it is a legitimate use of a street to allow a steam-railroad track to be laid and operated upon it where there is legislative authority therefor, under legislative authority merely authorizing tracks to be laid in the streets, it is not competent for a municipality to grant the exclusive use of a street to a railroad company. *Ligare v. Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619.

And it is not material to the liability of a city for granting the exclusive use of a street to a railroad company, so as to exclude the public from using it as a street, that the public is not expressly deprived of the use of the street upon which the railroad tracks are laid; the result and effect of the grant will control in that regard. *Ligare v. Chicago*, supra.

And an issue as to whether a street was rightfully obstructed by a railroad train should be submitted to the jury in an action involving that issue, if the circumstances attending the blockade are such that reasonable persons might entertain different views as to whether the action of the railroad company was justifiable or not. *Chicago & N. W. R. Co. v. Prescott*, 23 L.R.A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 239.

So, in the absence of express statutory authority, a city has no power to permit the use of steam motors upon its streets, either upon ordinary railroads or street railways, and the granting of such authority or permission constitutes negligence, which will render the city liable for damages caused thereby. *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706.

And where a private corporation to which has been granted the right to operate by electricity a street railway uses an appliance which is a constant menace to the public in the use of the street, however, and the city has notice thereof, but neglects to abate it, 20 L.R.A. (N.S.)

—the city is liable for injuries caused by such dangerous appliance to a person traveling upon the street. *Decatur v. Hamilton*, 89 Ill. App. 561.

And, where a railroad company dug a ditch across a street, and prepared no means of crossing it, and no warning was placed at or near the ditch, and the street was not lighted, and an injury resulted from a person driving into the ditch, the railroad company and the city are joint tort feors, and both are responsible in damages. *White v. San Antonio* (Tex. Civ. App.) 25 S. W. 1131.

So, the fact that iron rails for the use of street cars projected 3 or 4 inches above the plank surface of a street justifies the conclusion by a jury that the city had not discharged the duty imposed upon it by law of keeping its streets free from obstruction. *Michigan City v. Boeckling*, supra; *Danville v. Makemson*, 32 Ill. App. 112; *Prevost v. Montreal*, Rap. Jud. Quebec, 15 C. S. 39.

And a municipal corporation is liable for an injury suffered by the occupant of a carriage, caused by a loose rail in a street railway track crossing the street catching the wheel of the carriage, of which condition the municipality had due notice. *Natchez v. Shields*, 74 Miss. 871, 21 So. 797.

And permitting a street-railway side track which has been disconnected from the main track and has fallen into total disuse to remain in an unpaved street in such a way as to constitute a dangerous hidden obstruction in wet weather is negligence *per se* on the part of the city. *Cutcher v. Detroit*, 139 Mich. 186, 102 N. W. 629.

So, evidence that a city authorized a railroad company to lay tracks in one of its streets upon condition that the work should be done in conformity to the ordinances and under direction of the superintendent of city works; and the railroad company employed a contractor to construct its tracks; and the contractor left railroad ties in the gutter at a street corner between the cross walk and the curb, projecting 1 inch or 1½ inches above the curb; and that this caused an injury to a person who stumbled over it in the night, there being no light on the corner where the obstruction was placed; and that one of the police officers had been thrown by the same tie two nights previously,—is sufficient to charge both the railroad company and the city with negligence. *Higgins v. Brooklyn*, Q. C. & S. R. Co. 54 App. Div. 69, 66 N. Y. Supp. 334.

And evidence that a person was driving along a street in which there was a car track; and that one wheel of his wagon sunk into a hole or depression between the rails, throwing him from his wagon and injuring him; and that the depression had existed for several weeks or months prior thereto; and that there was a considerable furrow or hole alongside the rail, the cobblestones of the pavement having sunk several inches below the surrounding surface,—is sufficient to support a verdict of damages for personal injuries, against the city.

Eckert v. New York, 59 App. Div. 611, 69 N. Y. Supp. 124.

And it is for the jury, in an action for a personal injury, to say whether a guard rail, which is not a necessary part of a street railway, or which is improperly or insufficiently laid, or which has been loosened from its original position and fastenings, is a defect in the street, within the meaning of the Massachusetts statute which imposes upon towns the duty of keeping its highways in repair. *Hawks v. Northampton*, 116 Mass. 420.

A safety gate at a point where a railroad crosses a public street, however, is in no sense a private use of the street, but is clearly a police protection against injuries to persons passing along the street in consequence of the passage of railway trains over the same; and such a gate cannot be said to be a nuisance in the street. *Seibert v. Missouri P. R. Co.* 188 Mo. 657, 70 L.R.A. 72, 87 S. W. 995.

And a municipal corporation is not liable to persons injured by falling into a cattle guard lawfully constructed near a highway crossed by a railroad, where it maintained proper barriers up to the railroad, and as far as it could do so without impeding passing trains. *Jones v. Waltham*, 4 Cush. 299, 50 Am. Dec. 783.

Where a railroad crosses a street, and a safety gate is maintained at the point of crossing, whether the operating machinery shall be placed between the curb lines of the street or on the sidewalk which constitutes a part of the street is a question resting largely within the discretion of the municipal authorities; and the courts will not interfere therewith or condemn municipal action in respect to the place where such machinery is located, unless the presence on the street of such machinery or appliances necessarily interferes with the use of the street as a public highway. *Seibert v. Missouri P. R. Co.* supra.

And where, in such case, there are 39 feet of clear, unobstructed space left in the highway between the boxes and protections of the machinery of the safety gate, it cannot be said that the machinery appliances and protections necessarily interfere with the use of the street as a public highway. *Ibid.*

And where a railroad company, at a point where its road crossed a street, maintained, under authority of the city government, crossing gates to prevent vehicles from driving on the railway track when a train was approaching, the machinery to operate which was in boxes built on either side of the street 2 feet from the curb, standing about 4 feet inside of the driveway, which was about 50 feet wide, which machinery was protected by guard rails about 2 feet 6 inches in height, the guard rails were lawful structures in the street, and the foreman of a fire engine, who was injured by them in driving to a fire, is not entitled to recover for his injuries. *Klein v. Missouri P. R. Co.* 114 Mo. App. 89, 89 S. W. 75. 20 L.R.A. (N.S.)

(1) Embankments.

If an embankment in a street was so constructed and maintained as to render travel on the street passing over it dangerous and hazardous; and, by reason thereof, a person received injuries,—the city is liable therefor if the embankment was placed there by authority conferred by the ordinances of the city. *Golden v. Clinton*, 54 Mo. App. 190; *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447.

And, where an embankment on the side of a road, though created by nature, is maintained by the city as a barrier to prevent travelers from driving into a creek, it is a ministerial duty of the corporation, neither governmental nor discretionary, to see that it is not dangerous to anyone using the road or any part thereof; and, if it is allowed to become dangerous, the city can be held liable for a resulting injury. *Gibson v. Huntington*, supra.

And an embankment made across one of the principal thoroughfares of a large city, and left there for a long time without guards, constitutes a nuisance for which the city is liable. *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255.

So, where there was a depression in a street, and the authorities raised one half of the street over the depression, and left the other half of the street on its natural level, leaving an embankment between the two levels of some 6 feet in height, the side of the embankment being precipitous and rough, and the embankment being without railing or barrier to prevent travelers from being precipitated over it, it was unsafe as a matter of law. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

And a street crossed by a railway track which is somewhat above the level of the street, placed upon an embankment, in making which the material was obtained from two parallel ditches excavated on each side of the embankment where it extended across the street, the ditches being in the neighborhood of a foot deep and about 6 feet wide on either side of the grade, is defective, so that the city may be held liable for an injury resulting therefrom. *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763.

So, it is the duty of a city, when grading its streets and cutting through an elevation so as to leave an embankment beside the street, to build and finish the slopes thereof so that they will be in a reasonably and ordinarily safe condition as to such persons as may be lawfully in the street, and so that they will not unnecessarily endanger the lives and limbs of passers upon the sidewalk. *Nichols v. St. Paul*, 44 Minn. 494, 47 N. W. 168.

And, where a municipal corporation, in improving the grade of a street, dug it down, leaving the sidewalk elevated from 3 to 6 feet above the surface of the street, creating a precipitous descent, the edge of which was somewhat ragged; and a traveler

on the street in the night started to cross the street and fell down the descent and was injured,—the case is one where a recovery against the municipal corporation may be sustained. *Bennett v. Sing Sing*, 38 N. Y. S. R. 347, 14 N. Y. Supp. 463.

And, where a city, in grading a street near a school attended by small children, left for several months a precipitous bluff 30 or 40 feet high, which, from caving in and other causes, became dangerous; and the authorities of the city knew of the danger and neglected to repair it; and one of the school children eight years old, while playing in the street, was killed by the falling of a part of the bluff,—the city is liable in damages for the death, though the bluff was left in a reasonably safe condition at the time of the grading. *Vicksburg v. McLain*, 67 Miss. 4, 6 So. 774.

The existence of a well-paved street 40 feet wide with a rise on either side of 12 to 18 inches, against which a horse being driven along the street shied and caused an injury, however, does not show such negligence upon the part of the city as to require the court, in an action for the injury, to leave the question to a jury. *Johnston v. Philadelphia*, 139 Pa. 646, 21 Atl. 316.

And, where horses were frightened and ran away, and ran over an embankment in a street, the real questions in an action against the city for the injury are, Was the street, considering the width of the embankment, the height thereof, the slope of the descent to the portion not elevated, the condition thereof for smoothness and ease of carriage, reasonably safe for travel? and, If it was not, was the damage to the plaintiff reasonably caused by its unsafe condition, or by the running away of his horses unaffected by the city's negligence? *Wilson v. Atlanta*, 60 Ga. 473.

(m) Gutters and drains.

Ditches or gutters on the sides of highways designed for drainage and convenient for that purpose, with walks in the nature of bridges across them for the use of pedestrians, leaving unimpeded the traveled portion of the road, cannot be considered as defects or obstructions in the highway, for which a municipality is liable. *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048.

And a municipality is not liable for personal injuries caused by a fall into an uncovered gutter at a street crossing, where it appears that the gutter was reasonably safe, and that the open gutter is a common approved method of construction at crossings in cities and boroughs. *Bruch v. Philadelphia*, 181 Pa. 588, 37 Atl. 818.

So, the maintenance at a street crossing of a gutter 8 inches wide and 6 inches deep is not negligence upon the part of the municipality. *Wright v. Lancaster*, 203 Pa. 276, 52 Atl. 245.

And, where the roadway or traveled part of a highway running through a small incorporated village is about 8 feet wide, well

graded and in good condition, with a grass plot 6 or 7 feet wide between the edge of the roadway and a ditch running parallel therewith, made for the purpose of carrying off water, the village is not liable for injuries sustained by a traveler driving upon a dark night into a hole in such ditch caused by a drain discharging water into it. *King v. Ft. Ann*, 180 N. Y. 496, 73 N. E. 481.

So, a shallow gutter across a sidewalk, made to carry off the water from the conductor on the front of an abutting building, so constructed that the row of bricks on one side of the gutter is from three quarters to an inch higher than a corresponding course on the other side, is not a defect which will render the city liable for an accident caused thereby. *Haggerty v. Lewiston*, 95 Me. 374, 50 Atl. 55.

And a gutter, or waterway, or side ditch to drain water from a hillside along a turnpike, which is necessary in order to pass water across the road, which wagons have worn to some extent, creating a chuck hole about 18 inches deep through the ice, upon which a wagon broke, throwing the driver and injuring him, does not constitute such a defect in the road as will render the town liable for the damages for the injury. *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878.

Nor is a city bound to cover its crossings at all places if it does not see fit to do so; this, like other city improvements, it may do or not as the municipal authorities see proper; and the absence of a cover at a crossing is not of itself negligence in the corporation. *Heiss v. Lancaster*, 203 Pa. 260, 52 Atl. 201.

And a drain running along the side, or on the outer edge, of a street, where it serves the purposes of a gutter or ordinary roadside ditch, which is covered with plank and used as a sidewalk, does not become a culvert, for which the city is liable under a statute providing for such liability. *Kowalka v. St. Joseph*, 73 Mich. 322, 41 N. W. 416.

And where, on a declivity in a city, several streets intersect each other and are paved and worked in accordance with an established grade, which is not defective, the mere fact that a cross walk and stone gutter 8 feet wide parallel with it, otherwise properly constructed, and not out of repair, crosses a side street upon an angle a little less than a right angle, and the middle of the gutter for a space of about 30 feet in the middle of such street has a depression of from 5 to 6 inches, and outside of that space a depression of from 8 to 9 inches, does not constitute such a defect as to render the city liable. *Baker v. Madison*, 56 Wis. 374, 14 N. W. 289.

So, a small aperture in the curbing of a sidewalk 4 inches wide and some 3 inches deep, and not on the sidewalk or on a cross walk, made for the purpose of carrying away water from the street, is a prudent exercise of power by the city to make its streets dry for the use of the public; and it does not constitute negligence on its part, ren-

dering it liable for an injury caused by a person stepping into the opening. *Harrigan v. Brooklyn*, 67 Hun, 85, 22 N. Y. Supp. 39, affirmed in 143 N. Y. 661, 39 N. E. 21.

And an artificial opening for the purpose of drainage, made through snow or ice, but not extending below the surface of the soil in a street, whether made by the public authorities, or by someone for whose acts the city can be found liable, does not render the street dangerous in the sense that it constitutes either a defect in the roadway or an obstacle to travel, for which the city should be held responsible in damages. *Hadden v. Somerville*, 197 Mass. 480, 83 N. E. 1105.

Nor does the mere fact of the incorporation of an aqueduct company, and the assent of the selectmen of a town that such company might dig up and open a highway for the purpose of constructing an aqueduct under the authority of a statutory provision, discharge the town from liability for an injury occasioned by reason thereof. *Merrill v. Wilbraham*, 11 Gray, 154.

Failure properly to cover a culvert laid across a street by authority of a municipal corporation, however, is negligence for which the corporation is liable, in the absence of contributory negligence on the part of a person injured in consequence thereof. *O'Gorman v. Morris*, 26 Minn. 267, 3 N. W. 349.

And, where injuries were caused by a trench in a street which had been filled by the city after removing a culvert, the question whether or not the trench had been properly filled was one for the jury under the evidence. *Heberling v. Warrensburg*, 133 Mo. App. 544, 113 S. W. 673.

And the fact that a city filled a trench in one of its streets the same way that it filled all such holes in streets does not relieve it from liability for an injury occasioned thereby; the manner in which the city ordinarily fill such holes not being a standard of safety. *Ibid*.

So, a grating covering a cesspool in a street, having between one of the outside bars and the rim a space wide enough to permit a horse's foot to pass through, is a defect in the street, for injuries resulting from which the city is liable. *Buck v. Biddeford*, 82 Me. 433, 19 Atl. 912.

And, where a heavy iron plate was used for the cover of a gutter, and the stone upon which it rested had been broken or worn away so that it did not set level, and, when a wagon passed over one end of it, the other end was thrown up and fell upon the foot of a pedestrian and injured him, the negligence of the city in maintaining the plate in a dangerous condition was the efficient cause of the injury. *Louisville v. Johnson*, 24 Ky. L. Rep. 685, 69 S. W. 803.

And, where a municipal corporation had full power to repair or otherwise deal with a drain, and neglected to repair it, whereby a dangerous hole was formed, which was left open and unfenced, this constituted a nuisance in the highway, for which the municipality

was liable to an indictment, and also liable to a suit by any person who sustained a direct and particular damage from its breach of duty. *Bathurst v. Macpherson*, L. R. 4 App. Cas. 256.

So, evidence tending to show that the rock in a basket gutter carved in the natural rock for the passage of surface water had so broken out on one side as to form a perpendicular wall 8 inches high; and that a person driving his horses into the street from an intersecting one was thrown from his wagon and injured because one wheel sank into the depression next to the solid wall, while the opposite wheel mounted an elevation,—is sufficient to support a verdict for the plaintiff in an action against the city for the injury. *Stone v. Troy*, 38 N. Y. S. R. 44, 14 N. Y. Supp. 616.

And evidence that it was necessary to have an opening which caused an injury, for the purpose of disposing of surface water and of cleaning out a drain and keeping it open, is inadmissible in an action for the injury, since it is a matter of common knowledge that surface water can be disposed of by gratings and other small openings which would be harmless. *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808.

So, if a city, in raising the grade of a street by putting in insufficient drains, caused water that would not have otherwise flowed upon abutting land to flow there, it is liable for the injury caused; but, to warrant a recovery, the injury must be shown to have been caused by the casting of the waters from the city's drains onto the abutting land, and such casting of the water to have been the direct and natural result of the negligent construction of the drains or streets; and an instruction in an action for the injury to that effect is not objectionable as permitting a recovery without any showing of negligence or mismanagement by the city. *Mayrant v. Columbia* (S. C.) 64 S. E. 416.

Nor is the liability of a municipal corporation, in the limits of which a street obstructs a stream of water by providing too small a culvert to pass it, for the nuisance, affected by the fact that it did not originally construct the street. Its maintenance of the obstruction after the city limits were extended to include the locality is sufficient to create the liability. *Martin v. St. Joseph* (Mo. App.) 117 S. W. 94.

And the fact that the outlet of the culvert was outside the city limits does not affect the liability of the city for the nuisance caused by the overflow, the liability being based on the maintenance of the embankment within the city limits with an insufficient outlet. *Ibid*.

But evidence as to the quantity of earth and cost of work which would be required to fill in a lot to the level of the street pavement, so that surface water flowing upon the lot from land above would pass into the street, is incompetent in an action against the city for flooding the lot by raising the grade of the street and by insufficient drains,

where it is obvious that filling the entire lot would be unnecessary. *Mayrant v. Columbia*, supra.

So, proof of the existence of an open ditch about 300 feet long, between 3 and 4 feet in width, and from 18 to 30 inches deep, within the limits of a street of a village, into which a horse fell and was injured, is sufficient to sustain a finding of negligence upon the part of the village. *Bradner v. Warwick*, 91 App. Div. 408, 86 N. Y. Supp. 935.

And, where a ditch was dug through a sidewalk by an abutting owner in front of his premises to let water off his lot while repairing the sidewalk, pursuant to directions by the city; and the ditch was left open over night without any warning; and a pedestrian fell in and was injured,—he may introduce in evidence, in an action against the city for the injury, a city ordinance regulating such excavations, and providing for proper guards against accidents on account thereof, as tending to show the degree of negligence upon the part of the city. *Flater v. Fey*, 70 Mich. 644, 38 N. W. 656.

So, a city which has provided gutters, culverts, and sewers for the surface drainage of streets is bound to the use of reasonable diligence to discover and remedy defects therein. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773, affirming 40 App. Div. 320, 57 N. Y. Supp. 968.

And, where a street commissioner of a village found a gutter full of ice and snow and water running over the walk, and cleaned out the gutter, but did not remove the obstruction which prevented the water from running into the sewer; and the place was not guarded, and no lights were placed there; and, on the evening of the same day, a traveler upon the street stepped into the gutter and was injured,—a finding of negligence upon the part of the city is warranted. *Bly v. Whitehall*, 120 N. Y. 506, 24 N. E. 943.

Nor is a city excused from liability for failure to use reasonable diligence to discover and remedy defects in gutters, culverts, and sewers for the surface drainage of streets because a storm which created an obstruction was heavy and unexpected, since its care should include preparation, after notice of the obstruction, express or implied, for such storms as may be reasonably foreseen, and which, judging from experience, are liable to happen at any time. *Schumacher v. New York*, supra.

Whether it was necessary to have or permit a drain in a street is a question for the jury, in an action for an injury to a pedestrian who stepped into a drain from a cross walk, and not a subject for testimony. *Gallagher v. Tipton*, 133 Mo. App. 557, 113 S. W. 674.

(n) Holes and openings.

(1) Generally.

An excavation in a street, made by a city
20 L.R.A. (N.S.)

for a proper purpose, is not of itself a nuisance, and does not become such unless it is allowed to remain open for an unreasonable length of time. *Garnetz v. Carroll*, 136 Iowa, 569, 114 N. W. 57.

And excavations and piles of earth in the streets, necessary in making the ordinary improvements of a city, such as sewers, laying of water and gas pipes, and the like, made with ordinary care, are not unlawful obstructions of the streets, for injuries resulting from which the city is liable. *Swart v. District of Columbia*, 17 App. D. C. 407.

So, a city is not an insurer of the safety of its streets, and, if an unprotected excavation is left in a street without the fault of the city, it is not responsible unless it had actual or implied notice thereof, and failed to use due diligence in obviating and removing the danger. *Holitz v. Kansas City*, 68 Kan. 157, 74 Pac. 594.

Nor can a municipal corporation be held to be guilty of negligence in regard to a hole or depression in the pavement of a street where the defect was not one from which a reasonable man would have apprehended danger. *Belling v. Hamilton*, 3 Ont. L. Rep. 318; *Vandeskie v. New York*, 89 App. Div. 625, 85 N. Y. Supp. 836; *Beltz v. Yonkers*, 148 N. Y. 67, 42 N. E. 401; *Morroney v. New York*, 49 Misc. 307, 97 N. Y. Supp. 642, affirmed in 117 App. Div. 843, 103 N. Y. Supp. 1135.

And, where a street was unimproved, and had an unfrequented path on each side; and a person who had contracted to improve the street had run a furrow with a plow along what was intended to be a sidewalk on one side of the street; and, on the evening of that day, a person attempted to cross from one path to the other during a violent storm and fell into the furrow and was injured,—the accident was one which no human foresight could have anticipated; and the city was not liable therefor. *McNish v. Peckskill*, 91 Hun, 324, 36 N. Y. Supp. 1022.

And a trench, dug in a street for the purpose of supplying heat to the city library building, which is partly filled, part of which, on account of inability to obtain material, is left open awaiting the arrival of such material, is not of itself a nuisance, so that the city will be held liable in damages to one who drives into the ditch and is injured. *Garnetz v. Carroll*, supra.

The duty of a municipality is to keep its streets free from obstructions of every kind, however; and there is no difference in principle between a dangerous obstruction in the street, resulting from a hole or excavation, and an equally dangerous obstruction resulting from matter thereon which is liable to cause one to slip and to be injured. *O'Dwyer v. Northern Market Co.* 24 App. D. C. 81.

And a city has no right to permit or make a dangerous excavation in one of its streets, or allow the same to be made in a dangerous manner, unless it causes such care to be used that others exercising ordinary care will not be injured thereby. *Joliet v. Seward*, 99 Ill. 267; *Cleveland v. St. Paul*,

18 Minn. 279, Gil. 255; *Nitz v. Toledo*, 22 Ohio C. C. 454.

And a city which permits an unguarded pit or excavation crossing a street to exist to the peril of travelers disregards one of its plainest duties, and is guilty of negligence. *Birmingham v. Lewis*, 92 Ala. 352, 9 So. 243; *Montgomery v. Bradley* (Ala.) 48 So. 809; *Pierce v. Wilmington*, 2 Marv. (Del.) 306, 43 Atl. 162; *Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358; *Case v. Waverly*, 36 Iowa, 545; *Baltimore v. Holmes*, 39 Md. 243; *Baltimore v. Pendleton*, 15 Md. 12; *Muncy v. Bevier*, 124 Mo. App. 10, 101 S. W. 157; *Davenport v. Ruckman*, 10 Bosw. 20, 16 Abb. Pr. 341, affirmed in 37 N. Y. 568; *Uhrichsville v. Fisher*, 45 Ohio L. J. 229; *Hysell v. Central City* (W. Va.) 61 S. E. 43.

And if it is left in the street or highway after the city has knowledge of its existence, or, by the exercise of reasonable care, should have knowledge of its existence, the city is liable for an injury resulting to a person in the exercise of ordinary care. *Pierce v. Wilmington*; *Case v. Waverly*; *Cleveland v. St. Paul*; *Muncy v. Bevier*; and *Nitz v. Toledo*,—*supra*.

And an allegation in a complaint that a deep, dangerous trench or ditch was excavated in and across the traveled part of a street, and was suffered to remain in an open and exposed condition, is sufficiently specific in description of the defect charged to have caused the injury. *Sherman v. Oneonta*, 49 N. Y. S. R. 267, 21 N. Y. Supp. 137.

And it warrants the admission of evidence that a ditch or trench dug in the street by a water company for the purpose of laying its pipes had been left 2 feet below the regular grade of the street, and that a ridge of earth about 2 feet above the regular grade had been left along either side of such trench, such evidence not being objectionable as proving a mound to have been the cause of the injury, when the complaint alleged the existence of an unguarded trench. *Ibid*.

So, where the authorities of a city had power to forbid an excavation in a street, and knew of its existence and did not forbid it, they will be deemed to have permitted it. *Sterling v. Thomas*, 60 Ill. 264.

And, where an open trench with an embankment or heap of dirt from the excavation is created by the water board of a city, and allowed to exist for two months upon the traveled part of one of the city streets; and the hole is left entirely unguarded by any barrier and unprotected by light; and a person is injured thereby,—the city is liable for the injury because it permitted the street to be used after notice of its dangerous condition. *Pettengill v. Yonkers*, 25 N. Y. Week. Dig. 451, 4 N. Y. S. R. 830.

And, where a railroad company dug a ditch across a street, and prepared no means of crossing it, and no warning was placed at the ditch, and the street was not lighted, and a stranger who knew nothing of the ditch drove into it in the night, and an injury resulted, the question of the negligence of the 20 L.R.A. (N.S.)

city in permitting the condition is one of fact for the jury. *White v. San Antonio* (Tex. Civ. App.) 25 S. W. 1131.

So, digging post holes in a street is a public nuisance although it is done in a part of the street not used or susceptible of use by the public by reason of natural obstructions. *Wright v. Saunders*, 65 Barb. 214.

And, where a person was hurt by falling into a gully or ditch in a public alley between the sidewalk and the street, the question whether the gully or ditch, in the place where it was, was such an excavation as to render the thoroughfare unsafe for travel by day or night, is one of fact for a jury under proper instructions. *Harrell v. Macon*, 1 Ga. App. 413, 58 S. E. 124.

So, a municipal corporation which temporarily swings from its place as a portion of a street a bridge, thus creating a perilous chasm in the street, is under the duty to adopt such measures as are sufficient to give reasonable notice thereof, or such barriers as will afford reasonable protection to persons traveling in the usual manner. *Chicago v. McDonald*, 57 Ill. App. 250.

And a city is liable in damages for an injury caused by holes in the planking of a roadway over railroad tracks or a ditch, where the defect in the planking had been permitted to remain unheeded for a long time before the accident, and there was abundant time when by reasonably frequent examinations, it ought to have been known and remedied. *Chicago v. McCabe*, 93 Ill. App. 288; *Odon v. Dobbs*, 25 Ind. App. 522, 58 N. E. 562.

So, a hole 6 feet long, 2 feet wide, and 2 feet deep, which had been in a street for seven or eight months, and was concealed by water, creates a dangerous condition of the street, within the meaning of the rule that a city is bound to use reasonable care to keep its streets in a reasonably safe condition for the use of the traveling public. *Purcell v. Chicago*, 231 Ill. 164, 83 N. E. 137.

And the question whether a municipal corporation has exercised a reasonable degree of care in respect to an unpaved and in a measure unimproved public street by permitting the existence therein for a month or more of a rut from 8 to 18 inches in depth, 2 to 3 feet in length, and 7 to 10 inches in width, is one for the jury to determine, in an action for an injury caused thereby. *Brush v. New York*, 59 App. Div. 12, 69 N. Y. Supp. 51.

So, evidence that a hole in a street, into which a person stepped and was injured, was near the sidewalk line, and about 3 feet long, 4 to 6 inches wide, and 8 inches deep, and at the time of the accident was filled with slush caused by melted snow, and had existed for some three months prior to the accident, justifies a finding, in an action for the injury, that the city was negligent. *Finnegan v. Sioux City*, 112 Iowa, 232, 83 N. W. 907.

And the existence in a paved roadway of a street in a city of a hole 7 inches deep is

sufficient to authorize a finding of negligence on the part of the city which will render it liable for personal injuries sustained by a person stepping into the hole in the night. *Miller v. New York*, 104 App. Div. 33, 93 N. Y. Supp. 227.

So, while a city has full power to alter the grade of a street to improve and to modify it in its discretion, the city authorities have no right to dig pits in the public streets, and are bound, as all other persons are, to use ordinary care and diligence in their operations. *Milwaukee v. Davis*, 6 Wis. 377.

And the act of a municipal corporation of making a hole in a highway in order to ascertain whether repairs were required there, and omitting to replace the materials, or fill up the hole, or place a light there, by reason of which a person crossing the road fell across the materials and into the hole, gives the person injured a cause of action, within the meaning of a statute limiting the right of the plaintiff to sue on a cause of action after three months have expired. *Pearson v. York County*, 41 U. C. Q. B. 378.

And, where a city permitted a trench to be dug in a street adjacent to a building, the basement of which extended under the sidewalk, and during a heavy rain water accumulated in the trench and percolated through the wall into the basement and injured goods therein, if the city knew the danger to be apprehended from an unusual rainfall in case the culvert or gutter should become obstructed, and if it knew, or should have known, that the culvert was closed, and yet took no care to prevent injury to neighboring property, it was liable for damages naturally resulting from its neglect. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773, affirming 40 App. Div. 320, 57 N. Y. Supp. 968.

But a statement of witnesses, in an action against a city, that there was a hole, washout, or depression at the place in question extending into the beaten path, does not justify the submission to the jury of the issue whether the defect consisted of a depression, hole, or washout in the highway, extending into the ordinary traveled path. *Collins v. Watervliet*, 114 N. Y. Supp. 346.

So, whether it was negligence upon the part of a municipal corporation to construct a bridge of a width less than the traveled portion of the street, thus leaving an uncovered hole in the street, is a question of fact for a jury. *Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753.

And the rule is the same where a traveler's horse was injured by falling into an open trench in a public street, with reference to the question of negligence upon the part of the municipal corporation in permitting the existence of the trench. *Wood v. Bridgeport*, 143 Pa. 167, 22 Atl. 752.

And, where an independent contractor working under the supervision of a city inspector cut an opening in an asphalt pavement on a street, and, during a suspension of the work, put in a temporary filling, 20 L.R.A. (N.S.)

which washed out during a heavy rain, and a person was injured by driving into the opening, the city cannot escape liability on the claim that the accident was due solely to the rain, since it was its duty to anticipate and provide for the natural effect of rain on earth excavated and replaced, and to foresee that if rain gathered upon the street it would naturally tend to soak into this opening, where the rest of the street was asphalted. *Newman v. New York*, 57 Misc. 636, 108 N. Y. Supp. 676.

An ordinance providing that anyone who shall dig, or cause to be dug, any excavation on or adjoining any highway, street, alley, or sidewalk within the limits of the city, and shall leave the same unfenced or not securely covered, shall be deemed guilty of a misdemeanor, however, does not apply to the municipal corporation itself; and a violation of the ordinance would not, as against the city, constitute negligence *per se* so as to hold it liable to a person injured by stepping into a ditch in the nighttime in a public street within the corporate limits of the city. *Browne v. Bachman*, 31 Tex. Civ. App. 430, 72 S. W. 622.

And specifications given to a contractor by a city, showing how the work of laying a sidewalk should be done, and the written report of the engineer showing the excavation necessary to be made, are not competent evidence of the depth of the excavation, in an action against the city for an injury caused by it. *Moon v. Middletown*, 14 Ohio C. C. 498.

(2) For sewer purposes.

A city is liable for injuries received by a person falling into an open street sewer, where its officers had actual knowledge of the displacement of the cover thereof, and failed securely to cover it. *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483.

And a municipal corporation which, in constructing a sewer in a public street, left a manhole uncovered for several weeks, and near it a pile of sand, with knowledge that children were accustomed to play in the sand, is liable to a child of tender years, who, while at play in the sand, fell into the manhole and was injured. *South Bend v. Turner*, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271.

And, where the work of constructing a manhole in a street is done under the supervision and authority of the city, the city is responsible for the way in which it is done. *Kankakee v. Linden*, 38 Ill. App. 657.

And a manhole situated just outside the sidewalk, and at the corner formed by the intersection of two cross walks with the sidewalk, in a city, should be kept reasonably safe by it, having reference to the probable use which the public will make of it; and, where the cover is permitted to remain in such a condition that, when stepped upon, it will drop down and let the traveler fall in, the city is liable for an injury resulting therefrom. *Lincoln v. Detroit*, 101 Mich. 245, 59 N. W. 617.

So, it is gross negligence upon the part of a city to permit an excavation for a sewer over 70 feet long and about 8 feet deep to remain protected only at the head of the excavation. *Crowther v. Yonkers*, 39 N. Y. S. R. 748, 15 N. Y. Supp. 588.

And a hole about 5 feet square and 10 or 12 feet deep in a street between the tracks of an electric railway, which had been there a considerable time and was used in taking out earth from an underground sewer then being constructed, which hole was left unguarded, and there was nothing on the surface of the street to indicate its existence except a small quantity of dirt not far away, warrants the jury, in an action for an injury occasioned by a person falling into the hole, in finding the existence of a defective condition of the street. *Block v. Worcester*, 186 Mass. 526, 72 N. E. 77.

And a deep trench dug across the tracks of a street railway company for the purpose of laying a drain under a permit from the city, which has been in existence for four or five days and is left unguarded in a portion of the street, open to travel, and filled with soft mud, and looking like the rest of the street when wet and muddy, cannot be held, as matter of law, not to be a defect in the street. *Hyde v. Boston*, 186 Mass. 115, 71 N. E. 118.

So, although a city exercised care in re-filling a sewer ditch, if a dangerous hole was caused by the sinking of the street over the sewer pipe, and the city knew of the existence of the hole in time to repair the same by reasonable diligence, and failed to do so, it is chargeable with negligence. *Dallas v. Muncton*, 37 Tex. Civ. App. 112, 83 S. W. 431.

And a hole about 2 feet deep in a street, caused by a flow of surface water on the roadway to a sewer basin, produced by the particular manner in which the sewer basin was constructed and the situation in which it was placed, which hole or depression had existed in the same condition for six weeks previous to the accident in question, warrants the jury in finding, in an action brought by a person who drove into the depression and was injured, that the defect was one for which the municipality was responsible. *Lehmann v. Brooklyn*, 30 App. Div. 305, 51 N. Y. Supp. 524.

(o) Defects and obstructions in sidewalks and crossings.

(1) Breaks, excavations, and depressions.

While a sidewalk need not be continuous throughout the whole length of a street, when one is built or suffered to remain on a part of a street only, the ends or termini must be so graduated to the natural level of the street as to permit pedestrians safely to pass to and from it without being obliged to climb down over obstructions. *Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144, 37 N. W. 609; *Plainview v. Mendelson*, 65 Neb. 85, 90 N. W. 956.
20 L.R.A. (N.S.)

And, where a cement walk was so built that from the top of it to the dirt and stone below at the end of it, directly in line with the sidewalk and in the public street, there was a perpendicular descent or drop of about 2 feet, it is a question for the jury, in an action for an injury resulting therefrom, whether the city was guilty of negligence in permitting the existence of such a condition. *Chicago v. Carlson*, 138 Ill. App. 582.

So, an excavation in a sidewalk is a defect in the sense that there is a want of something necessary to make a complete sidewalk; and an instruction, in an action for damages by one who fell into the excavation, referring to it as a defect or excavation, is not prejudicial error. *Kansas City v. Birmingham*, 45 Kan. 212, 25 Pac. 569.

And an excavation in a sidewalk, in a populous city, of such dimensions and in such a part of it that foot passengers, if they fall into it, may suffer great harm, left at night without guard, protection, or light, is a nuisance for which the city is liable. *Walker v. Springfield*, 3 Ohio Dec. Reprint, 567; *Denver v. Solomon*, 2 Colo. App. 534, 31 Pac. 507; *Wallace v. New York*, 18 How. Pr. 169.

And which the city authorities may summarily abate, though it was created by an independent wrongdoer. *Walker v. Springfield*, supra.

And the act of municipal authorities in leaving open a ditch 3 feet deep and 2½ feet wide and 4 feet long, at a point where the ditch crosses a part of the sidewalk, is negligence imposing liability for a resulting injury. *Russell v. Monroe*, 116 N. C. 720, 47 Am. St. Rep. 823, 21 S. E. 550.

And, where the platform of a set of wagon scales situated in the middle of a city market building had sidewalks laid from opposite sides of the street in the center of which the building stands, to which steps were constructed leading from the platform of the market building to the scales on each side, making the platform accessible to pedestrians from every direction; and it had been used as a common thoroughfare by people generally for a great many years; and the scales were removed by the city or with its knowledge, and the hole or excavation caused thereby was left unguarded and unlighted,—the city is liable for injuries to pedestrians who without knowledge of the danger are injured thereby. *Nitz v. Toledo*, 22 Ohio C. C. 454.

So, where the owner of a lot abutting on a street, in erecting a building thereon, makes an excavation abutting upon the sidewalk; and the town authorities have knowledge of the excavation; and a traveler, without fault on his part, falls into it and is injured; and the hole is unguarded and no danger signals are displayed, the person injured can sue either the city or the lot owner. *Brown v. Louisburg*, 126 N. C. 701, 78 Am. St. Rep. 677, 36 S. E. 166.

And the trial court, in an action against a municipal corporation for an injury in a

street, may properly assume that an excavation several feet deep in the line of the sidewalk is a defect in the walk unless properly guarded. *McGrath v. Bloomer*, 73 Wis. 29, 40 N. W. 585.

And an unguarded opening 4 feet 9 inches in width, extending from the building line into the street 5 feet 6 inches, into which persons passing along the sidewalk or to or from the building in the night might accidentally fall without fault on their part, in a much frequented street, is a public nuisance; and neither lapse of time, nor the existence of like nuisances elsewhere with the consent of the municipality, will legalize it. *McNerney v. Reading*, 150 Pa. 611, 25 Atl. 57.

And, where a person fell into a trench across a footwalk which was in fact a wash-out caused by a flood which occurred about six weeks before the accident, the footwalk not being a sidewalk constructed in the ordinary manner, but an embankment of cinder and other material unguarded by railing or fence; and it was claimed by the city that the locality was protected by two red lights placed at each end of the opening, while the person injured testified that the red lights were not in place at the time of the accident, and several witnesses contradicted him, but they were not shown to have been present at the place of the accident,—the question of the contributory negligence of the person injured, and of the negligence of the city, is one for the jury; and a verdict and judgment in favor of the person injured will be sustained. *Strahl v. Philadelphia*, 35 Pa. Super. Ct. 301.

And, if a gas company, with the knowledge and consent of the city in which it does business, has discharged steam into a city sewer under a sidewalk, it is the city's duty to notify the company to stop the flow of steam while the sidewalk is being repaired, if the steam comes through the sidewalk so as to conceal the opening made therein, and also to warn pedestrians of the danger; and, if it fails to do so, it is primarily liable to a pedestrian injured by falling into the hole. *Bowling Green v. Bowling Green Gaslight Co. (Ky.)* 112 S. W. 917.

The mere fact of the existence of an excavation in a sidewalk which the city had a right to permit to be made and the work upon which was progressing with proper haste, however, does not show a want of care upon the part of the city for which it can be held liable because of a resulting injury. *Cohn v. Kansas City*, 108 Mo. 393, 18 S. W. 973.

And, where lot owners on a street in a sparsely settled part of a city were directed to construct a sidewalk, and all but one complied, and the ends of the walk opposite the open space were a few inches above the ground, but there was no more danger in walking over it than over walks constructed with a break so that travelers are compelled to step up and down, is not so defective as to render the city liable for an injury caused thereby. *Shietart v. Detroit*, 108 Mich. 309, 66 N. W. 221.
20 L.R.A. (N.S.)

So, a rut made by a push cart in soft snow or slush which had frozen on a sidewalk and then had been covered by 1 or 2 inches of fresh snow is a condition incident to city pavements in variable winter weather; and failure to repair such a defect is not negligence which would render the city liable to one who caught his heel in the rut and fell and was injured. *Gardner v. Philadelphia*, 221 Pa. 247, 70 Atl. 721.

And a depression 4 feet long, 11 inches wide, and 3½ inches deep, near the curb in a city sidewalk 15 feet wide, which has existed for several years, is not such a defect as will render the city liable to a pedestrian who in the daytime falls or slips into such depression. *Schall v. New York*, 88 App. Div. 64, 84 N. Y. Supp. 737.

Nor is a scoop-shaped depression in the bricks in a sidewalk, about 1½ inches deep, about the width of 12 bricks, and extending about 3½ feet, a defect for which the city would be responsible under the Massachusetts statute. *Isaacson v. Boston*, 195 Mass. 114, 80 N. E. 809.

And a city is not liable for an injury resulting from an uncovered depression in the center of a sidewalk made up of two courses of flagstones, due to the edges of the flags where they were united being broken and the parts removed, the depression being about 2½ inches deep and about 2 feet 2 inches in length, and 7½ inches in width, the defect being of such a character that a reasonably prudent man would not anticipate danger to travelers from it. *Beltz v. Yonkers*, 148 N. Y. 67, 42 N. E. 401.

So, where a city rebuilt a portion of a sidewalk by nailing planks on the upper sides of the walk, and permitted other parts to remain unchanged, so that there was a difference of level of 2 inches at the ends of the plank nailed on the walk, over which a person fell and was injured, the defect was too slight to justify a recovery as for injuries resulting from defects in streets. *Kawiecka v. Superior (Wis.)* 118 N. W. 192.

But, where a walk was constructed of hexagonal cement blocks, and one of them 6 inches from the step of a store had become depressed by the operation of frost, and had fallen below the general surface of the walk at its outer side an inch and a quarter and at the inner side to a less extent; and this condition had existed for a sufficient length of time to establish notice to the city, and was upon a sidewalk extensively traveled and below a raised step at the entrance of a store over which patrons of both sexes were accustomed to pass,—the depression might constitute such a defect as to render the municipality liable for damages to a person injured thereby. *Bieber v. St. Paul*, 87 Minn. 35, 91 N. W. 20.

And a charge of a depression in a sidewalk, of 3 feet in width and 3 inches in depth, which caused a fall, and of knowledge of the defect upon the part of the municipality, and duty to repair and neglect to perform it, prima facie shows an actionable defect. *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424.

And, where there was a depression in a sidewalk of 3 or 4 inches where the cemented portion of the sidewalk joined the dirt walk, it is a question for the jury whether or not the sidewalk was in a reasonably safe condition for those exercising due care. *Taylor v. Manson* (Cal. App.) 99 Pac. 410.

So, a person who fell from stepping into a depression in a sidewalk, about 6 inches deep below the average surface of the walk, where two flags joined and separated in the depression, which depression was concealed by snow and slush at the time of the accident, is entitled to recover of the municipality for her injury where it had notice of the depression. *Kellow v. Scranton*, 195 Pa. 134, 45 Atl. 676.

And, where a flag sidewalk for a considerable distance was broken and defective, and there were depressions and holes, and at the point of injury one set of the flags across the sidewalk were higher than the adjoining set, and the person injured slipped on a piece of ice, and her foot was caused to go into a hole, and she was thrown down, she is entitled to go to the jury in an action for the injury, on the question of the negligence of the city. *Mayhood v. New York*, 119 App. Div. 100, 103 N. Y. Supp. 856.

(2) Holes.

The duty of a city to use ordinary diligence in maintaining a sidewalk in a reasonably safe condition for persons to use the same comprehends the duty of exercising ordinary care to keep the sidewalk free from such holes as might reasonably be deemed liable to cause injury to persons while walking along the walk. *San Antonio v. Wildestein* (Tex. Civ. App.) 100 S. W. 231; *West v. Eau Claire*, 89 Wis. 31, 61 N. W. 313.

And whether a hole in a sidewalk is or is not a defect is a question for the determination of a jury under proper instructions from the court. *Schroth v. Prescott*, 63 Wis. 652, 24 N. W. 405; *Ottawa v. Stricklin*, 45 Ill. App. 288.

One whose heel was caught in a hole in a sidewalk cannot recover of the city for the injury received if the hole was such as not to have led the officers of the city, in the exercise of ordinary care and prudence, to have anticipated danger to a pedestrian passing over such walk. *Carson v. Dresden*, 113 N. Y. Supp. 959.

And danger is not reasonably to be anticipated from the presence of a hole in a flagstone sidewalk, between 3 and 4 inches deep, 12 inches long, and about 6 inches wide, which condition has existed between six and fourteen years; and the city is not liable for an injury to a pedestrian from stepping into such a hole. *Powers v. New York*, 121 App. Div. 433, 106 N. Y. Supp. 166.

Nor is a hole in a sidewalk, 3 or 4 inches deep and about 2 feet long and 18 inches wide, apparently caused by the breaking off and sinking of one corner of a flagstone, such a defect as to charge the municipality 20 L.R.A. (N.S.)

with negligence, where it appears that the sidewalk had for a long time been in a disturbed condition caused partly by adjoining excavations for a subway over which the city had no control and partly by the construction of an adjoining building. *Henry v. New York*, 119 App. Div. 432, 104 N. Y. Supp. 440.

And a hole in a stone sidewalk, from 1½ to 2 feet in area and from 1½ to 3 inches deep below the level of the walk, the sides of which are not abrupt, which was caused by the breaking out of the top cement and the wearing of the grouting beneath, is not a defect which renders the walk not reasonably safe, within the meaning of a statute imposing upon municipalities the duty to keep their sidewalks reasonably safe. *Jackson v. Lansing*, 121 Mich. 279, 80 N. W. 8.

A city is liable for an injury caused by a hole in a city sidewalk, however, where the dangerous condition had existed for a long time before the accident, and the municipal authorities had full notice thereof, but made no apparent effort to have the same repaired. *Valparaiso v. Donovan*, 28 Neb. 406, 44 N. W. 449; *Wahoe v. Reeder*, 27 Neb. 770, 43 N. W. 1145; *Bloomington v. Mueller*, 71 Ill. App. 268; *Streator v. Hamilton*, 61 Ill. App. 509.

And holes in a board sidewalk, occasioned by pieces broken or decayed and removed therefrom, although but a few inches in depth, may, in legal contemplation, be such defects as to render the city liable for injuries resulting therefrom. *Lawrence v. Davis*, 8 Kan. App. 225, 55 Pac. 492; *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605.

And, where a hole in a sidewalk into which a person fell on a dark night was from 18 inches to 2 feet long, 5 or 6 inches wide, and about 4 inches deep, and had existed for six weeks or two months, it is a question for the jury, in an action for the injury, whether the city was guilty of negligence in omitting to repair or cause it to be repaired. *O'Brien v. Syracuse*, 31 App. Div. 328, 52 N. Y. Supp. 322.

And the same rule applies to one about 20 inches long and of an irregular width averaging about 3 inches. *Denver v. Hyatt*, 28 Colo. 129, 64 Pac. 403.

So, a hole or aperture in a sidewalk into which the toe of a pedestrian's shoe may pass sufficiently far to hold the foot fast, requiring force to remove it, is not such a minor defect that reasonably prudent men will not differ as to whether accidents should have been reasonably anticipated from its continuance; and the question of the negligence of the city in permitting it is one for the jury in an action for a resulting injury. *Morroney v. New York*, 49 Misc. 307, 97 N. Y. Supp. 642, affirmed in 117 App. Div. 843, 103 N. Y. Supp. 1135, which was affirmed in 190 N. Y. 560, 83 N. E. 1128; *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322.

And evidence tending to show that a hole in a street, into which a woman fell and

was injured, was in the edge of the traveled part of the road; that it was 18 inches deep and 2 feet wide; and that a board walk had formerly covered the hole, but had gradually become out of repair; and that the borough had received written notice of the existence of the hole, and had allowed it to continue for a long time without light or guard; and that an electric light of a defective character near the hole was not burning at the time of the accident; and that the night was dark,—is sufficient to go to the jury, in an action for the injury, on the question of the negligence of the municipal corporation. *Nudd v. Lansdowne*, 190 Pa. 89, 42 Atl. 474.

And the rule is the same where a person was injured by stepping into a hole in a sidewalk, caused by a plank being broken several days before; and there were several churches and a schoolhouse on the street; and it was much traveled by those attending the churches and the school, as well as by those living in the street; and the planks of the walk were raised 10 or 12 inches from the ground; and a driveway crossed the walk; and the plank was broken by a loaded wagon. *Laurie v. Ballard*, 25 Wash. 127, 64 Pac. 906.

So, a hole in a sidewalk, about 10 inches in width and between 3 and 4 feet in length and about 1 foot in depth, is a dangerous defect, failure to repair which is negligence upon the part of the city. *Chicago v. Crooker*, 2 Ill. App. 279.

And, where planks were missing in a sidewalk, and boards broken, and stringers not in place, and pieces not nailed, and young men in passing had been tripped up by it, and an aged man, who was conducting his little granddaughter along the walk, stepped into a hole in the sidewalk in an attempt to prevent the little granddaughter from falling, which caused him to fall, the city is liable for the injuries received by him. *Gueble v. Lafayette*, 121 La. 909, 46 So. 917.

So, a person suing a city for an injury, who proves that the sidewalk has a 5-inch crack between two parallel boards composing it for its entire length, and that the city officers had actual knowledge of its condition, and that she unwittingly stepped into the crack and was caused to fall, and was injured, makes out a prima facie case, and should not be held to strict proof of the exact point in the sidewalk where she fell, or the exact distance which her foot went into the crack. *Caskey v. La Belle*, 101 Mo. App. 590, 74 S. W. 113.

And where, in the middle of a sidewalk 8 feet wide, there was a hole 26 inches long on the longest side 5 inches wide in the widest place tapering to a point each way, and 2 inches deep, which hole had remained for a number of years, and in which, when the earth was soft from moisture, a person's foot would sink into the ground and might become entangled or wedged between the stones, a jury, in an action for an injury caused thereby, is justified in holding the municipal corporation to have been negligent. *Beltz v. Yonkers*, 74 Hun, 73, 26 N. Y. Supp. 106.

gent. *Beltz v. Yonkers*, 74 Hun, 73, 26 N. Y. Supp. 106.

So, the act of a city in allowing a hole in a bridge on a sidewalk, caused by the removal of a plank, to remain on one of the principal streets in the city within a short distance of a market house from five to twenty days, is grossly negligent, rendering it liable for a resulting injury. *Griffin v. Johnson*, 84 Ga. 279, 10 S. E. 719.

And proof that a bridge through which a person fell and was injured had been for a long time before in a very bad condition, and that at the point of the accident there was a hole in the sidewalk one foot wide and 5 feet long, and that it was 35 feet from the bridge to the ground beneath, and that this hole had been there more than a month prior to the accident, is sufficient to support a verdict in favor of the person injured, against the city. *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34.

Nor does a declaration in an action against a city, charging that the plaintiff slipped into a hole in a sidewalk, and testimony that he stepped into the hole, create a material variance. *District of Columbia v. Haller*, 4 App. D. C. 405.

And a complaint charging that the defendant city negligently allowed a dangerous hole to remain in one of its sidewalks along which the public were accustomed to pass sufficiently charges the defect in the sidewalk, and notice of its existence. *Lord v. Mobile*, 113 Ala. 360, 21 So. 366.

And one charging that a cross plank of a walk was broken and depressed at the center to the ground is not insufficient merely because it fails to state the depth of the hole thereby caused. *Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311.

And that a hole in a sidewalk by which a person was injured was big enough for the witness to put his foot into it is a fact to which an ordinary witness may testify without being an expert. *San Antonio v. Talerico* (Tex. Civ. App.) 78 S. W. 28.

(3) *Hatchways, areas, and other openings.*

While a lot owner in a city may use space under the sidewalk in front of his lot by constructing and maintaining for his convenience hatchways and coal holes in the sidewalk, covering them when not in actual use, so that they will not affect the safety of the walk for ordinary travel, and when in use guarding them to prevent persons traveling on the walk in the exercise of ordinary care from falling into them, this rule does not shield a municipality from the consequences of knowingly permitting such an opening to be used in a negligent manner. *Whitty v. Oshkosh*, 106 Wis. 87, 81 N. W. 992; *Steger v. Milwaukee*, 110 Wis. 484, 86 N. W. 161.

And, if they are negligently left open for such a length of time that the municipal authorities ought, in the exercise of rea-

sonable diligence, to know and remedy the mischief, the city may be liable for injuries occasioned thereby to travelers exercising ordinary care. *Ibid.*

A city which allows a house owner to maintain a hatchway in the sidewalk in front of his premises is under duty to see that such hatchway is so located and constructed as not to be unnecessarily insecure for persons passing when it is open. *McClure v. Sparta*, 84 Wis. 269, 36 Am. St. Rep. 924, 54 N. W. 337.

And whether a sidewalk was defective by reason of the improper location of a hatchway therein by an abutting owner is a question for the jury, in an action for damages against the city for an injury resulting therefrom. *Ibid.*

So, where the cover of a coal hole was not defective or liable to slip when properly in position, but on pleasant days it had been propped open a few inches and left in that condition, such condition constituted a defect in the sidewalk for which the city is responsible. *Stege v. Milwaukee*, supra.

And a city ordinance prescribing as to the structure and material of covers of coal holes in sidewalks is admissible in evidence in an action against a city for a personal injury alleged to have been caused by the defective cover of a coal hole in a sidewalk. *Hearn v. Chicago*, 20 Ill. App. 249.

And so is an ordinance of the city requiring area ways to be properly guarded, in an action against the city for damages for injuries sustained by falling into an unguarded area way. *McNerney v. Reading*, 150 Pa. 611, 25 Atl. 57.

But a city cannot be held liable for an injury sustained by a person in consequence of stepping upon the displaced cover of a coal hole in a sidewalk, in the absence of evidence indicating any defect or tending to show that the cover was out of its socket for a sufficient length of time to have enabled the city officers to discover its condition and replace it, or that they had reasonable cause to apprehend that it might become displaced by ordinary use. *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

So, it is negligence upon the part of a municipal corporation to permit the owner or occupant of premises to make an opening in the adjoining sidewalk and permit a trapdoor for such opening to be left open, so that pedestrians may fall in. *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271.

And cellar doors opening out on the sidewalk and frequently or negligently kept or left open endanger the use of the sidewalk in the night, and the persons of imperfect vision by day; and the city is liable for injury to persons falling into such cellars if it has notice of such negligent use of the cellar doors. *Chapman v. Macon*, 55 Ga. 506; *Smith v. Leavenworth*, 15 Kan. 81.

So, where the owner of a building and his tenants maintained a cellar way from a traveled street to a basement with a trap door therein, which they left open without rail or guard, they are guilty of negligence; and 20 L.R.A. (N.S.)

whether the city is also guilty of a like negligence is a question for the jury, depending upon the method of construction, and the use made of the streets, and the number of times the door has been left open and unguarded, and other relevant facts and circumstances of the case. *Earl v. Cedar Rapids*, 126 Iowa, 361, 106 Am. St. Rep. 361, 102 N. W. 140.

And, where a person falls into a cellar way protruding into a city street some 3 feet, left open on a dark night without any guard or protection around it, it is only necessary for the person injured to show, in order to recover, the exercise of ordinary care and diligence in passing over the street. *Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217.

And, where a person walking a city street stepped toward a doorway and stubbed his toe against the step or doorsill and stumbled back and fell into an area in the sidewalk used by the adjoining proprietor, by the permission of the municipality, for the purpose of passing goods into the cellar, which was then open and being used, the municipality is liable to the person injured for negligence in leaving the opening without an adequate guard. *Homewood v. Hamilton*, 1 Ont. L. Rep. 266.

So, where a cellar way in a street was unguarded in front, but was protected on either side by a coping, and a person was injured by a fall into the cellar way over the coping, the question of the negligence of the city in permitting such cellar way, and of contributory negligence of the person who fell in, is one of fact for the jury, in an action for the injury. *Link v. New York*, 82 App. Div. 486, 81 N. Y. Supp. 577.

And the city is liable for injuries sustained by a person walking in an alley upon a dark night, who fell into a cellar way therein without negligence upon his part, where the alley was open for public travel, and the cellar way was located in it and had no railing guard or other protection around it, and it was 17 feet 5 inches in length and 5 feet 6 inches in depth. *Fletcher v. Ellsworth*, 53 Kan. 751, 37 Pac. 115.

And, where an injury resulted from a cellar window occupying a part of a sidewalk, the existence of similar apertures in other parts of the city may be shown in an action for the injury, as bearing upon the manner in which the streets of the city are used, the purpose of the sidewalks, and how far openings in them are obstructions to their proper use; but the fact that similar apertures had existed for a long time and to a great extent would not authorize a finding that such apertures were not actionable obstructions. *Bacon v. Boston*, 3 Cush. 174.

And, where there was a cellar under a sidewalk; and in the sidewalk were double trapdoors nearly 7 feet long, the sidewalk being about 10 feet 3 inches wide; and the doors were left open; and a person passing along the street fell into the cellar; and no barriers were constructed at the opening; and the ordinary method of using the doors was to lay them flat on the sidewalk; and the city knew of the existence and nature

of the doors and the method in which they were built and used,—the negligence of the city in permitting the existence and use of the doors without barriers is a question of fact for the jury, in an action for the injury. *Sweeney v. Butte*, 15 Mont. 274, 39 Pac. 286.

So, if the construction of a grating over an opening leading to the basement of a building was such as to make it constantly dangerous to public travel upon the walk by its liability to be left out of place, and proper supervision and care on the part of the city authorities would have discovered the danger and guarded against it, the city would be liable for an injury resulting from its displacement. *Littlefield v. Norwich*, 40 Conn. 406.

And, where excavations are made for admitting light at basement windows, the city should require the owner to place guards as security against possible accidents; and it is negligence in the city to allow them to remain open. *Lombard v. Chicago*, 4 Biss. 460, Fed. Cas. No. 8,470; *Galesburg v. Higley*, 61 Ill. 287.

Permission by a city to an abutting owner to use the space under a sidewalk in front of his property with an opening thereto in the walk, and the proper use thereof, however, do not violate any duty owing to the public by the city. *Whitty v. Oshkosh*, 106 Wis. 87, 81 N. W. 992.

And a municipal corporation cannot be held as a pure matter of law, irrespective of all questions of locality and surroundings, liable for an injury received by a person who falls into an opening made for a stairway, where the entrance only is left open. *Franklin v. Harter*, 127 Ind. 446, 26 N. E. 882.

And the act of a city in permitting the existence of a stairway leading to a basement in a sidewalk next to and parallel with a building, into which opening a person with defective eyesight fell, the place being lighted and having a rail running parallel with the building along the outside of the opening, leaving 6½ feet of sidewalk beyond and outside of the opening, is not negligence upon the part of the city which will charge it with liability for the injury. *Edwards v. Raleigh* (N. C.) 63 S. E. 1040.

Nor is it enough to warrant a recovery against a city by a person, who fell into a vault under a sidewalk, which had been left open, and was injured, to prove that the cover was insecurely fastened at the time of the accident, and that, by reason thereof and without fault on her part, she was injured. *Kenyon v. Indianapolis*, Wilson, Super. Ct. (Ind.) 129.

So, municipal corporations are not bound to maintain railings in front of the numerous basement offices and shops that line their business streets. *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677.

And, where a stairway descending from a sidewalk to the basement of an abutting building was parallel to the sidewalk, and there was a sufficient barrier on the side

thereof, and it did not encroach upon the sidewalk, the city sufficiently performed its duty by maintaining a sufficient barrier between the sidewalk and the stairway on the side thereof, and was not bound to cause a barrier or gate to be maintained at the entrance thereof. *Fitzgerald v. Berlin*, 51 Wis. 81, 37 Am. Rep. 814, 7 N. W. 836.

So, whether the use of cellar doors opening out on the sidewalk, and leaving them open, is proper and legitimate for the business of the owner, or capricious and unnecessary, and, if legitimate, whether habitually used so negligently as to endanger passers-by, are questions for the jury, in an action for an injury resulting from falling into the cellar. *Chapman v. Macon*, 55 Ga. 566.

And, where a grating over a coal hole in a sidewalk was hung on hinges and designed to be thrown back against the building when coal was being delivered, and, when so thrown back, was dangerous and liable to inflict injury upon those engaged in that business unless securely fastened; and the appliances furnished by the city for that purpose were inadequate, but many loads of coal had been safely delivered down this hatchway,—the question of the negligence of the city is one for the jury. *Galvin v. New York*, 112 N. Y. 223, 19 N. E. 675, reversing 22 Jones & S. 295.

Where an injury results from falling into a cellar the door in the sidewalk being left open by the owner of the property, there are two questions for the jury in an action against the city for the injury: First, Is the system adopted by the city in regard to allowing cellars under its sidewalks reasonably calculated to insure the safety of those who travel thereon? and, second, if so, is the city liable in the special case by reason of negligence in the owner, coupled with notice, actual or constructive, to the city? *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95.

The question of the liability of a municipal corporation for injuries to travelers, caused by persons using the space under the street, is treated in a note to State ex rel. *Crow v. St. Louis*, 61 L.R.A. 583.

(4) Steps.

It would be unreasonable and impracticable to require of cities and towns that they should so construct all their sidewalks that at the junction of rectangular streets the sidewalks should meet upon exactly the same level. *Morgan v. Lewiston*, 91 Me. 566, 40 Atl. 545; *Shippy v. Au Sable*, 65 Mich. 495, 32 N. W. 741.

And the general rule has been held to be that the existence of a properly constructed step from a sidewalk to a street crossing is not a defect which will render a city liable for accidents to pedestrians, caused thereby. *Miller v. St. Paul*, 38 Minn. 134, 36 N. W. 271; *Shippy v. Au Sable*, supra.

The fact that a sidewalk was higher than an adjoining cross walk does not constitute a defect for which the city is liable, where the alleged defect is a part of a plan adopt-

ed which was rendered necessary by the existing conditions. *Bigelow v. Kalamazoo*, 97 Mich. 121, 56 N. W. 339.

And a municipal corporation cannot be held liable for an injury resulting from a fall caused by the fact that a sidewalk built by an abutting owner was about 4 inches higher than the cross walk to which it joined. *Shippy v. Au Sable*, supra.

And, where municipal authorities established a uniform grade for the sidewalks of a street; and a property owner put down a concrete pavement in accordance with this grade, which was about 12 inches higher than the old grade of the adjoining pavement; and the municipality adopted as the best plan of relieving the obstruction a step between the two grades of sidewalk; and the arrangement was a satisfactory one and has been continuously used for six months,—the corporation cannot be held liable for an injury to a person who fell on the step. *Rotsell v. Warren*, 10 Pa. Super. Ct. 283.

So, where, at the junction of two streets, the walk upon one street upon one side and in the middle is from 1 to 2 inches lower than that on the other street, and, upon the extreme outside of the former street walk it is $5\frac{1}{2}$ inches lower than the other walk, the whole width of the walk being about 6 feet, this condition does not constitute a defect within the meaning of the Maine highway statute. *Morgan v. Lewiston*, 91 Me. 566, 40 Atl. 545.

Where, at the junction of two streets, the sidewalk upon one was higher than that upon the other, making a perpendicular drop of from 6 to 9 inches from the one sidewalk to the other; and this was on one of the most public thoroughfares in the city; and the condition had continued from one to two months; and there was no guard or light to call attention to the inequality, however,—the question of the unsafe condition of the sidewalk, and consequently of negligence on the part of the city in permitting it, is one of fact for a jury. *Tabor v. St. Paul*, 36 Minn. 188, 30 N. W. 765.

And, where a sidewalk of one street in a city was from 21 inches to 3 feet higher than the sidewalk of another at their intersection; and in passing from one to the other there was a step about half way down, and a man of sixty-two years of age, carrying on his shoulder a heavy basket, while attempting to go down, missed the step and fell, it being dark at the time and the street light having been extinguished,—the questions whether the sidewalk was insufficient or out of repair at the time, and, if so, whether the defect was the cause of the man's injury, are properly submitted to a jury. *Berg v. Milwaukee*, 83 Wis. 599, 53 N. W. 890.

And, where, at the intersection of two streets, one was somewhat lower than the other, and, for convenience of travelers, a plank was placed over the curb, gutter, or sluice in the lower street to be used as a step between the levels of the two streets, and this plank was permitted to remain un-

fastened so that, where two persons were walking together, and one stepped upon one end the other end flew up and injured his companion, evidence of the substitution of a stone step for the loose plank shortly afterwards is admissible in an action for the injury, not for the purpose of showing negligence of the municipal corporation, but for the purpose of showing control over the place. *Brown v. Towanda*, 24 Pa. Super. Ct. 378.

So, it has been held that a street crossing of plank, 14 inches above the level of the sidewalk, is a dangerous obstruction. *Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947.

And that a street crossing consisting of a plank raised from 2 to $2\frac{1}{2}$ inches in height above the level of a sidewalk is a dangerous obstruction; and, where the city negligently suffered such an obstruction to remain in one of its public sidewalks and street crossings for an unnecessary period of time, it is liable to one who was injured while passing over the sidewalk and crossing without notice or knowledge of the obstruction. *Glantz v. South Bend*, 106 Ind. 306, 6 N. E. 632.

So, the use of steps in a sidewalk of a municipal corporation is one of the several permissible means of overcoming a steep grade. *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051.

And the building of a step in a sidewalk is not of itself such negligence as will make the municipality liable for injuries to a pedestrian from a fall caused by the step, if the plan adopted is not palpably unsafe, and from the nature of the grade, the municipal authorities deem the step necessary and proper. *Teager v. Flemingsburg*, 109 Ky. 746, 53 L.R.A. 791, 95 Am. St. Rep. 400, 60 S. W. 718; *Clark v. Chicago*, 4 Biss. 486, Fed. Cas. No. 2,817.

Whether the use of steps in a sidewalk of a city as a means of overcoming a steep grade is the best means of constructing a particular sidewalk is a question for the municipal authorities to decide; and their decision is not subject to review by the courts. *Hoyt v. Danbury*, supra.

And, where a stone walk terminated, and the continuation was a dirt walk, and the surface of the stone and the adjoining dirt were not flush at their junction, the surface of the former rising above that of the latter by a distance of about $2\frac{1}{2}$ inches in the center and about 5 inches on the outer edge of the walk, the defect is too slight to render the municipal corporation liable for an injury resulting therefrom. *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712.

So, where a sidewalk in a city is constructed with a step at a change of grade, the city is not liable in damages to one who sustains an injury by falling on the step when it is slippery with ice. *Chicago v. Bixby*, 84 Ill. 82, 25 Am. Rep. 429.

A municipal corporation is liable for an injury caused by an unsafe condition of a sidewalk, consisting of a drop of 7 or 8 inches in

height from a new walk to an old one, against which a pedestrian walked and was injured, however, although the defect existed in the plan adopted by the city for the construction of the sidewalk, there being no necessity or reason for such defect. *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817.

And, where part of a sidewalk on a street is at grade and a part of it is not, requiring a step of 7 inches between them, and this condition has remained for a long time, and, in consequence, a person passing in the night is injured, the city is liable for the injury. *Toledo v. Higgins*, 12 Ohio C. C. 541.

So, if a city permitted an owner of land abutting upon a street to raise his sidewalk about 6 inches, when another abutting owner immediately adjacent was, owing to the city's negligence, allowed for more than a year, to the knowledge of its officers, to let his sidewalk remain about 6 inches below the regular grade at a place covered by a long shed where there was little or no light, the city is liable for an injury to a traveler caused by the difference in grade of the two sidewalks. *Blume v. New Orleans*, 104 La. 345, 29 So. 106.

And, where a new sidewalk was constructed, and at the point where the new sidewalk and the old one met the new one was several feet higher than the old one; and there were no guards to prevent persons from walking on the new sidewalk or to prevent their falling therefrom, and no lights to enable persons to see the condition of the sidewalk or to avoid injury; and a person fell from the new sidewalk to the old and was injured,—she is entitled to recover of the city for her injury. *Abilene v. Hendricks*, 36 Kan. 196, 13 Pac. 121; *Hogan v. Chicago*, 168 Ill. 551, 48 N. E. 210, reversing 59 Ill. App. 446.

So, three flagstones piled on a sidewalk by an abutting owner in order to make a step to a slight embankment at the inner edge of the sidewalk, which were allowed to remain on the sidewalk for a long period of time, the entire sidewalk at that place being only 3 feet in width and the obstruction extending over 11 inches of the paved walk, leaving only 2 feet and 1 inch between the obstruction and the curb, constituted an obstruction to the street which was negligence on the part of the city to permit. *Graham v. New Rochelle*, 120 App. Div. 414, 104 N. Y. Supp. 939.

And, where a city had notice of a break in a sidewalk a part of which was elevated and the continuance thereof was on lower ground, and the two parts were connected by a loose plank, and the city permitted it to remain in that condition, and invited the public to pass over it, it was its duty to see that the means adopted for descending from the higher to the lower level of the walk was safe. *Hogan v. Chicago*, supra.

And, where the authorities of a municipality, in their plan of improvement, made a sidewalk and crosswalk to meet on a level, and they were so used by the public, a private

citizen has no right to interfere with such plan in remodeling his sidewalk by creating a step or fall to the cross walk, and such a step is an obstruction which it is the duty of the municipal authorities to remove, and, if they fail to do so after notice, the municipality becomes responsible for the obstruction and for all damages resulting therefrom. *Shippy v. Au Sable*, 85 Mich. 280, 48 N. W. 584.

So, whether or not a difference of a few inches in height between a concrete sidewalk and an adjoining gravel one is such a defect as to render the municipality liable for injury to a traveler, caused by stumbling over the inequality, is a question of fact for the jury. *Watertown v. Greaves*, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; *Graham v. Oxford*, 105 Iowa, 705, 75 N. W. 473.

And the construction of a sidewalk with a step for descent of some 12 inches to a continuation thereof on a lower grade, and leaving the same unlighted at night, cannot be said as matter of law not to have been negligence; the question whether or not such construction was negligent is one of fact for the jury, in an action for an injury caused thereby. *Pfeifer v. Lake*, 37 Ill. App. 367.

And where the defect had existed for such a length of time before an accident occasioned thereby that the municipal corporation should be charged with knowledge of it is a question of fact, and not of law. *Graham v. Oxford*, supra.

But, where two pieces of sidewalk have, at the point of joining, a difference of 13 inches in the grade, making a clear perpendicular step off without sloping boards or a step; and a person passing along the higher sidewalk steps down to the lower one and falls and is injured,—the question of the negligence of the city in thus constructing the sidewalk is not one for the jury, the defect resulting from the plan of construction. *Healy v. Chicago*, 131 Ill. App. 183.

Likewise, whether a sidewalk running down a hill, consisting of 4 or 5 steps each elevated 8 inches above the other with no railing on either side, upon which a street lamp gave but a very dim light, was defective so as to charge the city with negligence, is one of fact for a jury. *Gutkind v. Elroy*, 97 Wis. 649, 73 N. W. 325.

And, where the grade of a street was quite steep; and a step or offset of about 5 inches in height extended across the sidewalk, the street being one on which a great many pedestrians traveled during both day and night; and the step or offset was known to the building inspector and street commissioners; and a person was injured by stepping off of the step or offset while traveling along the walk after dark, there being no light or signal at such place,—it is a question for the jury, in an action against the city for an injury, whether the step or offset in the sidewalk constituted such a defect that the city, in the exercise of ordinary care and prudence, should have remedied it. *Metz v. Butte*, 27 Mont. 506, 71 Pac. 761.

(5) Unevenness, inequalities.

"There are slight inequalities in sidewalks, and other trifling defects and obstructions, against which one may possibly strike his foot and fall; but, if the injury might be avoided by the use of such care and caution as every reasonable prudent person ought to exercise for his own safety, the city would not be liable." *Indianapolis v. Cook*, 99 Ind. 10.

No rule can be laid down as to what unevenness of a sidewalk is dangerous; and it is for the jury in each special case to determine whether the defect complained of was in fact dangerous, or was such as the city or its officers ought to have taken notice of and repaired. *Murphy v. Dayton*, 7 Ohio N. P. 227.

And a slight deviation of a sidewalk from its original level, caused by the action of the frost in the winter or spring, is not such a defect as to make the municipality liable for injury to a pedestrian injured thereby. *Burns v. Bradford*, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997.

Nor does the existence of an earth sidewalk on a much-traveled city street, with inequalities and depressions so slight as not to obstruct the ordinary use of the walk by pedestrians, but sufficient to permit water to collect in them which freezes in the event of a sudden fall of temperature, afford a sufficient basis for charging the city with negligence, in an action brought against it by a pedestrian who, while passing along the sidewalk, fell upon ice which had formed in depressions and was covered by snow. *Hogan v. Watervliet*, 42 App. Div. 325, 59 N. Y. Supp. 103.

And a municipal corporation is not chargeable with negligence when an accident happens to a traveler by reason of a slight defect such as a rounded depression in a flag sidewalk, 4 inches deep, 34 inches long, and about 12 inches wide, caused by the wheels of heavily laden trucks, which had worn off the corners of two flagstones where they came together, upon the edge of which depression the person injured stepped and his foot slipped in. *Hamilton v. Buffalo*, 173 N. Y. 72, 65 N. E. 944, affirming 55 App. Div. 423, 66 N. Y. Supp. 990.

So, the existence in a city sidewalk composed of flagging extending from an abutting building to the curb, of a depression 12 by 6 inches in area and from 2 to 3 inches in depth, caused by a piece of flagging having been broken and then removed or forced into the ground, is not such a defect as will render the city liable to a person who was thrown down in broad daylight by stubbing her toe against the side of the depression which had existed for a period of from four to six months. *Getzoff v. New York*, 51 App. Div. 450, 64 N. Y. Supp. 636.

And the fact that a brick in a slight depression in a sidewalk became slightly loosened, without getting out of position, is not sufficient to charge the city with liability to a woman who stepped upon the brick, which 20 L.R.A. (N.S.)

turned under the pressure of her foot and caused her to fall. *Morris v. Philadelphia*, 195 Pa. 372, 45 Atl. 1068.

And an inclination of about 1 inch in a foot of a stone leading across a gutter from a sidewalk into the street, and the inclination of the sidewalk of 6 inches in 2 feet immediately adjacent to the stone, is not such a defect in the street as will render the city liable for an injury alleged to have resulted in part therefrom. *Cook v. Milwaukee*, 27 Wis. 191.

So, evidence that a brick sidewalk had in its surface several depressions covered with ice and varying from $\frac{1}{2}$ to 2 inches in depth, caused by some of the bricks being depressed and some being elevated, there being no sharp corners and the surface of the depressions being smooth, does not warrant a finding, in an action for an injury caused by falling upon such ice, that the way when free from snow and ice was not reasonably safe and convenient for public travel. *Newton v. Worcester*, 174 Mass. 181, 54 N. E. 521.

And the testimony of witnesses that they had seen elevations of the same size in other sidewalks is not admissible in an action against a city to recover for an injury occasioned by an elevation in a sidewalk. *George v. Haverill*, 110 Mass. 506.

So, catching one's foot while passing over an incomplete, rough, uneven, sideling, and slippery sidewalk, against a projecting or loose brick, and falling, is an accident which is liable to occur at any place with old and feeble, careless and indifferent, persons; and it is not such an accident as a municipality may be held responsible for, even though the sidewalk is in an imperfect condition. *Waggener v. Point Pleasant*, 42 W. Va. 798, 26 S. E. 352.

And an apron or cover over a cement sidewalk, placed there in winter when the walk becomes slippery, constructed of pine boards laid lengthwise of the walk and fastened to cleats laid crosswise, the entire thickness being less than 2 inches, and there being no beveled plank leading from the cement to the top of the cover, the ends of the boards being sawed off square, the cleats not coming out flush with the ends, does not constitute an actionable defect in the sidewalk. *Kleiner v. Madison*, 104 Wis. 339, 80 N. W. 453.

It cannot be held, as a matter of law, however, that it is not negligence for a city to permit inequalities to the extent of 6 inches or more in height, of various portions of a sidewalk on a principal business street, to continue to exist for a period of twelve months. *Hartford v. Graves*, 8 Kan. App. 677, 57 Pac. 133.

And the fact that an obstruction upon a sidewalk was only from 2 to $2\frac{1}{2}$ inches in height above the level of the sidewalk renders it none the less dangerous to one who passes over the sidewalk without notice or knowledge of such obstruction, especially in the nighttime. *Glantz v. South Bend*, 106 Ind. 306, 6 N. E. 632.

And, where a plank in a sidewalk was broken so that there was a depression of

from 2 to 3 inches which was dangerous, and, when stepped on, it would sink down 3 to 4 inches, thus acting as a trip to one unused to stepping on the plank, a question for the jury arises, in an action for an injury resulting therefrom, as to whether the walk was in a condition reasonably safe and fit for travel. *Urtel v. Flint*, 122 Mich. 65, 80 N. W. 991.

And, where a traveler tripped and fell over a broken flagstone a piece of which had been removed so as to leave a depression 6 by 4 inches in surface dimension and about 2 inches deep, and this condition had existed for a long time, sufficient to justify the inference that the city had notice of it and to call for repair before the accident took place, he is entitled to recover of the city for the injury received, where it appears that, prior to the time of the accident, other people had fallen into the hole or tripped over the defect, and that at the time of the accident in question the place was dark, a neighboring street lamp not being lighted, so that after falling it was with difficulty that the hat of the person injured was found. *Brewer v. New York*, 31 App. Div. 244, 52 N. Y. Supp. 865.

So, where a sidewalk was constructed of 2-inch boards laid crosswise resting on stringers, and the side or edge of one board was laid on top of the one adjoining it, so as to project above the common level and to cause people to stumble and fall, and this condition was allowed to remain for many months, the court, in an action for an injury caused thereby, is justified in submitting the question whether or not the walk was reasonably safe for travel, to the jury. *Hill v. Sedalia*, 64 Mo. App. 494.

And a plank set edgewise across a sidewalk, and presenting a vertical face 3 inches above the level of the paving, is such an obstruction to public travel upon it that the walk cannot be deemed reasonably safe and convenient, within the meaning of the Maine statute; and the city is liable for an injury resulting therefrom. *Moriarty v. Lewiston*, 98 Me. 482, 57 Atl. 700.

In the above case *Morgan v. Lewiston*, 91 Me. 566, 40 Atl. 545, *infra* IX, d, 6, (o), (4), was distinguished upon the ground that in that case the defect complained of was that the sidewalks at the junction of two streets were not on the same level, the court holding that it would be unreasonable and impracticable to require cities and towns to construct all their sidewalks upon exactly the same level at the junction of rectangular streets.

(6) Holes in cross walks:

Cross walks seem to be regarded as sidewalks, or at least as being within rules of law with reference to municipal liability for obstructions in sidewalks; and the use of the word "sidewalk" in a complaint in an action against a city for an injury received in its streets, instead of the words "cross walk," is not a material variation. *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138. 20 L.R.A. (N.S.)

But an ordinance with reference to the width of sidewalks is not admissible in evidence in an action for personal injury caused by slipping on an alleged defectively constructed street crossing. *Fairgrieve v. V. Moberly* 39 Mo. App. 31.

So, a charter provision constituting the common council of the city commissioners of highways, and authorizing them to use certain funds in defraying the expenses of repairing and keeping in order the streets and highways, etc., casts upon the city the duty of keeping the cross walks which have been constructed in streets or highways under the direction of the city in a safe condition. *Hines v. Lockport*, 50 N. Y. 238.

It is the duty of a municipal corporation not only to make its gutter crossings safe in the first instance, but to use ordinary care to see that they are kept safe. *Indianapolis v. Scott*, 72 Ind. 196.

And the existence of a considerable gap in a traveled cross walk at a place where it was totally dark; and the facts that a person endeavoring to pass over it slipped and fell and was injured; and that the gap had been in existence at least three months and was readily noticeable,—tend to establish a breach of duty on the part of the city to keep its streets and sidewalks in a condition of reasonable safety for the use of the public. *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630.

So, the act of a city of leaving a ditch in a street crossing, about 3 feet deep, unguarded and unlighted at night, is negligence for which it is responsible. *Mt. Carmel v. Guthridge*, 52 Ill. App. 632.

And, leaving a manhole from 1 to 3 feet deep in a public street, almost if not directly in the line of the sidewalk, open at night without guards or lights while it is being repaired and cleaned under the direction and supervision of the city, is an act of gross negligence upon the part of the city, rendering it liable for a resulting injury. *Kankakee v. Linden*, 38 Ill. App. 657.

So, where a street-railway track in a paved street was removed, and the space which it had occupied was filled with cobblestones and pavement refuse, and, with the action of the elements, it sunk below the level of the remainder of the cross walk, and water cut a channel at one side of the old right of way of the railroad and undermined one end of a flagstone in such a manner as to permit it to project out over the channel so that one passing over the cross walk was liable to step into the channel and slip under the end of the stone tripping and falling, it is a question for the jury, in an action for an injury thus caused, whether the condition of the walk was such as to constitute negligence upon the part of the municipal corporation. *Cummings v. New Rochelle*, 38 App. Div. 533, 56 N. Y. Supp. 701.

And evidence that a person was injured at night by getting his foot fast in a hole in a plank crossing on a street, which had existed for two weeks or longer upon one of

the most frequented streets of the city, while using the crossing as one of the public footways, raises a question for the jury, in an action for the injury, on the question of negligence of the city authorities in having and leaving the crossing in that condition. *Dempsey v. Rome*, 94 Ga. 420, 20 S. E. 335.

And, where a pedestrian fell into a hole in a street, at a path used as a crossing to a board walk, just outside of the traveled track, made by the removal of a lamp-post and failure to fill the hole, which was about 2½ feet deep and about the same in diameter; and the street, though upon a hillside near the outskirts of the city, was a regularly laid-out street on the city plan, which was established, but poorly lighted,—the question whether the city was negligent is one of fact for the jury. *Wall v. Pittsburg*, 205 Pa. 48, 54 Atl. 497.

So, whether a displaced stone in a crosswalk which sloped from 2 ⅞ inches to 5 inches at one side and from 4½ to 8 inches on the other side rendered the walk unsafe is a question of fact for the jury, in an action for damages for an injury alleged to have resulted therefrom. *Goodfellow v. New York*, 100 N. Y. 15, 2 N. E. 402.

And an opening or hole in a footwalk, not being a gutter at a crossing where a break in the continuity of the pavement might be expected, into which one directed by a hand rail was in danger of stepping, into which a person stepped and was injured on a dark and stormy night while following the course indicated by the hand rail, furnishes a case for the jury on the question of negligence on the part of the city. *Conroy v. Pittston*, 222 Pa. 1, 70 Atl. 944.

And where, at a street crossing, there is a beaten footpath at a point included in a strip which would be covered by the lines of the sidewalk if extended, and a tile drain, which received water from an open ditch on the opposite side of the street, was allowed to discharge it into a continuation of the ditch at a point within the line of the sidewalk if extended, it is a question for the jury, in an action for an injury resulting therefrom, whether the highway at the crossing was in a reasonably safe condition for public travel. *Comiskie v. Ypsilanti*, 116 Mich. 321, 74 N. W. 487.

So, where a woman's foot was caught by a plank of a street crossing which was raised above the surface of the sidewalk, and she was thrown and injured; and there was a conflict of testimony as to the condition of the sidewalks; and there was testimony tending to show that the defect had existed for ten days or two weeks, and that the crossing was in a thickly inhabited part of the city and much used,—it is the province of the jury, in an action for the injury, to determine the condition of the plank and its height above the walk. *Baxter v. Cedar Rapids*, 103 Iowa. 599, 72 N. W. 790.

If a street crossing gets out of repair and becomes unsafe and remains so for such a length of time that the municipal authorities, in the exercise of reasonable care and

prudence, ought to discover the defect and repair it, however, the corporation is liable for the negligence without actual notice. *Aurora v. Bitner*, 100 Ind. 396.

And a loose plank in a cross walk, the end of which is raised about 2 inches above the level of the walk, is not such a defect as to prevent the walk from being reasonably safe, or to make it unfit for travel, within the meaning of a statute making it the duty of municipal corporations to keep cross walks in reasonably safe condition for public travel; and a person injured by stumbling against such plank cannot recover of the city. *Weisse v. Detroit*, 105 Mich. 482, 63 N. W. 423.

And, while a city is under no obligation to construct a crossing over an alley connecting the walks of the street, if it elects to leave such an alley in its natural state it is its duty to keep it free from obstruction; and, if it allows a person to place loose boards there, which, by reason of becoming warped and shifted about, render it dangerous for persons having occasion to cross the alley, it is liable to the same extent that it would have been had it undertaken to construct a crossing and allow it to become out of repair. *Springfield v. Tomlinson*, 79 Ill. App. 399.

(p) Decay and wear.

The duty of a municipal corporation of keeping its streets and sidewalks, drains, culverts, etc., in a reasonably safe condition does not end with putting them in a safe and sound condition originally. It is required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Moon v. Ionia*, 81 Mich. 635, 46 N. W. 25.

And, where the defect is simple, the city is not relieved from liability by making a futile effort to repair it. *Moon v. Ionia*, *supra*.

And a municipal corporation having actual notice of the defective condition of a walk cannot order it to be repaired by someone else and pay no further attention to it, but must, after having actual notice, see that it is repaired in a reasonable time, and put in a reasonably safe condition for travel. *Atherton v. Bancroft*, 114 Mich. 241, 72 N. W. 208.

And, where, by a city ordinance, the duties of the street supervisor of the city in regard to keeping streets and street crossings in repair are prescribed, and they have taken such structures under their cognizance and control, the neglect on their part to exercise the power given them by the ordinance will make the city liable for any damage resulting from such omission of duty. *Champaign v. Patterson*, 50 Ill. 61.

So, a municipal corporation is liable for the resulting injury where it negligently permitted a plank walk to remain in a street after the same was decayed and in a dangerous condition, having notice of its danger-

condition, where a person using the walk was injured. *Lehn v. Brooklyn*, 46 N. Y. S. R. 548, 19 N. Y. Supp. 668, affirmed in 143 N. Y. 674, 39 N. E. 21; *Washington v. Small*, 86 Ind. 462; *Evans v. Brookville*, 5 Pa. Super. Ct. 298.

And evidence, in an action against a city for an injury alleged to have been caused by a defect in a sidewalk, that the sidewalk was, at the place of accident, more or less rotten, and that some of the boards had become loosened, but that there was no manifest danger in attempting to pass over it, raises a question for the jury as to the negligence of the municipality. *Allen v. DuBois*, 181 Pa. 184, 37 Atl. 195.

And evidence that a sidewalk was old, narrow, made of wood, worn and decayed, and rested on wooden posts several feet high; and that the boards were loose and the sidewalk tipped toward a hole running under it; and that this hole was deep and was filled with water even with the surface of the walk; and that a child fell into the hole and was drowned,—shows a negligent maintenance of the walk by the city, and that such negligence was the proximate cause of the death of the child. *Benton v. St. Louis (Mo.)* 118 S. W. 418.

So, evidence that a sidewalk on which an injury occurred was for some weeks, and probably much longer, in a generally dilapidated condition, the boards loose and gone, and the stringers rotten, is sufficient to sustain a verdict for the plaintiff in an action for the injury. *Galesburg v. Benedict*, 22 Ill. App. 111.

And, where the planks of a sidewalk were laid crosswise on stringers, and, as a pedestrian stepped on one of the planks, it tipped up and caught his other foot and threw him down, the plank being warped and unnailed, and having been so for some time, a verdict for the plaintiff in an action for the injury is warranted, and will not be disturbed. *Holloway v. Lockport*, 54 Hun, 153, 7 N. Y. Supp. 363; *McKinney v. Brown (Tex. Civ. App.)* 81 S. W. 88.

And testimony that a sidewalk was in a rotten, shaky, and bad condition at the time of the injury in question is not objectionable as an expression of opinion. *Harrison v. Ayrshire*, 123 Iowa, 528, 99 N. W. 132.

So, opinions as to the length of time a certain kind of lumber will last in sidewalks may be given by competent witnesses on the question of negligence of a city in permitting a sidewalk to become rotten. *McConnell v. Ossage*, 80 Iowa, 293, 8 L.R.A. 778, 45 N. W. 550.

And a civil engineer who has had experience in judging of the soundness of timbers in bridges and such structures may be allowed to give an opinion, in an action against a city for an injury caused by a decayed and defective gutter crossing, whether one of the sleepers in the structure which he had examined had rotted recently, or the decay was of some length of time. *Indianapolis v. Scott*, 72 Ind. 196.

So, a sidewalk the stringers of which have rotted and sunk into the earth so as to let

the boards down on the surface so that they rest on the earth and not on the stringers, and have become partly imbedded in the earth, is *per se* defective on account of the decayed condition of the boards and of the inevitable uneven displacement of the earth. *Williams v. Hannibal*, 94 Mo. App. 549, 68 S. W. 380.

Where a sidewalk was elevated above the surface to approach a bridge adjoining an elevated platform and steps to a building fronting the same, the testimony of a witness that he saw a piece of timber which ran from the platform to the sidewalk split, and that as it did so the sidewalk came down with the platform; and several other witnesses testified that stringers supporting the walk next to the platform steps were rotten, and the walk tipped downward toward the building; and another testified that, when replanking the bridge in a prior year, he examined the joist supporting the walk near the platform, and that it had started to rot, and that he thereupon reported it to the city as unfit for use; and much of this evidence was contradicted; and there was affirmative proof that no stringer for which the city was responsible was broken,—an issue is raised for the jury, in an action for the injury resulting therefrom. *Leggett v. Watertown*, 55 App. Div. 321, 66 N. Y. Supp. 910.

So, a municipal corporation which, in repairing a defective sidewalk, uses unsuitable and unsafe materials, is chargeable with notice of the condition of the walk, and liable to anyone injured thereby while observing ordinary care for his own safety, in consequence of the use of such defective materials. *Wheaton v. Hadley*, 131 Ill. 640, 23 N. E. 422; *Nokomis v. Salter*, 61 Ill. App. 150.

And it is negligence upon the part of a city to permit an old sidewalk to remain in a condition of decay, and attempt to repair it by nailing a rotten board back to a rotten stringer. *Shelbyville v. Brant*, 61 Ill. App. 153.

And a municipal corporation having notice that a sidewalk is out of repair from the decay of the stringers to which the boards are nailed, which attempts to repair the same by the use of old stringers which are so rotten as not to be capable of holding nails, is liable for an injury to a person passing over it, in consequence of the looseness of the boards. *Wheaton v. Hadley*, 131 Ill. 640, 23 N. E. 422, affirming 30 Ill. App. 564.

And, where the question in an action against a city for damages received on a defective sidewalk was whether repair was made with material which would be reasonably safe when used in making repair of the walk in the way it was repaired, evidence that it was a common practice to make repairs of sidewalks in the way this one was repaired is incompetent, there being no question as to the manner of making the repairs. *Moore v. Platteville*, 78 Wis. 644, 47 N. W. 1055.

So, evidence, in an action for an injury

from an alleged defective sidewalk, that, about two weeks before the accident, the street commissioner and two assistants went over the walk, examined it, and attempted to fix the bad places in it by nailing on the boards; and their attention was called to the stringers, which they found "not right sound," but they thought they would hold the nails and took the chances,—warrants a finding by the jury, in an action for the injury, of negligence upon the part of the city. *Sciota v. Norton*, 63 Ill. App. 530.

And, where a sidewalk was defective, and repair was made by replacing the defective part with a small plank 4 feet long and 2 inches thick by 4 inches wide, and this broke when stepped upon by a pedestrian and caused her injury, the breaking of the plank, under the pressure of her weight tended strongly to prove that the plank with which the repair was made was a defective one; and, in the absence of proof to the contrary, it is evidence tending to show that the defect in the plank might have been discovered by a man with ordinary skill, exercising reasonable care in the selection of the plank for making the repair, so that the question of the negligence of the city in selecting such plank is one of fact for a jury. *Moore v. Platteville*, supra.

And in such case evidence, in an action against the city for the injury, that a good sound piece of plank of the same thickness and length and supported at the ends would bear up the weight of two heavy men placed on the middle of it, is incompetent and properly rejected. *Ibid*.

Liability of a street to become defective, however, is not in itself a defect; and a highway cannot be deemed defective merely because, by the ordinary course of the elements, it might be expected to become out of repair and dangerous. *Monies v. Lynn*, 124 Mass. 165.

But a municipal corporation, in the exercise of care over its streets, should look after the effects arising from the ordinary incidents of the protracted use of a sewer-basin cover in a sidewalk, likely to become dangerous in the course of time. *Cassidy v. Poughkeepsie*, 71 Hun, 144, 24 N. Y. Supp. 523.

And a city is not relieved from this duty, or from liability to one who sustains a personal injury through its negligence in this respect, by the fact that the appliance may have been originally constructed by lawful authority, and that the municipality was not responsible for the adoption of the plan or the actual construction of the work. *Ibid*.

And, where a sidewalk had been in a bad condition for a long time, was uneven and some of the bricks sunken, and water flowing from under a fence on the inside formed a pool extending from the middle of the sidewalk to the curb and rendered all of the bricks slippery, a woman who had never been along the street and was using care, and who fell and was injured, is entitled to recover of the city. *McDonnell v. Philadelphia*, 12 Pa. Co. Ct. 672.

So, a traveler on a highway of a city 20 L.R.A. (N.S.)

who slips on a portion of a sidewalk consisting of lights made partly of glass set in cement or concrete, the surface of which is smooth and slippery and has grown more so from being walked on, is entitled to go to the jury in an action against the city for the injury, on the question whether there was a defect in the highway which might have been remedied by reasonable care and prudence on the part of the city. *Moynihan v. Holyoke*, 193 Mass. 26, 78 N. E. 742.

And it is within the discretion of the court, in an action against a city for injuries from a fall caused by slipping on lights forming a part of the sidewalk, to admit or exclude evidence offered by the city to show that the walk was of the usual and ordinary construction for that kind of walk. *Ibid*.

But, a city is only required to maintain its sidewalks and crossings in a reasonably safe condition; and, where an iron gutter cover that was slightly arched was worn very smooth, and several persons had fallen on it, of which the city had notice, but it was daily used by the public without injury, a party who crossed the same at night and slipped and was injured, there being a slight snow, and the thermometer being below the freezing point, cannot recover for the injury. *Lyon v. Logansport* (Ind. App.) 32 N. E. 582.

7. Overhanging and falling objects.

(a) Generally.

The duty of a municipal corporation to see that its streets and sidewalks are in such a condition that people may travel upon them in safety, and that there shall be no obstruction to such travel, is not confined entirely to obstructions upon the street or walk, but applies as well to structures or things hanging over them that may make travel unsafe. *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414; *Decatur v. Hamilton*, 89 Ill. App. 561; *Hume v. New York*, 74 N. Y. 264.

This duty extends upwards indefinitely for the purpose of preservation, safe use, and enjoyment of the streets. *Fafayette v. Ashby*, 8 Ind. App. 214, 34 N. E. 238, 35 N. E. 516.

And a charter or statutory duty of a municipal corporation to use reasonable diligence to keep its streets and sidewalks in a safe condition, making it liable to those injured by its neglect of such duty, requires it to take reasonable precautions against dangers from overhead as well as under foot. *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730.

Obstructions entirely above ground may interfere as much with the safe and convenient use of a sidewalk as those upon the surface; and a city is not relieved from liability for an injury to a person in its streets by the fact that the injury arose from a structure high above the surface, not connected with the street or sidewalk, though projecting over it. *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262.

And an object permanently suspended directly over the traveled part of a street or highway is an obstruction to travel if it naturally tends to frighten horses of ordinary gentleness, although it is fastened to supports outside of the limits of the street, since such object drives travel from the street over which it is suspended because discreet persons will avoid the risk and danger incident to an attempt to pass under it. *Champlin v. Penn Yan*, 34 Hun, 33, affirmed in 102 N. Y. 680.

An object suspended over the highway entirely out of the way of travelers, yet dangerous to them by reason of its being insecurely fastened, however, does not render such way defective within the meaning of a statute imposing liability upon a town for injuries by reason of a defective road. *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718.

And a rope stretched across a highway above the ground, and attached at each end to objects which are outside of the limits of the highway, and in temporary use, is not a defect or want of repair in the highway for which a city is liable to a traveler who receives injuries from coming in collision with it while it is in motion from human agency. *Barber v. Roxbury*, 11 Allen, 318.

(b) Awnings, sheds, etc.

Where a municipal corporation is under duty to use reasonable diligence to keep its streets and sidewalks in safe condition, and liable to those injured by its neglect of such duty, if an awning in a condition dangerous to persons passing beneath it is permitted to overhang a public street, the street is not in a safe condition. *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730; *Decatur v. Hamilton*, 89 Ill. App. 561; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292.

And, where a wooden awning over a city street is permitted, a duty devolves upon the municipal authorities to exercise reasonable diligence to see that it is adequately secured; and, where an injury results from a defect of construction which might have been ascertained by inspection, or from an accumulation of snow, permitted to remain for such length of time as to warrant an inference of notice to the city officials charged with the duty of keeping the street in repair, the municipal corporation is liable for the injury. *Bieling v. Brooklyn*, 120 N. Y. 98, 24 N. E. 389.

So, an awning consisting of a permanent roofing of boards over an entire sidewalk, resting against an abutting building and supported on the outside by wooden posts bedded in the ground near the curbstones, thus converting that portion of the street into a covered way, the structure being made for private purposes, if unauthorized, is an encroachment upon the public street and a nuisance, especially if constructed so negligently as to be dangerous to persons passing under it. *Hume v. New York*, 74 N. Y. 264.

20 L.R.A. (N.S.)

And the structure may properly be treated as a defect in the street. *Ibid.*

And the fact that an awning placed over a sidewalk did not fall until after the lapse of seven years is not, as matter of law, conclusive evidence that it was properly constructed, or that its fall was not attributable to its defective support; these are questions for the determination of the jury in an action for an injury resulting from the fall of the awning. *Ibid.*

And, where a person was injured by the falling of a wooden shed or awning extending over a sidewalk, the liability of the owner of the shed therefor arises from his negligent conduct in erecting and maintaining the structure over the sidewalk, and the liability of the city therefor arises from its negligence in not keeping its sidewalks in a safe condition; and the person injured has a right of action against either the owner, or the city, or both. *Byne v. Americus* (Ga. App.) 64 S. E. 285.

So, if an insecure awning is erected over a sidewalk without authority from the city and without approval or direction of the street commissioner, it is an unlawful erection in the public streets by an individual for his private purposes, which it is the duty of the officers of the city to cause to be removed, after having actual or implied notice of its existence. *Hume v. New York*, *supra*.

And, if an awning is erected over a sidewalk; and the ordinance requires that such erection shall be made under the direction of the street commissioner; and, under the direction of that officer, or through his neglect to supervise it, it is constructed in a negligent and insecure manner and injury to an individual ensues,—the city is liable for such negligence. *Ibid.*

And this liability exists even though the structure is not made by the authority of the city, or under the supervision of any of its officers. *Ibid.*

Nor is a city absolved from liability for negligently permitting a dangerous awning to overhang a street by the fact that the council has failed to pass an appropriate ordinance for the removal and abatement of nuisances, obstructions, or encroachments upon the streets, or to prevent any person from obstructing sidewalks as it is authorized to do by charter, since the absence of such ordinances does not limit its power and duty to exercise a general care, supervision, and control over the streets. *Bohen v. Waseca*, *supra*.

So, a wooden shed or awning which extends from a building abutting on a street to the outer edge of the sidewalk, supported by four wooden posts set in the sidewalk at the edge of the curbstone, and secured to the building by nails, one of the posts of which is so placed that it is struck and broken by a truck in the street, is an improper use of the street; and if the city authorizes it, it is guilty of maintaining a nuisance so long as the obstruction continues; and, if it does not authorize it, it is guilty of permitting a nuisance where it

has existed so long that it was bound to take notice of it. *Mansfield v. New York*, 119 App. Div. 199, 104 N. Y. Supp. 386.

And where, in such case, the awning was constructed some sixteen or seventeen years prior to the injury in question; and since then substantially no repairs had been put upon it except to replace a broken post; and the post the breaking of which caused the injury in question was so far decayed that it would crumble when picked up,—the jury, in an action for the injury, would be justified in finding that the city had not performed its duty in that it had failed to make an inspection of the condition of the post, and that had it done so it would have discovered the defect. *Ibid*.

And, where an action is brought against a municipality for personal injuries resulting from a negligent failure to keep its sidewalks reasonably safe from an insecure overhanging shed, which it was its duty to have inspected, there is no error in refusing to charge that the same duty rested upon the plaintiff and defendant, and that any defects in the shed which would have been notice to the defendant would also have been notice to the plaintiff. *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

So, where an awning erected over a fruit stand is thrown down by a passing wagon of a third person, and a person is injured thereby, the city is liable for the injury though the fruit stand and awning were lawfully in the street, where the awning, either in its material or in its construction or maintenance, was of such a character as to be a menace and dangerous in itself to persons using the public highway, and was suffered to remain on the street for an unreasonable time after notice or knowledge thereof had come to the city, either express or implied. *Jarrell v. Wilmington*, 4 Penn. (Del.) 454, 56 Atl. 379.

And, where a wooden awning was constructed over a sidewalk upon a street in the usual manner by competent mechanics with timbers of proper form and size; and, four months prior to the accident in question, the awning was injured by a fire engine running against it, and was repaired by a competent mechanic, who did what he supposed necessary to make it safe; and, a day or two before the accident, there was an unusually heavy fall of snow, and a heavy body of snow was allowed to remain upon the awning, and that part of the awning which had been repaired gave way and fell upon and injured a person,—the question whether the fall of the awning was occasioned by a slight defect, not discoverable, resulting from the injury to it and the unusual quantity of snow upon it, or whether or not the city was negligent, is one of fact for the jury. *Hume v. New York*, 47 N. Y. 639.

So, a city is liable under Mass. Rev. Stat. chap. 25, § 22, devolving upon cities the duty to keep all highways in repair so that the same shall be safe and convenient for travelers, to a person who receives an injury by the falling of an awning projecting over

the sidewalk of a street, where the awning was dangerous to travelers for a space of twenty-four hours before the injury. *Drake v. Lowell*, 13 Met. 292; *Day v. Milford*, 5 Allen, 98.

But, where a stand in a street was covered by an awning; and the stand was located in the street lawfully and pursuant to an ordinance authorizing it; and the awning was a reasonably safe one for the place and purpose; and it was thrown down by a passing wagon of a third person, and a person was injured thereby,—the city is not liable for such injury. *Jarrell v. Wilmington*, *supra*.

Nor is a platform slightly narrower than the sidewalk, projecting out over the sidewalk on the level of the second floor of an abutting building, which is used to store baled hay and straw, the platform being used in loading and unloading the bales from wagons in the street below, a nuisance and an obstruction in itself to the street, which will impose a liability upon the city for permitting it to remain and be used for such purpose; since the municipality has the right to presume that it will be properly used. *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90.

Whether an awning erected in a street by permission was dangerous in itself, so as to render the city liable for an injury resulting therefrom, or was a reasonably safe and proper one for the place and purpose, due regard being had to the safety of people using the highway, is a question of fact for the jury, to be determined from all the evidence, in an action for damages for an injury caused by the awning. *Jarrell v. Wilmington*, *supra*.

(c) Signs, billboards, etc.

The rule of liability of a city for injuries resulting from obstructions in its streets is not confined to cases of obstructions upon the surface of the street; an overhead sign or other object may be as dangerous as an obstruction upon the surface. *Decatur v. Hamilton*, 89 Ill. App. 561.

And the measure of a city's duty with respect to signs attached to abutting property and hanging over a street or a sidewalk, which became unsafe, is the exercise of reasonable care. *Leary v. Yonkers*, 95 App. Div. 126, 88 N. Y. Supp. 829.

And, where an occupant of premises abutting on a city street suspended a business sign from an iron rod extending from the building, so that it hung over the middle of the sidewalk and about 13 feet above it; and the city allowed the sign to remain in that position, after receiving notice, or after it should have known, that the sign had become unsafe,—it is liable for personal injuries sustained by a pedestrian in consequence of the sign falling upon him. *Ibid*.

So, a transparency to announce a show in a building, fastened at one end to the building and at the other supported temporarily by a pole resting on the sidewalk of a street, the pole being so insecurely put up that it

is likely to fall and injure persons passing on the sidewalk, constitutes a defect in the street within the meaning of the Massachusetts statute, so that the city is liable for injuries caused by the fall of the pole. *West v. Lynn*, 110 Mass. 514.

And, where an advertising banner was suspended directly over the traveled part of a street by means of ropes attached to the chimneys of stores on opposite sides of the street, and stayed at the bottom by guy ropes, one fastened to an awning post and one to a window sill of a store, which was an object likely to frighten horses ordinarily gentle and well trained, at which a horse took fright, became unmanageable, upset the buggy, and injured a passenger, the city is liable therefor, where the board of trustees had knowledge that the banner was so suspended over the street. *Champlin v. Penn Yan*, 34 Hun, 33, affirmed in 102 N. Y. 680.

So, an improperly constructed billboard standing wholly in a street between the sidewalk and the abutting property is a defect in the sidewalk, within the meaning of a statutory provision that no action shall be brought against a municipal corporation on account of injuries resulting from defective streets or sidewalks after six months from the date of the injury, unless written notice of such injury is served on the corporation within ninety days after its occurrence. *Bliven v. Sioux City*, 85 Iowa, 346, 52 N. W. 246.

And a city is chargeable with knowledge of the existence and use of a large and heavy billboard at the entrance of an opera house near the sidewalk, and of the danger of its being blown over by the wind when it has been so used for four or five months. *Cason v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192.

So, where a billboard beside a street was blown over and fell upon a passer-by, evidence, in an action against the city for the injury, as to the places where it had been kept at different times, is admissible to show when such board was used, and that it had been used for such time before the accident that the city was chargeable with notice of its use. *Ibid.*

And evidence that a billboard standing on a sidewalk was 4 by 8 feet in size and weighed 140 pounds; and that when not in actual use it was so placed that the top rested against the side wall of the building while the bottom rested a few inches from it on the sidewalk; and that it was not fastened in any way; and that it had been so used and kept for such a length of time that the city was chargeable with knowledge of it,—is sufficient to support a verdict finding the city guilty of negligence in allowing it thus to stand on the sidewalk. *Ibid.*

So, evidence tending to show that a billboard which a city had permitted to be erected and maintained close to or upon a sidewalk, and which blew over and injured a traveler, was not securely braced at the time; and that such condition had existed for some twelve months prior thereto,—is admissible in an action against the city for

the injury. *Bemis v. Omaha* (Neb.) 116 N. W. 31.

Where a billboard is placed in a portion of the street not generally used by the public, and it is not an obstruction and does not interfere with the ordinary use of the street or sidewalk near it, and is constructed in a substantial manner so as to be safe under ordinary circumstances, however, and it is blown over by an extraordinary and unprecedented wind, and a person is injured thereby, the city cannot be held responsible for the injury. *Oak Harbor v. Kallagher*, 52 Ohio St. 183, 39 N. E. 144.

And, where a billboard erected near or upon a street by permission of the city was blown over and injured a traveler; and the witnesses in behalf of the plaintiff in an action for the injury testified that the character of the storm which blew the billboard over was extraordinary and unprecedented, and others in behalf of the defendant testified that the storm was not worse than had occurred through various years, and that in preceding years the winds had been as high and variable as the one that overturned the billboard,—the court will not say as matter of law that reasonable men might not differ as to whether or not the wind storm was of such a character that the city, in the exercise of ordinary care, would not be bound to anticipate and guard against it; this should be left to the jury. *Bemis v. Omaha*, supra.

And notice of the dangerous condition of a sign suspended over a sidewalk will not be imputed to the city, in an action for an injury caused thereby, because the dangerous condition had existed for twelve or fourteen months, unless the servants of the city should, in the ordinary exercise of their duties, have discovered that fact. *Leary v. Yonkers*, 95 App. Div. 126, 88 N. Y. Supp. 829.

So, a municipal corporation is not liable for an injury sustained by a traveler on a highway by the fall from an adjacent building of a sign insecurely fastened, under a statute requiring towns to keep highways in good repair. *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578.

And, where a flag was suspended by private individuals across a public street of a city with iron weights at the lower corners, and one of such weights became detached by the motion of the flag in the wind, and fell upon and injured a traveler in the highway, who was in the exercise of reasonable care, the city is not liable therefor under a duty imposed upon it by law to keep the street in good and sufficient repair. *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718.

Nor is a municipal corporation liable for injuries to a traveler upon a sidewalk through the fall of a billboard insecurely placed by an abutting owner upon his own property near the edge of the street, under a statute requiring the municipal corporation to keep its streets reasonably safe and fit for travel. *Temby v. Ishpeming*, 140 Mich. 146, 69 L.R.A. 618, 112 Am. St. Rep. 392, 103 Atl. 588.

And a city is not liable for an injury received by a traveler on a sidewalk through the falling of a sign suspended and projecting over the sidewalk, which was attached to the building by the occupant for purposes relating exclusively to his occupancy, although the city had notice of the position and insecurity of the sign and its fastenings. *Jones v. Boston*, 104 Mass. 75, 6 Am. Rep. 194.

(d) Electric wires, appliances, etc.

A municipal corporation may be held to the same degree of responsibility with regard to fallen or hanging electric wires obstructing a street and likely to come in contact with a traveler that is imposed upon it with reference to awnings and other similar encumbrances on a street. *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A.(N.S.) 474, 75 N. E. 1116.

It is the duty of a municipal corporation to keep its electric wires along its streets in such condition as not to interrupt or endanger public travel. *Colbourn v. Wilmington*, 4 Penn. (Del.) 443, 56 Atl. 605.

And, if it is guilty of negligence in permitting one of its electric wires to lie on the ground in a street, it is liable to a traveler who, without fault, comes in contact with it and sustains injury thereby. *Emporia v. White*, 74 Kan. 804, 86 Pac. 295.

A city, or borough, or township may not with impunity leave a highly dangerous and insidious obstruction, such as a heavily charged and exposed electric wire, on any part of the public highway, or so near to it that a traveler, accidentally or intentionally deviating a few feet from the beaten track, may encounter it to the risk of his life. *Emery v. Philadelphia*, 208 Pa. 492, 57 Atl. 977; *McKim v. Philadelphia*, 217 Pa. 243, 19 L.R.A.(N.S.) 506, 66 Atl. 340.

And, where an electric wire is broken down and suspended in a street by reason of sleet adhering to it, if, after notice of the dangerous condition thereof, the city does not within a reasonable time remove or repair the same, or take proper precaution to notify travelers, or protect them from the danger, it is guilty of negligence, and liable for resulting injuries. *Colbourn v. Wilmington*, *supra*.

Nor is liability of a city for neglect of its duty to exercise care and supervision over electric wires suspended over its streets lessened by the fact that individuals or corporations are subjected to a like duty and liability. *Mooney v. Luzerne*, 186 Pa. 161, 40 L.R.A. 811, 40 Atl. 311.

So, evidence that wires were put up by a city without sufficient guards to protect them, among the trees of an avenue, where they were liable, by the swaying of the limbs, to be detached from the poles and come in contact with wires carrying deadly currents of electricity below, when a parallel and safer line could have been selected and used without difficulty; and that it permitted unused wires, after they had been abandoned, to fall into the street time and again 20 L.R.A.(N.S.)

to the obvious danger of persons on the street,—is sufficient to go to the jury, in an action for a resulting injury, on the question of the city's negligence. *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131.

And, though a city policeman is a mere peace officer of the state, and not an agent of the municipality, competent, in the absence of a statute or ordinance, to charge the latter with responsibility for his negligence in failing properly to remove dangerous obstructions to street travel, or guard the public against them, yet, if the city negligently allows a broken, suspended electric wire to remain upon the sidewalk after falling down, it is liable for injuries caused by the negligent act of a policeman in so moving the wire as to make it a conductor of electric current from above, and in failing to guard or warn passers-by against it, not because of the policeman's negligent performance of a legally imposed duty, but because of its negligence in allowing the wire to remain in a condition exposing the public to the hazard of its being so misplaced, or meddled with as to do harm. *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350.

So, if a telephone company, in the operation of its lines, uses defective wires which frequently break and expose persons and horses passing upon the street to danger; and the city, with knowledge of such use, neglects to have it discontinued,—the city is liable for a resulting injury. *Decatur v. Hamilton*, 89 Ill. App. 561.

And, where a telephone wire was broken during a storm, and negligently allowed to remain for four months suspended from a tree overhanging a street, and the municipality had notice thereof, both the telephone company owning the wire and the municipality are liable for an injury occasioned thereby to a person using the street. *District of Columbia v. Dempsey*, 13 App. D. C. 533.

So, neglect of municipal authorities for eight days to remove from a business street obstructions consisting of telephone wires which had broken because of water thrown upon them during a fire and freezing, and which had fallen upon the sidewalk and street, justifies a finding, in an action for a resulting injury, that the city was guilty of negligence. *Nichols v. Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56, 23 N. W. 868.

And a telegraph wire which sloped down from a house to which it was fastened and lay across the highway within a foot of the ground, which caused an injury to a traveler, was a defect in the highway rendering the town liable for the injury if it had, or ought to have had, notice thereof. *Hayes v. Hyde Park*, 153 Mass. 514, 12 L.R.A. 249, 27 N. E. 522.

And negligence of a city, causing the death of a person by contact with an abandoned telephone wire, is a question for the jury, where the wire had been unused for several months, crossing a charged electric

wire in close proximity thereto, and, after sagging so as to interfere with public travel, was cut by a member of the borough council and wrapped around a post within easy reaching distance of pedestrians, and with one end resting on the ground or in the water. *Mooney v. Luzerne*, supra.

So, where an electric light is upon a public street of a city, the city is responsible for its presence there, and is bound to use care commensurate with its dangerous character, to protect people passing on the street. *Schmidt v. Chicago*, 107 Ill. App. 64.

And the act of a city of permitting an electric lamp to be within reach of passers-by on a sidewalk, improperly insulated and without protection, is gross negligence; and, where a person is killed by such lamp, the question whether or not this negligence is the proximate cause of the death is one of fact for the jury, in an action against the city for the injury. *Ibid*.

Nor is the rule that a municipal corporation is liable for an injury resulting from leaving a heavily charged and exposed electric wire in a public highway altered or affected by the fact that the wire was owned or used by the city as a part of its police instruments. *Emery v. Philadelphia*, 208 Pa. 492, 57 Atl. 977.

And that a municipal corporation operated an electric-light plant in a public capacity is no answer to a claim of liability on its part for permitting uninsulated wires to obstruct its public streets. *Palestine v. Siler*, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345.

Nor need it be shown, to render a municipal corporation liable for injuries to a person walking on a sidewalk, caused by a live electric wire stretched across the walk, that he necessarily came in contact with it. *Ibid*.

And the liability of a city for the killing of a person by a heavily charged and exposed electric wire used by the police department of the city is not affected or relieved by the fact that the injury occurred on the side of the road of which 16 feet was macadamized in the middle, and that, if the deceased had kept in the macadamized portion of the road, he would not have been injured. *Emery v. Philadelphia*, supra.

A city is not responsible, however, for an injury resulting from the breaking or suspension of an electric wire, the property of the city, which was suspended in a street, by reason of sleet adhering to it, and without any neglect or fault upon the part of the city, since such breaking would be regarded as what is called the "act of God." *Colbourn v. Wilmington*, 4 Penn. (Del.) 443, 56 Atl. 605.

And, where a telephone wire lay across an electric-light wire, and the insulation on the wires had worn away, and the telephone wire hung down from a tree to the ditch between the sidewalk and the carriage way, and a person came in contact with it and was injured, the negligence of the municipal corporation in permitting the wire to exist in that shape is a question for the 20 L.R.A.(N.S.)

jury, to be determined with reference to the length of time the wire had been hanging down, whether the village authorities knew or should have known of its condition, and also whether it was likely to be dangerous because of the place at which it was hanging. *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A.(N.S.) 474, 75 N. E. 1116.

But a municipal corporation is not under the duty to inspect the insulation of electric wires, the position in which they are strung, and similar matters involving technical knowledge, except in a case of obvious danger or exceptional occurrence. *Ibid*.

In the above case *Twist v. Rochester*, supra, was distinguished upon the ground that in that case the line of the wire was maintained and used by the defendant, and the defendant's liability was predicated, not on the failure of its duty as a municipality to keep its streets safe, but on its negligence as the owner and operator of a telephone line.

(c) *Trees, poles, etc.*

Since trees in streets will necessarily decay and become dangerous to human life, the duty devolves upon the municipality to make tests and examinations, using reasonable diligence to ascertain whether they are safe or not; and a failure to make tests may be taken as a circumstance upon the subject of the city's negligence, in an action for an injury caused by a tree falling in a street. *McGarey v. New York*, 89 App. Div. 500, 85 N. Y. Supp. 861.

And, where a tree growing on a sidewalk fell and killed a traveler; and, after the tree fell, it was apparent that it was rotten from the roots up, to a dangerous degree; and there was a conflict of evidence as to whether there was any exterior sign of rottenness when the tree was standing,—it is a question for the jury as to whether the city should or should not have done something, even to the cutting down of the tree, to prevent the danger. *Vosper v. New York*, 17 Jones & S. 296.

So, evidence that a limb of a tree in a street, which fell upon and injured a traveler, was 3 inches in diameter and from 3 to 4 feet long, and was without branches, and was decayed all through and covered with moss; and that the tree was rotten at the point where the break occurred; and that branches had fallen from the tree during the month previous to the accident,—justifies a verdict for the plaintiff in an action against the city for the injury. *McGarey v. New York*, supra.

And, while a municipal corporation has the right to cut down and remove shade trees in the street when to do so may be regarded by its officers as necessary or expedient, in so doing it must take such precautions as will prevent unnecessary or unreasonable danger to persons using the streets for the purpose for which they are intended; and it may be held liable for an injury to a traveler upon whom a tree, being cut down by order of the municipal author-

ities, fell where there were no barriers in the streets to give warning. *Ward v. District of Columbia*, 24 App. D. C. 524.

But, where the top of a tree was cut off to enable an elevated railway to pass over it, and the remaining stump became decayed and was thrown down by a blow from a heavy truck, and a person was injured thereby, the city cannot be held liable for the injury if the appearance and condition of the tree were not such as to indicate insecurity to persons of ordinary observation, care, and prudence; the duty of the city in respect to the tree being reasonable care and prudence. *Gubasko v. New York*, 14 Daly, 559, 1 N. Y. Supp. 215.

So, under a statute giving leave and power to highway surveyors, with reference to shade trees in a highway, to apply to the proper tribunal for adjudication that they shall be removed, if the superintendent of streets of a city, upon being notified that a shade tree standing in a street is unsound and dangerous, does not proceed to obtain authority to remove it, or take due precaution against the danger, the city will be liable to a traveler who, while in the exercise of due care, is injured by its fall. *Chase v. Lowell*, 151 Mass. 422, 24 N. E. 212.

And a city the charter of which gives the common council power to make by-laws for the regulation and protection of trees in the public squares and streets, and the common council of which passed a by-law imposing a fine on any person who should cut or otherwise injure any shade tree in any public square or street, without special license, is liable to a person injured while passing under a shade tree, by being struck by a dead limb which fell from the tree, which the city had negligently allowed to remain upon the tree. *Jones v. New Haven*, 34 Conn. 1.

So, a city is liable, under its duty to keep its streets in good condition, for injury to one who, without contributory negligence, was driving a wagon along the street, and was thrown therefrom by coming in contact with a large limb of a tree projecting over the street dangerously low. *Louisville v. Michels*, 114 Ky. 551, 71 S. W. 511.

And the fact that the person injured in such case was a servant of the city, driving a patrol wagon, does not impose on him the duty, in an action against the city for the negligence, to negative contributory negligence by averring in his petition that he did not know the condition of the street, it being no part of his duty to examine the streets and report their condition. *Ibid.*

So, a municipality may be held to the same degree of responsibility with regard to electric-light poles, telegraph poles, and the like that is imposed upon it with reference to awnings, gratings, and similar encumbrances on the street. *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A. (N.S.) 474, 75 N. E. 1116.

And it is the duty of a municipal corporation to remove a pole which had been erected in a street by citizens years before and had become rotten; and, where such a pole

falls and injures a person lawfully in the street, the municipality is liable for the injury whether the neglect was wilful or not. *Norristown v. Moyer*, 67 Pa. 355.

And its liability is not affected by the fact that the pole was in such a part of the road as not to obstruct travel. *Ibid.*

Nor may a city authorize the maintenance of telephone poles in a street which are needlessly projected from the sidewalk over the roadway at such a height as to prevent the free passage of ordinary vehicles near the curb. *Fisher v. Mt. Vernon*, 41 App. Div. 293, 58 N. Y. Supp. 499.

And evidence, in an action against a city for damages for personal injuries sustained by a collision with such a pole, that the pole was erected by a telephone company with the sanction of the city; and that it was 8 inches inside of the curb line at its base; and that for more than a year it had been permitted from a point 7½ or 8 feet above the street to overhang the driveway, the construction of which was such as to render it proper for travelers to use all parts of the driveway up to the curb,—is sufficient to go to the jury on the question whether the position of the pole was such as to make the highway unsafe for public travel. *Ibid.*

(f) Other objects or structures in and over streets generally.

A municipal corporation which permits the stringing of a wire across a public street for the giving of an acrobatic performance is liable to a pedestrian upon the street for injuries caused by being struck by a performer who falls from the wire while engaged in his performance, where the duty is imposed upon the municipality, by statute, of keeping its streets free from nuisances. *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057.

And a wire stretched from a building on one side of a public street downward across the street until one end terminates near the ground, down which a performer is to slide while purporting to be supported only by her teeth, is, when considered in connection with such performance, a public nuisance which the municipality cannot authorize. *Ibid.*

And, where an electric light company licensed to use a street erected a pole therein, and, to keep it in position, attached a wire from the top thereof across the street, which was fastened to a decayed and unsafe tree outside and beyond the street, the city, having actual notice or knowledge of the negligence and carelessness of the company in fastening the wire to an insecure and decayed tree in an unsafe manner, is under the duty to exercise at least reasonable diligence in having the wire removed, or safely secured; and, where the decayed tree fell, and the wire was thereby loosened so that it lay across the street about 8 inches above the sidewalk, and injuries were sustained by a person from tripping thereon, the city may be held liable for the injury, though it had no notice of the falling of the tree and of

the presence of the wire in its position after the fall. *Lafayette v. Ashby*, 8 Ind. App. 214, 34 N. E. 238, 35 N. E. 516.

So, where a street lamp in a municipal electric-light plant in a city was let down so that it was only a few feet from the ground, and the employee, after cleaning it and preparing it for future service, left it down and went some distance away, when a person on horseback was caught by the wires holding the lamp and injured, the question of the negligence of the city and the contributory negligence of the person injured is one of fact for a jury. *Mickey v. Indianola* (Iowa) 114 N. W. 1072.

And whether a wire stretched along the outer edge of a sidewalk about 4 feet from the ground and fastened by two poles, by contact with which a person was injured, was an obstruction to the safe use of the street, is a question of fact for the jury to determine, in an action for the injury, under proper instructions from the court. *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389.

And so is the question whether a wire attached to a stringer at the outer edge of a sidewalk, or to stakes driven in the street close to the sidewalk and extending along the sidewalk to the top of a fruit booth 6 feet higher than the sidewalk and 8 feet from the place where the wire is attached to the stakes or sidewalk, is an obstruction on the sidewalk. *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243.

So, where a railroad trestle which passed over a public street in a city was always so low that it necessarily impaired the usefulness of the street; and the city permitted such trestle to be built and maintained; and the injury in question resulted from the insufficiency of the height of such trestle above the street,—the whole question of the responsibility of the railroad company and of the city, and of their negligence in respect to the trestle and street, was properly left to the jury in an action for the injury. *Ft. Scott v. Peck*, 5 Kan. App. 593, 49 Pac. 111.

And, though a railroad bridge over a city street does not constitute a defect for which the city is liable, the act of the city in raising the surface of the street under the bridge, thereby rendering the way defective in view of the height of the bridge over it, constitutes a defect for which the city will be liable. *Talbot v. Taunton*, 140 Mass. 552, 5 N. E. 616.

So, where a water tank was erected by a private citizen in a street, and a person, while engaged in work near by, was sitting in the shade of the tank engaged in sharpening a saw as an incident of the work in which he was engaged, and, by the breaking of a decayed sill, which was not observable, the tank fell upon him and killed him, it was for the jury, in an action against the city for the killing, to pass upon the question of the city's negligence and the contributory negligence of the person killed. *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 So. 452.
20 L.R.A. (N.S.)

(g) *Objects and structures adjacent to streets.*

The duty of a city to keep the streets and sidewalks in such a condition that persons passing over them or along them may do so with safety and convenience applies to imperfectly constructed and insecure structures, not on the street, but standing so near it as to be liable to fall upon it. *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165, 11 Pac. 38.

And, where a billboard was constructed on private property near a sidewalk, and it became insecure and was blown over into the street by the wind, and a person was injured thereby, the city cannot escape liability for the injury on the ground that the billboard was private property on private property, and used for private purposes only. *Ibid.*

In the above case, *Taylor v. Peckham*, 8 R. I. 349, 5 Am. Rep. 578, 91 Am. Dec. 235, supra; IX., d, 7, (c); *Hixon v. Lowell*, 13 Gray, 59, infra; and *Jones v. Boston*, 104 Mass. 75, 6 Am. Rep. 194, supra, IX., d, 7, (c),—were distinguished upon the ground that in those cases the alleged liability was one created by statute alone, and depended upon the construction of the language of the statute.

So, a cornice on a building, projecting over the sidewalk and constructed in such manner as to be dangerous and liable to fall, is a nuisance interfering with the safe use of the sidewalk, and may be abated by the city; and, if the city fails to do so, and permits the building to be completed with the projecting cornice, and fails to take steps to guard the public against the danger of passing under it, it is liable for an injury resulting from its fall upon a passerby. *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262.

And a building beside a street the walls of which are unsafe and insecure and liable to fall, and which is dangerous to passers-by on the sidewalk, is a public nuisance for which the city is responsible. *Pearson v. Birmingham* (Ala.) 47 So. 80.

So, a crumbling brick wall left, after the burning of a house, in an insecure condition and liable to fall upon the sidewalk, should be pulled down and removed by the city authorities although it is not actually in the street; and for their failure to do so they will be liable for resulting damages. *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486.

And, where a city authorized by its charter to declare and abate nuisances had, by general ordinance, declared all buildings and structures which were dangerous to the public to be nuisances; and, after becoming aware of the dangerous condition of a decayed wall situated so near to a street as to imperil the lives of persons passing by on the street, it neglected to cause its removal, and a child was crushed to death by the falling of the wall,—the city is liable though the wall stood on private property and the child at the time of the fall was not in the street, but was on private property, though within

a foot of the street. *Kiley v. Kansas City*, 69 Mo. 102, 33 Am. Rep. 491.

To subject a city to an action for damages occasioned by insecure projections from buildings adjacent to a public street, but so far elevated above the sidewalk as not to interfere with the ordinary use of the same by a traveler, however, there must have been a defect or want of repair in the projection, of such a nature that rendered its continuance dangerous to the public. *Drake v. Lowell*, 13 Met. 292.

And, if a brick wall left, after the burning of a house, beside a sidewalk, was firm and solid, and did not under any ordinary circumstances endanger any person passing by; and it was thrown down by a tempest or other act of God; and a person was injured thereby,—the city is not liable for the injury. *Parker v. Macon*, supra.

And it has been held that a city is not liable for injury to the property of a citizen, caused by the falling of a wall left standing after a building which belonged to a private owner was burned, although it had been notified of the fact that the wall was dangerous. *Anderson v. East*, 117 Ind. 126, 2 L.R.A. 712, 10 Am. St. Rep. 35, 19 N. E. 726.

So, the power conferred by a city charter authorizing its common council to pass ordinances for the razing or demolishing of buildings which, by reason of fire, may become dangerous, is simply one of local legislation; and the failure to exercise it does not make the city liable for injuries caused by the falling of the wall of a building which had become dangerous by reason of a fire. *Cain v. Syracuse*, 95 N. Y. 83, affirming 29 Hun, 105.

And, where a city charter gives to the common council power to compel by resolution the owners or occupants of any wall or building within the city which may be in a ruinous or unsafe condition to render the same safe, or to take down or remove the same, and to require summary removal or abatement of all nuisances; and a penalty is imposed for the violation of such resolution; and a dangerous wall in the city did not front upon the street, but was upon the line between the lot on which the building stood and an adjoining lot,—an omission upon the part of the common council to pass a specific resolution in regard to the wall, at least in the absence of evidence that that body had notice of its dangerous character, does not render the city liable for an injury caused by the falling of the wall. *Ibid.*

So, where there is no structure, such as, if inconsistent with the safety of travelers, would be an encroachment upon the street, and the way itself is properly constructed, the descent of snow or water from the roof of a building, whether sudden or gradual, causing an injury, does not give a right of action against the town or city to recover compensation therefor. *Hixon v. Lowell*, supra.

And this is so although it has so overhung the highway for more than twenty four hours before the accident. *Ibid.*
20 L.R.A. (N.S.)

In the above case, it was said that in *Drake v. Lowell*, 13 Met. 292, supra, IX., d. 7, (b), one of the limits of reasonable interpretation was reached.

Nor is a city bound from time to time to enter the premises of the owners or occupants of lands along the streets, and make close examination of signs or other projections extending over the highway, for the purpose of ascertaining whether or not they are in a safe condition. *Leary v. Yonkers*, 95 App. Div. 126, 88 N. Y. Supp. 829.

And a city, by granting a building permit, does not render itself liable for the negligent acts of persons constructing a building under a permit so granted; and it is not bound to anticipate that the persons erecting the building will be so grossly negligent as to throw a board from the roof of the building into the street. *Copeland v. Seattle*, 33 Wash. 415, 65 L.R.A. 333, 74 Pac. 582.

8. Objects calculated to frighten horses.

(a) Generally.

Where, by law, it is made the duty of towns to cause the highways within their limits to be kept reasonably safe and convenient; and they are rendered liable to travelers for injuries caused by a neglect of this duty,—a road may be rendered unsafe by objects upon it which are calculated to frighten animals as well as by its defective construction. *Dimock v. Suffield*, 30 Conn. 129; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 390.

And an object in a public street which is calculated to frighten horses is such an obstruction as makes the corporation liable in case of an accident happening in consequence thereof. *Chicago v. Hoy*, 75 Ill. 530; *Ayer v. Norwich*, supra; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292; *Washay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73.

And it may be a nuisance, and is not distinguishable in law from an obstruction which a traveler drives against. *Clinton v. Howard*, 42 Conn. 294.

And cities and towns should be held liable for injuries resulting from the fright of horses of ordinary gentleness at objects naturally calculated to frighten such horses, which the corporation has negligently placed, or permitted to be placed and remain, upon its streets. *Rushville v. Adams* and *Ayer v. Norwich*, supra; *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518; *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *Rice v. Whithy*, 28 Ont. Rep. 598.

Municipal corporations are held to a higher responsibility with reference to removing deposits of private property which are placed on a highway without right, and obstruct public travel by their frightful appearance, than with reference to removing equally dangerous objects which either are incident to the nature of the soil and country, or are thrown upon the margin in the process of

constructing the road. *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

Nor is a city relieved from liability for an injury resulting from an obstruction in a highway of such a nature as to frighten horses of ordinary gentleness, by the fact that there was no actual contact with the obstruction. *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722.

Or by the fact that it was so far removed from the traveled path as to prevent all danger of collision. *Foshay v. Glen Haven*, *supra*.

Nor is a person, injured by his horse taking fright at an object in the street naturally calculated to frighten horses of ordinary gentleness, deprived of a right to recover against the municipality for his injury by the fact that the bit broke. *Cairncross v. Pewaukee*, 86 Wis. 181, 56 N. W. 648.

And, if an obstruction at which a horse took fright was located in a street, the village is liable for injuries resulting from its being there, even though the horse took fright while on a cross road and just before entering such village street. *Barr v. Bainbridge*, 42 App. Div. 628, 59 N. Y. Supp. 132.

In order to render a municipal corporation liable for injuries resulting from the fright of horses frightened at objects on the streets, however, it must in some way be made to appear that the object or obstruction was one naturally calculated to frighten horses of ordinary gentleness. *Rushville v. Adams*, *supra*; *Royal Center v. Bingaman*, 37 Ind. App. 626, 77 N. E. 811.

And this fact must be charged in the complaint in an action against the city for the injury. *Royal Center v. Bingaman*, *supra*.

And it must be made to appear that the horse which was frightened was one of ordinary gentleness. *Rushville v. Adams*, *supra*.

But an instruction, in an action against a town for injuries received from a horse becoming frightened by rubbish in the street, requiring the jury, before finding for the plaintiff, to believe that there was a pile of rubbish on the street, and that it was an object reasonably calculated to frighten gentle horses, sufficiently submits the question whether the street was in a reasonably safe condition. *Nicholasville v. Fain*, 30 Ky. L. Rep. 564, 99 S. W. 275.

And evidence that other horses passed the same place during the same time and in the same manner, and were not frightened by the obstruction, is competent, in an action for an injury from a horse being frightened by it, on the question of the liability of the obstruction to frighten horses. *Gould v. Hutchins*, 73 N. H. 69, 58 Atl. 1046.

And so is evidence that other horses were frightened by it, as tending to show that it was dangerous. *Elgin v. Thompson*, 98 Ill. App. 358; *Galt v. Woliver*, 103 Ill. App. 71.

Nor does the duty to travelers, of municipal corporations, to remove from the margins of their highways objects unlawfully deposited there, which, by their frightful appearance, make it unsafe to travel the road with ordinarily gentle horses, attach until the municipality knows of the obstruction, or ought to know of it. *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

Nor does it attach while the property is lying upon the highway a reasonable time in loading or unloading, or for the ordinary purposes of transportation. *Ibid*.

But, while the right and duty to repair a bridge in a street involves the right, if necessary, to place material therefor in the street, if such material is naturally calculated to frighten horses of ordinary gentleness it is the duty of the city to place it where it cannot be seen by horses, or temporarily to close the street; though this principle is not one to be given in charge to the jury as determining negligence as a matter of law. *Patterson v. Austin*, 15 Tex. Civ. App. 201, 39 S. W. 976.

And, where a street cleaner turned on a hydrant when there was a horse and wagon 25 feet or more from it, and the horse was frightened and injury resulted, it is a question of fact for the jury whether or not the act of the street cleaner was negligence for which the city was responsible. *Crouter v. New York*, 114 N. Y. Supp. 353.

So, an object, though within the limits of a traveled way, which may frighten horses and is likely to do so, but is not otherwise an obstruction to travel, is not a defect within the meaning of statutes requiring towns to keep their ways in repair. *Bemis v. Arlington*, 114 Mass. 507; *Brooks v. Acton*, 117 Mass. 204; *Cook v. Montague*, 115 Mass. 571; *Maxwell v. Clarke*, 4 Ont. App. Rep. 466.

An object in a highway with which a traveler did not come in contact or collision, and which is not shown to have been an actual encumbrance or obstruction in the way of travel, is not a defect merely because it was of a nature to cause a horse to take fright, in consequence of which he escaped from the control of his driver and caused damage. *Kingsbury v. Dedham*, 13 Allen, 186, 90 Am. Dec. 191.

And the same rule applies to objects which, though they obstruct a part of the statutory highway, yet are permissible in the locality. *Maxwell v. Clarke*, *supra*.

So, an injury resulting from fright taken by a horse at certain objects exposed for sale in the streets of a town is not an injury caused by any neglect or mismanagement upon the part of the municipal corporation in keeping the streets of the town in proper and safe repair, for which it is made liable by S. C. Rev. Stat. 1893, § 1582. *Dunn v. Barnwell*, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 315.

The question of negligence upon the part of a municipal corporation in respect to the removal of objects in a highway calculated to frighten timid animals should always be examined in reference to what may rea-

sonably be required. *Dimock v. Suffield*, 30 Conn. 129.

And whether a particular object is naturally calculated to frighten horses is to be determined by experience, observation, and intelligence of the court and jury, in an action for damages for an injury resulting therefrom, as applied to the facts of the case before them; and it is not a subject to be pleaded and proven. *Cleveland, C. C. & I. R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118.

And, where a horse was proved to be gentle and to have been carefully driven; and it was frightened by an alleged obstruction in a street,—those facts should be taken into consideration on the question whether or not the obstruction was one which was likely to frighten gentle horses carefully driven. *Vandalia v. Huss*, 41 Ill. App. 517.

But whether or not an object standing upon a street is calculated to frighten horses of ordinary gentleness is not a question for expert testimony. *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676.

Though a witness testifying from his personal observation and experience may give his opinion whether a certain object on a highway would be likely to make an ordinarily gentle horse shy. *Clinton v. Howard*, 42 Conn. 294.

And the question whether an alleged obstruction in a street frightened a horse, from which fright an injury resulted; and whether the alleged obstruction was of a character likely to frighten gentle horses carefully driven,—is one to be determined by the jury in an action for the injury, from a consideration of all the evidence touching the character, location, and surroundings of the obstruction at the time of the accident. *Vandalia v. Huss*, supra; *ELAM v. MT. STERLING*.

(b) *Steam rollers, etc.*

A municipal corporation possesses the right to use any proper improvement run by steam for the purpose of constructing or repairing its streets, and, in the absence of carelessness or negligence in its management, is not liable for damages occasioned by a horse becoming frightened at it. *Sparr v. St. Louis*, 4 Mo. App. 573, Appx.; *McMulkin v. Chicago*, 92 Ill. App. 331; *Lane v. Lewiston*, 91 Me. 292, 39 Atl. 999.

Where notice of such use was brought home to the traveler before an injury occurred in consequence thereof. *Lane v. Lewiston*, supra.

And the use by a city of a steam roller to press down the material of which a street is composed is not negligence. *McMulkin v. Chicago*, supra.

Nor, when a steam roller is being so used, is the city legally bound to notify persons approaching it with horses that it is about to start. *Ibid*.

And evidence, in an action against a city for an injury caused by a horse being frightened by a steam roller, as to what the effect

of the operation of the steam roller was on horses, is incompetent. *Ibid*.

Nor can such use of a steam roller, though it may necessarily impede travel over the street to some extent, constitute a defect within the meaning of the statute; and it cannot furnish a ground for recovery against the city for permitting an obstruction in the street. *Lane v. Lewiston*, supra.

But a steam roller, being a machine by reason of its construction and appearance and the manner of its operation calculated to frighten horses if taken through the streets at a time when it is being used by the public, and when its passage is necessarily attended with danger, requires the exercise upon the part of the persons in charge of a high degree of care and the use of every reasonable precaution to avoid accident. *Denver v. Peterson*, 5 Colo. App. 41, 36 Pac. 1111.

And leaving upon the street a steam roller about 20 feet long, 10 feet high, and 8 feet in width, with a smokestack and three rollers, operated by steam in a horizontal boiler, and covered with a rubber blanket, at which a horse had shied, raises a question for the jury as to the negligence of the municipal corporation, though there is no direct proof that the machine would scare horses. *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518.

And the liability of a city for leaving a steam roller upon a public street from Saturday noon until Monday morning following, near the traveled part, for an injury to a person resulting from his horse being frightened at the roller, is not affected by the fact that the roller had been used by the authorities of the city in macadamizing the street, and that it was left near the place where it had been used in order that it might be used again on the Monday morning following; the sole question for determination is whether the city exercised reasonable care in its conduct with the roller to avoid injury to others. *Young v. New Haven*, 39 Conn. 435.

But leaving a steam roller close to the curb on a street where it was in use for two days, after it was broken, without any change in its appearance to enhance the danger of frightening animals, except by putting over it the usual canvass cover to protect it from the weather, does not present a case of negligence for the jury, where a horse became frightened by its presence in the street, and an injury resulted. *District of Columbia v. Moulton*, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840.

So, the act of dumping a load of stone on the wooden platform of a stone crusher, and of starting up the engine of the crusher and letting off steam just as a horse, which was being driven on a roadway 25 feet away and in plain sight was opposite it, may be found to have been a negligent act on the part of the agents of a city operating the crusher, and would constitute evidence of negligence upon the part of the municipality. *Butman v. Newton*, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401.

As to right to leave steam roller in street over Sunday, see *Keeley v. Shanley*, 140 Pa. 213, 21 Atl. 305, 306, *supra*, IX., d, 5, (a).

(c) Building material and other objects.

A municipal corporation is not liable for injuries resulting from the fright of a horse, caused by the presence of building material in the highway, although of such a nature as to frighten horses of ordinary gentleness, unless an unlawful or unreasonable use was made of the highway in placing it there, of which fact the municipal authorities had notice. *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048.

And, where ordinary stones, such as are used to build stone walls, having nothing peculiar or strange about them, were placed in a street by a person about to rebuild a wall along his premises; and a horse shied at them and ran against a fence upon the opposite side of the street,—no negligence upon the part of the municipal corporation appears, for which it can be held liable. *McCord v. Ossining*, 10 N. Y. S. R. 407. And see *ELAM v. MT. STERLING*.

Nor is a city liable for an injury caused by a horse being frightened at the sight of a boulder that had been dug out of the roadbed in a street, left between the gutter and the traveled part of the way until it could be removed by a person who had asked for and obtained permission to take it for building purposes. *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383, 21 N. W. 873.

And where, on the side of a road, there was a fill of about 15 feet with railings on either side; and a quantity of tiles were piled by the municipal corporation on one of the sides of the highway in a slight hollow behind the railings of the fill, for the purpose of repairing a culvert running through the fill; and some planks were thrown over them and a board nailed over the two boards forming the railing, so as further to hide the tiles from view,—no negligence upon the part of the municipal corporation appears which will render it liable for injuries sustained by a person whose horse became frightened at the tiles and ran away. *Macdonald v. Yarmouth Twp.* 29 Ont. Rep. 259.

So, ordinary wagons are neither strange nor rare, and they are not objects which are calculated to frighten horses of ordinary gentleness, constituting an obstruction in a street, for an injury from which the city would be liable. *Studeor v. Gouverneur*, 15 App. Div. 229, 44 N. Y. Supp. 122.

And the existence of a broken-down wagon with a bright red board sticking up in it on the side of a highway and partly in the ditch, where it had been hauled by the owner, some 8 or 10 feet from the traveled part, leaving plenty of room to pass, and remaining there for ten days, does not constitute evidence of actionable negligence upon the part of the municipal corporation; and a person who was thrown out and in-

jured in consequence of his horse taking fright at the wagon and board, and shying, cannot recover of the municipality for his injury. *Rounds v. Stratford*, 26 U. C. C. P. 11.

Nor is a steam threshing machine allowed to stand upon the traveled portion of a public street as matter of law such an obstruction as is calculated to frighten horses of ordinary gentleness; whether or not it is so is a question for the jury. *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676.

If bales of hay deposited without right by a third person on the margin of a highway presented such an appearance that they might reasonably be expected to and naturally would frighten horses of ordinary gentleness, however; and an injury occurred from such fright,—the municipal corporation is liable, although the surface and width of the traveled path was faultless. *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

And the facts that a pile of shavings was within a few feet of the traveled track in a public street along which teams were obliged to pass, and that it frightened a gentle horse, carefully driven, furnish sufficient ground for the belief that the obstruction was likely to frighten gentle horses, carefully driven. *Vandalia v. Huss*, 41 Ill. App. 517.

And an instruction in such case that, if the street in question was in a condition to be reasonably safe for travel at the time and place of the injury, the city was not liable, ignoring the question of the obstructions complained of then and there upon it, is properly refused, since it was not the condition of the street alone that caused the accident, but the dangerous obstruction permitted to remain near the traveled track. *Ibid.*

And a finding that a city was not guilty of negligence in permitting a pile of stones to remain in the street is contrary to the evidence, and cannot be sustained where many witnesses testified that a great many horses had taken fright at the stones, and a witness living near the place of the accident and having ample opportunity for observation stated that she knew of no horse passing there which was not frightened at the stones. *Patterson v. Austin*, 15 Tex. Civ. App. 201, 39 S. W. 976.

So, where a workman employed by a city in cutting a ditch along the side of a street left his scraper in the street with its bright side exposed to view, so as to be calculated to frighten horses passing along the street, the city is liable to a person whose horse was frightened by the scraper and backed into a ditch, notwithstanding the fact that the width of the street afforded an unobstructed passage of between 50 and 60 feet. *Weatherford v. Lowery* (Tex. Civ. App.) 47 S. W. 34.

And that a water pipe was constructed by a borough or village in the public highway, which was in such a condition that the water escaped therefrom and was thrown into the air with a hissing noise from time to time in such a manner as was calculated

to frighten ordinarily gentle and roadworthy horses, is evidence of negligence upon the part of the borough or village. *Baker v. North East*, 151 Pa. 234, 24 Atl. 1079.

So, a tent on a portion of the traveled path of a highway over which the public is accustomed to pass with horses, carriages, and teams, which is, in its general operation, calculated to frighten horses of ordinary gentleness, and of such size and character as to obstruct travel, is a nuisance which it is the duty of the city to remove; and its failure to do so renders the city liable for an injury resulting therefrom, under a statute requiring it to keep its highways reasonably safe and convenient, and making it liable to travelers for injuries caused by a neglect of this duty. *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396.

And a city which authorizes and sanctions and knowingly and carelessly allows one of its principal streets to be obstructed by an exhibition of wild animals therein, which exhibition is calculated to produce injury to persons lawfully traveling along the street, is liable for an injury caused by the animals frightening a team traveling on the street, rendering it unmanageable, so that a passenger is injured. *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435.

9. Snow and ice.

(a) Limitation to recent cases.

The liability of municipal corporations for ice on streets or sidewalks was fully considered in a note to *Hausmann v. Madison*, 21 L.R.A. 263; and the question of liability for permitting water to accumulate and freeze on a sidewalk to the injury of travelers was exhausted in a note to *Brown v. White*, 58 L.R.A. 321. This leaves little to be done here except to set out decisions rendered since these notes were written.

(b) General rules.

Ice and snow are unavoidable incidents in streets in winter, and a city can make use of only the requisite skill and industry to remove or mitigate their effects. *Roanoke v. Harrison*, 1 Va. Dec. 801, 19 S. E. 179.

And the general rule is that the duty of a city to exercise reasonable care to keep its sidewalks in safe condition for travel is not limited to structural defects, but extends, also, to dangerous accumulations of ice and snow. *Wright v. St. Cloud*, 54 Minn. 94, 55 N. W. 819; *Kortlang v. Mt. Vernon*, 129 App. Div. 535, 114 N. Y. Supp. 252.

And failure to act after actual notice, or after time sufficient to justify the inference of knowledge, presents a question of negligence for the consideration of a jury. *Kortlang v. Mt. Vernon*, *supra*.

Nor is the degree of care and diligence required of a city to keep its sidewalks in proper condition with reference to snow and ice affected or varied by the number of miles of walks in the city; if labor is necessary for the purpose, the force should be commensurate with the work to be done. 20 L.R.A. (N.S.)

Lindsay v. Des Moines, 68 Iowa, 368, 27 N. W. 283.

Though it has been held that, if ice, or snow, or sleet had fallen in such quantities as are unusual, and could not have been removed except at a greater expense than could reasonably be incurred, the municipality would not be liable for an injury resulting therefrom. *Cresler v. Asheville*, 134 N. C. 311, 46 S. E. 738.

A city is not bound, under all circumstances, however, to keep its sidewalks free from ice; it is required to exercise only reasonable diligence under the circumstances of the case. *Clark v. Chicago*, 4 Biss. 486, Fed. Cas. No. 2,817; *Chicago v. McDonald*, 111 Ill. App. 436.

Its duty in this respect is to use only reasonable care to see that they are reasonably safe for persons exercising ordinary care and prudence. *Chicago v. McDonald*, *supra*.

And the duty of a city to keep its walks free from ice and snow does not require it also to clear that part of the roadway that is so near the walk that a traveler might step upon it to avoid a pool of water. *Lichtenstein v. New York*, 159 N. Y. 500, 54 N. E. 67, reversing 29 App. Div. 542, 51 N. Y. Supp. 642.

So, a municipal ordinance requiring persons to see that no snow or ice shall be permitted to remain on the sidewalk and gutter in front of any house, building, or lot occupied by them has no relation to the duty of the city in respect to the walk in front of an alley, which is a cross walk rather than a sidewalk. *Moran v. New York*, 98 App. Div. 301, 90 N. Y. Supp. 596.

And a crossing is not a sidewalk, within the meaning of a statute which exempts corporations from accidents arising from persons falling owing to snow or ice upon sidewalks, except in cases of gross negligence. *Drennan v. Kingston*, 23 Ont. App. Rep. 406.

And Mass. Stat. 1896, chap. 540, providing that no city or town shall be liable for any injury to person or property received or suffered in or upon any highway by reason or in consequence of snow or ice thereon, if the place at which the injury or damage was received or suffered was, at the time of the accident, otherwise reasonably safe and convenient for travelers, means that a way shall not be deemed unsafe by reason of snow or ice thereon if it would be reasonably safe and convenient for travelers but for the presence of the snow and ice. *Newton v. Worcester*, 169 Mass. 516, 48 N. E. 274, second appeal, 174 Mass. 181, 54 N. E. 521.

And whenever ice or snow is the sole proximate cause of an accident, there is no liability on the part of the city. *Newton v. Worcester*, 174 Mass. 181, 54 N. E. 521.

So, Mass. Rev. Laws 1902, chap. 51, § 19, relieves a city from liability for injuries caused solely by snow or ice in a street, though put into dangerous form by human agency. *Hitchcock v. Boston* (Mass.) 87 N.

E. 470; Hadden v. Somerville, 197 Mass. 480, 83 N. E. 1105.

While it is not the duty of a city, under all circumstances, to remove ice from streets or crossings, however, if there is anything out of the ordinary course of things which renders the sidewalk and crossings especially dangerous, and which can be removed, it ought to be done. Clark v. Chicago, *supra*.

But the fact that children were accustomed to slide on an icy sidewalk does not create such an artificial cause of a dangerous condition as will take the case out of the operation of the rule that, where it is practically impossible to remove ice from a sidewalk until a thaw comes which remedies the evil, the municipality is not negligent in awaiting that result. Buck v. Glens Falls, 4 App. Div. 323, 38 N. Y. Supp. 582.

(c) *Mere slipperiness.*

A municipal corporation is not liable for injuries from mere general slipperiness of its streets and sidewalks, occasioned by a recent fall of rain or snow. Holbert v. Philadelphia, 221 Pa. 266, 70 Atl. 746; Blaine v. Philadelphia, 33 Pa. Super. Ct. 177; Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621; Hendrickson v. Chester City, 221 Pa. 120, 70 Atl. 552; Metzger v. Chicago, 103 Ill. App. 605; Marek v. Chicago, 89 Ill. App. 358; Masters v. Troy, 50 Hun, 485, 3 N. Y. Supp. 450; Haight v. Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193; Brennan v. New York, 114 N. Y. Supp. 578; Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738; Calder v. Walla Walla, 6 Wash. 377, 33 Pac. 1054; Beaton v. Milwaukee, 97 Wis. 416, 73 N. W. 53.

Unless some defect in the walk concurs with its slippery condition in producing the accident. Beaton v. Milwaukee, *supra*.

Or unless the ice is so rough and uneven, or so rounded up, or at such an incline, as to make it an obstruction. Calder v. Walla Walla and Metzger v. Chicago, *supra*; Anthony v. Glens Falls, 4 App. Div. 218, 38 N. Y. Supp. 536; Blaine v. Philadelphia, *supra*.

And this has been allowed to remain for an unreasonable time. Cresler v. Asheville, *supra*.

Nor does mere iciness or slipperiness of a sidewalk, produced by a sudden freezing, render the city liable for an injury caused thereby. Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20; McQueen v. Elkhart, 14 Ind. App. 671, 43 N. E. 460; Buck v. Glens Falls, 4 App. Div. 323, 38 N. Y. Supp. 582; Anthony v. Glens Falls, *supra*.

And something more than the presence of ice due to the result of a low winter temperature must be shown to make a city chargeable with negligence. Peard v. Mt. Vernon, 83 Hun, 250, 31 N. Y. Supp. 395.

A municipal corporation is not bound to remove smooth slippery ice from a sidewalk, where there are no hills or ridges which amount to an obstruction, unless the slip-

pery condition is caused by the independent negligence of the municipality. Ingram v. Philadelphia, 35 Pa. Super. Ct. 305.

And, where a sidewalk is in a slippery condition from ice and snow which does not amount to an obstruction to travel upon it, and a person is injured thereon, not by stumbling against anything, but merely by slipping, the city cannot be held liable for the injury. Chicago v. McDonald, 111 Ill. App. 436.

Nor does proof that a considerable quantity of ice formed on a sidewalk near a watering trough, and that the ice was rough, and that a person fell upon it and was injured; but not tending to show that the roughness of the ice caused the fall,—show that the fall was the result of any actionable defect in the street. Mueller v. Milwaukee, 110 Wis. 623, 86 N. W. 162.

And a person walking on a sidewalk on a steep grade during a snowstorm which had continued for two hours and had covered a coating of old ice on the walk to the depth of 2 inches, who fell while so walking, cannot recover from the city for the injury received, in the absence of evidence that the old ice was a concurring cause of his fall. Lawless v. Troy, 44 N. Y. S. R. 735, 18 N. Y. Supp. 506.

So, a city is under no specific duty to sand its streets or sidewalks; and an instruction in an action for an injury from a fall on an icy sidewalk, that, if sanding the walk would have prevented the injury, and was a reasonable duty on the part of the city, the person injured could recover, is properly refused. McGuinness v. Worcester, 160 Mass. 272, 35 N. E. 1068.

(d) *Ordinary falls of snow.*

The obligation imposed by law on a city to keep its streets in repair and free from nuisance does not extend to the removal of an ordinary fall of snow and ice upon a sidewalk. Vandyke v. Cincinnati, 1 Disney (Ohio) 532; Rolf v. Greenville, 102 Mich. 544, 61 N. W. 3; Brennan v. New York, 114 N. Y. Supp. 578.

When the ice on a sidewalk is the result of rain or snow which has made all the sidewalks slippery, it is not negligence of the city to fail to remove it. Masters v. Troy, 50 Hun, 485, 3 N. Y. Supp. 450; Anthony v. Glens Falls, 4 App. Div. 218, 38 N. Y. Supp. 536; Haight v. Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193.

And a slippery condition of a sidewalk which is a natural temporary condition caused by the weather for the time being, with constant alternations from rain to snow and from thawing to freezing, is not a defect or an obstruction for which the city is liable. Brennan v. New York, 117 App. Div. 849, 103 N. Y. Supp. 266.

Nor is a city liable for an injury alleged to have resulted from an accumulation, at a certain point, of snow and ice upon a sidewalk, where it does not appear that the sidewalk was out of repair or defective, or that the accumulation of snow and ice upon

the walk was so great as to constitute a nuisance or a material obstruction to ordinary travel upon the street. *Bretsh v. Toledo*, 1 Ohio S. & C. P. Dec. 96.

And a city situated in the latitude of northeastern Ohio is not bound, as a matter of law, to remove, even from its principal streets, snow which fell during an unusual storm to the depth of 4 feet; and the fact that the snow had remained a week, and had been piled up by the street car companies in clearing their tracks, and had become frozen and hard, is notice to the public as well as to the city authorities of its dangerous condition, and therefore the public is bound to exercise care in driving. *McDonald v. Toledo*, 63 Fed. 60.

Nor is a municipality which worked diligently to remove snow from its streets chargeable with negligence for failing to completely clear a street, where no defect or obstruction is shown other than a temporary condition of ice and snow caused by the weather conditions. *Brennan v. New York*, supra.

So, a recovery cannot be had against a municipal corporation for an injury by a fall on a sidewalk, where the walk was well made and of good material, and the fall would not have occurred had it not been for an extraordinary fall of snow and the formation of ice by the tramping of the snow, and freezing,—contingencies against which the corporation could not always provide. *Gibson v. Johnson*, 4 Ill. App. 288.

And, where a pile of snow has been sufficient to cause an accumulation in a roadway higher than the sidewalk, which is added to by the snow removed from the sidewalk, so that it is impossible to prevent the snow from being thrown back on the sidewalk by passing vehicles, and being tramped down and frozen into compact masses near the curb; and the temperature remains below freezing so that such masses of compact frozen snow and ice are hard to remove,—a person using the street when such conditions are apparent is not justified in expecting to find the whole width of the sidewalk entirely free from obstructions; and a city cannot be obliged to see that all such obstructions, especially those near the curb and away from the center of the sidewalk, have been removed. *Winckler v. New York*, 129 App. Div. 45, 113 N. Y. Supp. 412.

(c) Rough accumulations of snow and ice.

While the mere slipperiness of a sidewalk, occasioned by ice or snow, not accumulated so as to constitute an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby, if the snow or ice is permitted to accumulate, or to become rough and uneven, so that the slipperiness becomes more dangerous than if it lay in a smooth surface, it is generally held to constitute an obstruction which the municipality must remove or pay resulting damages. *Storm v. Butte*, 20 L.R.A. (N.S.)

35 Mont. 385, 89 Pac. 726; *Mareck v. Chicago*, 89 Ill. App. 358; *Jones v. Troy*, 22 N. Y. S. R. 276, 4 N. Y. Supp. 792, affirmed in 127 N. Y. 671, 28 N. E. 255; *Brennan v. New York*, 114 N. Y. Supp. 578.

And, where ice and snow have been allowed to accumulate upon a particular spot in a street for a considerable length of time, until they become an obstruction and dangerous to pedestrians, the city is liable for injuries resulting therefrom. *Brennan v. New York*, 117 App. Div. 849, 103 N. Y. Supp. 266; *Masters v. Troy*, 50 Hun. 485, 3 N. Y. Supp. 450; *Haight v. Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193; *Beck v. Buffalo*, 50 App. Div. 621, 63 N. Y. Supp. 499; *Bull v. Spokane*, 46 Wash. 237, 13 L.R.A. (N.S.) 1105, 89 Pac. 555; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729; *West v. Eau Claire*, 89 Wis. 31, 61 N. W. 313.

Where they have been there for a time long enough to give constructive notice to the city. *Masters v. Troy* and *Beck v. Buffalo*, supra; *Wyman v. Philadelphia*, 175 Pa. 117, 34 Atl. 621; *Bull v. Spokane* and *Smith v. Spokane*, supra.

Ice and snow accumulating on a sidewalk from natural causes, if suffered to remain until the surface is so rough and ridged, rounded or slanted, that it is difficult and dangerous for persons traveling on foot to pass over it when exercising ordinary care, constitute a defect for which the city or town is liable. *Huston v. Council Bluffs*, 101 Iowa, 33, 36 L.R.A. 211, 69 N. W. 1130; *Wyman v. Philadelphia* and *Mareck v. Chicago*, supra.

So, where snow on a sidewalk had thawed and frozen until the walk was in a rough and uneven condition, the center thereof being rounded and sloping toward either edge of the walk; and water from melting snow had run down onto the walk and there frozen; and the day before the accident in question was warm, and the snow and ice had largely disappeared, but pieces of ice still remained; and, during the night, there was a storm of sleet or snow and a drop in the temperature, so that on the next morning, when the accident in question occurred, the walk was uneven, slippery, and dangerous,—it is sufficient to take the case to the jury on the issue of the city's negligence. *Templin v. Boone*, 127 Iowa, 91, 102 N. W. 789.

And evidence that snow and ice were piled up on a sidewalk; and it was exceedingly dangerous to walk upon in that condition; and that said condition continued for several weeks; and that a person who fell and was injured on it did not know of its slippery condition; and that the fall was after dark,—is sufficient legally to present the question to a jury as to whether or not the city was negligent, and as to whether or not such negligence was the proximate cause of the injury. *Bull v. Spokane*, supra.

And a complaint in an action against a city, alleging that it negligently permitted snow and ice to accumulate on a sidewalk

to the depth of several inches at a point where the injury in question occurred, and that, by persons passing over it and other causes, it became so uneven and rounded, and had such an angle from the level of the sidewalk, that a person could not walk over it without danger of falling; and that this condition was known to the city for a long time prior to the date of the plaintiff's injury; and that the accumulation constituted an obstruction which the city negligently permitted to remain without proper protection, and without light or signal to indicate danger,—sufficiently shows actionable negligence upon the part of the city in the absence of special demurrer. *Storm v. Butte*, supra.

So, that a sidewalk was icy, slanting, and uneven, with hills or hummocks of ice 2 or more inches high; and that it was upon one of these hills or hummocks that a person slipped when she fell and received injuries; and that the ice on the walk was 3 or 4 inches thick; and that this condition had existed practically all winter, and most of the ice had accumulated ten days before the accident,—furnishes proof of negligence upon the part of the city. *Klaus v. Buffalo*, 86 App. Div. 221, 83 N. Y. Supp. 620.

And a municipal corporation which permits a ridge of ice 4 inches wide and from 2 to 5 inches high to remain across a sidewalk for a month, upon which a person slips and falls after it is covered with snow, is liable in damages for the injuries sustained. *Moore v. Philadelphia*, 33 Pa. Super. Ct. 194.

So, evidence that a ridge of snow and ice extending along the center of a sidewalk was 5 or 6 inches high; and that it was formed of snow part of which fell during a storm about sixteen days before the injury complained of, and a part during another storm about four days previous to the injury; and that it was packed down and glazed with ice and uneven and very slippery, and had been so about a week before the injury,—is sufficient to warrant a verdict charging the village with negligence. *Keane v. Waterford*, 130 N. Y. 188, 29 N. E. 130.

And so is evidence that a person fell on a ridge of snow on a sidewalk, some 8 or 10 inches in height and 6 or 8 inches in width, running through the center of the walk for its entire length; and that, though the ridge of snow was the result of an unusually severe and prolonged storm, yet many other walks in the immediate locality were entirely cleared of snow which had fallen, within a reasonable time after the storm had subsided, and this had been permitted to remain; and that it might have been removed with the exercise of a fair degree of care and diligence. *Scanlon v. Weedsport*, 85 App. Div. 623, 82 N. Y. Supp. 577.

And evidence that, during the winter, a ridge of hard snow or ice had formed in the center of a sidewalk, about 4 inches high and 12 inches wide at the base, and sloping from the highest point at the center to the

edges; and that the ridge was rough and slippery, so that a person using the walk was liable to stumble by his feet coming in contact with the ridge, or to step upon the ridge and fall by his foot slipping upon its sloping and rough sides,—is sufficient to make a question for the jury, in an action for an injury caused thereby, whether the walk was reasonably safe for public travel, *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26.

And evidence that, at a place where an accident occurred, there was a slope or declivity in the sidewalk, occasioned by snow having been cleared off the walk opposite one lot and having been allowed to accumulate in front of an adjoining lot, so that at the point where the accident occurred there was a descent or declivity at an angle of 45 degrees, of the length of 10 or 12 inches extending the entire width of the sidewalk, justifies the jury, in an action for an injury resulting therefrom, in finding that the municipal corporation was negligent in not removing an accumulation of snow and ice from the sidewalk at the place where the accident occurred, and that such negligence was a proximate cause of the injury. *Goff v. Little Falls*, 47 N. Y. S. R. 729, 20 N. Y. Supp. 175.

So, a fall upon an icy sidewalk is attributable to the negligence of the city, where it appears that the walk where the accident occurred and for a considerable distance on either side of that point was covered with ice and snow some 4 or 5 inches in depth, and that the accumulation was higher in the center of the walk than upon either side, and the entire width of the walk was in an icy and slippery condition, and that it was difficult to pass over it without slipping and falling, and this condition had existed for such a time before the accident as to afford constructive notice to the city. *Walsh v. Buffalo*, 17 App. Div. 112, 44 N. Y. Supp. 942.

And, where the plaintiff and three other witnesses in an action for damages against a city for a personal injury testified to the existence of hills and ridges of ice of a dangerous character on a sidewalk, continuing long enough to charge the city with constructive notice, a verdict and judgment for the person injured will be sustained though three or four of the plaintiff's own witnesses contradicted him, and a large number of witnesses for the defendant testified that no such condition existed on the sidewalk in question at the time of the accident and before it. *McDevitt v. Philadelphia*, 35 Pa. Super. Ct. 317.

And proof, in an action against a municipal corporation for damages for an injury alleged to have been caused by an obstructed sidewalk, tending to show that, in violation of a city ordinance requiring owners or occupants to remove before 9 o'clock in the morning all snow and ice which may have fallen upon the sidewalk in front of his premises, an accumulation of snow and ice at least 9 inches in thickness has been per-

mitted to remain upon the sidewalk in question at the point where the accident happened, charges the city with notice thereof, and makes the question as to the negligence of the municipality one to be submitted to the jury. *McPherson v. Buffalo*, 13 App. Div. 502, 43 N. Y. Supp. 658.

Nor does the condition of general slipperiness of the streets in the winter relieve a city from liability for their obstruction caused by accumulations of ice or snow after knowledge, actual or constructive; and, if the accumulations assume the shape of ridges or hills, or any other form which renders travel dangerous, they constitute unlawful obstructions, and a municipality, in allowing them to remain for an unreasonable length of time, is guilty of negligence. *Scott v. Scranton*, 5 Lack. Legal News, 73.

And, if a city is negligent in allowing ice and snow upon its sidewalks to become and remain in a dangerous condition, it cannot avoid liability for injuries caused thereby by showing that the iciness or slippery condition of the walk was caused by natural causes, as by rain or sleet or sudden changes of the weather. *Templin v. Boone*, 127 Iowa, 91, 102 N. W. 789.

And a city is responsible for injuries suffered by one who fell on a walk because of the rough surface of the snow and ice which it had had an opportunity to remove, though it was made more dangerous by a recent fall of sleet, provided the injury would not have been sustained but for the uneven condition due to the older snow and ice. *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523.

The duty resting upon municipal corporations to remove accumulations of ice and snow as it falls from time to time upon their streets, however, is a qualified one, and becomes imperative only when dangerous formations or obstacles have been created and notice of their existence has been received by the corporation. *Hawkins v. New York*, 54 App. Div. 258, 66 N. Y. Supp. 623; *O'Shaughnessy v. Middleport*, 93 App. Div. 93, 86 N. Y. Supp. 944; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

And only when the accumulations of ice or snow render the walk dangerous to pedestrians. *Berger v. New York*, 65 App. Div. 394, 73 N. Y. Supp. 74; *O'Shaughnessy v. Middleport*, supra; *Anthony v. Glens Falls*, 4 App. Div. 218, 38 N. Y. Supp. 536; *Metzger v. Chicago*, 103 Ill. App. 605; *Chicago v. Hutchinson*, 129 Ill. App. 239; *Cresler v. Asheville*, 134 N. C. 311, 46 S. E. 738.

And a city cannot be held liable for an injury caused by an icy sidewalk when the roughness and unevenness at the point of injury was only such as was occasioned by footprints made in the slush and wet snow, of the previous day, which had frozen the night before the accident. *Vonkey v. St. Louis (Mo.)* 117 S. W. 733.

So, a person who fell on a slippery sidewalk and received injury is not entitled to recover from the city therefor, where it appears that the irregularities of the surface of the ice where he fell were very slight. 20 L.R.A. (N.S.)

Ingram v. Philadelphia, 35 Pa. Super. Ct. 305.

And a sidewalk merely covered evenly with tramped snow 2 inches deep, and then made rough by being traveled on when the snow was soft and sloppy, and then frozen hard, leaving the surface indented with footprints, is not legally defective, so as to render the city liable for an injury caused thereby. *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729.

Nor is the formation of ice on a sidewalk from a hydrant during the course of a night, in a few hours, by which a person is injured, negligence on the part of the city, as a matter of law. *Cresler v. Asheville*, supra.

And, in the absence of structural defects which combined with the action of the elements in causing accumulations of ice and snow on a sidewalk, the condition of a sidewalk crossing an alley, which has become uneven by falling snow and the melting and freezing of the same while used by persons and teams, does not constitute an actionable defect. *Dapper v. Milwaukee*, 107 Wis. 88, 82 N. W. 725.

Nor is a city bound to remove from the roadway or bed of a street ridges of snow accumulated from clearing a cross walk. *Lichtenstein v. New York*, 159 N. Y. 500, 54 N. E. 67, reversing 29 App. Div. 542, 51 N. Y. Supp. 642.

Or which had been thrown off the sidewalk, and off a street-car track by the street railway company. *Hutchinson v. Ypsilanti*, 103 Mich. 12, 61 N. W. 279; *Ellis v. Lewiston*, 89 Me. 60, 35 Atl. 1016.

In *Hutchinson v. Ypsilanti*, supra, *Joslyn v. Detroit*, 74 Mich. 458, 42 N. W. 50, supra, IX., d, 5, (b), and *Hayes v. West Bay City*, 91 Mich. 418, 51 N. W. 1067, supra, XI., a, 1, were distinguished upon the ground that in each of those cases the city was an active agent in placing the obstruction.

A street railway is required to move its cars over its road, and is authorized to remove snow from the track to prevent its obstruction and enable it to operate its road, and owners of property upon the street are under obligation to remove the snow from their sidewalk; and where there is a constant accumulation of snow and ice from these causes, and a continuous storm practically without intermission, and an injury results from the accumulation of ice and snow, it is a case in which no ordinary care could have preserved the street from the ice and snow which accumulated in it, and no breach of duty upon the part of the city appears rendering it liable for the injury. *Peard v. Mt. Vernon*, 83 Hun, 250, 31 N. Y. Supp. 395.

So, where a crosswalk has been cleared of snow to its full width, the law does not impose upon the municipal authorities the duty of foreseeing that water may accumulate on the walk, and that a traveler, in avoiding it, may be injured by stepping upon a ridge of snow cast from the walk into the roadway; and the omission to re-

move the snow so as to render such a contingency impossible does not constitute negligence. *Lichtenstein v. New York*, supra.

Where a person fell upon an icy sidewalk and was injured, and there was evidence tending to show that at the point where the fall took place the sidewalk was in a dangerous condition, caused by an accumulation of snow and ice, of which the city had actual or constructive notice, the question whether or not the city was negligent is a question for the jury. *Hawley v. Gloversville*, 4 App. Div. 343, 38 N. Y. Supp. 647; *Holbert v. Philadelphia*, 221 Pa. 266, 70 Atl. 746.

And so is the question of the contributory negligence of a person injured. *Holbert v. Philadelphia*, supra.

And whether a city was negligent in allowing snow and ice shoveled off a railway track at a crossing to accumulate in the highway on each side of the railway in such a manner as to make an unnatural hump or ridge on either side of the railroad track is a question of fact for the jury, in an action for a resulting injury. *Johnson v. Marquette* (Mich.) 15 Det. L. N. 655, 117 N. W. 658.

(f) Time and opportunity for removal.

Where ice and snow accumulated upon a sidewalk in the ordinary manner, the city must be allowed due time to remove the same, or so to deal with the conditions as to render the walks as reasonably safe as could ordinarily be expected under the circumstances. *Bull v. Spokane*, 46 Wash. 237, 13 L.R.A. (N.S.) 1105, 89 Pac. 555.

A municipal corporation is entitled to reasonable time after the defect is known to it, or should be so known, within which to remove it. *Cosner v. Centerville*, 90 Iowa, 33, 57 N. W. 636; *Stanton v. Salem*, 145 Mass. 476, 14 N. E. 519; *Brennan v. New York*, 114 N. Y. Supp. 578.

And, when it is attempted to make a municipal corporation responsible in damages for an accident caused by ice on a sidewalk, it must be shown that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time. *Ince v. Toronto*, 27 Ont. App. Rep. 410; *Cresler v. Asheville*, 134 N. C. 311, 46 S. E. 738.

Nor is a municipal corporation in a northern state required to remove the snow and ice from a sidewalk immediately after it falls or forms. *Kleng v. Buffalo*, 72 Hun, 541, 25 N. Y. Supp. 445; *Crawford v. New York*, 68 App. Div. 107, 74 N. Y. Supp. 261; *Kortlang v. Mt. Vernon*, 129 App. Div. 535, 114 N. Y. Supp. 252.

And a city will not be held liable for the presence on the sidewalk of ice upon which a person slipped and was injured, where the accident took place a little more than two days after the rain which caused the ice had ceased. *Zunz v. New York*, 103 N. Y. Supp. 222.

And, where a street in a city becomes unsafe by the sudden freezing at night of the snow and slush thereon, the city is not liable for injuries to a pedestrian, occurring about

noon the following day by slipping on a sidewalk. *Vonkey v. St. Louis* (Mo.) 117 S. W. 733.

So, where a city keeps a force of men constantly employed in removing snow, ice and mud from the crossings of its streets, an injury resulting from a hole in a crossing cannot be said to have been occasioned by any negligence on the part of the city for which it should respond in damages. *Roanoke v. Harrison*, 1 Va. Dec. 801, 19 S. E. 179.

And, where a sidewalk in front of a store which was one of the chief business places in the city was 20 feet wide and level and perfect in its construction, and was lighted by electric lights in the usual manner; and there was upon the sidewalk an accumulation of ice and snow extending along its center for a considerable distance, being from 1½ to 4 or 5 inches in thickness and from 2½ to 7 feet in width, sloping gradually to either side; and the accumulation was rough and uneven on top and had been allowed to remain for several days, but the conditions were such that, immediately preceding the accident, the sidewalks were unavoidably icy and slippery; and the city had sprinkled the walk with sawdust and ashes in the morning, and again immediately preceding the time of the accident,—the city was not negligent in allowing the walk to remain in that condition. *Rogers v. Rome*, 96 App. Div. 427, 89 N. Y. Supp. 130.

Nor is a city guilty of negligence in permitting a crossing on a street to be encumbered with snow and ice during a period when the temperature is so low that the coating adheres to the pavement, and cannot, with the use of reasonable care, be conveniently removed. *Staley v. New York*, 37 App. Div. 598, 56 N. Y. Supp. 237.

And, where a fall of rain is suddenly followed by severe cold, by reason of which the snow or ice is frozen to the sidewalk, so that it is practically impossible to remove it until a thaw comes, the municipality is not negligent in awaiting a thaw. *Ibid.*; *Betts v. Gloversville*, 29 N. Y. S. R. 331, 8 N. Y. Supp. 795.

Nor is a city liable for an injury where the icy condition of a sidewalk was caused by melting snow on an adjoining lot, and had existed only three or four days before an accident caused thereby, during which time the temperature was such as to cause both thawing and freezing each day. *Kortlang v. Mt. Vernon*, supra.

And a city cannot be charged with negligence in not causing the removal of ice on a sidewalk, formed as the result of a storm or the melting of snow, where there is no evidence that the same had been softened by a thaw for a sufficient length of time prior to the injury in question to charge the city with negligence in not causing its removal. *Berger v. New York*, 65 App. Div. 394, 73 N. Y. Supp. 74.

Nor is a municipal corporation negligent because, during a period of frequent snowstorms and of very cold weather, it failed

to remove the accumulated ice and snow from a cross walk, and thus keep the surface of the cross walk exposed, or because it failed to keep the snow and ice on the cross walk in a perfectly smooth condition. *O'Shaughnessey v. Middleport*, 93 App. Div. 93, 86 N. Y. Supp. 944.

And a city is not liable for injuries to a person resulting from falling on a sidewalk because of snow and ice thereon, where there had been snow and ice on the sidewalk for two weeks, and the temperature was uniformly below the freezing point, except for portions of three days, when it snowed and rained, and the sidewalks of the city were partly covered with ice during that time, and these conditions were general throughout the city, the weather conditions being such that the city was not obliged to remove the snow and ice from the sidewalks. *Cupp v. Elmira*, 126 App. Div. 539, 110 N. Y. Supp. 742.

And, where a severe snowstorm took place, and for three days afterwards the temperature was below the freezing point, and for the following two days it was below the freezing point except at short intervals on each of those days, and on the last of the two there was another storm which continued until the morning of the following day, and at 3 o'clock in the afternoon of the next day an accident occurred, the city cannot be said to have been negligent because it did not clear the sidewalk of snow and ice within that time. *Foley v. New York*, 95 App. Div. 374, 88 N. Y. Supp. 690.

Nor can a city be said to be negligent immediately following a fall of snow because it does not proceed at once to clear the sidewalks of snow and ice, where it is the duty of abutting property owners to do that work; in such case the city has a right to rely for a reasonable time upon the assumption that they will perform the obligation which the law casts upon them. *Ibid.*; *Crawford v. New York*, supra; *Hawkins v. New York*, 54 App. Div. 258, 66 N. Y. Supp. 623.

And in such case it is called upon to act only when it has actual or constructive notice that dangerous accumulations of snow or ice exist, and a reasonable time has elapsed after such notice to enable it, in the exercise of ordinary care, to remove the obstruction. *Berger v. New York*, supra.

And it is not guilty of negligence if, observing that the work is being generally done, it awaits for a reasonable period the action of its citizens. *Hawkins v. New York*, supra.

And a city sued for an injury resulting from ice on a sidewalk is entitled to have an ordinance requiring persons occupying property abutting on streets where sidewalks were laid to keep the same free from snow and ice admitted in evidence to show that it had provided a way for keeping sidewalks free from obstruction, and that it was authorized to wait a reasonable time for the persons upon whom the duty was imposed to comply with the provisions of 20 L.R.A. (N.S.)

the ordinance. *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054.

There is an affirmative duty upon a municipality to keep its sidewalks reasonably free from accumulations of ice and snow, however; and the failure to do this after adequate notice, or after ample time has elapsed to justify the inference of knowledge of the defective condition, constitutes negligence upon the part of the city. *Beck v. Buffalo*, 50 App. Div. 621, 63 N. Y. Supp. 499; *Cuzner v. Calgary*, 1 N. W. Terr. 162.

And, where an accumulation of ice and snow in a street formed a dangerous obstruction which it was the duty of the city to remove, and this was permitted to remain for over a month before the accident in question, the negligence of the city in so permitting it to remain is a question for the jury, in an action for an injury caused thereby. *Haight v. Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193.

And a city the charter of which makes the members of its common council commissioners of highways, and charges them with the care of the streets, is liable for an injury occurring to one passing after dark along an unlighted street, who was injured by slipping upon ice which had been permitted to remain for a week upon the sidewalk, into a hole which had existed there for three weeks, it appearing that the street had usually been lighted by the city. *Deufel v. Long Island City*, 19 App. Div. 620, 46 N. Y. Supp. 355.

And an objection to an instruction that it fixed a liability upon the defendant city for injury caused by snow on a sidewalk without reference to whether the city had had a reasonable time within which to remove the snow is cured by another instruction that the city was not negligent if snow had fallen so short a time before the accident that with ordinary care it could not have been removed in time to have avoided the injury. *Robinson v. Cedar Rapids*, 100 Iowa, 662, 69 N. W. 1064.

(g) Snow and ice combined with defect in street.

While a municipal corporation is not responsible in damages for the results of mere iciness or slipperiness of its sidewalks, produced by natural causes, where such conditions concur with a previous defect for which the municipal corporation is responsible, it is liable for damages. *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523; *Newton v. Worcester*, 174 Mass. 181, 54 N. E. 521; *Holbert v. Philadelphia*, 221 Pa. 266, 70 Atl. 746; *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20.

And a statutory provision exempting municipal corporations from liability for injuries caused by obstructions of snow and ice in the highways, unless notice of the particular obstruction causing the injury has been given to the highway officers, applies to obstructions of snow and ice produced by artificial causes as well as those produced

by natural causes. *Winsor v. Tripp*, 12 R. I. 154.

This rule applies to the act of allowing snow and ice to accumulate on a sidewalk in an uneven and dangerous manner, and to remain there for a long time. *Salzer v. Milwaukee*, supra.

And a municipal corporation is liable for injuries to a person slipping on ice in a street or sidewalk, which has accumulated by reason of the city's neglect to construct and maintain suitable drains to carry off the water. *Holbert v. Philadelphia*, supra.

And, where a broken leader on a house cast water on the sidewalk every time there was a rain or thaw, which water froze there, and there was an alternation of freezing and thawing all the time in winter, which condition continued for more than a year, the condition constituted a nuisance to be abated by the city, and for which the city is liable. *Duffy v. New York*, 128 App. Div. 837, 113 N. Y. Supp. 118.

And, where the evidence, in an action against a city for damages for a personal injury, shows that the plaintiff was injured by stepping on a ridge of ice about 8 inches high, which had been formed by water dropping from the eaves of an abutting building; and there was conflicting evidence as to whether the general sidewalks of the city were slippery and icy from rain suddenly turning to ice, and as to whether the plaintiff knew of the dangerous character of the locality,—the case is one for the jury in an action for the injury. *Miller v. Bradford*, 186 Pa. 164, 40 Atl. 409.

So, a city which constructs a sidewalk with a slope so abrupt as to make it dangerous to pedestrians, under conditions likely to occur in the winter when it is covered with ice and snow, is liable to one who slips on it when coated with ice, unless it is built pursuant to a plan prepared by a competent engineer. *Hodges v. Waterloo*, supra.

And, where, to the knowledge of a city, a sidewalk has become uneven and unsuitable for travel; and the public has on that account been induced to walk on the surface of the ground beside the walk: and a peg or other obstruction has been left in such traveled portion of the street set apart for sidewalk purposes,—the city is negligent in allowing the obstruction to exist, and allowing snow and ice to accumulate about it so as to render the traveled path unsafe. *Rea v. Sioux City*, 127 Iowa, 615, 103 N. W. 949.

So, smooth, level, and slippery ice formed upon the surface of a sidewalk or in depressions therein, by reason of its improper construction or of its condition, may be found to be a defect which will render a municipal corporation liable for injuries caused by falling on it. *Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231.

And, where a pedestrian was walking at an ordinary gait, and fell because of ice formed on the sidewalk, and sustained injury by catching his foot in a hole, worn in the crossing by heavy wagons, which had

been there for a year or more, the question of the city's negligence is one for a jury. *Hamilton v. Buffalo*, 55 App. Div. 423, 66 N. Y. Supp. 990, affirmed in 173 N. Y. 72, 65 N. E. 944.

A municipal corporation is not liable, however, for an injury caused by the recent accumulation of ice and frozen snow on a crossing, though it knew or ought to have known that the crossing was defective or out of repair, and that such want of repair combined with its icy and slippery condition rendered it dangerous, unless such accumulation of ice and snow might reasonably have been anticipated as the natural and probable result of such construction or lack of repair. *Circleville v. Sohn*, 20 Ohio C. C. 368.

And, in order to recover of the city for the injury, it is necessary for the person injured to prove, among other things, not only that the way when bare was defective, but also that the accident was due, in part at least, to the operation of this defect as such. *Bailey v. Cambridge*, 174 Mass. 188, 54 N. E. 523.

And that a sidewalk consists of only three boards 8 inches wide does not constitute a defect which, combined with its icy condition, will render the city liable for an injury received by a person who slips upon it. *Beaton v. Milwaukee*, 97 Wis. 416, 73 N. W. 53.

So, where a city, in paving a street, lowered the sidewalk so that it lay 18 inches below a sidewalk on an intersecting street with which it had previously been level; and about 3 feet of the intersecting walk had been cut away so that the earth walk inclined 12 inches in 3 feet; and upon this inclined walk ice and snow collected, and a person attempting to cross over it fell and was injured,—the sidewalk was in a condition in which the city had a right to leave it, and was made unsafe solely by the accumulation of ice and snow; and the city it not, therefore, liable for the injury. *Wesley v. Detroit*, 117 Mich. 658, 76 N. W. 104.

And, where there was a gutter in a concrete sidewalk, 20 inches wide and 3 inches deep in the middle; and the bottom of the gutter was not true grade, so that the accumulated water did not all run off after rains; and, after a heavy snowstorm, a person slipped on ice in the gutter and was injured,—the mere presence of the ice, in the absence of notice to the city, does not render it liable for injury; to make it liable the gutter must in itself have constituted such a defect as would have rendered the city liable in case the accident had happened by reason of it in the absence of the ice. *Allen v. Cook*, 21 R. I. 525, 45 Atl. 148.

Nor can a municipal corporation be held liable for allowing the sidewalk on one of its streets to have an inclination of $\frac{1}{4}$ of an inch to the foot greater than that provided for by its own ordinance, and permitting snow and ice to accumulate thereon, by reason of which a pedestrian was caused to fall and sustained injuries. *Stamberger v. Cleveland*, 22 Ohio C. C. 65.

And, where an inclination or slope of a stone apron leading from a sidewalk to a cross walk is not such as to constitute an actionable defect in the street, a slippery condition of it resulting from ordinary accumulations of ice in winter, when such accumulations are smooth, does not constitute an actionable defect. *De Pere v. Hibbard*, 104 Wis. 666, 80 N. W. 933.

So, where a defect in a sidewalk was harmless in itself, but existed for a long time, and afterwards became dangerous in combination with snow and ice, with reference to which the municipal corporation had no notice, the corporation is not liable simply because it had notice of the pre-existing defect. *Free v. District of Columbia*, 21 D. C. 608.

But, while a city is not guilty of negligence in building a sidewalk slanting for the purpose of draining, the greater the slope the greater will be the city's duty to keep it free from slippery substances, such as mud, ice, etc. *Milledge v. Kansas City*, 100 Mo. App. 490, 74 S. W. 892.

And while a municipal corporation is not bound to construct a sidewalk so that, when rendered slippery with snow and ice, it will be impossible for one passing over it to slip and fall, it must exercise reasonable care so that the sidewalk shall be reasonably safe at all times to one in the exercise of reasonable care and caution thereon. *Chicago v. Richardson*, 75 Ill. App. 198.

And the presence of snow at a defective street crossing does not relieve the municipal corporation from liability for injuries resulting from the defect if the snow was not a factor in causing the accident. *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128.

So, a municipal corporation is under a continuing duty to prevent property owners from discharging water from spouts upon sidewalks, and thus causing dangerous accumulations of ice thereon. And the accumulation of ice from a water spout which casts water on the sidewalk is a nuisance which it is the duty of the municipal corporation to abate; and, if it negligently fails to do so, it is liable for resulting injuries. *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250.

And a municipality is liable for injury sustained by one who, while exercising ordinary care, slipped upon a bed of ice covering part of a sidewalk, which was not the result of frost or the casual freezing of rain or accumulated snow, but of a flow of water from abutting premises that in freezing weather regularly produced the same result to an extent that rendered it a dangerous obstruction to travel, provided that such conditions had existed for such a length of time that the municipal officers would necessarily have discovered them by the exercise of ordinary care under all the circumstances. *District of Columbia v. Frazer*, 21 App. D. C. 154; *McGowan v. Boston*, 170 Mass. 384, 49 N. E. 633; *Stone v. Poughkeepsie*, 15 App. Div. 582, 44 N. Y. Supp. 609.

And, where a ridge of ice from 2 to 4 inches thick had formed across a sidewalk, 20 L.R.A. (N.S.)

not from natural causes alone, but from the freezing of water discharged upon the walk from a pipe in a supporting wall on abutting premises; and the ridges had negligently been allowed to remain in said condition during the whole winter preceding the accident in question; and a person slipped on one of the ridges and was injured,—the city is not relieved from liability for the injury by the circumstance that the ridge had been augmented by a recent fall of snow for which it was not responsible. *Kopper v. Yonkers*, 110 App. Div. 747, 97 N. Y. Supp. 425, affirmed in 188 N. Y. 592, 81 N. E. 1168.

Nor is there any distinction between a smooth and a corrugated bed of ice, as affecting the question of responsibility of the municipality for an injury from slipping on a bed of ice resulting from a flow of water from abutting premises that in freezing weather regularly produced the same result to an extent that rendered it a dangerous obstruction to travel. *District of Columbia v. Frazer*, supra.

And ice in a street, produced by water escaping from a water main of the city, which ran upon the street and was frozen and became a dangerous obstruction, being some 18 inches thick at one side of the street and sloping down to two or three inches at the other side, which condition had existed for ten days, constituted a nuisance; and it was the duty of the city to remove the obstruction. *Cincinnati v. Grebner*, 25 Ohio C. C. 700.

So, where a city, during or just after a storm, shoveled off a cross walk and threw the snow upon an iron grating at a corner, which was designed to carry off the water from the street; and this grating became clogged so that it did not do its work; and the water was thrown onto the sidewalk and froze; and a passer-by slipped and fell upon it,—the city is liable for the injury, the cause of the accident having been occasioned by the direct act of its servants. *Bishop v. Goshen*, 10 N. Y. S. R. 401.

Where injuries were received from falling on a sidewalk by reason of snow and ice thereon, however, no recovery can be had against the city, where it is uncertain whether the fall was on ice formed by water dripping from a platform, or from snow left on the sidewalk, when in the former event the city would not be liable. *Cupp v. Elmira*, 126 App. Div. 539, 110 N. Y. Supp. 742.

And a town or city should not be held liable upon less notice for the existence of obstructions by snow and ice in the streets due to artificial causes, which it has no agency in creating, than from those arising from natural causes. *Winsor v. Tripp*, 12 R. I. 454.

And evidence that a woman was injured by stepping on a ridge of ice about 8 inches high, which had formed by water dripping from the eaves of an abutting building, together with conflicting evidence on the question as to whether the general sidewalks of the city were slippery and icy from rain

suddenly turning to ice, and as to whether the person injured knew of the dangerous character of the locality, is sufficient to go to the jury in an action by the woman against the city for damages for the injury. *Miller v. Bradford*, 186 Pa. 164, 40 Atl. 409.

Where a person falls and is injured because of a ridge of earth upon a cross walk, the sides of which are covered with snow and ice, whether the way when bare is defective, and whether the accident is wholly or partly caused by this defect, are questions for the jury in an action against the city for the injury. *Bailey v. Cambridge*, 174 Mass. 188, 54 N. W. 523.

And the fact that the jury, in an action for an injury on an icy sidewalk, might have had some difficulty in determining whether the plaintiff's accident was caused by the irregular surface of the walk, or by its mere slippery condition, does not warrant the court in taking the issue from the jury and determining the question in favor of the municipality. *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523.

e. General condition and other accidents as evidence of negligence.

1. General condition of street.

The bad condition of a street or sidewalk in the immediate vicinity of a place of an accident may be shown in an action for damages for the injury, upon the question of negligence and notice upon the part of the city. *Mt. Sterling v. Crummy*, 73 Ill. App. 572; *Shelbyville v. Brant*, 61 Ill. App. 153; *Witt v. Latimer* (Iowa) 117 N. W. 680; *Duncan v. Grand Rapids*, 121 Wis. 626, 99 N. W. 317; *O'Neil v. West Branch*, 81 Mich. 544, 45 N. W. 1023; *Stebbins v. Oneida*, 1 Silv. Sup. Ct. 240, 5 N. Y. Supp. 483; *Belton v. Turner* (Tex. Civ. App.) 27 S. W. 831.

And evidence that the planks of a sidewalk were rotten for some distance either side of the place where an injury occurred is admissible, in an action against the city for an injury, to show that the city had notice of the bad condition of the walk. *Viellesse v. Green Bay*, 110 Wis. 160, 85 N. W. 665; *Smith v. Butler*, 48 Mo. App. 663.

Nor need the evidence in an action against a municipal corporation for an injury caused by a defective sidewalk be confined to the condition of the sidewalk at the immediate place of the accident; it may properly take in the condition of the walk along the premises in front of which the injury occurred. *Huff v. Marshall*, 97 Mo. App. 542, 71 S. W. 477.

And that other obstructions not alleged in the petition narrowed the roadway at the point in question, and the condition of the street, together with all the surroundings at the time and place of the accident in question, are competent and admissible in evidence in an action against a city for negligently allowing an obstruction to remain in a street unguarded and without lights or other warnings to travelers there-

on, by reason of which an accident occurred. *Kansas City v. McDonald*, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123.

So, evidence that other gutter crossings in the city were in a similar condition to the one at which the accident in question occurred is competent in an action against a city for an injury caused by falling into an open gutter between a street crossing and a curbstone. *Heiss v. Lancaster*, 203 Pa. 260, 52 Atl. 201.

And, on the trial of an issue as to whether the material in a sidewalk was unfit for the purpose and therefore washed out by ponded surface water, leaving a hole, evidence that subsequently the rain washed another hole in the same sidewalk under similar conditions is relevant. *Columbus v. Anglin*, 120 Ga. 785, 40 S. E. 318.

And, where a person fell through an iron and glass framework covering an area under a sidewalk, evidence of the condition of the frames adjoining on either side, which were of the same material and put in about the same time, is admissible in an action for the injury. *Buckley v. Kansas City*, 95 Mo. App. 188, 68 S. W. 1069.

So, a witness in an action against a city for an injury caused by a defective sidewalk may be allowed to exhibit to the jury pieces of the plank in which was the hole which caused the injury, for the purpose of showing its condition, where the hole in the walk and its rotten condition are established. *Viellesse v. Green Bay*, supra.

And photographs of a sidewalk at a place where a person was injured by a defect showing a cement patch where the walk had been repaired are admissible in evidence on an issue as to the extent of a hole in the sidewalk. *San Antonio v. Talerico* (Tex. Civ. App.) 78 S. W. 28.

A bad condition of a sidewalk at a place remote from the accident in question, however, cannot be shown in an action against a city for an injury alleged to have been caused by an obstruction or defect in a street. *Mt. Sterling v. Crummy*, 73 Ill. App. 573.

And evidence as to the defective condition of the sidewalks a block or more each way from a cross walk where an injury occurred from a passenger stepping into a hole in it is inadmissible in an action against the city for the injury. *Dundas v. Lansing*, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011.

Nor is evidence as to a generally defective condition of a sidewalk in the vicinity of an accident admissible, where the particular defect causing the injury, such as the breaking down of a strong plank, had no relation to such general condition. *Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311.

And evidence that the wooden walks of a city were generally in defective condition does not establish a particular defect by which an injury was alleged to have been caused. *Boulder v. Weger*, 17 Colo. App. 69, 66 Pac. 1070.

And the fact that sidewalks in other cities were constructed upon the same plan as the

sidewalk in question is not admissible in evidence in an action against a city for an injury resulting from a defective sidewalk. *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808.

So, the generally good condition of a sidewalk prior to an accident thereon is admissible in an action by a pedestrian who was injured by slipping upon refuse matter on the sidewalk used for market purposes by a market company, brought against the city and the market company, on behalf of the defendants, to meet evidence introduced by the plaintiff tending to prove the existence of a nuisance, and showing that the sidewalk had been in bad condition for many years on account of the same refuse matter. *O'Dwyer v. Northern Market Co.* 30 App. D. C. 244.

And evidence, in an action against a city for an injury from a projecting door in a sidewalk, that there were no other such doors in the city, is not prejudicial to the city, where it is not sought to show that the city was negligent in this instance by reason of negligence in other instances, but is pertinent as bearing upon the question of contributory negligence. *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674.

But findings, in an action against a city, that the sidewalk in question had been used for a long time by day and by night by a large number of people without accident, are not conclusive where the nature of the alleged defect can be definitely appreciated, and proof of prior use by the general public without injury, if admissible at all, can, at the most, only be an evidentiary circumstance bearing on the question of due care. *Newcastle v. Grubbs* (Ind.) 86 N. E. 757.

So, evidence of the defective condition of a sidewalk before or after the accident in question is admissible in an action against a city for damages alleged to have resulted from a defective or obstructed sidewalk, if within such reasonable time as to justify the inference that it was in such condition at the time of the accident. *Norton v. Kramer*, 180 Mo. 536, 79 S. W. 699; *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578; *Vandalia v. Ropp*, 39 Ill. App. 344; *Lohr v. Philipsburg*, 165 Pa. 109, 30 Atl. 822; *Reed v. Spokane*, 21 Wash. 218, 57 Pac. 803; *Monroeville v. Weihl*, 13 Ohio C. C. 689.

And witnesses who examined a sidewalk after an accident thereon are competent to testify as to its condition, there being other evidence that it was practically the same as when the accident occurred. *Harrison v. Ayrshire*, 123 Iowa, 528, 99 N. W. 132.

And evidence, in an action against a municipal corporation for personal injuries received from a defective sidewalk, that the walk was in the same condition at various times, is admissible as a statement of fact, and is not a mere conclusion. *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095.

So, where an injury occurred by a fall upon a temporary sidewalk at a place where a street was being regraded, the accident happening between midnight and 1 o'clock A. M., evidence of the condition of the sidewalk 20 L.R.A. (N.S.)

walk just before daylight that morning, and before there was any traffic on the street, is admissible in an action for the injury. *Jones v. Seattle* (Wash.) 98 Pac. 743.

And the condition of a coal hole and cover which projected above the sidewalk in which they were placed, and over which a person fell and was injured, about an hour and a half after the accident, is admissible in evidence in an action for the injury, where the nature of the coal hole and cover was such that there could have been no substantial change in their condition in the meantime. *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079.

Nor is evidence of the condition of a defective highway a long time after an accident inadmissible in an action for damages for injuries resulting from the accident, if no repairs or changes in the condition had been made during that time. *Salladay v. Dodgeville*, 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696; *Indianapolis v. Scott*, 72 Ind. 196; *Dallas v. Jones* (Tex. Civ. App.) 54 S. W. 606.

And a photograph of a hole or defect in the street, taken a long time after a person fell into it and was injured, is admissible in evidence in an action for the injury, where it appears that the photograph correctly represented the condition of the hole on the day of the accident, with an explanation of any changes. *Miller v. New York*, 104 App. Div. 33, 93 N. Y. Supp. 227; *San Antonio v. Talerico*, supra.

But, while the defective condition of a sidewalk may sometimes be shown by evidence of its condition at a subsequent time, when the time is such that the evidence in respect to the subsequent defective condition would more probably lead to a wrong inference than a correct one such evidence should not be admitted. *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853; *Ottawa v. Black*, 10 Kan. App. 439, 61 Pac. 985; *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95.

And, where a person was injured by a loosened plank in a sidewalk, one end of which was raised above the level of the sidewalk, the condition of the stringers underneath the walk something over a year after the injury complained of is not admissible in evidence in an action for the injury. *Edwards v. Cedar Rapids*, 138 Iowa, 421, 116 N. W. 323.

So, the condition of a sidewalk more than two years prior to the injury complained of may be properly excluded in an action against a city for an injury caused by falling into a hole in a cross walk. *Scheel v. Detroit*, 130 Mich. 51, 89 N. W. 554, 90 N. W. 274.

But the admission of evidence in an action for an injury caused by an obstruction in a street, of the condition of the sidewalk two years after the accident in question, does not justify the granting of a new trial where there was no dispute but that the condition of the sidewalk was the same at the expiration of such two years as at the time of the

accident. *Brewer v. New York*, 31 App. Div. 244, 52 N. Y. Supp. 865.

So, where a portion of a sidewalk is generally defective and in disrepair, evidence that it had remained so for a considerable length of time previous to an accident caused thereby must be received as bearing upon the question of negligence of the municipal corporation in failing to ascertain and repair the particular defect complained of. *Kellogg v. Janesville*, 34 Minn. 132, 24 N. W. 359.

But that similar defects were frequently suffered to continue for a considerable time without attention from the public authorities is immaterial and inadmissible in evidence, in an action against a city for an injury caused by a defect in one of its streets, the jury having nothing to do with any negligence except that which resulted in the injury complained of. *Grand Rapids v. Wyman*, 46 Mich. 516, 9 N. W. 833.

And that a walk was built in the manner customarily adopted by the city is no defense in an action against the city for an injury alleged to have resulted from a defect, the fact that negligence was usual or customary being no defense. *Weber v. Creston*, 75 Iowa, 16, 39 N. W. 126.

License for negligence in making an excavation in a street will not be presumed against a city from the overlooking by it of negligence committed on former occasions in similar cases. *Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. 319.

And evidence that in former years a city had been negligent in allowing the sidewalks in front of certain vacant lots to become encumbered by snow and ice is inadmissible in an action against the city for an injury caused by snow and ice upon the sidewalk in front of those lots. *Crawford v. New York*, 68 App. Div. 107, 74 N. Y. Supp. 261.

Nor is the fact that sidewalks similarly constructed, or constructed in any given manner, were common in other cities, towns, or localities, admissible in evidence in an action against the city for an injury from the alleged slippery condition of a sidewalk caused by ice amounting to a defect, for the purpose of showing either that the sidewalk was properly constructed, or that the person injured did not exercise proper care and prudence in passing over it. *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

And an official of a city who has had charge of the repairs of streets and sidewalks for some years, and who is familiar with the condition of streets and sidewalks of many cities, is not competent to testify as to whether it is common to find in cities depressions in the sidewalks, caused by irregularities in the paving or covering, large enough to admit a portion of the foot of an ordinary adult. *Marvin v. New Bedford*, 153 Mass. 464, 33 N. E. 605.

2. Subsequent repair or removal of defect or obstruction.

Evidence that, after an accident resulting from a defect or obstruction in a street, the 20 L.R.A. (N.S.)

city repaired the same, is competent, in an action against the city for injuries received in such accident, for the purpose of showing that the defect was one which the city was bound to repair. *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Shelbyville v. Brant*, 61 Ill. App. 153; *Vandalia v. Ropp*, 39 Ill. App. 344; *Kelley v. Boston*, 201 Mass. 86, 87 N. E. 494.

And as tending to show that the street was out of repair at the time of the accident. *Osborne v. Detroit*, 32 Fed. 36.

And evidence of the removal from a street of an obstruction after an accident caused by it is competent to show that the obstruction was not necessary. *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Rufher v. Aurora*, 71 Mo. App. 418.

So, the fact that a sidewalk was removed by the city authorities, and another and better one substituted therefor soon after an injury occurred, may be considered, in an action for the injury, as a circumstance tending to show that the walk removed was out of repair. *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893.

And, while removal of a boulder constituting an obstruction in a city street, by the city after an injury caused thereby, is not evidence, in an action for the injury, of negligence in failing to remove it before that time; it is relevant as tending to show that the point where the accident occurred was in a street over which the city had assumed control, and hence was under obligation to repair. *May v. Anaconda*, 26 Mont. 140, 66 Pac. 759.

So, where there had been for a long time an open ditch or drain across a street; and over this ditch there was a bridge on the westerly side of the street; and the city removed this bridge and built a new one across the center of the street, placing no guard or protection where the old bridge had stood; and a person was injured by driving into the ditch at the place where the old bridge had been,—evidence that, after the accident, the city widened the bridge so as to cover the exposed portion of the ditch is admissible in an action for the injury, though not very strong, as tending to show that the condition of the street was such that it was at least proper that the ditch should be covered at that point. *O'Leary v. Mankato*, 21 Minn. 65.

And, where a contractor holding a contract with a village to keep a sidewalk in repair testifies, in an action for damages against the city for injuries caused by a defective sidewalk, that, immediately after the accident, he examined the sidewalk at the point in question and found it in good condition, it is competent to ask him, on cross-examination, whether he did not, a few days later, repair the sidewalk at the point in question. *Bond Hill v. Atkinson*, 16 Ohio C. C. 470.

It has been held, however, that the existence of a previous defect or nuisance in a street, which has been removed, has no tendency to prove a subsequent one, or to show

notice to the city that another similar obstruction will be created. *Donaldson v. Boston*, 16 Gray. 508.

And that the repairing of a sidewalk after an accident does not tend to show knowledge upon the part of the city of the defect before the accident and evidence of such repairing, in an action against the city for the injury, is improper and prejudicial. *Dallas v. Meyers* (Tex. Civ. App.) 55 S. W. 742.

And evidence that an obstruction which caused an injury has since been removed is incompetent, in an action for damages for the injury, to prove the character of the obstruction. *Dillon v. Raleigh*, *supra*.

So, where, in an action against a city for a personal injury, the plaintiff fails to show the nature of the defect in the sidewalk complained of at the time and before the accident, it is error to predicate the existence of an actionable defect upon the fact of repairs subsequent to the accident. *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947.

And, where a sidewalk was rebuilt after an injury thereon, and witnesses in the employ of an abutting owner testified that it was rebuilt because of a change of grade, the opinion of a witness that the sidewalk was rebuilt because it needed rebuilding is inadmissible. *Rogers v. Orion*, 116 Mich. 324, 74 N. W. 463.

But withdrawal by plaintiff's attorney, in the presence of the jury, of evidence that the city repaired the street after plaintiff's injury thereon; and the court's announcement of the withdrawal, and direction that the evidence should not be considered,—cure error in its admission. *Heberling v. Warrensburg*, 133 Mo. App. 544, 113 S. W. 673; *Robinson v. Cedar Rapids*, 100 Iowa, 662, 69 N. W. 1064.

And an attempt to show that the sidewalk in question was repaired after an accident is not a ground for reversal of a judgment in favor of the person injured, where neither bad faith nor prejudice appears. *Normal v. Bright*, 125 Ill. App. 478, affirmed in 223 Ill. 99, 79 N. E. 90.

So, where a defect consisting of a hole in a sidewalk is shown to have existed prior to the accident, the admission of evidence showing subsequent repairs, if erroneous, is without prejudice. *Lombar v. East Tawas*, *supra*.

And evidence that, after an injury caused by defect in a street from a large hole washed in one side of the traveled way, a bridge was built by the village at that place, which freed the street from the injurious effect of water crossing it, is incompetent in an action against the city for the injury; but, where it further appeared that, before the accident, the stone for the bridge had all been placed upon the street, evidence of which was competent, the further proof of the completion of the bridge planned before the accident was harmless. *Mt. Morris v. Kanode*, 98 Ill. App. 373, 20 L.R.A. (N.S.)

3. Other accidents.

The frequency of accidents at a particular place is good evidence of its dangerous character; and the prevailing rule would seem to be that, in an action against a municipal corporation to recover damages for injuries received from a fall caused by an obstruction or defect in a street or sidewalk, proof that other accidents of the same character had been frequent there is admissible as tending to show the existence of a dangerous condition. *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 22 Sup. Ct. Rep. 840; *District of Columbia v. Duryee*, 29 App. D. C. 37, 10 A. & E. Ann. Cas. 675; *Aurora v. Brown*, 12 Ill. App. 122, affirmed in 109 Ill. 165; *Taylorville v. Stafford*, 196 Ill. 288, 83 N. E. 624; *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079; *Smith v. Des Moines*, 84 Iowa, 685, 51 N. W. 77; *Burrows v. Lake Crystal*, 61 Minn. 357, 63 N. W. 745; *Golden v. Clinton*, 54 Mo. App. 100; *Stebbins v. Oneida*, 1 Silv. Sup. Ct. 240, 5 N. Y. Supp. 483; *Avery v. Syracuse*, 29 Hun. 537.

Within this rule, evidence of similar accidents to other persons, caused by the same obstruction, is admissible in an action against a city for negligently permitting an obstruction to exist in a street or sidewalk, by means of which a person was injured. *Scott v. New Orleans*, 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373; *Osborne v. Detroit*, 32 Fed. 36; *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095; *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W. 379; *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947; *Gillrie v. Lockport*, 12 N. Y. S. R. 707; *Fordham v. Gouverneur*, 160 N. Y. 541, 55 N. E. 290; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Magee v. Troy*, 48 Hun. 383, 1 N. Y. Supp. 24; *Sherman v. Oneonta*, 49 N. Y. S. R. 267, 21 N. Y. Supp. 137; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674.

On the issue as to the extent and character of the defect, and whether it was such as the city was bound to repair. *Birmingham v. Starr*, *supra*.

And similar accidents occurring in the same neighborhood may be shown in evidence in an action for an injury caused by an obstruction or defect in a street, not only as tending to show the actual condition of the walk, but also as tending to show notice to the city. *Osborne v. Detroit*, *supra*.

Thus, where roots of a tree were negligently left projecting above a sidewalk, and the foot of a pedestrian at night was caught thereby, causing her to fall and injuring her, evidence, in an action against the municipal corporation for the injury, that another person was tripped and thrown by the same roots at the same place some days previously is admissible as tending to show that they were such as to occasion falls. *Gilmer v. Atlanta*, 77 Ga. 688.

And, where an action is brought against a city for injuries resulting from falling

through a cellar door on one of its sidewalks, evidence that children upon different occasions had previously fallen into such openings is admissible as bearing upon the question as to the reasonable safety of the city's sidewalks according to the system adopted by it in regard to cellars therein in front of business houses. *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95.

So, evidence by witnesses, in an action for an injury sustained on an icy sidewalk, that, subsequent to the accident and on the same afternoon, they had slipped on ice at the same place; and that another person had been seen to slip about the same time and place; and that, three days previous to the accident, one of them had fallen upon the same sidewalk,—is competent as tending to show the actual condition of the sidewalk. *Masters v. Troy*, 50 Hun, 485, 3 N. Y. Supp. 450.

And that a culvert had previously given way is admissible in evidence for the purpose of showing that the culvert was defectively constructed, and that the municipal corporation had notice of the defect. *Willey v. Portsmouth*, 35 N. H. 303.

And the testimony of a witness in an action for an injury caused by an obstruction in a road, that he had always driven around the place in question after having made one attempt to cross over it, is admissible as tending to show the condition of the street. *Sherman v. Oneonta*, supra.

But evidence of similar accidents to other persons, caused by the same obstruction or defect in a street, is not competent for the purpose of showing independent acts of negligence. *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079; *Taylorville v. Stafford*, supra; *Barrett v. Hammond*, 87 Wis. 654, 58 N. W. 1053.

Nor is the fact that other people may, at different times, have stumbled or fallen at the same place, competent to show either the character of the defect or obstruction at the time of the injury in question, or that the person injured did not exercise ordinary care, or that the city had notice of the defect. *Birmingham v. Starr*, supra; *Circleville v. Sohn*, 20 Ohio C. C. 363.

And evidence that similar accidents had happened to others from driving against an obstruction in a street is not admissible in an action against a city for damages for an injury caused by driving against the obstruction in question, when not offered for the purpose of showing notice to the town of the defect, but to prove that the obstruction constituted a defect and was in the traveled part of the highway. *Phillips v. Willow*, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731.

Nor is the testimony of a witness that she fell on the same defective walk three or four days after the fall in question admissible in an action by a person injured by reason of the tipping up of a loose plank in a sidewalk, where there was nothing to show how the witness was walking, or whether using due care, or that the accident

was due to the same cause. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

And the testimony of a witness in such an action, that, about two years prior to the accident in question, he fell upon the ice at the same place, and that there was then about the same amount of ice, is inadmissible where it does not appear that the prior accumulation was caused by defects in the sidewalk. *Gillrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357.

So, the contrary rule has been squarely held, that the testimony of witnesses in an action against a city for injuries caused by falling into a hole in a sidewalk, that they fell into the same hole on the same night, is inadmissible. *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387.

And it has been held that the fact that other persons, in passing upon a sidewalk, had met with difficulty and slipped there, is inadmissible in evidence, in an action by a person against the city for an injury received at that place from an alleged defect in the sidewalk, consisting of its slippery condition caused by ice, as presenting a collateral issue, and raising an issue material in the case which the other party was not bound to be prepared to meet. *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605.

But while, under this rule, injuries to others in the same accident are irrelevant and inadmissible in an action against a city for injuries from a defect or obstruction in a city street, an instruction that such evidence was admitted only as part of the circumstances surrounding the accident; and that it was not to be considered in relation to, or in connection with, any injuries suffered by the person injured,—renders the admission of such evidence harmless. *Apker v. Hoquiam* (Wash.) 99 Pac. 746.

And in erroneous admission of testimony that a witness had her attention called to a defective sidewalk by falling thereon is without prejudice where she was afterwards permitted without objection to tell how, when, and where she fell. *Robinson v. Cedar Rapids*, 100 Iowa, 662, 69 N. W. 1064.

So, while the absence of any prior accident due to an alleged defect or obstruction in a street is not conclusive that the construction is a proper one, it is important in establishing the propriety of the construction and in relieving the municipal corporation from any imputation of negligence in not changing it. *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712.

And it is cogent evidence of the lack of any negligence on the part of the city in failing to guard the spot. *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858.

And the fact that no previous accident had happened because of a defect or obstruction in a street is important as bearing upon the question whether or not the street was reasonably safe, and as bearing

upon the question of notice to the municipality. *Moroney v. New York*, 117 App. Div. 843, 103 N. Y. Supp. 1135, affirmed in 190 N. Y. 560, 83 N. E. 1128.

And evidence that a number of persons had passed along a sidewalk without harm is admissible, in an action for damages for injuries received from slipping on a formation of ice extending across the sidewalk, as tending to show that the ice was not slippery and dangerous. *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194.

So, where, in constructing a bridge, a city made an excavation in the bed of a shallow stream where it was crossed by a street, and left the same unguarded, and a child fell in and was injured; and there was evidence tending to show that, previous to the excavation, the stream was not dangerous,—the testimony of a witness that she had never before heard of anyone being drowned there is competent. *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155.

But the fact that no previous accident has resulted from a defect or obstruction in a street does not excuse the municipality for allowing the defect or obstruction to continue. *Moroney v. New York*, supra.

And the facts that an obstructed street had been in the same condition for forty years, and that there had been no previous accidents of a similar character to the accident in question, do not establish the safety of the street, or that the village authorities had no reason to apprehend the occurrence of the accident in question. *Bradner v. Warwick*, 91 App. Div. 408, 86 N. Y. Supp. 935.

And that no accident had previously happened at the place of an alleged defect is not competent, has been held by high authority. *Marvin v. New Bedford*, supra.

f. Sufficiency of way, how determined.

Whether a given street was in a reasonably safe condition for the convenience of travel is a practical question, to be determined by the jury in each case by the particular circumstances. *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Taubman v. Lexington*, 25 Mo. App. 218; *Anniston v. Ivey*, 151 Ala. 392, 44 So. 48; *Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518; *Rock Island v. Drost*, 71 Ill. App. 613; *Vandalia v. Ropp*, 39 Ill. App. 344; *Weber v. Creston*, 75 Iowa, 16, 39 N. W. 126; *Scurlock v. Boone (Iowa)* 120 N. W. 313; *Witham v. Portland*, 72 Me. 539; *Hall v. Lowell*, 10 Cush. 260; *Metz v. Butte*, 27 Mont. 506, 71 Pac. 761; *Craig v. Sedalia*, 63 Mo. 417; *Caton v. Sedalia*, 62 Mo. App. 227; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *McDowell v. Auburn*, 126 App. Div. 173, 110 N. Y. Supp. 941; *Bullock v. New York*, 99 N. Y. 654, 2 N. E. 1; *Bennett v. Sing Sing*, 38 N. Y. S. R. 347, 14 N. Y. Supp. 463; *Welsh v. Amesbury*, 170 Mass. 437, 49 N. E. 735; *Culverson v. Maryville*, 67 Mo. App. 343; *McClure v. Sparta*, 84 Wis. 269, 20 L.R.A. (N.S.)

36 Am. St. Rep. 924, 54 N. W. 337; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *McNamara v. Clintonville*, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; *Hill v. Fond du Lac*, 56 Wis. 242, 14 N. W. 25; *Peake v. Superior*, 106 Wis. 403, 82 N. W. 306; *Kawiecka v. Superior (Wis.)* 118 N. W. 192; *Merrill v. Portland*, 4 Cliff. 138, Fed. Cas. No. 9470.

And the court should not assume the existence of the bad condition of the street in its instructions. *Rock Island v. Drost*, supra.

And whether an obstruction or a defect in a street is such that it is negligence on the part of the municipality to suffer it to exist is generally and in the main a question of fact for a jury. *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *District of Columbia v. Duryee*, 29 App. D. C. 327, 10 A. & E. Ann. Cas. 675; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454, 56 Atl. 379; *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389; *Harrell v. Macon*, 1 Ga. App. 413, 58 S. E. 124; *Pontiac v. Grandy*, 108 Ill. App. 466; *Champaign v. Jones*, 132 Ill. 304, 23 N. E. 1125; *Newport v. Miller*, 93 Ky. 22, 18 S. W. 835.

And the rule is the same where the evidence in an action for injuries received in consequence of a defective condition of a sidewalk in a city leaves it doubtful what caused the injury complained of. *Alexander v. Big Rapids*, 70 Mich. 224, 38 N. W. 227.

And, where there was a defect in a street, from which an injury resulted of such a character that reasonable and prudent men might reasonably differ as to whether an accident could or should not have reasonably been anticipated from its existence, then the case is generally one for the jury. *Archer v. Mt. Vernon*, 57 App. Div. 32, 67 N. Y. Supp. 1040.

So, whether, when a part of a sidewalk is defective through negligence of the city, the other part which is not defective is sufficient and reasonably safe and convenient for travel thereon, is a question of fact for a jury. *Tritz v. Kansas City*, 84 Mo. 632; *Streeter v. Breckenridge*, 23 Mo. App. 244.

And, where a defect in a sidewalk, which caused an injury, was one about which different minds might honestly draw different conclusions as to its liability to cause an accident, and the danger which might reasonably be anticipated from its existence, the question as to the negligence of the city in permitting it to exist should be submitted to a jury. *Denver v. Hubbard*, 29 Colo. 529, 69 Pac. 508.

Nor should a jury, in determining from the evidence of its condition whether a highway was or was not in a reasonably safe condition for travel, be restricted to the mere inquiry whether a certain class of persons may or may not think that accidents are liable to befall ordinarily careful travelers at the place of the alleged insufficiency, by reason thereof. *Draper v. Iron-*

ton, 42 Wis. 696; Peake v. Superior, supra; Chicago v. McGiven, 78 Ill. 347.

And a witness in an action against a city for injuries caused by a defective sidewalk cannot give his opinion as to whether the sidewalk was reasonably safe. Metz v. Butte, 27 Mont. 506, 71 Pac. 761; Anniston v. Ivey, 151 Ala. 392, 44 So. 48; District of Columbia v. Haller, 4 App. D. C. 405; Chicago v. McGiven, supra; Alexander v. Mt. Sterling, 71 Ill. 366; Atherton v. Bancroft, 114 Mich. 241, 72 N. W. 208; Heberling v. Warrensburg, 133 Mo. App. 544, 113 S. W. 673; McKim v. Philadelphia, 217 Pa. 243, 19 L.R.A. (N.S.) 506, 66 Atl. 340.

A witness in an action for an injury caused by an obstruction in a street must give the facts as to the condition of the walk, and the jury must decide as to its safety. Mt. Vernon v. Brooks, 39 Ill. App. 426.

Where the existence of a particular obstruction upon a sidewalk is admitted, or the proof of its existence is clear and conclusive, however, it is a question of law whether or not the obstruction is such as to render the sidewalk not in a reasonably safe condition, thereby making the corporation liable in damages to a person injured by reason thereof. Parrish v. Huntington, 57 W. Va. 286, 50 S. E. 416.

And, when the facts bearing upon the subject are unquestioned, or are sustained by uncontroverted testimony, their legal effect is a matter of law. Witham v. Portland, 72 Me. 539.

But, when the fact is determined by the jury, their finding will not be disturbed unless absolutely unsupported by the evidence. Saylor v. Montesano, 11 Wash. 328, 39 Pac. 653.

And a judgment for the plaintiff in an action for an injury caused by an obstruction in a street, on evidence tending to show that the street was unsafe, and that the city knew, or by the exercise of reasonable care could have known, of its condition, will not be disturbed on appeal as against the evidence, though the evidence was quite conflicting, and the preponderance of it tended to establish that the crossing where the injury occurred was in a reasonably safe condition for public travel. Henderson v. Sizemore, 31 Ky. L. Rep. 1134, 104 S. W. 722; Kawiecka v. Superior (Wis.) 118 N. W. 192.

And, where the question in an action against a city was whether the condition of a street was such that danger was reasonably to be apprehended, which must be determined by the facts proven; and the jury was so instructed,—refusal to instruct that a certain defect in a street, therein described, would not render the city liable as for negligence, was not erroneous. Kelly v. New York, 114 N. Y. Supp. 178.

So, where the jury in an action against a city for an injury caused by an alleged obstruction in a street, at the request of the defendant, were permitted personally to inspect the obstruction and form their own

opinion concerning it, a verdict in favor of the plaintiff will be permitted to stand, although the evidence as to the dangerous character of the obstruction was rather weak. Atlanta v. Milam, 95 Ga. 135, 22 S. E. 43.

X. Failure to prevent improper conduct in streets as affecting liability.

This has been made the subject of an independent subject note in this series.

XI. Precautions against injury.

a. Warning of obstruction.

1. General rules.

A city having knowledge of a dangerous obstruction or defect in a street is bound to exercise ordinary care for the protection of the traveling public in giving warning of the danger. Louisville v. Keher, 117 Ky. 841, 79 S. W. 270; McPherson v. District of Columbia, 7 Mackey, 564; Holitz v. Kansas City, 68 Kan. 157, 74 Pac. 594; Hayes v. West Bay City, 91 Mich. 418, 51 N. W. 1067; Dolan v. Brooklyn, 1 Alb. L. J. 315, reversing 46 Barb. 604; Bauer v. Rochester, 35 N. Y. S. R. 959, 12 N. Y. Supp. 418; Revis v. Raleigh (N. C.) 63 S. E. 1049; O'Malley v. Parsons, 191 Pa. 612, 71 Am. St. Rep. 778, 43 Atl. 384; Pittston v. Hart, 89 Pa. 389; Memphis v. Lasser, 9 Humph. 760.

And this is so whether the obstruction was made or created by the city, or by an individual. Holitz v. Kansas City, supra.

And whether the work causing it is being done by the corporation through its own servants, or by contract, or by subcontractors under the primary contractor. Savannah v. Waldner, 49 Ga. 324.

The duty of municipal corporations to keep highways in repair and safe for travel includes the duty to use proper precautions against accident while they are unsafe and out of repair. Klatt v. Milwaukee, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162.

And, if it is necessary to erect barriers at certain places in order to maintain streets in a reasonably safe condition for public travel, failure upon the part of the municipal corporation to do so is negligence. Andrews v. Elmira, 128 App. Div. 699, 113 N. Y. Supp. 711.

While a city has the right temporarily to allow obstructions on the streets and sidewalks for any lawful purpose, while they remain there the traveling public should have notice and warning thereof; and, if a city permits a dangerous obstruction on a street, it can justify its action only by showing that it took proper steps to protect the public. Arthur v. Charleston, 51 W. Va. 132, 41 S. E. 171; O'Rourke v. Monroe, 98 Mich. 520, 57 N. W. 738.

And, if a work in a street amounting to a nuisance is, for any reason, tolerated by the authorities, it is their duty to exercise a supervision over its construction and condition; and it is negligence and a breach

of duty in them to omit to exercise such supervision. *Wendell v. Troy*, 39 Barb. 329, affirmed in 4 Abb. App. Dec. 563.

So, under a statutory requirement that a city must keep its streets in a condition reasonably safe and fit for travel, it is its duty to place signals or other safeguards at given points of danger or obstruction, or to give other proper warning, or to see that the street is closed to travel, and it is liable for injuries resulting in case of non-performance of such duty. *Joslyn v. Detroit*, 74 Mich. 458, 42 N. W. 50.

Nor is a municipal corporation permitting an obstruction in a street relieved from liability for failure in the performance of its duty to have such safeguards and lights as will protect travelers from accident and injury thereby, by the fact that the work was in the hands of contractors who were liable for the injury. *Bauer v. Rochester*, supra; *Brusso v. Buffalo*, 90 N. Y. 679; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845; *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 644, 70 Pac. 231.

Or by the fact that the omission was that of some person who had previously assumed to give warning. *Tiers v. New York*, 74 Hun, 462, 26 N. Y. Supp. 688.

But, where blasting is done in a street by individuals, and a team is thereby frightened and caused to run away, and an injury results, evidence that the persons in charge of the work were expressly told by the alderman of the city that no blasting should be done is admissible in an action against the city for damages for the injury. *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35.

Nor does the responsibility of a city for an obstruction in a street without guard or light depend upon the question whether its charter requires the streets to be kept in repair, or simply leaves it permissive. *Arnold v. San Jose*, 81 Cal. 618, 22 Pac. 877.

And, where there is an obstruction consisting of an uncovered excavation across a street, the duty of the city to repair the street, or to give warning of the danger to travelers, is not affected by the fact that the day after the defect occurred was Sunday. *Snook v. Anaconda*, 26 Mont. 128, 66 Pac. 756.

And evidence of an overseer of streets of a city as to its rules in relation to doing street work on Sunday are properly excluded in an action against the city in such a case. *Ibid*.

So, the obligation of a municipal corporation to erect barriers around an obstruction, such as an area adjoining or extending into one of its highways, grows out of the duty which rests upon municipal corporations to maintain their streets and sidewalks in a safe condition for those who may rightfully use them, whether they be grown persons or children. *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369.

And, where a person fell into an excavation in a sidewalk made for the purpose of erecting a building, an instruction in an

action for the injury, with reference to the "unsafe and dangerous condition of the sidewalk," is not objectionable as tending to mislead the jury by keeping before it the defective condition of the walk instead of the defective manner of guarding or of giving notice of the condition, which was legal and permissive. *Kansas City v. Birmingham*, 45 Kan. 212, 25 Pac. 569.

Nor is a city ordinance permitting a person engaged in building to deposit material upon the street, occupying one half of its width, a defense to an action against the city for negligence in permitting obstructions to remain in the street at night without any light, or other signal to give warning of them, in consequence of which a traveler sustains injuries. *McCoull v. Manchester*, 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379.

And an instruction on the negligence of a city in leaving open a street excavation without guarding it is not erroneous because it does not submit the issue of contributory negligence, where that issue is submitted in other instructions. *Campbell v. Stanberry*, 105 Mo. App. 56, 78 S. W. 292.

So, where it appears, in an action against a city for a personal injury, that the injury was caused by the negligence of the city in failing to place a barrier along the edge of a sidewalk, the city cannot urge that a defect in the sidewalk, for which it was responsible, caused the injuries, rather than the failure to maintain a barrier. *Newcastle v. Griggs (Ind.)* 86 N. E. 757.

All that is required of a municipal corporation, however, is that it shall see that its sidewalks are reasonably safe and fit for travel, and, if they are kept in that condition, whether it is done by a contractor engaged in work on the street, an abutting property owner, or the city, it is to be treated as done by the city, and there can be no liability; and the city will not be held liable for an injury caused by an excavation in a sidewalk because it placed no barriers or lights thereon where the contractor and the property holder had erected barriers and placed lights. *Walker v. Ann Arbor*, 111 Mich. 1, 69 N. W. 87; *Kansas City v. Birmingham*, supra.

Nor does the mere fact that there was no light at a place where an injury was received from an alleged obstruction in a street necessarily show negligence upon the part of the municipality, since its absence might be accounted for in many ways consistent with freedom from legal negligence. *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L.R.A. 789, 46 Am. St. Rep. 766, 54 N. W. 1044.

And, where an excavation, not amounting to a nuisance, is made in a street, and notice is given by sufficient lighting, and, without fault of the city, and without its knowledge, the light is removed, it is not liable for an injury resulting therefrom until it knows or should know of the removal. *Garnetz v. Carroll*, 136 Iowa, 569, 114 N. W. 57; *Se-*

vestre v. New York, 15 Jones & S. 341; Richmond v. Poore (Va.) 63 S. E. 1014.

And this is so though no watchman was employed. *Sevestre v. New York*, supra.

And, where an excavation was made adjacent to a sidewalk in a city street; and a person fell into it in the night and was injured; and there was positive evidence of the erection of a barricade on the night in question; and the person injured testified that there was no barrier or guard around the excavation when he fell,—the inference will arise that the barrier was removed in some unexplained way for which the city is not in any way responsible. *Welsh v. Lansing*, 111 Mich. 589, 70 N. W. 129.

Nor is a municipal corporation liable for failure to guard an obstruction where it had no authority to erect barriers; and, where a street was laid out along a canal, covering land along the canal belonging to the state, a strip of land along a retaining wall of the canal belonging to the state being used as a part of the street, and an injury occurred to a traveler which would have been prevented by a railing on such wall, legal negligence on the part of the corporation cannot be predicated on its omission to erect such a railing, where the wall was on land of the state and the municipal corporation had no right to put a railing on it. *Veeder v. Little Falls*, 100 N. Y. 343, 3 N. E. 306.

And a permit by a city to use part of a street for the placing of building materials for use in the construction of a building on adjacent property is the mere regulation of a right of the property owner to make such use of the street, and is not a license to do any act in the street which but for such license would be illegal or a nuisance; and a city, by giving such permit, is not charged with the duty of seeing that the place is guarded, and will not be liable in damages to a person injured in consequence of the omission to guard such places with barriers or lights, unless it had notice, express or implied, of such omission, and after such notice was guilty of negligence. *Columbus v. Penrod*, 73 Ohio St. 209, 3 L.R.A. (N.S.) 386, 111 Am. St. Rep. 716, 77 N. E. 826.

So, an ordinance obligating the city to guard an excavation in its streets by barriers and mark it by lights, at most, affords only evidence of negligence, in an action against the city for an injury resulting from an unguarded and unlighted excavation in a street; and refusal to instruct, in such an action, that, as a matter of law, an ordinance of the city obligated the city thus to guard the excavation, is proper. *Sterling v. Detroit*, 134 Mich. 22, 95 N. W. 986.

It has been held, however, that the rule that there is no liability upon the part of cities and towns for the negligence of their officers or agents in the performance of duties purely public and governmental in their nature saves a city from liability for injuries resulting from a failure of its servants to display danger signals at a point where a street which is being repaired is obstruct-

ed by a barricade. *Collier v. Ft. Smith*, 73 Ark. 447, 68 L.R.A. 237, 84 S. W. 480.

2. Necessity of.

Whether a city is under obligations to erect a fence or other barrier along an embankment made or permitted by it in one of its streets depends upon whether or not the street was reasonably safe for travel without the fence. *Fugate v. Somerset*, 97 Ky. 48, 29 S. W. 970.

And whether the absence of a railing in a highway is a defect, and a neglect to maintain one a breach of duty, rendering a municipal corporation liable for an injury, must be determined by the character of the place or object in question. *Spencer v. Mayfield* (Ind. App.) 85 N. E. 23; *Adams v. Natick*, 13 Allen, 429.

A city under the absolute duty to keep its streets in a safe condition for public travel, and bound to exercise reasonable diligence and care to accomplish that end, which causes or permits an obstruction to be placed in a street, is bound to see that it is carefully guarded so that it is reasonably free from danger to travelers upon the street. *Brusso v. Buffalo*, 90 N. Y. 679; *Covington v. Bryant*, 7 Bush, 248; *O'Malley v. Parsons*, 191 Pa. 612, 71 Am. St. Rep. 78, 43 Atl. 384.

And failure of a municipal corporation to provide railings or barriers at a dangerous place along a public highway will render it liable for injuries resulting therefrom, where the erection of such railings or barriers is a reasonable and necessary precaution to guard travelers against injury. *Malloy v. Walker Twp.* 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012.

It is a question of the exercise of ordinary prudence. *Peoria v. Walker*, 47 Ill. App. 182.

And a general custom and usage as to placing railings or barriers along a highway embankment is of no importance in determining the liability of a municipal corporation for failure to provide such barriers at a dangerous place, where the statute imposes an absolute liability to make highways safe for travel. *Malloy v. Walker Twp.* supra.

And an instruction, in an action for damages against a city, that it was the city's duty to keep a street, when excavated, in a reasonably safe condition; and that, if it left the excavation open, unguarded, and unlighted, and an injury occurred, and it was dangerous to persons crossing at night, this was a breach of duty,—is not objectionable as requiring, without qualification, that the street be kept absolutely safe. *Campbell v. Stanberry*, 105 Mo. App. 56, 78 S. W. 292.

So, the violation of a statutory duty, such as a failure to put out, as required by a city's ordinances, danger signals at night where a ditch is being dug across a street, is negligence as a matter of law; and the court, in an action for an injury caused thereby, may so charge. *Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. 319.

And where a statute provides that, where

a defect in a street exists for a day after notice to the superintendent of streets, persons bound by law to repair it and the officers through whose neglect the defect remains shall be liable to one injured thereby, the exercise of due care to prevent injury by such obstruction, thus imposed upon a contractor and the superintendent, requires the erection of guards and the placing of lights. *Stockton Automobile Co. v. Confer* (Cal.) 97 Pac. 881.

So, it is the duty of a municipal corporation to exercise ordinary care in causing warnings to be given by persons licensed by it to use a portion of the public street as a place of deposit for building materials; and it is liable as well as the person using the street if it fails to exercise such care. *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270; *Dolan v. Brooklyn*, 1 Alb. L. J. 315, reversing 46 Barb. 604.

And, where a city granted a license to a person to move buildings in the streets subject to the supervision of the city marshal, and the city marshal had knowledge that a building was left in the street after dark without guard or signal of any kind, it was his duty to see that ordinary care was taken to warn passers-by of its presence; and his neglect of such duty was the negligence of the city, for which it is liable. *Hayes v. West Bay City*, 91 Mich. 418, 51 N. W. 1067.

And a municipal corporation which neglects its duty to cause guards or lights to be put up at night at an excavation in a street to prevent accidents is liable for a resulting injury, though the excavation was not made for a public improvement, but was made for the private benefit of an individual, and was left unguarded at night by the fault of such individual or of some person employed by him and acting under a permit of the city authorities. *Dolan v. Brooklyn*, 1 Alb. L. J. 315.

And a complaint in an action against a city for injuries from negligence in failing to maintain a barrier between a sidewalk and an adjoining low lot, charging a negligent failure to keep the sidewalk in a safe condition for public travel by the erection of a guard or barrier, and that it was very dark, and the person injured, while walking upon the sidewalk, stumbled upon a projection or uneven surface and fell over the side of the walk into the excavation, and that his injuries were caused by the negligence of the municipality in failing to place a guard, railing, or barrier along the sidewalk, sufficiently charges that the guard was needed to render the sidewalk ordinarily safe, and that it was because of the lack thereof that the injuries were received. *Newcastle v. Grubbs* (Ind.) 86 N. E. 757.

And an allegation in a complaint against a city for an injury caused by an obstructed street, that building material was suffered to remain in the street after dark without being guarded, is a direct averment that no guards or lights were placed around the obstruction, and not a mere recital of such facts, the word "without" being synonymous

with "not being." *Laporte v. Osborn* (Ind. App.) 86 N. E. 995.

So, the absence of a railing to guard an open basement, where the public travel is endangered thereby, constitutes a defect in the highway as rendering it unsafe for public travel, independently of any statutory provision as to a railing. *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677.

A railing or barrier is not required to be erected along a street or sidewalk, however, merely because a traveler may meet with an accident if there is none; the question in each case is whether one is needed to make the highway reasonably safe and convenient for travelers who are themselves in the exercise of due care. *Logan v. New Bedford*, 157 Mass. 534, 32 N. E. 910; *O'Rourke v. Monroe*, 98 Mich. 520, 57 N. W. 738.

And a railing is not required as a protection to the traveling public, unless there is some dangerous object or place outside the required railing in or upon which a traveler might come to harm if not warned therefrom by the railing. *Spencer v. Mayfield* (Ind. App.) 85 N. E. 23.

The danger which requires a railing along a sidewalk must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads and streets are not bound to be fenced against unless their condition is such as to expose travelers to unusual hazard; and a person receiving injury by walking off from a sidewalk which adjoined land which was substantially on a level with the sidewalk, and there slipped upon smooth ice covered with snow, cannot recover of the city for her injury. *Damon v. Boston*, 149 Mass. 147, 21 N. E. 235.

And, where the risk from a dangerous place or object near the line of travel of a street is so small that it would be unreasonable to require the city to provide a railing for the protection of travelers, the court, in an action against the city for personal injuries occasioned thereby, will decide the question as to whether a railing is required as one of law, and order a verdict for the defendant. *Scannal v. Cambridge*, 163 Mass. 91, 39 N. E. 790.

And, where a bank wall about 3 feet high connected two houses from 20 to 25 feet apart, and was between 5 and 6 feet from and parallel to the street line; and there were steps projecting from the houses to the street line, and the surface of the land rose slightly from the sidewalk to the wall, and, including the sidewalk, was all of the same general character, the danger from the wall is not so evident or unusual as to require that a fence or barrier should be erected or maintained by the city. *Logan v. New Bedford*, supra.

So, where municipal authorities have arranged a safe and convenient means of avoiding a place naturally dangerous in its streets, but have omitted to fence off the traveler from the straightforward and perilous path, they are not responsible to a person well acquainted with the locality and

with the means which have been provided for escaping the danger, who, in a moment of oblivion, pursued the path of peril and sustained injury thereby. *Vicksburg v. Hennessy*, 54 Miss. 391, 28 Am. Rep. 354.

And a failure of a city to put a fence around a water hydrant, when such hydrant is properly located, cannot render the city liable for an injury from coming in contact with the hydrant. *Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315.

And, where an archway in front of a brick block was built up to and formed the line of the highway, but was at right angles with and not a continuation of the sidewalk; and it was about 3 feet wide and 3 or 4 feet high, and served as an entrance space leading down to an arched and covered passageway which ran through the block; and no part of the steps, archway, or passageway was within the line of the highway except a portion of the space which did not come above the surface, but was covered by planks, making the street at that point even and regular with the rest of the highway, and of proper width,—the reasonable security of the public did not require that it should be fenced or railed; and the city is not liable to a person who slipped down and slid through the passageway because of a failure to maintain a fence or rail. *Richardson v. Boston*, 156 Mass. 145, 30 N. E. 478.

Nor is it negligence on the part of a municipal corporation to omit to erect a barrier on the boundary line of a street, if such barrier would have rendered the street more unsafe than it was in its existing condition. *Veeder v. Little Falls*, 100 N. Y. 343, 3 N. E. 306.

And, where a street is obstructed, and a contractor erects suitable warnings to travelers, the city may avail itself of such warning, and need not take a like precaution. *Stockton Automobile Co. v. Confer* (Cal.) 97 Pac. 881.

So, a municipal corporation need not provide means of access from private property to its streets; and it is not liable for failure to guard its streets from approach from such property at dangerous points. And a traveler who approaches a public street over private property which he has no right to use as a traveled way, and over which the city has no control, and is precipitated over the embankment into an excavation in the street, and injured, cannot recover therefor from the city on the ground that the city failed to provide proper danger signals along such street. *Mulvane v. South Topeka*, 45 Kan. 45, 23 Am. St. Rep. 706, 25 Pac. 217; *Ivester v. Atlanta*, 115 Ga. 853, 42 S. E. 220; *Calhoun v. Milan*, 64 Mo. App. 398.

It is not required to put up danger signals along an excavated street so as to protect persons traveling outside thereof, except at the crossings or intersections of such streets by other public streets or highways. *Mulvane v. South Topeka*, supra.

Nor is the rule that a city is not bound to furnish safe means of reaching its streets 20 L.R.A. (N.S.)

from private property, or to protect those passing over private property from injury by falling into the street, affected by the fact that the walk on which the person was injured was within the actual limits of a street as originally laid out, where the city had never recognized it as public property, and had graded and built the public sidewalk as though the embankment was the true dividing line between the street and the private property. *Calhoun v. Milan*, supra.

And the fact that persons were in the habit of traveling across lots and passing over a sidewalk and gutter into the street at a place other than the street intersection does not create a license by the city of such method of traveling; and it will not be required to put up barriers or keep a light where the path so beaten crosses the gutter. *Holding v. St. Joseph*, 92 Mo. App. 143.

But a city, which, in altering and lowering the grade of a street at the point of intersection of two streets, and just where an old well-established and well-used walk way entered the street, negligently omitted to put any barrier or sign to warn the public, whereby a person who had long used the walk way across the adjoining lot, in ignorance of the alteration of the street, stepped off a precipice of 8 feet and sustained injuries therefrom, is liable for damages for the injuries thus sustained. *Orme v. Richmond*, 79 Va. 86.

And it has been held that a municipal corporation does not in all cases fulfill the duty incumbent on it by law by merely placing barrier across a street which is obstructed, to protect travelers from injury, without adopting any measures to guard against accidents to those who may have occasion lawfully to come on the dangerous portion of the way from private lands adjoining and lying within the limits, which are closed against travelers approaching in other directions. *Burnham v. Boston*, 10 Allen, 293.

Whether a place in or near a street where an injury occurred required a guard or barrier for the protection of travelers, and whether the municipal corporation was guilty of actual negligence in not constructing such guard or barrier, are questions for the jury in an action against the corporation for an injury resulting from an obstruction or defect in the street. *Hyatt v. Rondout*, 44 Barb. 385; *Rockford v. Russell*, 9 Ill. App. 229; *Newcastle v. Grubbs* (Ind.) 86 N. E. 757; *Wyandotte v. Gibson*, 25 Kan. 236; *Fugate v. Somerset*, 97 Ky. 48, 9 S. W. 970; *Scannal v. Cambridge*, 163 Mass. 91, 39 N. E. 790; *Malloy v. Walker Twp.*, 77 Mich. 448, 6 L.R.A. 695, 43 N. E. 1012; *Pettengill v. Yonkers*, 39 Hun, 449.

And, where the negligence complained of in an action against a city was in failing to place a guard or barrier along a sidewalk in front of an excavation, the jury may, in determining whether the city was guilty of negligence in failing to do so, consider the nature of the lot, its location, and the condition of the sidewalk and all the other con-

ditions and surroundings bearing on the question. *Newcastle v. Grubbs*, supra.

But, while the question of negligence upon the part of a city in failing to guard or light a trench dug by it in a street is usually one of fact for the jury, where it is patent to every reasonable mind that the failure to guard or light such ditch is negligence, then the court may so declare as a matter of law. *Campbell v. Stanberry*, 85 Mo. App. 159; *Scannal v. Cambridge*, supra.

3. Nature and sufficiency of barrier.

Since a street is a public highway of a city, to the proper use of which all the citizens are entitled, it is the duty of the city, where there is an obstruction in it, so to place and mark it as properly to guard the public safety, and to give such notice and warning of the existence of the obstruction as would reasonably notify all persons having occasion to use the street that the danger is there. *Anderson v. Wilmington*, 2 Penn. (Del.) 28, 43 Atl. 841; *Ahlfeldt v. Mexico*, 129 Mo. App. 193, 108 S. W. 122.

A city, an officer of which digs a pit in, or otherwise obstructs, a public highway, must so guard and protect it that no accident can happen except by extreme negligence of the traveler. *Childs v. West Troy*, 23 Hun, 68.

And a statement in a charge in relation to the duty of a city to protect the public from injury in the use of its streets, that "what does not protect is not sufficient," is not subject to the objection that it is too emphatic, where it does not appear that anything whatever had been done to guard an excavation in a much-frequented thoroughfare, or give notice of the danger to a footman, except a small pile of dirt, and a lot of rubbish scattered about, which he might or might not see at night; the dirt and rubbish being there only incidentally, and not so placed as to give notice of the excavation. *Toledo v. Nitz*, 23 Ohio C. C. 350.

So, it is the duty of a municipal corporation, while engaged in excavating a public street, not only to provide during the nighttime the usual electric lights, but also to display danger signals, or to put up barriers so as to keep pedestrians from walking into the excavation. *La Salle v. Evans*, 111 Ill. App. 69.

And, where there is an obstruction or excavation in a street, and barriers and lights will not afford the degree of protection required, then other means must be employed to make the street reasonably safe for public travel by giving reasonably sufficient notice and warning of the defect. *Griider v. Jefferson Realty Co.* (Ky.) 116 S. W. 691.

And proof that an obstruction had remained in a street a sufficient length of time to give the city notice thereof, and that the same was left without guard of light, warrants a finding of negligence upon the part of the city. Although there was an electric

light near by. *Naylor v. Salt Lake City*, 9 Utah. 491, 35 Pac. 509.

And a custom, obtaining in the city and in other neighboring cities and towns, to display certain signals to indicate one class of dangerous conditions in a street and other signals to indicate other classes of dangerous conditions, is admissible in an action against a city for an injury resulting from a dangerous condition of a street closed for improvement, as bearing upon the question of reasonable care upon the part of the city, as tending to show what ordinarily prudent persons do under like circumstances, and for the purpose of determining the question of the plaintiff's contributory negligence and enlightening the jury as to what he was to understand from certain signals and what should be his course of conduct upon seeing them. *Ahlfeldt v. Mexico*, supra.

So, where an excavation is made in a street, ordinary care which will relieve the city from liability for an injury resulting therefrom calls for something more than the mere erection of a mound of earth at the point where excavation is made. *Akers v. New York*, 14 Misc. 524, 35 N. Y. Supp. 1099.

And, where a city contracts for the paving of the roadway of a street, and the contractor leaves a large pile of stones in the street which he lights with one red light, and there is evidence to show that this was quite dim and placed in a sheltered position to protect it from the wind, it is a question for the jury, in an action for an injury resulting from driving against the obstruction, to say whether the obstruction was sufficiently lighted to warn persons using the street of the existence thereof. *Godfrey v. New York*, 104 App. Div. 357, 93 N. Y. Supp. 899.

And, where a street was obstructed with two piles of gravel or concrete material, and an injury resulted therefrom, the question whether the city discharged its duty by placing, or causing to be placed, on the obstruction a single common old stable lantern which was rusty and somewhat weatherbeaten, is one of fact for the jury. *Saut-hof v. Granger*, 19 R. I. 606, 35 Atl. 300.

And in such case the condition of the weather, particularly as to the force and velocity of the wind on the day of the accident, coupled with the fact that it frequently came in sudden puffs or gusts, is an element for the jury, in an action for the injury, to consider in determining whether a single lantern was a sufficient safeguard. *Ibid.*

And, where a street was closed by a wooden horse with a lantern attached, standing across the roadbed, but there was no barrier across the sidewalk, and a person walked along the sidewalk of the street and was injured by falling into a trench crossing it, the question whether the barrier was sufficient notice that the sidewalk as well as the roadway was closed is one of fact for the jury. *White v. Boston*, 122 Mass. 491.

So, where there was an excavation in a street, and a rope was put up as a barrier, and a traveler in an automobile ran against the rope and was injured; and the evidence tended to show that the rope was of a color not easily distinguishable, and that no flag or other means of attracting attention to the presence of the rope was used, and the traveler did not see the rope until within 2 or 3 feet of it,—the question whether the way was defective, and whether the traveler was in the exercise of due care, is for the jury, in an action for a resulting injury. *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336.

And the rule is the same where, after a fire which left the front wall of a building standing, in order to prevent accidents to passers-by a barricade was erected to prevent passing by within reach of the danger, and a part of the barricade consisted of a rope stretched across the sidewalk about 2 or 3 feet from the ground, extending from the gutter to the building, there being no signal light on the rope, and it being about midway between two electric arc lamps, the nearer one being about 125 feet away; and a person was injured by running against the rope. *Place v. Yonkers*, 43 App. Div. 380, 60 N. Y. Supp. 171.

And the liability of a city for the negligence of those in charge of a street in stretching a rope across it, thereby causing an injury, is not affected by the fact that the control of the street was not vested in the city council, but in the park board. *Kleopfert v. Minneapolis*, 90 Minn. 158, 95 N. W. 908.

So, a barbed wire placed across a street at a place where the street is in process of reconstruction, to prevent traffic thereon, is a nuisance; and, in the absence of any light or warning, the city is liable in damages to one who in the nighttime runs against the wire. *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381.

Nor can it be said, as a matter of law, that a railing $2\frac{1}{2}$ feet high less than one half the height of an ordinary man, is a sufficient protection to an area way along the line of a sidewalk, to persons passing on the busiest and most frequented street in a large city; the question is one of fact for the jury. *Donnelly v. Rochester*, 166 N. Y. 315, 59 N. E. 989.

And where, along the side of a sidewalk, there is a perpendicular descent of about 20 feet with a rapid descent of over 30 feet in addition thereto, along which the ground is covered with stones and rubbish, there is no rule of law from which it can be determined that one piece of scantling 2 by 4 inches, extending from post to post and $2\frac{1}{2}$ feet above the bed of the sidewalk, constitutes a safe and sufficient protection to all persons using the sidewalk; the question of negligence in such case is one of fact for the jury. *St. Paul v. Kuby*, 8 Minn. 154, Gil. 125.

So, the question of negligence is one of fact for the jury, where a trench dug by 20 L.R.A.(N.S.)

the owner of an adjoining lot for the purpose of connecting his premises with the water mains in the street extended from near a gutter several feet into the street, and the barriers consisted of one or more slabs laid over the trench, on which were placed two boxes and a barrel, and a person drove into the trench and was thrown from his wagon and injured. *Weed v. Ballston Spa*, 76 N. Y. 329.

And so is the question whether a board placed across a sidewalk as a guard to prevent persons from walking into an excavation in the sidewalk, which was without any permanent or substantial fastening, and was liable to be thrown down at any time by the mere carelessness or thoughtlessness of persons passing along the sidewalk, was a sufficient protection to the public. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273.

And evidence, in an action against a city for an injury caused by a person falling into a sewer in the process of construction, that the person injured was 6 feet 8 inches in height and weighed 250 pounds, and that he came in contact with the barricade at the excavation, which consisted of a cross-grained board which gave way, is sufficient to warrant the jury in finding that the guard at the sewer excavation was inadequate. *Ott v. Buffalo*, 40 N. Y. S. R. 716, 16 N. Y. Supp. 1, affirmed in 131 N. Y. 594, 30 N. E. 67.

So, where a city dug a trench across a highway and under the track of a horse railroad for the purpose of laying a sewer, and erected barriers to make it reasonably safe and convenient for travelers, but permitted the railroad company to continue running its cars, knowing that it would be necessary to remove the barriers as often as a car passed, the city is responsible for the negligence of the railroad company in omitting to replace the barriers, and is liable for an injury resulting therefrom. *Prentiss v. Boston*, 112 Mass. 43.

And, where a street railway company, under authority from the city to build its road on certain streets on grades to be approved by the city authorities, dug a trench in a street, and, upon being notified to suspend work until the grade was fixed, built a fence around the trench, which remained there awaiting the establishment of the grades, and, when a person was driving down a steep incline leading to the fence, the holdback strap of his harness broke and the horse started and collided with the fence, and he was thrown out and injured, a question for the jury arises, in an action against the city, as to whether it was negligent in leaving the trench open and unprotected, and as to whether or not the fence was a proper one. *Lane v. Syracuse*, 12 App. Div. 118, 42 N. Y. Supp. 219.

Actual notice is not required to be given to a traveler, however, of every obstruction on a public highway; knowledge that there is a probability of danger is enough, and it is sufficient that he has notice or knowl-

edge enough of the facts to put him on inquiry. *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

And it is not the duty of a city, in the exercise of reasonable diligence, and in order to keep a street in a safe condition, to place a signal or guard at an excavation in it when it is plainly visible to those traveling upon the street. *Rock Island v. Gingles*, 217 Ill. 185, 75 N. E. 468.

So, no other notice to travelers of the presence of a steam roller in the street is needed than a view of the roller itself, when it can be seen in ample time to avoid it. *District of Columbia v. Moulton*, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840, reversing 15 App. D. C. 363.

And, when a steam roller was being taken through a street at a time when it was being used by the public; and the horse of a traveler was frightened thereby, and the traveler was injured; and there was evidence, in an action against the city for the injury, that a mounted policeman went ahead of the roller and told the person injured that it was coming and directed her to turn aside into another street, which she failed to do; and there was evidence in her behalf that there was no person going ahead of the roller,—the question of the negligence of the city is properly submitted to the jury. *Denver v. Peterson*, 5 Colo. App. 41, 36 Pac. 1111.

So, if a cut or excavation in a city street, made in the course of the execution of a public work, is sufficiently guarded by barriers, lights are unnecessary, and to omit them is not negligence. *Sevestre v. New York*, 15 Jones & S. 341.

And a city which dug a trench in a street for the purpose of laying water mains is not under the duty of putting up both guard rails and lights; it is merely required to maintain either guard rails or lights. *Campbell v. Stanberry*, 85 Mo. App. 159.

But an error in an instruction in such a case in requiring the city both to place a guard rail or barricade about a street excavation, and to place lights along its sides, is harmless where there is no evidence that either precaution was taken to prevent injury. *Campbell v. Stanberry*, 105 Mo. App. 56, 78 S. W. 292.

So, where a city street in the middle of which a car track is laid, dividing the ordinary course of travel into two streams, is undergoing repairs, and in a defective condition, it cannot be held, as matter of law, that a danger sign placed upon one side of the car track is not a reasonable warning to those approaching on the other side. *Mulligan v. New Britain*, 69 Conn. 96, 36 Atl. 1005.

And, where an excavation was made between the rails of a street-railway track in a street for the building of a tide gate in a sewer, and a person attempting to catch a car ran for it between the rails and fell into the excavation and was injured, the city cannot be said to have failed in the exercise of reasonable care and diligence. 20 L.R.A. (N.S.)

where it had erected barriers with signs to show that the way was not open to public travel, and had a watchman on the spot night and day, and what happened could not reasonably be expected to happen. *Martin v. Chelsea*, 175 Mass. 516, 56 N. E. 703.

So, while a city in which, along the side of a street, there is a precipice 40 feet deep, the edge of which is within the line of the street as dedicated, and the sidewalk on that side of which extends along near such edge, is under duty to maintain a proper fence or barrier along the precipice, no such extraordinary duty rests upon the city as that of maintaining a barrier so high and so close that children cannot find ways or means to surmount it. *Lineburg v. St. Paul*, 71 Minn. 245, 73 N. W. 723.

The test of sufficiency of protection against danger from an obstruction or excavation in a street is not whether barriers and lights had been used, but whether or not the means employed, whatever they may be, are reasonably sufficient for the purpose. *Grider v. Jefferson Realty Co. (Ky.)* 116 S. W. 691.

And what constitutes a reasonable precaution upon the part of a municipal corporation to protect an unguarded pit in a city thoroughfare is a question of law for the court, and should not be submitted to the jury. *Montgomery v. Bradley (Ala.)* 48 So. 809.

But it is a question for the jury, in an action against a city for personal injuries to a traveler caused by an obstruction or defect in a street, whether barriers erected by the city to protect travelers against it were reasonably safe and proper, and, whether, after being erected, they were maintained by the city. *Norwood v. Somerville*, 159 Mass. 105, 33 N. E. 1108; *Stockton Automobile Co. v. Confer (Cal.)* 97 Pac. 881; *Koontz v. District of Columbia*, 24 App. D. C. 59.

4. Application to particular classes of obstructions.

(a) Excavations, embankments, etc.

A city, on excavating in a street for any proper purpose, is under the duty to place proper barricades about the excavation to prevent injury to passers-by; and, if it fails to do so, and injury results to one in the exercise of due care on his part, it is liable therefor. *Chicago v. Johnson*, 53 Ill. 91; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *Covington v. Bryant*, 7 Bush. 248; *Merrill v. Wilbraham*, 11 Gray, 154; *O'Rourke v. Monroe*, 98 Mich. 520, 57 N. W. 738.

And the rule is the same where a city permits an individual to make an excavation in a street. *Covington v. Bryant*, *supra*.

Whenever, owing to the existence of embankments or excavations along the side of a public street or highway, it will be reasonably prudent and necessary to erect and maintain railings or other suitable barriers to prevent accidents to persons travel-

ing there, or coming into or leaving the public street or highway at customary and proper points, it becomes the duty of the proper municipal authorities to provide such guards or barriers; and its neglect to do so will render it liable in damages to those who, in the exercise of ordinary and reasonable care, sustain injuries in consequence of such neglect. *O'Malley v. Parsons*, 191 Pa. 612, 71 Am. St. Rep. 778, 43 Atl. 384.

Although an excavation in a street is not a nuisance, it is the duty of the city to barricade or light it, or both, and to take such reasonable precautions to warn and protect the public as reasonable care and prudence would dictate for the safety of travelers using the street. *Garnetz v. Carroll*, 136 Iowa, 569, 114 N. W. 57; *O'Rourke v. Monroe*, supra; *Moon v. Middletown*, 14 Ohio C. C. 498.

An excavation for a sewer in the traveled part of a highway is a defect for which the municipality is responsible, unless guarded by sufficient barriers. *McGowan v. Watertown*, 130 Wis. 555, 110 N. W. 402; *Chicago v. Seben*, 62 Ill. App. 248, affirmed in 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244.

And a municipal corporation owing to the public the duty of keeping its streets in a safe condition for travel, which undertakes to construct a sewer in a public street, cannot, in that undertaking and in any mode of providing for the execution of the work, throw off its duties and responsibilities; and it is liable to persons receiving injury from the neglect to keep proper lights and guards at night around the excavation for the sewer which it has caused to be made, whether it has or has not contracted for such precautions with the persons executing the work. *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437.

And where a sewer is constructed in a street, and the excavation is such as to make the street dangerous to those traveling in street cars along the course of the sewer, it is a question of fact for the jury whether a railing or barrier placed along the excavation is suitable and sufficient to afford safety to passengers on the cars. *Koontz v. District of Columbia*, 24 App. D. C. 59.

So, it is negligence in the authorities of a city to leave a ditch constructed by them in or across a public street open and unguarded or unprotected, without lights or danger signals, during the nighttime. *Salem v. Webster*, 95 Ill. App. 120, affirmed in 192 Ill. 369, 61 N. E. 323; *Mt. Carmel v. Guthridge*, 52 Ill. App. 632; *Deyoe v. Saratoga Springs*, 1 Hun. 341, 3 Thomp. & C. 504.

And evidence that a trench dug in a street for the purpose of setting a curbstone was allowed to remain exposed; and that the place was not barricaded, and no signal lights were placed to give warning to pedestrians of its dangerous character; and that a person attempting to cross in the night stepped in and was injured,—shows a clear case of negligence upon the part of the city. *Canton v. Dewey*, 71 Ill. App. 346, 20 L.R.A. (N.S.)

And an instruction, in an action against a city for an injury caused by an unguarded pit in a thoroughfare, which assumes that there were circumstances surrounding the hole which should be taken into consideration, is faulty and improper, where the circumstances surrounding the hole consisted of the dirt taken from the excavation, and the evidence as to this is conflicting. *Montgomery v. Bradley* (Ala.) 48 So. 809.

Nor does a permit from the village authorities to lay a drain authorize the person receiving it to open or dig in a street; and, where an opening is made in a street in pursuance of such a permit, the person making it is a trespasser, and, if his work renders the street unsafe for ordinary travel, it is the duty of the village authorities, having actual or constructive notice of the dangerous condition created by him, to take proper measures to protect the public against it. *Boyle v. Hazleton*, 171 Pa. 167, 33 Atl. 142; *McPherson v. District of Columbia*, 7 Mackey, 564.

And, where a person, in going from the sidewalk of a street toward a street car to get upon it after dark, is injured by falling into a trench between the curbstone and the railway track, made for the purpose of laying water pipes, the question of due care is one for the jury, in an action for the injury, where the evidence tends to show that the excavation was inefficiently lighted, and that proper barriers were not maintained. *Fox v. Chelsea*, 171 Mass. 297, 50 N. E. 622.

Nor does the fact that the proximity of an excavation in a street to a street-car track therein prevents its complete inclosure by barriers excuse the municipal corporation from adopting such means as may be reasonably sufficient to give warning of the excavation and prevent persons exercising ordinary care from falling into it. *Griender v. Jefferson Realty Co.* (Ky.) 116 S. W. 691.

And, where a railroad company, pursuant to authority from the city to build its road on certain streets of grades to be approved by the city authorities, dug a trench in a street, and, upon notice by the city authorities, suspended work until the city fixed the grade of the street, and built a fence around the ditch; and these conditions remained for several months awaiting the establishment of the grade, when an accident took place causing an injury,—it is a question for the jury, in an action against the city for the injury, whether the city authorities were negligent in suspending the work and allowing the street to remain in such a condition for such a length of time. *Lane v. Syracuse*, 12 App. Div. 118, 42 N. Y. Supp. 219.

So, the act of a city of leaving a ditch filled with water 5 feet deep, bordering on the sidewalk in a public street, without guards, is negligence. *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378.

And evidence, in an action for damages from stepping into the gutter while attempting to pass from one street into an-

other, that the sidewalk and cross walk at the junction of the two streets was covered with water, so that the person injured could not determine the location of the gutter; and the testimony of the street commissioner that, on the day of the accident, he found the gutter at the point in question full of ice and snow and water running over the walk, and he cleaned out the gutter, but did not remove the obstruction which prevented the water from running into the sewer; and that the place was not guarded and no lights were placed there,—justifies a finding of negligence upon the part of the defendant. *Bly v. Whitehall*, 120 N. Y. 506, 24 N. E. 943.

And, where a sidewalk and street in front of a building in process of construction were obstructed as far as the tracks of a street railway, but the tracks and the other side of the street were open for travel; and between the rails of the track next to the obstruction there was on unguarded deep trench filled with soft mud as high as the level of the street and looking like the rest of the street; and a woman who came to the obstruction passed around it and along the car track and fell into the trench,—the question whether the city exercised reasonable care and diligence to keep the street safe for travelers is one for the jury in an action for the resulting injury. *Hyde v. Boston*, 186 Mass. 115, 71 N. E. 118.

So, while a person attempting to travel in a street in the night is bound to exercise care and caution commensurate with the danger incurred, he is not bound to anticipate that he will encounter excavations or embankments without having some notice thereof by lights or other precautions taken for his protection. *Wright v. Saunders*, 65 Barb. 214; *Collins v. Dodge*, 37 Minn. 503, 35 N. W. 368.

And the rule that a traveler in the carriage path of a street must guard against natural obstacles and irregularities of the surface; but has the right to assume that there are no pits in his way without a rail to prevent his walking into them, or a light to warn him of their existence,—applies alike whether the street is a completely worked and improved thoroughfare, or one in its natural condition. *Collins v. Dodge*, supra.

And whether a manhole in a city street was properly barricaded, and sufficient signal lights were displayed in the night, is a question of fact for the jury, in an action for an injury resulting therefrom. *Perry v. Centralia*, 50 Wash. 670, 97 Pac. 802.

So, a municipal corporation is liable for an injury to a person, caused by falling off of an embankment leading to a bridge, where the accident was due to the fact that the municipality failed to maintain a proper railing along the embankment. *Toms v. Whitby*, 37 U. C. Q. B. 100.

And evidence that, between the top of a cut or steep embankment and the line of a street, there was plenty of public ground over which the city had exclusive control, on which the barrier could have been erected; 20 L.R.A. (N.S.)

and that the street had recently been excavated; and that a traveler, while driving along the highway, was thrown from his carriage over the embankment,—raises the questions for the jury to determine, what the condition of the street was, and what the municipal corporation could and should have done under the circumstances. *O'Malley v. Parsons*, 191 Pa. 612, 71 Am. St. Rep. 778, 43 Atl. 384.

Likewise, if dangerous excavations are made in a sidewalk, no matter by whom, the city must fill them up or cause them to be filled up; or if, in constructing a building, it is necessary to make excavations in a pavement, the city must, if such excavations are dangerous, guard them, or cause the owner or contractor to guard them. light them in the night, or otherwise warn travelers against them. *Walker v. Springfield*, 3 Ohio Dec. Reprint, 567.

And whether sufficient barriers were erected by a municipal corporation across a cross walk on each side of an excavation in a principal street, and whether lights were placed thereon, is a question for the jury in an action against the city to recover damages for personal injuries sustained by falling into the excavation, where the testimony on that point is conflicting, and it is undisputed that, if any barriers or lights were erected or placed at that point, they were removed prior to the accident. *Reed v. Spokane*, 21 Wash. 218, 57 Pac. 803.

And a city in which subway work is being done is bound to know that such work is likely to leave dangerous holes in the highways, and as to any hole of which it has notice, or which has existed long enough to justify a presumption of notice, it is its duty to see that it is properly lighted or otherwise guarded; and it must exercise reasonable care with reference thereto, determined by taking into account the desirability of interfering as little as possible with traffic, and the probability or improbability of pedestrians attempting to cross a street at a point other than the usual crossing. *McDonald v. Degnon-McLean Contracting Co.* 124 App. Div. 824, 109 N. Y. Supp. 519.

So, where the law required all areas in a city to be protected by railings with an allowance of 4 feet for an opening or entrance, and a building had an area along its entire front, but had no railing, and a person fell in and was injured, it is no defense, in an action against the city for the injury, that he fell into the area at a point where the opening or entrance would have been had a railing been erected. *McGill v. District of Columbia*, 4 Mackey, 70, 54 Am. Rep. 256.

And a city has the right to erect a barrier across the entrance of a passageway which opens upon and is below the level of a public street, if it is necessary to do so in order to make the street safe and convenient for travelers. *Alger v. Lowell*, 3 Allen. 402.

The failure of a city to guard or light a place where holes exist in a sidewalk, however, is not negligence *per se*, but raises a question of fact for the jury, in an action

for an injury caused by the defect. *Gerber v. Kansas City*, 105 Mo. App. 191, 79 S. W. 717.

And, where a ditch along the side of a street is 22 inches deep at the deepest point, and about 4 feet wide, and was constructed with a culvert running across and intersecting the street, so as to cover the whole width of that street including sidewalks, and that portion of the town was new and sparsely settled, and the street and sidewalk were unimproved, the municipal corporation is not negligent as matter of law in omitting to maintain a railing as a protection to the traveling public against injury therefrom, since injury therefrom could not reasonably be anticipated in the exercise of reasonable prudence. *Spencer v. Mayfield* (Ind. App.) 85 N. E. 23.

And municipal corporations are not required to place barriers to prevent the use of the street along the sides of which excavations are being made for water pipes, gas pipes, and the like if sufficient room is left for the passage of vehicles. In such case travelers are entitled to the use of the street if they choose, at their own responsibility. *O'Rourke v. Monroe*, 98 Mich. 520, 57 N. W. 738.

But an instruction in an action for damages against a city, that the city was negligent in leaving a street excavation unlighted and unguarded, is not subject to objection as excluding the consideration of every possible precaution, where there is no evidence that the excavation was protected in any way. *Campbell v. Stanberry*, 105 Mo. App. 56, 78 S. W. 292.

So, where an excavation was made in a sidewalk covered by a roof which was supported by posts at the outer side of the sidewalk; and a board was nailed to the corner of the house on the inner side of the sidewalk and to the posts supporting the porch at the outer side about 3 or 4 feet above the walk; and beneath this board a piece of 2x12 plank about 4 feet in length was laid up against the house; and there was an arc light about 150 feet distant from the excavation, the barrier having been placed there simply to guard the excavation over night,—the barrier was sufficient as a matter of law to relieve the city from liability for an injury caused by the excavation. *Tagge v. Roslyn* (Wash.) 98 Pac. 668.

Whether ordinary care requires a city to guard against accidents of teams and wagons falling into the ditches being excavated in its streets is a matter of fact for the jury, in an action for such an injury. *Peoria v. Walker*, 47 Ill. App. 182.

And so is the question whether a city was negligent in failing to guard an excavation in a street with barriers and lights. *Jackson v. Kansas City*, 106 Mo. App. 52, 79 S. W. 1174.

And so, also, is the question, where the evidence is conflicting, whether the excavation in question was protected by a barrier, or by lights, as required by law. *Myers v. Kansas City*, 108 Mo. 480, 18 S. W. 914; 20 L.R.A. (N.S.)

Garnetz v. Carroll, 136 Iowa, 569, 114 N. W. 57.

(b) Defective bridges.

The duty of a municipal corporation to keep a bridge or a highway in repair extends not merely to the floor of the bridge or road-bed of the highway, but to proper guards or railings on their sides or borders, when necessary for the safety or protection of the public. *Hyatt v. Rondout*, 44 Barb. 385.

And, where the evidence, in an action against a city, shows that the planking on the driveway of a street narrowed at a certain point from 16 to 8 feet in width; that the street at that place was elevated more than 4 feet without a guard rail along the side; and that an ordinarily safe horse, accustomed to bicycles, became frightened at a bicycle while upon such portion of the street, and backed over the side of the highway into the depression below, injuring an occupant of the carriage to which it was attached,—the question whether the city was negligent in the construction of the street is one for the jury; and their verdict will not be disturbed. *White v. Ballard*, 19 Wash. 284, 53 Pac. 159.

So, where a street was being improved by independent contractors; and it became necessary to lower a bridge forming a part of the street so as to correspond with a new grade; and one end of the bridge was raised several inches in order that the abutment might be cut down; and, while the bridge was thus raised, the workmen employed by the contractors placed a block at the end of the bridge making a step for footmen, who continued to cross; and a traveler passed over the bridge using the block as a step, and in the evening, about two hours after he had crossed the bridge in safety, he attempted again to cross, and the block had been removed, and no lights or barriers had been placed, and he fell and was injured,—the city is liable for the injury. *Indianapolis v. Marold*, 25 Ind. App. 428, 58 N. E. 512.

And where, across a frequented street, there had for a long time been an open ditch or drain 3 feet deep and about 3 feet wide at the bottom and 6 or 8 feet wide at the top; and over this ditch was a bridge on the westerly side of the street; and the city removed this bridge and built a new one across the ditch in the center of the street; and no guard or protection of any kind was placed where the old bridge had stood,—it was a case of gross and culpable neglect upon the part of the city of its duty to keep its streets in a safe condition; and a person who, not knowing of the removal of the old bridge, drove through the street on a dark night and followed the beaten traveled track, and two of the wheels of his wagon went upon the bridge and the other two missed it, whereby he was thrown from his wagon and injured, is entitled to recover damages therefor against the city. *O'Leary v. Mankato*, 21 Minn. 65.

Nor can a city sought to be held liable for

an injury in a street, due to the fact that a bridge which had existed over a creek which crossed the street had been washed away, resist liability on the ground that there were other streets by which the person injured might have reached the point at which he was aiming when he was hurt, where the officers of the city permitted the street to be used without warning the public of its condition. *Erie City v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87.

And evidence, in an action against a city charging negligence in failing to construct and maintain a railing on a bridge over a stream crossing one of its streets, tending to show a change in the construction of the railing after the accident in question, is admissible. *McDonald v. Duluth*, 93 Minn. 206, 100 N. W. 1102.

The lack of barriers on the side of approaches to a bridge, however, will not make a municipality liable for injuries caused by a team going off the bank, where the roadway was wide enough for two teams to pass without difficulty, and the proximate cause of the accident was the fact that the horse became frightened and so unmanageable that the driver could not keep him within the limits of the road. *Bell v. Wayne*, 123 Mich. 386, 48 L.R.A. 644, 81 Am. St. Rep. 204, 82 N. W. 215.

And, where a bridge over a canal for the passage of draft horses from one side to the other was used by the public as a highway across the canal; and there was a steep descent to the towpath which was unguarded by a wall or railing; and a traveler was injured by his horse losing his footing and falling down the descent or declivity,—the city cannot be held guilty of a neglect of duty in not barricading the road so as to prevent travelers from using the bridge. *Carpenter v. Cohoes*, 81 N. Y. 21, 37 Am. Rep. 468.

So, that there are a great number of bridges in the city that were built higher than the street, and that nearly all approaches to these bridges thus built were raised, is inadmissible in evidence and irrelevant to the issue, in an action against a city for an injury resulting in a fall received on a raised approach to a bridge. *Perkins v. Fond du Lac*, 34 Wis. 435.

Whether the want of a warning light at a bridge at night tends to establish negligence upon the part of the city, however, depends upon the character of the danger as arising from the situation, condition, and use of the bridge, and is properly a question for the jury. *Loewer v. Sedalia*, 77 Mo. 431.

(c) *Elevated streets and sidewalks.*

Municipal authorities having power and jurisdiction to erect embankments in streets have power and are under duty to make such embankments safe by side railings or other suitable barriers. *Wilson v. Atlanta*, 60 Ga. 473.

And, where a city maintains a street on 20 L.R.A. (N.S.)

two levels, one considerably higher than the other, and the two are divided by an abrupt declivity, and both levels are open to travel, it may be incumbent on the city to place a barrier upon the upper level to prevent accidents in driving over the edge. *Herdson v. Salt Lake City (Utah)* 95 Pac. 646.

So, a street on low ground, in which the city had constructed an embankment in the center about 15 feet high and 30 feet wide at the top, upon one side of the center of which a street-car track was laid with iron rails projecting 3 inches above the surface, with no guard or railing of any kind on either edge of the embankment, cannot be held to be reasonably safe. *Danville v. Makemson*, 32 Ill. App. 112.

And a city which maintains a street elevated from 3½ to 6 feet above the adjacent land without a guard rail to protect teams from shying off the roadway in case of fright is liable where a gentle horse, driven with ordinary care by an experienced driver, becomes frightened at the sight and noise of escaping steam blown off at that point in the street through pipes passing thereunder from an electric power house operated by the city, and backs the buggy to which it is harnessed off the roadway, causing injury to the driver. *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143.

But, where an injury is alleged to have resulted from the absence of a railing upon an embankment in a street, the questions whether such railing was reasonably necessary for safety, and whether the city was guilty of negligence in not constructing it, and whether the absence actually caused the injury, may well be elucidated by inquiry whether the person injured would have been hurt even though the railings had been constructed; and, in order to recover, he must show that barriers would probably have prevented his injury. *Wilson v. Atlanta*, supra.

And whether the omission of a city to supply a railing upon an embankment in a street was in any given case negligence depends upon various considerations, such as the amount of travel on the street, etc., and is a question of fact for the determination of a jury. *Wyandotte v. Gibson*, 25 Kan. 236.

And whether an injury on a highway, caused by the sliding of the rear end of a vehicle over an embankment, would have occurred if proper railings or barriers had been provided at the place, is a question for the jury in an action for damages caused thereby. *Malloy v. Walker Twp.* 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012.

So, more precaution may be needed when a sidewalk is elevated a long distance above the ground than when it rests directly upon it; but in all cases it must be reasonable care and diligence, relative to the danger and risk. *Atchison v. Jansen*, 21 Kan. 560.

And it is gross negligence for a city to omit the duty of erecting railings or other guards on the side of a walk, elevated over a ravine, adequate for protection from the danger of falling therefrom, of persons using

the walk with ordinary care. *Mt. Vernon v. Brooks*, 39 Ill. App. 426.

And, where a sidewalk was a dangerous structure when built, being only 4 feet wide and 6 feet above the level of the street and 4 feet from the buildings, without any railings or guards, and being upon a busy thoroughfare; and a person in the night fell from it and was injured; and the walk had no appearance of any change since it was built,—the city is guilty of gross negligence; and it is liable for the injury without reference to notice of the defect in the walk which caused it. *Chicago v. Langlass*, 66 Ill. 361.

And, if a sidewalk was so constructed and maintained as to be apparently intended for public use, then the city is at fault in allowing it to terminate 3 feet above the ground without barriers or railings so that one attempting to use such sidewalk in the dark is liable, in the exercise of reasonable care, to step inadvertently from the walk to the ground below, and be injured. *Dunn v. Oelwein* (Iowa) 118 N. W. 764.

And a statutory provision that any person who shall receive bodily injury or damage in his person or property through a defect in any street or public way by reason of defect or mismanagement of anything under the control of a municipal corporation within the limits thereof may recover the amount of actual damages sustained, makes municipalities liable for damages resulting from failure to place safeguards at a ditch at which a sidewalk ends. *Hutchison v. Summerville*, 66 S. C. 442, 45 S. E. 8.

So, a city is liable for an injury resulting from the absence of a guard rail on a sidewalk adjoining a bridge, where the guard rail had been down for a time sufficient to give it constructive notice thereof. *Chicago v. Farrell*, 27 Ill. App. 526.

And, where a sidewalk crossed a stream and was elevated above the bed of the stream about 4 feet, and the walk was 4 feet in width and originally had a guard rail along each side, but the rail on one side had been off for over two years, and the rail on the opposite side deflected inward narrowing the space for the traveling public, although there was room left for a person to walk along, a jury, in an action for the injury caused thereby, is justified in finding that the municipal corporation was negligent. *Williams v. Port Leyden*, 62 App. Div. 490, 70 N. Y. Supp. 1100.

So, where a slip is crossed by a bridge much narrower than the street, and there is no protection in the course from the sidewalk to the bridge to prevent persons proceeding in that direction from falling into the slip if they continue in a direct line from the walk to the slip, the omission to erect proper barriers to protect persons from so walking and falling into it is negligence for which the city is liable for damages resulting therefrom. *Chicago v. Gallagher*, 44 Ill. 295.

And whether it was the duty of a city to erect a railing or barrier at the blind end of a 20 L.R.A. (N.S.)

plank wall to keep persons from falling down an inclined driveway beyond it is a question of fact for the jury, in an action for an injury resulting from such a fall, although the walk is on private property and adjoins the real sidewalk at the lot line, there being no visible line of demarcation between them, and apparently they are parts of a single sidewalk. *Chicago v. Baker*, 195 Ill. 54, 62 N. E. 892, affirming 95 Ill. App. 413.

And, where a sidewalk was raised in front of one lot only on a street between 6 or 8 inches; and the municipal authorities knew that it was so raised; and the danger after nightfall arising from the abrupt change of grade at the junction of the new walk with that adjoining could have been guarded against by sloping the approach to the raised portion, guarding it with a suitable barrier, or adequately lighting the spot, the failure to do this was negligence for which the municipality must answer. *Canfield v. East Stroudsburg*, 19 Pa. Super. Ct. 649.

So, a cross walk on one of the principal streets of a city, which at a point where it left the sidewalk was $3\frac{1}{2}$ feet above the street, and descended to the street at a distance of but 8 feet from the sidewalk, and which was but 4 feet 5 inches wide, while the sidewalk was 14 feet 9 inches in width, and was not in line with the sidewalk, and had no rail or other protection to prevent a traveler from falling therefrom, or to guide him along it, cannot be said, as matter of law, to have been in all respects sufficient. *Whitney v. Milwaukee*, 57 Wis. 639, 16 N. W. 12.

The construction of a sidewalk elevated above the surface of the ground 30 inches and without guard rails, however, is not negligence *per se*, or conclusive evidence that the sidewalk so constructed is a place of danger. *Sumner v. Scaggs*, 52 Ill. App. 551.

And whether a substantial plank sidewalk which is 8 feet wide, in good condition, and raised 3 or 4 feet above the surface of the ground, and but 34 feet long, in a small country town, is sufficiently safe for the travel passing over it, without side railings, is a question of fact to be determined by a jury, in an action for an injury resulting from falling from such sidewalk, upon a consideration of all the circumstances. *Forker v. Sandy Lake*, 130 Pa. 123, 19 Atl. 609.

And where, at the junction of the sidewalks of two streets, they are elevated several feet, and an open space is left within the angle, the city is under no obligation, in the absence of charter or statutory requirements, to maintain guard rails around such open space to prevent travelers from stepping off in making the turn. *Bohl v. Dell Rapids*, 15 S. D. 619, 91 N. W. 315.

So, a footway 35 feet from the line of the street, the side of which toward such line rests on the top of posts 6 feet high, thus rendering it practically inaccessible directly from the abutting lots, is not a sidewalk for the construction of which a lot owner can be held liable, under a charter by which lot

owners may be required to construct and repair sidewalks in front of their lots; and a lot owner cannot be required to construct and maintain a railing along such footway. *Cronin v. Delevan*, 50 Wis. 375, 7 N. W. 249.

(d) Objects outside of way.

A municipal corporation is not, as a general rule, required to erect barriers or railings along a street to prevent travelers from straying from it. *Puffer v. Orange*, 122 Mass. 389, 23 Am. Rep. 368; *Daily v. Worcester*, 131 Mass. 452; *Murphy v. Gloucester*, 105 Mass. 470; *Stockwell v. Fitchburg*, 110 Mass. 305; *Monmouth v. Sullivan*, 8 Ill. App. 50; *Herndon v. Salt Lake City* (Utah) 95 Pac. 646.

And this is so although there is a dangerous place at some distance from the highway which they may reach by so straying. *Puffer v. Orange* and *Daily v. Worcester*, *supra*.

Barriers are generally required only where an obstruction or excavation is placed in the traveled part of a street, or where the excavation is so near the traveled part that it makes a dangerous place to pass over; barriers are intended to make the passage-way safe, and not to define or mark the limits of the way. *Herndon v. Salt Lake City*, *supra*.

Nor can statutes which require cities and towns to provide railings for streets when necessary for the safety and convenience of travelers be made to inure to the benefit of one who, in pursuit of his own pleasure or business, designedly leaves the street to go upon adjoining land, and there meets with an obstruction. *Morgan v. Hallowell*, 57 Me. 375.

Obstructions or excavations near the boundaries of streets or highways, and separated therefrom by no visible mark which may aid the traveler to keep within the highways, however, may charge a municipality with liability for neglecting to guard against accidents. *Sweet v. Poughkeepsie*, 97 App. Div. 82, 89 N. Y. Supp. 618.

And railings along a public way are necessary when defects are in such close proximity to the traveled way as to make it unsafe to travel upon it and near its boundary. *Stockwell v. Fitchburg*; *Puffer v. Orange*; and *Daily v. Worcester*, *supra*; *Hudson v. Marlborough*, 154 Mass. 218, 28 N. E. 147; *Monmouth v. Sullivan*, *supra*.

And the absence of a railing on a highway to prevent travelers from going down a declivity just outside of the limits of the way constitutes a want of repair of the way for which the city is liable. *Alger v. Lowell*, 3 Allen, 402.

And it constitutes a defect in the highway itself. *Spencer v. Mayfield* (Ind. App.) 85 N. E. 23.

And proof that a highway was defective by reason of the want of a railing to protect travelers from going down a declivity just outside of the limits of the highway is competent under a declaration alleging simply 20 L.R.A. (N.S.)

a want of repair in the highway. *Alger v. Lowell*, *supra*.

And evidence that the water in a slip was noxious and dangerous is admissible in an action against the city for failure to maintain proper barriers to keep people walking along the sidewalk from walking into it, for the purpose of showing the greater degree of care required of the city in protecting the public. *Chicago v. Gallagher*, 44 Ill. 295.

So, a city is liable for an injury sustained by reason of the want of a railing at a point so near to a declivity outside of the limits of a street as to make the street dangerous for travelers, although the injury was not received by passing down the declivity directly from the street itself. *Alger v. Lowell*, *supra*.

And the liability in such case is not affected by the fact that the injury was sustained by a person by being pushed from the street down the declivity by a crowd, if it was not done through the wilful act or negligence of the crowd or any person therein. *Ibid*.

Nor is it the duty of the city to protect animals by a guard or barrier at a dangerous place in proximity to a street confined to animals which at the time of the injury are docile and obedient and under the absolute control of the owner. *Kennedy v. New York*, 73 N. Y. 365, 29 Am. Rep. 160.

And a city owning part of a dock which is used in connection with its streets is charged with the duty of keeping the dock in a safe condition; and, if in using it in the customary way, a person's horse, without negligence, is lost, the city is liable, although the horse was not at the moment obedient to the will of the owner. *Ibid*.

And, where there was a steep, perpendicular bank at the side of a road extending about 28 feet above railroad tracks below, and about 56 feet distant from the tracks; and there were no guards or barriers along the road; and the horse of a traveler took fright at a locomotive and ran over the embankment,—the question of the defendant's negligence in an action against the city for the injury received, is one for the jury. *Wellman v. Susquehanna Depot*, 167 Pa. 239, 31 Atl. 566.

So, evidence that a street ran parallel with and about 20 feet from a canal, and the surface of the street sloped toward the canal, and, after reaching the edge of the street, the descent became precipitous; and there was a guard on the canal side of the street originally consisting of several rails, all of which except the bottom rail about 12 inches from the ground were gone; and that a man, while walking along the street on a snowy evening, fell over the rail and into the canal,—justifies the submission, in an action for the injury, of the claim of the city's negligence to the jury. *Tompkins v. Oswego*, 40 N. Y. S. R. 4, 15 N. Y. Supp. 371.

And an instruction in an action for a personal injury resulting from the failure of a city to erect barriers along a street next to a river bank is not erroneous in failing to define under what circumstances it would

have been the city's duty to erect such barriers, where the entire charge showed that, if the facts admitted in evidence were proved, such circumstances were shown as made it the city's duty to have erected the barriers. *San Antonio v. Porter*, 24 Tex. Civ. App. 444, 59 S. W. 922.

So, a city which graded and filled one of its public streets so as to level it with and include as part thereof the top of a high wall erected by the owners of adjoining real estate, and allowed the public to use such street, without erecting guards or railings to prevent accidental driving or falling over such wall, is liable to a traveler who, having no knowledge of the wall, and without fault on his part, fell over the embankment and was injured. *Aurora v. Colshire*, 55 Ind. 484.

Likewise, an unguarded and unlighted excavation in close proximity to a cross walk may constitute negligence on the part of the municipality, although the cross walk itself is not defective. *Hall v. Manson*, 90 Iowa, 585, 58 N. W. 881.

And a municipal corporation is liable for the death of a child who was drowned in a pond of water situate in part on a public street and in part on abutting lots, where the accumulation of water was occasioned by the negligence of the city in filling in the street with earth, there being no fence or barrier, and the child having entered the pond from the street. *Bowman v. Omaha*, 59 Neb. 84, 80 N. W. 259; *Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528.

And a finding, in an action against a city, charging that a child was killed by the failure of a city to prevent it from getting from a street into a sand pit, that the banks caved in upon it; and a failure or refusal of the jury to find whether the accident would have occurred even if the city had maintained barriers reasonably sufficient to protect persons lawfully using the street,—do not entitle the city to a judgment, notwithstanding a general verdict against it. *Hawley v. Atlantic*, 92 Iowa, 172, 60 N. W. 519.

A municipal corporation is not liable, however, for an injury caused by a dangerous place on a roadside which required a fence or barrier to make the road safe, where it had no power or right to erect such a fence or barrier. *Jones v. Waltham*, 4 Cush. 299, 50 Am. Dec. 783.

And a municipal corporation is not bound to erect barriers of any kind to prevent or warn travelers from straying off the side of a highway and falling into a dock 25 feet distant, although the land between the highway and the dock is on a level with the way, and open. *Murphy v. Gloucester*, 105 Mass. 470.

And a dangerous place at a distance of 25 feet from the limits of a highway is not in such proximity to the way as to make it necessary for the municipal corporation to maintain a railing. *Hudson v. Marlborough*, 154 Mass. 218, 28 N. E. 147.

Nor are municipal corporations bound so
20 L.R.A. (N.S.)

to construct their roads that a horse frightened by any cause, and rushing out of the track which is wrought for travel, will not expose himself, and the carriage or its occupants to injury from embankments, gutters, or other obstructions upon the side of the road, either within or without the limits of the highway. *Adams v. Natick*, 13 Allen. 429.

And this is so even though the near location of a railroad may render such occurrences probable. *Ibid*.

And, where a public road leading from a city into the country, in passing through the outskirts of the city, crossed a low tract of land on an embankment 33 feet wide and 7 feet high; and there was nothing along the highway which was ordinarily likely to frighten horses or make them unmanageable,—the city is not guilty of negligence in failing to maintain railings or other barriers along the side of the embankment; and a person whose horse, while being driven upon the embankment, stopped, backed up, and precipitated the driver and her wagon over the embankment, cannot recover for the injury received. *Tarras v. Winona*, 71 Minn. 22, 73 N. W. 505.

So, where a road runs along the bank of a lake and the roadside has no high bank, the whole descent from the top of the road-bed being only about 2½ to 3 feet in a distance of about a rod, no part of which descent is abrupt, and, when the lake is full, the water comes within 6 or 8 feet of the roadway, but, when it is shallow and the water is low, the water recedes to a distance of 6 or 8 rods from the opening, neither the bank formed by the side of the road, nor the vicinity of the margin of the lake, is of so dangerous a character as to require the municipality to maintain a railing between the road and the lake, or render the town liable for an accident at that place. *Adams v. Natick*, *supra*.

And, where a street runs along the towpath of a canal and another street comes into this street at right angles and crosses the canal by a bridge, the sides of the bridge being sufficiently protected, but there are no guards on the edge of the towpath or elsewhere except directly on the bridge, the city is not liable to a person who, in the night, started to cross the bridge, and fell from the edge of the towpath into the canal at a point 7 or 8 feet from the bridge, since the city is under no duty to guard the canal. *Reinhart v. South Easton*, 2 Sadler (Pa.) 90, 4 Atl. 532.

And, where a street was laid out along a canal, and a strip of land along a retaining wall of the canal was used as a portion of the street, and a traveler was thrown into the canal by driving onto the retaining wall, the city will not be held liable for the injury on the theory that it was negligent in not having erected a railing or wall in the street inside of the line of the property of the state, where by so doing the width of the street would have been so contracted that the obstruction that the guard or barrier would have created would have constituted a

greater danger to travelers than the one sought to be avoided. *Veeder v. Little Falls*, 100 N. Y. 343, 3 N. E. 306.

So, where, at the intersection of two streets, the surface of the streets and abutting lots were level, and the grade of one of the streets became gradually lower so that about 30 feet down one of the lots the sidewalk was about 2 or 3 feet lower than the level of the abutting lot, and a traveler passing along the former street and supposing that she was turning on the latter street turned upon the lot instead, and walked some 30 feet over the lot, when she fell off the embankment and was injured, no such dangerous place contiguous to the street as to warrant a finding that there was negligence in the construction of the street, or in failing to erect barriers to prevent travelers from walking on the private lot, is shown; and a finding of negligence upon the part of the city in not having the street lighted is unwarranted. *Denison v. Warren* (Tex. Civ. App.) 36 S. W. 296.

Nor does the exercise of reasonable care by a city to keep its streets in a safe condition for bicycles and other vehicles require its officers to foresee that a woman riding a bicycle about midway between the sidewalks would lose control of it while riding down a slight descent and be carried across the carriage way and plank walk down to an embankment on the side of the street, so as to render it negligence upon the part of the city to fail to erect a guard rail or barrier that would have prevented her going over the walk and down the embankment. *Smith v. Henderson*, 54 App. Div. 26, 66 N. Y. Supp. 347.

And the obligation of municipal corporations to erect barriers around excavations in proximity to a highway does not extend to the protection of children against every sudden freak that may possess them; and a municipal corporation will not be held liable in damages to a child who had left the street or highway and suffered injury in consequence of having climbed upon a structure, entirely without its traveled limits, and fallen therefrom. *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369.

Nor can a temporary location of a traveling circus in the vicinity convert a reservoir in process of construction in a vacant lot into a nuisance, either public or private, so as to render a city liable for an injury to a person attracted to it by the circus. *Morgan v. Hallowell*, 57 Me. 375.

b. Lighting streets.

Unless the duty to light the streets of a municipality is imposed by statute or charter, the failure to maintain lights in the streets is generally not regarded as negligence. *Herndon v. Salt Lake City* (Utah) 95 Pac. 646; *Gaskins v. Atlanta*, 73 Ga. 746; *Randall v. Eastern R. Co.* 106 Mass. 276; 8 Am. Rep. 327; *Miller v. St. Paul*, 38 Minn. 134, 36 N. W. 271; *Andrews v. Elmira*, 128 App. Div. 699, 113 N. Y. Supp. 711.
20 L.R.A. (N.S.)

And a city is under no obligation to light its streets to enable travelers to avoid a dangerous embankment outside a street where the street itself is safe and convenient for travel the whole width, unless the duty to do so is imposed by its charter. *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5; *Miller v. St. Paul*, supra; *White v. New Bern*, 146 N. C. 447, 13 L.R.A. (N.S.) 1166, 59 S. E. 992; *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096.

In *Canavan v. Oil City*, supra. *Bruch v. Philadelphia*, 181 Pa. 588, 37 Atl. 818, was distinguished upon the ground that that case turned upon the question of contributory negligence: and the obligation of the city to provide light was not in question.

A municipal corporation exercises a quasi judicial or governmental function in establishing street lights. *Andrews v. Elmira*, supra.

So, failure of a city to avail itself of a discretionary power conferred upon it to light its streets cannot properly be regarded as an act of negligence rendering it liable for an injury to a person received from falling into an excavation in a street in the night, which would have been safe had the city lighted its streets. *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Chicago v. McDonald*, 57 Ill. App. 250; *Chicago v. Apel*, 50 Ill. App. 132; *Daytona v. Edson*, 46 Fla. 463, 34 So. 954, 4 A. & E. Ann. Cas. 1000.

And a city which is under no statutory obligation to light its streets is not, as matter of law, when lighting them voluntarily, bound to do it in such a manner as to enable persons using them to see any obstruction that the city may have placed in the street irrespective of the question whether the obstruction was a reasonable and proper one or not. *Columbus v. Sims*, 94 Ga. 483, 20 S. E. 332.

Nor is a city liable for an accident that might have been caused by a failure to keep the street lamps lighted if this was its only omission. *Indianapolis v. Scott*, 72 Ind. 196.

And when, either from its having undertaken to do so, or from any other cause, it becomes the duty of a municipal corporation to light a bridge or street, it is sufficient if it does so in such a manner that it is in a reasonably safe condition for travel in the ordinary modes. *Chicago v. Apel*, and *Chicago v. McDonald*, supra.

But, if a city has assumed to light a street, but exercised the power in a negligent manner, and failed to furnish light sufficient to afford proper security from danger, it is liable for an injury caused by an obstruction or defect in the street when proper lighting would have removed the danger. *Freeport v. Isbell*, supra; *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37.

And this is so whether the charter imposes the obligation to light the streets or not. *Winchester v. Carroll*, supra.

In such case it is under duty to light its streets and bridges in such a manner as will afford protection to travelers against dangers which may be incident to their use.

Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418.

And a nonsuit in an action against a municipal corporation to recover damages for personal injuries sustained by a fall into an excavation in a city street will not be granted on the ground that the street was sufficiently lighted to enable a person, in the exercise of ordinary care, to discover the danger and avoid it, where the testimony is conflicting as to the amount of light afforded by the street lights at that point, and there is evidence that the night was dark and foggy. Reed v. Spokane, 21 Wash. 218, 57 Pac. 803.

So, a charge in an action against a city that it carelessly and negligently allowed and permitted a cellar way to remain open in one of its public streets is broad enough to cover negligence in the manner of lighting the opening at night; and an instruction that, if the fall was caused by darkness, or arose from any other cause than the existence of an open cellar way, the verdict should be for the defendant was properly refused. McLeod v. Spokane, 26 Wash. 346, 67 Pac. 74.

And, where a personal injury is alleged to have been received by reason of a city negligently permitting an obstruction to be and remain upon a sidewalk of a street in the lighting of the city gas lamps in the vicinity lamps in that vicinity, by reason of which the person injured had fallen over the obstruction, evidence touching the location and lighting of the city gas lamps in the vicinity of such obstruction at the time of the accident is admissible. Indianapolis v. Gaston, 58 Ind. 224.

And the testimony of the engineer of an electric-light station that a large arc light was burning at the time and place of an alleged injury from an obstruction of the sidewalk, from a record kept by him made at the time showing that the light went on and off, is admissible in an action for the injury, claimed to have occurred when the place was unlighted. Edwards v. Cedar Rapids, 138 Iowa, 421, 116 N. H. 323.

And, where a personal injury is alleged to have resulted from a city negligently permitting an obstruction to be and remain upon a sidewalk of a street, and from its negligently failing to light the gas lamps in the vicinity so that a person passing along upon the sidewalk fell over the obstruction, evidence may be given of an ordinance of the city prescribing the duty of its commissioner of streets. Indianapolis v. Gaston, supra.

So, where a street was partially obstructed or out of repair, and might have been reasonably safe if lighted, but dangerous if unlighted, the fact that it was not lighted may be material upon the question of negligence of the city in failing to keep its streets in a proper condition. Miller v. St. Paul, supra; Indianapolis v. Scott, 72 Ind. 196; McKim v. Philadelphia, 217 Pa. 243, 19 L.R.A. (N.S.) 506, 66 Atl. 340.

And, where a person attempted to enter upon a bicycle path in a parkway with a 20 L.R.A. (N.S.)

bicycle at night when the path was so poorly lighted that he could not distinguish the barriers thereof, and, deviating therefrom, he was injured by an obstruction near the path, the city is liable for the injury where the path is used by a large number of people at night, and the city, knowing such fact, took no precautions to warn the people of the danger. Collett v. New York, 51 App. Div. 394, 64 N. Y. Supp. 693.

And, where a person was injured by driving into a pile of bricks which had been placed in the street by certain contractors, who were building houses at a place near by, which was left in the nighttime without light or signal to indicate danger, the municipality is liable in an action for the damages sustained, where the accident resulted from a want of light, since it is responsible for the failure of the electric light company to light the street, where the evidence shows that the accident would not have happened had the street been lighted, notwithstanding the neglect of the contractor to place a lantern on the obstruction. Baltimore v. Beck, 96 Md. 183, 53 Atl. 976.

But, where the proximate cause of an injury is an opening or water way in a street, it is not error to give an instruction, in an action for the injury, authorizing a recovery, which does not require the jury to determine whether or not a lamp was maintained in the vicinity of the place of the accident. Davenport v. Hannibal, 108 Mo. 471, 18 S. W. 1122.

And an instruction in an action for an injury resulting from an obstruction in a street, that, if the place was not lighted, and the injury resulted solely from a failure to light the street, then no recovery could be had, is properly refused where the negligence in respect to which a cause of action was claimed was, in suffering a cross walk to remain out of repair, in improperly constructing a cross walk and improperly replacing it. Jefferson v. Chapman, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33.

So, if, in order to maintain the streets of a municipality in a reasonably safe condition for public travel, it is necessary to place lights at certain places, the failure of the municipal corporation to do so is negligence. Andrews v. Elmira, 128 App. Div. 699, 113 N. Y. Supp. 711.

And absence of lights and defective lights are evidence on the question whether, at the time and place where an injury occurred, the streets were in a reasonably safe condition. White v. New Bern, 146 N. C. 447, 13 L.R.A. (N.S.) 1166, 59 S. E. 992.

And evidence that a municipality provided arc lights for the vicinity of a sidewalk past a lot containing an excavation, and that these lights and those from near-by stores must have aided a person falling into the excavation in discerning the general course of the sidewalk, does not conclusively show that the city was not negligent in failing to guard the excavation, where it appears that the street light at the next street intersection toward which the person injured was walking was not giving any light at

the time, and that such light had not been working properly for several days. *Newcastle v. Grubbs* (Ind.) 86 N. E. 757.

But, where a person was injured while walking after dark on a pathway at the side of a road in the outskirts of a city in a neighborhood that was sparsely settled, by being run into by a bicycle rider riding an unlighted bicycle; and there were two arc lights of about 200 candle power each, located a little over 300 feet from the place of accident, and an incandescent light about 190 feet distant, which lights were maintained under a contract with the city,—the failure of the city to supply the streets with more lights was not negligence, rendering it liable for the injury. *Andrews v. Elmira*, supra.

So, refusal to admit in evidence city ordinances for the placing of lights by persons occupying the streets for the storage of building materials is not error in an action against the city for an injury received from colliding with such an obstruction, since such ordinances do not give rise to a liability on the part of the city. *Mills v. Philadelphia*, 187 Pa. 287, 40 Atl. 821.

And, where a street has been closed at the top of a high embankment over which it had formerly passed on a bridge, which bridge had been removed and a new one erected a short distance away with an approach intersecting the street at another point, whereby the street at that point and the embankment where the old bridge had been was converted into a cul-de-sac terminating at the top of the embankment, barricaded by a fence and guard rail which might be a dangerous place in the night to travelers unacquainted with the locality, and who might be misled into thinking that the cul-de-sac might be a continuation of the street leading to the new bridge, such cul-de-sac should be so well lighted as to give fair warning that it is a mere cul-de-sac, or so guarded as to prevent entrance at the point of danger, even upon the darkest night. *Corcoran v. New York*, 188 N. Y. 131, 80 N. E. 660.

And where, in such case, a party riding in an automobile in the night through the street left it at the point where it intersected with the cul-de-sac, crashing through the fence at the top of the embankment, and fell to the railroad tracks below, where several of the party were struck by a passing train, there being evidence that the lights were insufficient to show the guard rail and fence at the end of the cul-de-sac, and also that, a short time before, another automobile had crashed into the fence under similar circumstances, which accident had been reported, the question whether the city had provided sufficient light to enable a traveler at night to discern the guard rail and fence, and to be aware of the danger in time to avoid accident, is one of fact for the jury. *Ibid.*

So, the absence or presence of lights in the streets of a city may be important on the question of the contributory negligence of a 20 L.R.A. (N.S.)

traveler injured because of a defect or obstruction in a street. *Herndon v. Salt Lake City* (Utah) 95 Pac. 646; *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545.

But the presence of a light at a place where there was an opening in a sidewalk from which an injury resulted does not excuse the city, which is required to keep its streets in a safe condition, from liability for the injury. *Giffen v. Lewiston*, supra.

The duty of a city especially to illuminate a place where an obstruction exists, or to give warning thereof, however, depends upon the object being an unlawful obstruction; and a municipal corporation is not charged with the duty so to light a street as to show the presence of a stepping stone on the sidewalk near the curb, by a statute directing the proper authorities to increase as the public good may require the number of street lamps in the city, and to do any and all things pertaining to the well lighting of the city; the stepping stone not being an unlawful obstruction. *Wolff v. District of Columbia*, 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 A. & E. Ann. Cas. 967, affirming 21 App. D. C. 464, 69 L.R.A. 83.

And a city which permitted a ridge of earth from 4 to 6 inches high in a street over a water main, and allowed stumps and brush to remain in the street, and placed a hydrant in the street, failing to fence it, and failed to light the street or to place a light or signal at the hydrant, is not liable for an injury to a person who drove along the street and struck the hydrant, where the hydrant was in its proper place, and the city had a right to place it there, and neither the ridge, the stump, nor the brush pile, caused or contributed to the accident. *Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315.

But, where the evidence in an action against a city for an injury from falling into a street drainage ditch about 2 feet in depth, running parallel with the outside of the sidewalk, the negligence charged being a failure to maintain a light and provide barriers, tends to prove an unsafe condition of the place of the injury with respect to the relative position of the sidewalk and ditch and the absence of light; and that the unsafe condition was known to the municipal officers, or would have been known by the exercise of reasonable care; and that the person injured was in the exercise of due care for his own safety,—a peremptory instruction for the defendant is properly refused. *Odin v. Nichols*, 133 Ill. App. 306.

So, the duty of a city as to the walks in one of its parks is one of reasonable care commensurate with the danger to be apprehended; and, since the walks of a park are not generally used in the nighttime for pleasure travel, it cannot be held that the city has the legal duty imposed upon it to light them so that the attention of people will necessarily be called to irregularities like those of steps connecting different surfaces of the walks, *O'Rourke v. New York*, 17 App. Div. 349, 45 N. Y. Supp. 261.

Nor is a city which causes a lamp-post to

be set in a street in the prosecution of a public improvement, which it has power to authorize, rendered liable for an injury caused by a collision with the lamp-post, by the fact that no light is placed upon the post. *Van Wie v. Mt. Vernon*, 26 App. Div. 330, 49 N. Y. Supp. 779.

And a municipal corporation is not bound to have its streets or bridges so well lighted that intoxicated persons, or others proceeding with reckless want of care, may go safely along. *Chicago v. Apel*, 50 Ill. App. 132.

So, evidence that, when a person injured by falling over a hydrant reached the place where the hydrant was, a near-by electric light in the street flickered and went out, is not alone sufficient to show negligence upon the part of the city in lighting the street, since it is not possible to guard against particular electric lights going out suddenly. *Halifax v. Lordly*, 20 Can. S. C. 505.

And whether or not a city is negligent in permitting an electric light to be placed in such a manner that the shadow cast by the supporting pole conceals an opening in a cross walk, which may cause an injury to pedestrians, is a question for the jury in an action for such an injury. *Stone v. Seattle*, 30 Wash. 65, 67 L.R.A. 253, 70 Pac. 249.

XII. Knowledge or notice of obstruction.

a. Necessity of, to liability.

1. General rules

The duty to remove obstructions in streets the neglect of which will make a city liable to an injured person must come from knowledge of their dangerous character. *Kunz v. Troy*, 16 N. Y. S. R. 459, 1 N. Y. Supp. 596; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 533.

And, before a municipal corporation charged with the duty of maintaining a highway can be made liable for a defect or obstruction therein, it must have notice, actual or constructive, of such defect or obstruction. *Boucher v. New Haven*, 40 Conn. 456; *Denver v. Aaron*, 6 Colo. App. 232, 40 Pac. 587; *Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098; *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 356; *District of Columbia v. Payne*, 13 App. D. C. 500; *Brunswick v. Braxton*, 70 Ga. 193; *Lewis v. Atlanta*, 77 Ga. 756, 4 Am. St. Rep. 108; *Rome v. Suddeth*, 116 Ga. 649, 42 S. E. 1032; *Chicago v. McCarthy*, 75 Ill. 603; *Ft. Wayne v. DeWitt*, 47 Ind. 391; *Spiceland v. Alier*, 98 Ind. 467; *Evansville v. Senhenn*, 151 Ind. 42, 41 L.R.A. 728, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88; *Lewisville v. Batson*, 29 Ind. App. 21, 63 N. E. 861; *Bucher v. South Bend*, 20 Ind. App. 177, 50 N. E. 412; *Ft. Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. 167; *Rosedale v. Ferguson*, 3 Ind. App. 596, 30 N. E. 156; *Canfield v. Newport*, 24 Ky. L. Rep. 2213, 73 S. W. 788; *Bell v. Henderson*, 24 Ky. L. Rep. 2434, 74 S. W. 206; *Bragg v. Bangor*, 51 Me. 532; *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 So. 452; *Butler v. Ox-*

ford, 69 Miss. 618, 13 So. 626; *Gerber v. Kansas City*, 105 Mo. App. 191, 79 S. W. 717; *Caton v. Sedalia*, 62 Mo. App. 227; *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Sweet v. Gloversville*, 12 Hun, 302; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Hoyer v. North Tonawanda*, 79 Hun, 39, 29 N. Y. Supp. 650; *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A. (N.S.) 474, 75 N. E. 1116; *Griffin v. New York*, 9 N. Y. 456, 61 Am. Dec. 700; *Hart v. Brooklyn*, 36 Barb. 226; *Bush v. Geneva*, 3 Thomp. & C. 409; *Higgins v. Brooklyn*, Q. C. & S. R. Co. 54 App. Div. 69, 66 N. Y. Supp. 334; *Seaman v. New York*, 3 Daly, 147; *McDermott v. Kingston*, 19 Hun, 198; *Magee v. Troy*, 48 Hun, 383, 1 N. Y. Supp. 24; *Jones v. Greensboro*, 124 N. C. 310, 32 S. E. 675; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Boyle v. Mahanay City*, 19 Pa. Co. Ct. 195; *Duncan v. Philadelphia*, 173 Pa. 550, 51 Am. St. Rep. 780, 34 Atl. 235; *Galveston v. Smith*, 80 Tex. 69, 15 S. W. 589; *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162; *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

But notice may be either express or constructive, arising from the lapse of time. *Anderson v. Wilmington* (Del.) 70 Atl. 204.

Where defects or obstructions in a street are not occasioned by any act of the municipal corporation, its officers or agents, the basis of an action against the city for an injury resulting therefrom is negligence; and notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability. *Rosedale v. Ferguson*, supra; *Madison v. Baker*, 103 Ind. 41, 2 N. E. 236; *Lafayette v. Blood*, 40 Ind. 62; *Warsaw v. Dunlap*, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Denver v. Magivney* (Colo.) 96 Pac. 1002; *Denver v. Dean*, 10 Colo. 375, 3 Am. St. Rep. 594, 16 Pac. 30; *Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632; *Anderson v. Wilmington*; *Lewis v. Atlanta*; and *Rome v. Suddeth*, supra; *Montezuma v. Wilson*, 82 Ga. 206, 14 Am. St. Rep. 150, 9 S. E. 17; *Warren v. Wright*, 3 Ill. App. 602; *Chatsworth v. Ward*, 10 Ill. App. 75; *Chicago v. Watson*, 6 Ill. App. 344; *Paxton v. Frew*, 52 Ill. App. 393; *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35; *Royal Center v. Bingaman*, 37 Ind. App. 626, 77 N. E. 811; *Black v. Mishawaka*, 30 Ind. App. 104, 65 N. E. 538; *Dwyer v. Boston*, 180 Mass. 381, 62 N. E. 397; *Smith v. St. Joseph*, 42 Mo. App. 392; *Martin v. St. Joseph* (Mo. App.) 117 S. W. 94; *McGinity v. New York*, 5 Duer, 674; *Mattimore v. Erie*, 144 Pa. 14, 22 Atl. 817; *Boyle v. Mahanay City*, supra; *Lohr v. Phillipsburg*, 156 Pa. 246, 27 Atl. 133; *Galveston v. Smith*, 80 Tex. 69, 15 S. W. 589; *Klein v. Dallas*, 71 Tex. 280, 15 S. W. 90; *Ft. Worth v. Johnson*, 84 Tex. 137, 19 S. W. 361; *New York v. Sheffield*, 4 Wall. 189,

18 L. ed. 416; Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309.

And the mere existence of an obstruction or defect in a street, not resulting from defective construction, is not sufficient to establish negligence upon the part of a municipal corporation. *Doulon v. Clinton*, 33 Iowa, 397; *Turner v. Indianapolis*, 96 Ind. 51; *Kenyon v. Indianapolis*, *Wilson*, Super. Ct. (Ind.) 129; *Fitzgerald v. Concord* and *Vandyke v. Cincinnati*, *supra*.

To hold a city liable for an injury resulting from a defective or obstructed sidewalk or street, it must be made to appear either that the city had actual notice of the defect, or that it was a patent defect and had continued so long that notice might reasonably be inferred, or that the defect was one which, with reasonable and proper care, should have been ascertained and remedied. *Kansas City v. Bradbury*, 45 Kan. 381, 23 Am. St. Rep. 731, 25 Pac. 889; *Pleasanton v. Rhine*, 8 Kan. App. 452, 54 Pac. 512; *Jansen v. Atchison*, 16 Kan. 358; *Denver v. Dean*, *supra*; *Boulder v. Weger*, 17 Colo. App. 69, 66 Pac. 1070; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454, 56 Atl. 379; *Anderson v. Wilmington*, *supra*; *Herfurth v. Washington*, 6 D. C. 289; *Montezuma v. Wilson*, *supra*; *Decatur v. Hamilton*, 89 Ill. App. 561; *Joliet v. Gerber*, 21 Ill. App. 622; *Ransom v. Belvidere*, 87 Ill. App. 167; *Sherman v. Chicago*, 101 Ill. App. 312; *Ryan v. Chicago*, 79 Ill. App. 28; *Chicago v. Langglass*, 66 Ill. 361; *Kenyon v. Indianapolis*; *Turner v. Indianapolis*; and *Doulon v. Clinton*,—*supra*; *Edwards v. Cedar Rapids*, 138 Iowa, 421, 116 N. W. 323; *Sikes v. Manchester*, 59 Iowa, 65, 12 N. W. 735; *Jones v. Clinton*, 100 Iowa, 333, 69 N. W. 418; *Hazellrigg v. Frankfort*, 29 Ky. L. Rep. 207, 92 S. W. 584; *Mitchell v. Brady*, 124 Ky. 411, 13 L.R.A. (N.S.) 751, 124 Am. St. Rep. 408, 99 S. W. 266; *Donaldson v. Boston*, 16 Gray, 508; *Parker v. Boston*, 175 Mass. 501, 56 N. E. 569; *Miller v. St. Paul*, 38 Minn. 134, 36 N. W. 271; *Moore v. Minneapolis*, 19 Minn. 300, Gil. 258; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709; *Squires v. Chillicothe*, 89 Mo. 226, 1 S. W. 23; *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Jordan v. Hannibal*, 87 Mo. 673; *Yocum v. Trenton*, 20 Mo. App. 489; *Williams v. Hannibal*, 94 Mo. App. 549, 68 S. W. 380; *Bonine v. Richmond*, 75 Mo. 437; *Nothdurft v. Lincoln*, 66 Neb. 430, 92 N. W. 628, 96 N. W. 163; *Palmer v. Portsmouth*, 43 N. H. 265; *Hunt v. New York*, 20 Jones & S. 198; *Hart v. Brooklyn*, 36 Barb. 226; *Dorlon v. Brooklyn*, 46 Barb. 604; *Hume v. New York*, 47 N. Y. 639; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506; *Beekman v. New York*, 18 Misc. 509, 41 N. Y. Supp. 990; *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657; *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Walker v. Springfield*, 3 Ohio Dec. 20 L.R.A. (N.S.)

Reprint, 567; *Circleville v. Sohn*, 20 Ohio C. C. 368; *Lohr v. Phillipsburg*, 156 Pa. 246, 27 Atl. 133; *Briggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51; *Goodnough v. Oshkosh*, 24 Wis. 549, 1 Am. Rep. 202; *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

That a city had actual or constructive notice of a defect in a street, causing a personal injury, is a substantive fact to be established by the evidence, in an action for the injury; and this fact cannot be left to the mere inference or conjecture of the jury. *Nothdurft v. Lincoln*, 66 Neb. 434, 92 N. W. 628, 96 N. W. 163.

And the burden of proof rests with the plaintiff to establish that the defect was open and notorious, of long standing, and of such a character as would naturally arrest the attention of the passer-by. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

And a person injured by a hidden defect in a sidewalk of which the city had no actual notice cannot recover for the injury in the absence of anything tending to show how long the defect had existed before the accident occurred, or the usual duration of sidewalks of the kind in controversy. *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319.

And a city is not liable for an injury caused by a defective sidewalk, where the defect was caused by the soil underneath the stone giving way and causing the stone to become loose, the sidewalk having been in such defective condition but a short time, and its condition not being known to the city. *Dixon v. San Antonio* (Tex. Civ. App.) 30 S. W. 359.

A city is responsible only for reasonable diligence in repairing a defect in a street or taking proper precautions to prevent accident after being advised of the defective condition. *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 356.

And, if work by which an obstruction or defect in a street is created is done by the consent of the city, but not under its immediate supervision, the city is not liable for the negligence of those doing the work, but only for its own negligence in not correcting the evil after notice, actual or constructive. *McDermott v. Kingston*, 19 Hun, 198.

And a complaint against a city for an injury caused by a dangerous hole in a sidewalk must show that the city authorities had notice of the defect, or with reasonable care might have known of it. *Cuthbert v. Appleton*, 22 Wis. 642.

But, where the charge in an action for injuries resulting from a hole in a sidewalk fully explained the element of notice of the defect, an instruction as to the degree of care required of the city is not rendered erroneous by omitting the subject of notice. *Padelford v. Eagle Grove*, 117 Iowa, 616, 91 N. W. 899.

Nor can the officers of a municipal corporation be said to have suffered a use of a way, within the meaning of a statute making it liable for injuries resulting from suffering a use of a defective or obstructed way,

unless they knew or ought to have known of its use. *Hyde v. Swanton*, 72 Vt. 242, 47 Atl. 790.

And the liability of a city for injuries arising from defects in public ways is the same, so far as concerns innocent persons, whether the condition of the way is due to wear and decay, or to the misconduct of individuals in tearing it up, in the absence of any showing of actual notice to the municipality, or that a reasonable time to repair has elapsed. *Hembling v. Grand Rapids*, 99 Mich. 292, 58 N. W. 310.

Nor does a city ordinance requiring the owners or occupants of a dwelling house to remove snow, or rain which shall freeze on the sidewalk, within four hours, under a penalty, render the city liable in an action against it for damages for personal injuries sustained by slipping upon ice which had formed on the sidewalk in front of a building the title to which was in the city, without proof of actual or constructive notice of the condition of the sidewalk before the happening of the accident; and the mere fact of ownership by the city raises no presumption of notice. *Heintze v. New York*, 18 Jones & S. 295.

So, if a sidewalk was properly constructed, and afterwards became out of repair, the city would not be liable for a resulting injury, unless it had notice of the defect. *Montgomery v. Des Moines*, 55 Iowa, 101, 7 N. W. 421; *Miller v. St. Paul*, supra.

And, where a street had been put in good condition, and was reasonably safe against all accidents that could be reasonably foreseen and provided for, and afterwards it became dangerous from any cause, the corporation would not be liable for an injury resulting therefrom unless it had notice of such dangerous condition in time to have repaired it. *District of Columbia v. Boswell*, 6 App. D. C. 402; *Rogers v. Williamsport*, 199 Pa. 450, 49 Atl. 293.

But, where a sidewalk in a city was out of repair, and the occupant of the abutting lot was required by the city commissioner to repair it under an invalid ordinance, and did so, but left it in a defective condition, the defect not being apparent, and this defect caused an injury to a pedestrian, the city having had notice of the former defect, its obligation to repair continued until the walk was put in proper repair; and it will be conclusively presumed that the city knew of the defect left therein when the repairing was done which caused the injury. *Woodward v. Boscobel*, 84 Wis. 226, 54 N. W. 332.

Municipal authorities having actual notice of a dangerous defect or obstruction in a street, however, are under duty, without unreasonable delay, to repair it. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Aurora v. Dale*, 90 Ill. 46; *Reid v. Chicago*, 83 Ill. App. 554; *Lamb v. Cedar Rapids*, 108 Iowa, 629, 79 N. W. 366; *Farrell v. Dubuque*, 129 Iowa 447, 105 N. W. 696; *Aitchison v. King*, 9 Kan. 550; *Fugate v. Somerset*, 97 Ky. 48, 29 S. W. 970; *Covington v. Huber*, 23 Ky. L. Rep. 2107, 66 S. W. 619; 20 L.R.A. (N.S.)

Cline v. Crescent City R. Co. 43 La. Am. 327, 26 Am. St. Rep. 187, 9 So. 122; *York v. Everton* (Mo. App.) 116 S. W. 490; *Caton v. Sedalia*, 62 Mo. App. 227; *Tucker v. Salt Lake City*, 10 Utah, 173, 37 Pac. 261; *Delger v. St. Paul*, 4 McCrary, 634, 14 Fed. 567; *Merrill v. Portland*, 4 Cliff, 138 Fed. Cas. No. 9,470.

And in such case the city is liable for an injury caused thereby to one in the exercise of proper care. *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745; *Bradford v. Aniston*, 92 Ala. 349, 25 Am. St. Rep. 60, 8 So. 683; *Buckley v. Kansas City*, 95 Mo. App. 188, 68 S. W. 1069; *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96; *Weed v. Ballston Spa*, 76 N. Y. 329; *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727; *Delger v. St. Paul*, supra.

So, where a defect or obstruction in a street of a city is patent or obvious, and has continued so long that notice may be reasonably inferred; or where the defect or obstruction is one which, with reasonable or proper care, should have been ascertained and remedied,—the city is liable for injuries resulting therefrom. *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Aitchison v. King*, 9 Kan. 550; *Aurora v. Dale*, supra; *Schmidt v. Chicago & N. W. R. Co.* 83 Ill. 405; *Fugate v. Somerset*; *Covington v. Huber*; and *Caton v. Sedalia*,—supra; *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483; *Miller v. Canton*; *Buckley v. Kansas City*; and *York v. Everton*,—supra; *Norwalk v. Jacobs*, 27 Ohio C. C. 691; *Tucker v. Salt Lake City* and *Gordon v. Richmond*, supra.

And this is so no matter how the defect was caused. *Aitchison v. King*, supra.

So, failure of municipal authorities to discover and remedy a dangerous defect in a public street within a reasonable time is itself negligence. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Niven v. Rochester*, 76 N. Y. 619.

And failure to repair a defect in a traveled public street after notice and reasonable opportunity to do so is evidence of negligence on the part of the city. *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Weed v. Ballston Spa*, 76 N. Y. 329.

And a charge that a city wrongfully and negligently permitted a walk to remain unsafe and out of repair sufficiently alleges notice, actual or constructive. *Mattoon v. Worland*, 97 Ill. App. 13.

And one charging that the city negligently permitted a sidewalk to be broken and out of repair so as to be unsafe, and negligently permitted it to remain in such unsafe condition, warrants proof that the defendant city had actual notice of such defective sidewalk, or that it had been out of repair for such a length of time as to impute notice to the city. *Guthrie v. Finch*, 13 Okla. 496, 75 Pac. 288.

The duty is imposed upon a municipal corporation to keep its sidewalks in a reasonably safe condition, and the law conclu-

sively presumes either that such diligence has been exercised, and that the knowledge which such diligence would procure has been acquired, or that the city has been culpably negligent in not employing such diligence. *Rice v. Des Moines*, 40 Iowa, 638.

And, to maintain an action against a municipal corporation for an injury to a person in consequence of its streets or sidewalks being defective, obstructed, and out of repair, it may be alleged and proved that the corporation or its officers had notice of such defect and want of repair; or a state of facts may be shown from which notice may be implied or inferred. *Mack v. Salem*, 6 Or. 275.

And where, in an action against a city for injuries from an excavation across a sidewalk, in which the defense was that the excavation was made by an independent contractor, the parties proceed to trial, and no objection is made until the argument of counsel that the petition does not allege that the city had constructive notice of the excavation, it is proper, under a statutory provision authorizing amendments in furtherance of justice, to allow an amendment to the petition, no prejudice to the defendant being shown, charging that the city had constructive notice of the excavation so as to conform it to the evidence. *Pace v. Webster City*, 138 Iowa, 107, 115 N. W. 888.

So, a charge in a petition in an action against a city for an injury by an obstruction in a street, that the defendant unlawfully and negligently permitted the street car company to make the obstruction, sufficiently alleges notice to the city of the existence of the obstruction, since the city could not negligently permit a thing not known to it. *Sparr v. St. Louis*, 4 Mo. App. 573; *Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246, affirming 21 Ill. App. 326; *Union Street R. Co. v. Stone*, supra.

And error in instructing the jury in an action against a city, that the city was charged with the duty promptly to repair an alleged defect in a street after it had knowledge of its existence, or after the circumstances were such that knowledge might be inferred, is without prejudice, where the evidence shows that the defect had existed for an unreasonable length of time, and that the city had actual or constructive knowledge of it. *Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986.

So, a municipal corporation is liable for injuries resulting from a depression or excavation in a sidewalk caused by the operations of an abutting owner, if it has actual or constructive notice of the defect, through the owner is also liable. *Philadelphia v. Smith*, 1 Monaghan (Pa.) 147, 16 Atl. 493.

And evidence, in an action for injuries sustained in falling upon an icy sidewalk, tending to show an accumulation of ice which had remained a length of time sufficient to charge the municipality with notice of its existence, and which would have enabled it, by the exercise of ordinary care, to have caused its removal; and that its con-

dition was such as to indicate the necessity of its removal,—justifies the jury in finding a failure of the performance of its duty upon the part of the municipality. *Colburn v. Canandaigua*, 28 N. Y. Week. Dig. 441, 15 N. Y. S. R. 668.

2. Effect of special statutory provisions.

Where the statute in express terms imposes an absolute liability upon a municipality for defects or obstructions in its streets, the question of notice thereof to the municipality is immaterial; and it is not necessary to allege or prove notice to the municipality of the defect. *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. 22; *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51; *Evans v. Huntington*, 37 W. Va. 601, 16 S. E. 801.

And, if the street or sidewalk was in fact defective, and such defect caused the injury in question, it is no defense on the part of the town that it had exercised great care in repairing the street or sidewalk. *Biggs v. Huntington*, supra.

And a statute declaring that any person who sustains any injury to his person or property by reason of a public road, bridge, street, sidewalk, or alley in any corporate city, town, or village being out of repair may recover all damages sustained by him by reason of such injury, is unqualified and absolute, and fixes the liability upon the municipal corporation for an injury caused by a defect or obstruction in a street, irrespective of the question of notice to the municipality. *Chapman v. Milton*, supra.

Where, under the statute, cities and towns are liable for injuries caused by a defect in a way only when the defect might have been remedied by reasonable care and diligence on their part, however, it is incumbent upon a person injured by a defect or obstruction in a street to show either actual notice of the defect to the city or town before the accident, or such facts and circumstances that the city or town, by the use of care and diligence, might have had notice of it. *Whitney v. Lowell*, 151 Mass. 212, 24 N. E. 47; *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249.

And, under a statute providing that towns are liable in damages for injuries happening to any person, his team or carriage, traveling upon any highway, by reason of any obstruction, defect, insufficiency, or want of repair of a bridge, culvert, sluiceway, or dangerous embankment, and defective railings, which renders it unsuitable for travel thereon, a town is not liable to a highway traveler who is injured by falling into a trench dug across a sidewalk by an adjoining landowner, unless it has been given express notice of the defect in the manner provided by the statute, and has not begun to repair. *Wilder v. Concord*, 72 N. H. 259, 56 Atl. 193.

So, a charter provision that the city shall not be liable for any damage or injury sustained by any person in consequence of

any street, highway, bridge, culvert, sidewalk, or cross walk in said city being out of repair, unsafe, dangerous, or obstructed, unless actual notice of the defective, unsafe, or obstructed condition of said street, highway, bridge, culvert, sidewalk, or cross walk shall have been given to the city at least a specified time previous to such damage or injury, requires actual notice as distinguished from constructive notice. *McNally v. Cohoes*, 127 N. Y. 350, 27 N. E. 1043, affirming 53 Hun, 202, 6 N. Y. Supp. 842; *Smith v. Rochester*, 79 Hun, 174, 29 N. Y. Supp. 539; *Tarba v. Rochester*, 41 App. Div. 188, 58 N. Y. Supp. 755.

It is not sufficient that the proper city officer was negligent in not discovering the defect. *Smith v. Rochester and Tarba v. Rochester*, *supra*.

And such a provision has been held not to be unconstitutional as depriving a person injured of a remedy against the party who had inflicted the injury, and affording no other remedy. *McNally v. Cohoes*, 53 Hun, 202, 6 N. Y. Supp. 842.

And it is valid and bars a recovery where the required notice has not been given. *Houston v. Vatter*, 32 Tex. Civ. App. 298, 74 S. W. 806.

But it has also been held that such a provision is an unreasonable regulation amounting to a denial of justice, and is, therefore, void. *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386.

And it is sufficient if the defective condition of a sidewalk was actually brought to the knowledge of the proper city officer for a sufficient length of time prior to the accident to have enabled the city authorities by reasonable diligence to remedy the defect in the walk; and the notice need not necessarily be a written or a verbal one. *Smith v. Rochester*, *supra*.

But, where a city charter expressly provides that no action is maintainable against the city for an injury to person or property caused by snow or ice upon a sidewalk or street, unless a designated notice thereof be given the city, the city cannot be held liable for an injury to a pedestrian falling on a sidewalk on account of accumulated ice, unless such notice was given in accordance with the charter provision. *Sayfaus v. Rochester*, 113 N. Y. Supp. 840.

So, under a city charter providing that the city shall not be liable for any damages arising or growing out of any sidewalks being in a defective or dangerous condition, or out of repair, unless it is shown that, previous to the happening of the same, one of the aldermen of the ward in which the same is located had knowledge thereof; and no knowledge of such condition of the same shall be presumed unless the defect out of which the same grew existed three weeks before such damages occurred,—if there was no actual knowledge of the defect on the part of the aldermen of the ward it is necessary, in order to establish liability on the part of the city, to prove that the defect had in fact existed for three weeks before the injury, and also such facts as would

charge the proper city officers with notice of the defect before the accident happened. *Sullivan v. Oshkosh*, 55 Wis. 508, 13 N. W. 468.

And the defect must have existed three weeks continuously in order that the city may be charged with constructive notice. *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26.

But knowledge or notice may be presumed where the defect has existed three weeks, in any case in which such presumption would have arisen before the enactment of the charter provision. *Studley v. Oshkosh*, 45 Wis. 380.

And the fact that the defect which caused the injury had existed for three weeks before the accident need not be proved by positive evidence that the particular defect which caused the injury existed so as to be dangerous for that period of time; it may be inferred, like any other fact, from all the evidence upon the subject. *Sullivan v. Oshkosh*, *supra*.

And a complaint, in an action against a city under such a provision, which charges the continuance of a defect in a sidewalk for more than three weeks preceding the accident, shows *prima facie* a liability upon the part of the city. *Studley v. Oshkosh*, *supra*.

But an instruction to the jury, in an action under such a provision, that, if the defect had existed for three weeks prior to an injury therefrom, they might presume and find the city had knowledge thereof, is erroneous; it should have been so framed as to permit the jury to find whether, under all the facts and circumstances of the case, the conditions were such as to bring constructive notice home to the city. *Rhyner v. Menasha*, 107 Wis. 201, 83 N. W. 303.

So, under a statutory provision that no recovery can be had against a town or city for an injury received through a defect in one of its highways, unless some one of its municipal officers, or highway surveyors, or road commissioners had twenty-four hours' notice of the actual defect, the notice must be of the identical defect which caused the injury; notice of another defect, or of the existence of a cause likely to produce a defect, is not sufficient. *Smyth v. Bangor*, 72 Me. 249.

And a statute providing that any person who has received any injury by reason of any defect in a highway which has existed for the space of twenty-four hours may recover; and that, if the town had reasonable notice of such defect, the person injured may recover double the damages sustained,—is intended to give damages in every case if the defect had existed twenty-four hours, without other proof of notice, and to give a penalty in addition if the town had actual and seasonable notice. *Brady v. Lowell*, 3 Cush. 121.

And, where a defect or obstruction has existed in a street for twenty-four hours; or where the town has been duly notified of its existence,—the town is primarily liable for all injuries of which it is the sole cause. *Hawks v. Northampton*, 116 Mass. 420.

And, where an obstruction in a street is occasioned by the exercise of a temporary right to dig up the way for laying an aqueduct pipe, the duty attaches to the municipal corporation of providing proper guards for the public travel during the period that the way may be necessarily dug up for such purpose; and the municipality is liable for injury occasioned by such a defect in the highway, not only upon reasonable notice thereof, but also where it has existed for the space of twenty-four hours previous to the occurrence of the injury. *Merrill v. Wilbraham*, 11 Gray, 154.

But this provision makes the previous existence of such a defect for the length of time specified in the statute an essential to entitle a party suffering damage to a remedy; and under it a city is not liable for either single or double damages if the defect had not previously existed for twenty-four hours. *Brady v. Lowell*, *supra*.

And the defect which was the proximate cause of the injury must have existed twenty-four hours, or been brought to the notice of the town, or been such that, with due care, the town might have known of its existence before the time of the injury; it is not enough that another defect, which occasioned the defect which was the proximate cause of the injury, had then existed more than twenty-four hours. *Ryerson v. Abington*, 102 Mass. 526.

A statutory requirement of written notice to a city of the dangerous condition of a street for the purpose of making the adjoining lots chargeable with the expense of repairing the street, however, has no application to the liability of the city for permitting the nuisance to remain in its streets, by means of which persons or property are injured. *Harper v. Milwaukee*, 30 Wis. 365.

So, a charter provision that the city shall not be liable for any damages or injury arising from the bad condition of the streets, alleys, or highways of the city by reason of the neglect of the proper officer of said city to repair the same, until the supervisor of said city shall have been notified thereof, and shall have failed to repair the same within a reasonable time after such notice, does not apply in a case in which there is no charge of negligence in not keeping the street in repair, but one of permitting a work to be carried on in a street dangerous in itself without proper safeguards. *Springfield v. Le Claire*, 49 Ill. 476.

Nor does a charter provision of a city that no action shall be maintained against the city for injuries caused from streets, sewers, etc., being out of repair from the gross negligence of the city, unless the same shall have remained so for ten days after special notice in writing to the mayor or city engineer, apply to an injury caused by the caving in of a sewer in a street near another break which had existed for two months. *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173.

But it does not exempt a city from liability for ordinary negligence in failing to

repair a broken grating near the corner of two of the principal streets and adjacent to the sidewalk, on which a person stepped and was injured without fault on her part. *Peacock v. Dallas*, 89 Tex. 438, 35 S. W. 8.

And, where a city's failure to construct a crossing in the most substantial manner only remotely contributed to an injury to a traveler in using it, while the proximate cause was its failure to keep the same in repair; and the crossing had been out of repair for more than ten days prior to the injury, the city is not liable in the absence of the notice prescribed by the charter. *Houston v. Vatter*, 32 Tex. Civ. App. 298, 74 S. W. 806.

Nor does this provision protect a city which sold fences on property through which a street was opened, and authorized the purchaser to remove them, which he did, but failed to fill a hole where a fence post was removed, just beside the sidewalk, and a pedestrian stepped into the hole and was injured, although no notice of the hole had been given, since the act of the purchaser was to be considered the act of the city. *Still v. Houston*, 27 Tex. Civ. App. 447, 66 S. W. 76.

b. Actual knowledge or notice.

1. General rules.

Actual knowledge or notice to officers of a municipality of a defect or obstruction in its streets, when such officers are clothed with general powers and duties with reference to supervision and control of corporate affairs, or are clothed with specific duties as to the care of the streets, is notice to and binding upon the municipality. *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763; *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270; *McEvoy v. Sault Ste. Marie*, 136 Mich. 172, 98 N. W. 1006; *Small v. Kansas City*, 185 Mo. 291, 84 S. W. 901; *Gage v. Hornellsville*, 2 N. Y. S. R. 351; *Nitz v. Toledo*, 22 Ohio C. C. 454; *Lynchburg v. Wallace*, 95 Va. 640, 29 S. E. 675; *Harper v. Milwaukee*, 30 Wis. 365.

And the knowledge of a defect or obstruction in a street, of an officer or agent, obtained in the line of his duty a sufficient length of time before an accident caused thereby, for the repair of the defect or the removal of the obstruction, is actual notice to the city. *Denver v. Dean*, 10 Colo. 375, 3 Am. St. Rep. 594, 16 So. 30; *Fuller v. Jackson*, 82 Mich. 480, 46 N. W. 721; *Lincoln v. Woodward*, 19 Neb. 259, 27 N. W. 110.

And that a municipal corporation refused or failed, when informed of the condition of a street, to repair it, is competent, in an action for an injury resulting from the alleged want of repair, as tending to establish the fact of negligence. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

By actual notice of a defect or obstruction in a sidewalk is meant that some member of the board of mayor and aldermen, or some agent or employee of the city, whose

duty it was to keep the streets in repair, or see that they were so kept, saw it; or that someone notified them, or some of them, of its existence. *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57.

And, where subordinate officers of a municipal corporation, charged with the duty of inspection, have actual notice of an obstruction in a street, their failure to report cannot shield the city from liability for an injury resulting therefrom. *Goodfellow v. New York*, 100 N. Y. 15, 2 N. E. 462.

And a person injured by a defect or obstruction in a street has the right to show, in an action against the city for the injury, that the city, through any of its officers charged with police powers, or superintendents of the street, had notice of its condition. *Johnson v. Poughkeepsie*, 29 App. Div. 16, 51 N. Y. Supp. 190; *Woods v. Lisbon*, 138 Iowa, 402, 16 L.R.A. (N.S.) 886, 116 N. W. 143; *Bowman v. Tripp*, 14 R. I. 242.

Nor is there any legal distinction between the personal knowledge of a municipal officer charged with the duty of supervision of a street, and his official knowledge; there is no line dividing the physical senses or the intellectual perceptions of individuals from those of the officer; and, when an officer is bound to act upon knowledge, and the law fixes no channel through which it must reach him in order to impose a duty, the knowledge gained by the individual must be imputed to the officer. *Canfield v. East Stroudsburg*, 19 Pa. Super. Ct. 649.

So, in satisfying a charter provision requiring notice to the city officers having charge of highways of a defect in a sidewalk as a prerequisite to a right of action to recover damages for an injury caused thereby, it is unimportant how the defective condition of the walk is brought to the knowledge of the proper officer, provided he actually knew the fact long enough before the injury to enable the city by reasonable diligence to remedy the defect. *Sprague v. Rochester*, 159 N. Y. 20, 53 N. E. 697.

And actual information, intelligence, or knowledge of a defective or dangerous condition of a sidewalk, on the part of a superintendent of streets, is sufficient to answer the requirement of a statutory provision requiring actual notice of a defect to hold the city liable for an injury resulting therefrom. *McNally v. Cohoes*, 127 N. Y. 350, 27 N. E. 1043.

So, under a charter provision that the city shall not be liable for any damage arising from accidents occasioned by reason of the sidewalks or streets being in a defective or dangerous condition, unless one of the officers of the city had actual knowledge of the defect three days prior to the accident, where officers of the city had actual knowledge of a dangerous excavation in a sidewalk and neglected to erect a barrier or warning to prevent people from falling into it, the city is liable for the consequences of such neglect though the defect had existed but a few hours. *Cantwell v. Appleton*, 71 Wis. 463, 37 N. W. 813, 20 L.R.A. (N.S.)

And, if a city had knowledge of and permitted to exist an opening and trapdoors in a sidewalk which it knew were dangerous whenever they were used in the manner for which they were built to be used, and ordinarily were used, in order to hold the city liable for injuries resulting from such use it need not be shown that the city had knowledge that they were used in that particular way at the particular time the accident occurred. *Sweeney v. Butte*, 15 Mont. 274, 39 Pac. 186.

And, where a sidewalk upon which a person fell and received an injury was made of old boards or planks which had long been in use, before being placed in the walk, and some of the planks were broken, and some were gone, and some were partly out of place; and this condition had existed for from three months to two years; and it was not only a condition of common knowledge, but was personally known to the town marshal, and had been brought to the knowledge of the town council of the city,—the city should have, in the exercise of ordinary diligence, repaired the walk; and it is liable for the injury. *Huntingburgh v. First*, 22 Ind. App. 66, 53 N. E. 246.

But notice of defects in a sidewalk must relate to the defects which caused the injury; and notice to a councilman of defects which had been repaired before the accident occurred will not charge the municipal corporation with notice of those which caused the injury although they occurred at the place where the repairs had been made. *Carter v. Monticello*, 68 Iowa, 178, 26 N. W. 129.

And, where a city councilman, at noon on the day of the accident in question, discovered a plank out of the walk at the place where the accident subsequently occurred, and replaced it without nailing, and, upon the evening of that day, notified the street commissioner, the jury, in an action for an injury caused by the defect in the sidewalk, should not be permitted to base a finding of negligence upon the failure of the councilman sooner to notify the commissioner. *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148.

So, notifying a member of the street committee of a village of a loose plank in a sidewalk, without specifying the location, is not sufficient to charge the village with notice of the defect. *Rogers v. Orion*, 116 Mich. 324, 74 N. W. 463.

2. How established.

Actual knowledge or notice may be established by evidence, either direct or circumstantial, the same as any other fact. *McNally v. Cohoes*, supra.

And it may be shown by proof of such notice to any officer having authority to act, or to cause action to be taken, or whose duty it is to report the matter to some officer with authority. *Dallas v. Meyers* (Tex. Civ. App.) 55 S. W. 742.

And the question of notice to a city of a defect or obstruction in a street, where

there is evidence in an action for an injury alleged to have resulted from the defect or obstruction, is a question of fact for the jury. *Ft. Worth v. Johnson*, 84 Tex. 137, 19 S. W. 361; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414; *Harrell v. Macon*, 1 Ga. App. 413, 58 S. E. 124; *Davis v. Adrian*, 147 Mich. 300, 110 N. W. 1084.

Notice to municipal officers of the necessity of barriers or railings along a dangerous place in a highway is sufficiently shown where it appears that they lived in close proximity to the place, and some of them frequently passed over it. *Malloy v. Walker Twp.*, 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012; *Clark v. Brookfield*, 97 Mo. App. 16, 70 S. W. 934.

And a city's knowledge of a defect in a sidewalk can be inferred from the fact of its officers frequently passing over such walk in its defective condition. *Shipley v. Bolivar*, 42 Mo. App. 401.

And a statement by an officer who had the condition of a street specially in charge, tending to show that he and the village authorities generally knew before the injury in question that the street was defective, describing its condition as such, that people could get across by careful driving, but careful driving was necessary at night, sufficiently establishes notice to the village of the condition of the street. *Mt. Morris v. Kanode*, 98 Ill. App. 373; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.

And testimony, in an action against a city for injuries caused by a defective bridge, of a policeman whose duty it was to watch for defects in it, that, some time during the day before the injury in question at night, he discovered the hole in the bridge through which the person injured fell, and immediately telephoned to the officer whose duty it was to have repaired it, is proof of actual notice to the city of the dangerous condition of the bridge. *Covington v. Gates* (Ky.) 117 S. W. 342.

So, where the evidence, in an action for personal injuries received by reason of the negligence of a city in not properly guarding an excavation in a place used as a sidewalk caused by the removal of a set of scales, shows that the city, by ordinance, leased the scales to a certain person, and, through the proper officer, notified the former lessee to remove his scales and give way to the new lessee; that the city auditor was personally notified of their removal by the retiring lessee immediately after removal; and that the new lessee was notified of such fact the same day by such officer; and the market superintendent was present and knew that the same were removed,—the city cannot deny notice, so as to excuse it from properly guarding the excavation. *Nitz v. Toledo*, 22 Ohio C. C. 454.

And declarations by a sidewalk inspector, made by him while in the discharge of his duty in supervising the erection of frames in the street for purposes of decoration during a street fair, as to the dangerous character of the sidewalk by reason of their improper erection, are admissible in evidence 20 L.R.A. (N.S.)

in an action against the city for an injury resulting from the falling of a crosspiece of one of the frames, on the question of notice of their dangerous condition. *Farrell v. Dubuque*, 129 Iowa, 447, 105 N. W. 696.

And, where the mayor of a city, and council and police, had personal knowledge of an excavation across a street before an accident caused thereby, error, if any, in an action against the city for damages for an injury caused by the accident, in admitting evidence that the overseer of streets said, several days after the accident, that he knew of the defect and had intended to repair it, without prejudice. *Snook v. Anacanda*, 26 Mont. 128, 66 Pac. 756.

So, a person injured by a defective sidewalk may prove that the council of the city had previously resolved to repair it in order to show that the city had knowledge of its condition. *Grattan v. Williamston*, 116 Mich. 462, 74 N. W. 668.

And the testimony of a member of a city council to certain complaints concerning the condition of a sidewalk in the city, which were made to the council, is admissible in an action for an injury happening on such sidewalk, to show that the city had notice of the alleged defect, and that the notice was given to the officers of the city whose duty it was to make provision for keeping the streets in repair. *Trapnell v. Red Oak Junction*, 76 Iowa, 744, 39 N. W. 884.

And evidence that the boards in a sidewalk at the place of an accident had been occasionally loose, and that this fact was known to at least one member of the village board, and he had immediately nailed them down, but that the stringers were insufficient to hold the nails, justifies a finding that the walk at that place was out of repair, and that such fact was known to the authorities. *Sorento v. Johnson*, 52 Ill. App. 659.

The burden of showing defects and obstructions in the public streets, causing injury, and notice thereof, express or implied, however, rests with the plaintiff, in an action against the city for an injury caused thereby. *Jones v. Greensboro*, 124 N. C. 310, 32 S. E. 675; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519.

And notice of a defect in a sidewalk, to a city officer who had no authority in the premises, and who was charged with no duty in relation to such matter, does not affect the city with notice. *Dallas v. Meyers*, *supra*.

And the fact that a sidewalk upon which an injury occurred was removed after the injury by the city authorities and another and a better one substituted therefor is not evidence that the city authorities had knowledge of the defect before the occurrence of the injury. *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893.

Nor is a petition for the building of a new sidewalk 7 feet wide, presented to a village board about six months and a half prior to an injury on a sidewalk, the old walk being only 4 feet wide, admissible in evidence in an action against the city for an

injury, for the purpose of showing notice to the village authorities of the condition of the walk at the time the petition was presented, or otherwise, since the object of the petitioners may have been merely to secure a wider walk. *Barrett v. Hammond*, 87 Wis. 654, 58 N. W. 1053.

And evidence, in an action against a city for damages for an injury sustained by a person by falling upon a ridge of ice and snow about 2½ feet long, 8 or 9 inches wide, and 3 or 4 inches high, on a sidewalk, that the superintendent of public works of the city was seen by a witness walking along the sidewalk in question looking at it at the point of injury with his head down, and that the ridge of snow or ice remained substantially unchanged from the time the superintendent passed over it until the time of the accident, is insufficient to sustain a finding of actual notice to the superintendent of public works, within the meaning of a charter provision that the city shall not be liable for damage or injury sustained by any person in consequence of any sidewalk or cross walk being unsafe or obstructed by snow, ice, or otherwise, unless actual notice of the defective, unsafe, or obstructed condition shall have been given to the mayor and board of public works or superintendent of public works, or any regular policeman, at least forty-eight hours previous to such damage or injury. *McManus v. Watertown*, 88 App. Div. 361, 84 N. Y. 638.

3. Officers or agents whose knowledge or notice is binding.

Actual knowledge or notice of a defect or obstruction in a street, to be notice to the municipal corporation, must be that of officers clothed with general powers and duties with reference to the supervision and control of corporate affairs, of that of officers clothed with specific duties as to the care of the streets. *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763; *Austin v. Colgate* (Tex. Civ. App.) 27 S. W. 896.

And an instruction, in an action for damages for an injury resulting from an obstruction on a sidewalk, that notice to any of the city officers, or to a street commissioner, of the defect, is notice to the city, is erroneous. *Edwards v. Cedar Rapids*, 138 Iowa, 421, 116 N. W. 323.

But a notice to any of the municipal officers who are charged with the supervision and repair of sidewalks is notice to the city. *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96.

And a city in the streets of which a dangerous obstruction has existed for several weeks with knowledge of its officers, whose duty it is to report such matters, is estopped, in an action for personal injuries resulting therefrom, to claim that it had no notice of the obstruction. *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270.

And it is the duty of a city's representatives, as, for example, its police or other employees, to notify the proper officer whose 20 L.R.A. (N.S.)

duty it is to repair defective sidewalks and to keep them in order, and meanwhile to take proper precautions to warn people of the danger and prevent accident; and notice to such officers is notice to the city. The city cannot claim exemption upon the ground that some particular officer had not been notified. *Lundon v. Chicago*, 83 Ill. App. 208.

Thus, notice to the chief executive officer of a city of an obstruction in its streets is notice to the city. *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542.

And so is notice to the mayor and marshal of the city. *Salina v. Trosper*, 27 Kan. 544.

And, where the evidence in an action for damages for an injury caused by a dangerous hole in a street tends to prove that the excavation was made some two months before the person injured fell into it; and that the mayor of the city and at least one of the members of the council were frequently in close proximity to it before the accident occurred,—it is not error to refuse to withdraw the question of notice from the consideration of the jury. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273.

And statements of the president of a municipal corporation subsequent to the accident in question, showing knowledge prior thereto that the street where the accident occurred was used for the customary storage of vehicles while not in use, is admissible, in an action for an injury resulting therefrom, on the question of notice. *Radichel v. Kendall*, 121 Wis. 560, 99 N. W. 348.

So, the superintendent of streets of a city is the proper officer to whom to give notice of an obstruction in a public street; and notice to him is notice to the city. *Walker v. Lockport*, 43 How. Pr. 366; *Bradford v. Anniston*, 92 Ala. 349, 25 Am. St. Rep. 60, 8 So. 683; *Joliet v. McCraney*, 49 Ill. App. 381; *Mason v. Winthrop*, 196 Mass. 18, 81 N. E. 644; *Hawley v. Gloversville*, 4 App. Div. 343, 38 N. Y. Supp. 647; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121.

And notice of a dangerous obstruction in a street, to the street commissioner of a city, upon whom is imposed the duty of keeping the streets in proper condition, is notice to the city. *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Brownlee v. Alexis*, 39 Ill. App. 135; *Fuller v. Jackson*, 82 Mich. 480, 46 N. W. 721; *McSherry v. Canandaigua*, 35 N. Y. S. R. 432, 12 N. Y. Supp. 751, affirmed in 129 N. Y. 612, 29 N. E. 821; *Kittredge v. Milwaukee*, 26 Wis. 46.

And this is so though the city is divided into wards, and the commissioners are called ward officers. *Kittredge v. Milwaukee*, *supra*.

And notwithstanding the fact that neither the charter nor the by-laws of the village provide for the appointment of such an officer. *McSherry v. Canandaigua*, *supra*.

And, where a person is injured by defects in a public street in the control of a city contractor, evidence that the city engineer

and street commissioner had knowledge of such defects is admissible in an action against the city for the injury, to establish negligence upon the part of the city. *Patterson v. Austin* (Tex. Civ. App.) 29 S. W. 1139.

So, a city is chargeable with notice of the existence of an obstruction on one of its sidewalks where the obstruction had been there for two or three weeks, and the police and the street superintendent passed that way every day. *Palestine v. Hassell*, 15 Tex. Civ. App. 519, 40 S. W. 147.

And, under a city charter requiring all repairs of sidewalks to be made under the supervision of the street commissioners and the direction of the common council, and that one or more commissioners may be appointed by the city, the commissioner may be fairly regarded as representing the corporation in matters with relation to repairs of sidewalks; and, if the defect is one which he ought to have known, and which he has failed to repair within such reasonable time after such knowledge may be presumed to have reached him as, under the circumstances, was sufficient to provide for such repairing, then the city is liable, but not otherwise. *Dewey v. Detroit*, 15 Mich. 307.

And, while highway surveyors are public officers whose duties are prescribed by law, in performing which they are not agents of the town, a surveyor by whom or under whose direction repairs may be made or work done upon or with reference to the highway may be deemed the agent of the town to receive and charge the town with notice of an alleged defect, insufficiency or want of repair existing under his special observation and superintendence; and the fact that a defect, insufficiency, or want of repair existed through the fault of the surveyor who caused it would be evidence from which a jury might find knowledge of its existence on the part of the town. *Hardy v. Keene*, 52 N. H. 370.

So, knowledge by the city inspector of sidewalks, whose duty it is to inspect the sidewalk in question, of a defect or obstruction therein, is notice to the city. *Small v. Kansas City*, 185 Mo. 291, 84 S. W. 901, s. c. on subsequent appeal, 110 Mo. App. 721, 85 S. W. 627.

And evidence tending to show that an awning over a sidewalk had been inspected by an inspector some seven years prior to the injury in question, and pronounced by him in an unsafe condition, is admissible in an action for an injury caused by the falling of the awning. *Mansfield v. New York*, 119 App. Div. 199, 104 N. Y. Supp. 386.

But notice of a defect in a sidewalk in a city, given to a sidewalk inspector, is not actual notice to the city officers having charge of highways, where the sidewalk inspector has no authority to repair sidewalks, his duty being to examine the sidewalks and notify the abutting owner to remedy any defects discovered by him, and, if such defects are not remedied within five days, to notify the foreman of repairs to the end 20 L.R.A. (N.S.)

that the latter may make the necessary repairs and charge the expense upon the abutting property. *Touhey v. Rochester*, 64 App. Div. 56, 71 N. Y. Supp. 661.

So, notice of defects in a sidewalk, to a person employed by the city to have charge of repairs in sidewalks and general supervision over them, is chargeable to the city. *Smith v. Des Moines*, 84 Iowa, 685, 51 N. W. 77.

And notice of a hole in a sidewalk, given to a foreman of sidewalks clothed with general power to repair throughout a large district of a city, is notice to a city officer having charge of highways, within the meaning of a charter provision requiring notice to the city officers having charge of highways of a defect in a sidewalk as a prerequisite to a right of action to recover damages for an injury caused thereby. *Sprague v. Rochester*, 159 N. Y. 20, 53 N. E. 697.

So, the rule has been asserted generally that notice to a member of a city council of a defective or obstructed street is notice to the city. *Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65; *Owen v. Ft. Dodge*, 98 Iowa, 281, 67 N. W. 281; *Carter v. Monticello*, 68 Iowa, 178, 26 N. W. 129; *Pittsburg v. Broderson*, 10 Kan. App. 430, 62 Pac. 5; *Fuller v. Jackson*, 82 Mich. 480, 46 N. W. 721; *Frazier v. Butler*, 172 Pa. 407, 51 Am. St. Rep. 739, 33 Atl. 691; *Waxahachie v. Connor* (Tex. Civ. App.) 35 S. W. 692.

And this is certainly the rule where the notice was to an alderman of the ward in which the obstruction was located, who, as a member of the council, had charge of the streets. *Dundas v. Lansing*, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011; *Frazier v. Butler*, supra.

And, where the members of the council of a city are charged with the duty of acting with respect to the streets and sidewalks of the city, knowledge on their part of an unsafe condition of a street or sidewalk is notice to the city. *Cropper v. Mexico*, 62 Mo. App. 385.

And evidence of complaints made to a city council concerning obstructions in a street is admissible, in an action for injuries caused thereby, to show actual notice to the city, though the time of the complaints was not definitely fixed, it appearing that they were made within two years, during which time the obstructions existed prior to the injury in question. *Larsen v. Sedro-Woolley*, 49 Wash. 134, 94 Pac. 938.

So, evidence that a defect in a sidewalk which caused an injury consisted of a rotten plank; that the sidewalk was largely used, and was on one of the principal streets of the town; that it was passed over daily by one of the selectmen; that it had been for some time in a bad condition; and that several of the planks composing it were rotten and decayed,—is sufficient to take the case to the jury, and to permit them to infer that the proper officers of the town knew, or with reasonable diligence might have known, the condition of the way, although no one had previously noticed the

rotteness of the particular plank the breaking of which caused the injury. *Noyes v. Gardner*, 147 Mass. 505, 1 L.R.A. 354, 18 N. E. 423.

And, where a section of a sidewalk was removed, leaving an opening from 8 to 12 feet deep; and a passer-by fell in, there being no guards or lights, and was injured; and the work had been going on for from four days to a week; and the president of the village lived on the same street in which the work was done, 10 or 20 rods from the place, and there was nothing to prevent his seeing the excavation from his house; and the place of business of one of the trustees of the village was on the corner of the street in sight of the work; and another of the village trustees, in going from his residence to his place of business, passed along the street in view of the walk in question.—it is a question for the jury, in an action for the injury, whether one or more members of the board of trustees did not know, or in the exercise of a reasonable degree of diligence and care ought not to have known, of the defective condition of the sidewalk. *Higgins v. Salamanca*, 6 N. Y. S. R. 119.

But the rule has been asserted that knowledge of a member of a municipal council of a nuisance in a street is not, of itself, notice to the municipality, since his knowledge and acts as an individual are not notice to the municipality of which he is an official representative. *Frazier v. Butler*, supra; *Groveport v. Bradfield*, 2 Ohio C. C. 145.

And the fact that one of the aldermen of a city saw an excavation in a street being made is not *per se* evidence that the city was guilty of neglect, in an action for damages for an injury caused by such excavation. *McDermott v. Kingston*, 19 Hun, 198.

And knowledge of defects in a sidewalk, acquired by a person before he became a burgess of the borough, does not bind the borough and charge it with notice of such defects after he became a burgess, so as to render the borough liable for an injury caused by such defects. *Lohr v. Philipsburg*, 156 Pa. 246, 27 Atl. 133.

Nor is the fact that two of the trustees of a village saw a plank placed over a gutter to enable people to pass over at the time of an extraordinary overflow, when they were passing along the street, notice to the corporation even that the plank was there, and much less that it rendered the street dangerous. *Bush v. Geneva*, 3 Thomp. & C. 409.

And the testimony of the trustees of a village, taken at an inquest held by the coroner on the body of a person killed by a wire charged with electricity which hung down from a tree to the ditch between the sidewalk and carriage way, and with which deceased came in contact, though competent for the purpose of contradicting their testimony on the trial of an action against the city for the injury, is incompetent as affirmative evidence to show that the trustees of the village had notice of the dangerous condition of the pendent wire. *Fox v. Man-* 20 L.R.A. (N.S.)

chester, 183 N. Y. 141, 2 L.R.A. (N.S.) 474, 75 N. E. 1116.

So, where a city does not require permits for the erection of buildings, an alderman making an excavation in a sidewalk for the erection of a building without permission is not a trespasser, so as to prevent his knowledge from being notice to the city, because it was to his interest to keep his knowledge from the city, where the excavation was easily seen, and no fraud or concealment appears. *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227.

Likewise, the actual knowledge and presence of a market superintendent, whose duty it is to see that a market place is not rendered dangerous either by obstructions or excavations, when market scales are removed, leaving an excavation or opening in a platform generally used as a thoroughfare by pedestrians for many years with the city's knowledge, constitutes notice to the city of the excavation and opening. *Nitz v. Toledo*, 22 Ohio C. C. 454.

And knowledge by two members of the board of public works and the city engineer who had charge of the construction of a sewer, of the existence of an obstruction in the streets resulting therefrom and its dangerous character, in time to have abated it before the injury, was notice to the city. *Harper v. Milwaukee*, 30 Wis. 365.

And, where a city ordinance establishes the office of state electrician, and defines the duties of the officer, and lays down rules and regulations concerning electric wiring and appliances, which delegates to such officer authority to supervise the use of electrical apparatus on the streets of the city, a notice to such officer of a dangerous appliance or condition would be notice to the city; and such an ordinance is admissible in evidence, in an action for an injury resulting from such use. *Decatur v. Hamilton*, 89 Ill. App. 561.

So, notice to a city marshal of a defect in a sidewalk is not notice to and does not bind the city, where he was clothed with no power and charged with no duty in regard to the repairing of sidewalks. *Cook v. Anamosa*, 66 Iowa, 427, 23 N. W. 907.

But while, as a general rule, notice to a city marshal of a town or city of the defective condition of a street or sidewalk is insufficient to charge the municipality with actual notice, where the city marshal is instructed by the city council or board of trustees to look after the condition of the streets and sidewalks, and to repair them or cause them to be repaired, evidence that such officer had actual notice of the condition of the sidewalk a short time before the accident occurred is admissible in an action for a resulting injury. *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791.

And notice of an obstruction or defect in a street, to a patrolman detailed to report any violation of city ordinances, and his report thereof to his superior officer, made in the usual course, constitutes notice to the

city. *Twogood v. New York*, 102 N. Y. 216, 6 N. E. 275.

So, where members of the police force of a city are officers of the city, the city is liable for an obstruction to a sidewalk caused by the negligent use of city property by such officers; and knowledge of the obstruction by such officers is knowledge on the part of the city. *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240.

And notice to policemen charged by the statute with the duty at all times to remove nuisances existing in public streets, and enforce ordinances relating to police, public health, or criminal procedure, of an unlawful obstruction in a street, is notice to the city; and the city is chargeable with any neglect upon the part of the policeman to make proper observation or inquiry, or for any negligence in permitting the obstruction to exist. *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657; *O'Hara v. Brooklyn*, 57 App. Div. 176, 68 N. Y. Supp. 210; *Cummings v. Hartford*, 70 Conn. 115, 38 Atl. 916; *San Antonio v. Talerico* (Tex. Civ. App.) 78 S. W. 28.

And the attention of the jury in an action for an injury caused by a defective sidewalk may properly be called to the fact that the accident occurred in front of the police station, and within sight of the officers whose duty it was to have charge of the station. *Osborne v. Detroit*, 32 Fed. 36.

So, a city ordinance which makes it the duty of policemen to report to the lieutenants of police all footways, bridges, and sidewalks requiring repairs renders it incumbent on the lieutenants to report upon the same to the authorities, whose duty it is to have the needed repairs made; and, under such an ordinance, notice to a policeman or lieutenant of a hole in a sidewalk is notice to the city. *Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749.

And evidence tending to prove that the attention of a city's policeman was called to the defective or obstructed condition of a sidewalk shortly before an accident caused thereby is admissible for the purpose of showing notice, where policemen were expressly required by ordinance to report defects. *Chicago v. Davies*, 110 Ill. App. 427.

And, where, with knowledge and approval of the superintendent of streets, a book is kept at the police station in which policemen were directed to note defects in sidewalks, and the superintendent is accustomed to resort to the reports of policemen for information concerning defects in streets, in case of knowledge of a defect by a policeman for a sufficient length of time in the exercise of reasonable care to report and repair it, the city will be held chargeable with notice of the defect. *Joliet v. Looney*, 159 Ill. 471, 42 N. E. 854, affirming 56 Ill. App. 502.

So, the fact that all the members of a police force of a city, just before the injury in question, were frequently instructed to report obstructions in the street, may properly be admitted in evidence in an action

against the city for damages for injuries caused by an obstruction in a street, as bearing upon the question of notice. *Koch v. Williamsport*, 195 Pa. 488, 46 Atl. 67.

And, where a third person dug a ditch across a street, and an injury resulted therefrom, evidence, in an action for the injury, that it had existed about three weeks, and had attracted the attention of a policeman, who notified the city attorney about it, and that it was on a public street, is sufficient to justify a jury in finding that the city had notice of the ditch. *Ft. Worth v. Johnson*, 84 Tex. 137, 19 S. W. 361.

But notice to a policeman of the existence of a hole or other obstruction in a street or sidewalk is not necessarily notice to the municipal authorities, unless it is affirmatively shown that the police officer had some duty to perform in reference to the streets or sidewalks. *Columbus v. Ogletree*, 96 Ga. 177, 22 S. E. 709; *Reid v. Chicago*, 83 Ill. App. 554.

And, where the statute provides that the common council of a city shall appoint police commissioners; and these commissioners are not amenable to the city, but are removable only by the supreme court; and the commissioners appoint policemen and have power to remove them,—the police department of the city is a creation under the laws of the state for the purpose of securing public order, and not a creation of the city, and is not its agent; and notice to a policeman of an obstruction on a street is not notice to the city. *Kunz v. Troy*, 36 Hun. 615; *King v. Troy*, 21 N. Y. Week. Dig. 558.

And, when it does not appear that there was any act of the legislature authorizing a municipal corporation to prescribe the duties of a policeman and to make him an agent of the corporation in respect to its duty of keeping its streets open and in repair; or when the legislature has conferred such power upon the corporation, and it does not appear that the council of the corporation has, by ordinance or resolution, so prescribed the duties of a policeman and so made him its agent for such purpose,—a rule of a police department which requires a policeman to note defects in the streets or sidewalks and to remove them when practicable, and, in case of complaint by any citizen, to report the same, is irrelevant and incompetent as evidence to charge such corporation with liability for a defect in a street or sidewalk, although it is shown in connection therewith that the policeman had knowledge of such defect. *Cleveland v. Payne*, 72 Ohio St. 347, 70 L.R.A. 841, 74 N. E. 177.

So, where a sidewalk was covered with ice caused by the freezing water which flowed from a hydrant, which ice remained for several days, the fact that the president of the council of the city lived on the opposite side of the street and took a street car frequently in front of his house does not warrant an inference of knowledge upon his part of the obstruction, in the absence of evidence that he knew of the ice. *Corey v. Ann Arbor*, 134 Mich. 376, 96 N. W. 477.

But, testimony of a night watchman paid by private parties, as to circumstances tending to show an obstruction in a street, and notice thereof to the city, is not subject to the objection that the jury might infer that notice to the watchman was actual notice to the city, where such inference is expressly negatived by the instructions. *Ottawa v. Hayne*, 214 Ill. 45, 73 N. E. 385.

Notice of a defective condition of a sidewalk to a city treasurer, police magistrate, or other municipal officer whose duty in no way relates to the care of streets, however, is not notice to the city which will charge it with liability. *Savanna v. Trusty*, 98 Ill. App. 277.

And a city clerk who is required to keep the books and act as the clerk of the board of public works of a city is not an officer having charge of the city streets, so that notice to him of a defective street will constitute notice to the city. *Corey v. Ann Arbor*, supra.

And the knowledge of an open coal hole in a sidewalk, by a janitor of a school building appointed by the school committee, the city having no voice in the appointment and no control over him, is not notice which will render it liable for an injury caused thereby. *Foster v. Boston*, 127 Mass. 290.

Nor does proof of notice of an obstruction or defect in a street to one or more of the inhabitants of a city establish the requisite notice to the city, since it is not their duty to repair the defect or remove the obstruction. *Donaldson v. Boston*, 16 Gray, 508; *Frazier v. Butler*, 172 Pa. 407, 51 Am. St. Rep. 739, 33 Atl. 691.

So, while the declarations of an officer which accompany his official acts and tend to explain them are admissible in evidence, notice of a defect in a street or highway cannot be proved by the admission of a town or city officer, such an admission consisting only of a narration of past transactions. *Smyth v. Bangor*, 72 Me. 249.

4. Creation of obstruction as affecting.

(a) By act of city itself.

If a municipal corporation causes work to be done upon its streets or sidewalks which is in its nature dangerous to the public, it is bound to take notice of the character of the work, and the condition in which it is left, whether safe or dangerous. *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 So. 452; *Beatrice v. Reid*, 41 Neb. 214, 59 N. W. 770.

And notice is not necessary to establish the liability of a municipal corporation for an obstruction in a street, where the obstruction was caused by the direct act of the municipality, or by its authority. *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250; *Ft. Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. 167; *Jefferson v. Chapman*, supra; *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255; 20 L.R.A. (N.S.)

Carver v. Jackson, 82 Miss. 583, 35 So. 157; *Smith v. St. Joseph*, 42 Mo. App. 392; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Milwaukee v. Davis*, 6 Wis. 377.

Or where the obstruction or defect was produced by acts done with the express sanction of the municipality. *Haniford v. Kansas City*, 103 Mo. 172, 15 S. W. 753; *McDermott v. Kingston*, 19 Hun, 198.

Where an unsafe or obstructed condition of a street is caused directly by the act of the municipal corporation itself or its agents, liability for injuries resulting therefrom attaches directly, and not through the doctrine of notice, either express or constructive. *Riddle v. Westfield*, 65 Hun, 432, 20 N. Y. Supp. 359.

And in such case the municipal corporation will be conclusively presumed to have notice of the obstruction. *Ludlow v. Fargo*, 3 N. D. 485, 57 N. W. 506; *Salem v. Webster*, 192 Ill. 369, 61 N. E. 323; *Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115; *Akers v. New York*, 14 Misc. 524, 35 N. Y. Supp. 1099.

And a city cannot defend in an action against it for an injury caused by an obstruction in a street upon the ground of want of notice, where the act creating the obstruction was done by itself, or by its authority. *Denver v. Aaron*, 6 Colo. App. 232, 40 Pac. 587.

The question of notice to city authorities concerning the condition of a street or an obstruction therein is involved only where they have not produced the condition themselves. *Salem v. Webster*, 192 Ill. 369, 61 N. E. 323.

And, where work in the way of the construction of sewers is done within the limits of a city, it is presumed to be done by the proper authority of the city. *Chicago v. Brophy*, 79 Ill. 277.

And where a hole in a street of a city resulted from the construction of a sewer by the city, the city is liable for an injury caused thereby to a traveler, though it had no notice thereof. *Smith v. St. Joseph*, supra; *Hutchinson v. Clarke*, 26 R. I. 307, 58 Atl. 948.

And the same rule applies to a municipal corporation charged with negligence in so constructing and grading a sewer that a hole was washed out along a sidewalk, and in failing to place guards along it to protect travelers, and in bridging such hole with planks which had become warped and insecurely fastened. *Dallas v. Jones*, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377.

So, a city which causes a ditch to be made in a street may be held liable for an injury resulting therefrom, without reference to notice to it of the excavation. *Chicago v. Johnson*, 53 Ill. 91; *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833.

And the same rule applies to an embankment constructed in a street by the authority of the city; and this is particularly so where the embankment conformed to the requirements of the ordinance permitting it. *Golden v. Clinton*, 54 Mo. App. 100.

And, where a water box was constructed by a water company at the outer edge of a sidewalk, and there was negligence in the placing of the box, and the city widened the sidewalk and built it around the box, leaving a depression or hole in the sidewalk, the city necessarily then became aware of the depression or hole and the danger arising therefrom, and it is chargeable with knowledge of the defect coexistent with the laying of the sidewalk. *Denver v. Magivney* (Colo.) 96 Pac. 1002.

So, where an obstruction in a street was the natural result of defects in its original construction by the city, the city was chargeable with notice from the beginning, and was under a continuing duty to repair it. *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483; *Brake v. Kansas City*, 100 Mo. App. 611, 75 S. W. 191; *McDonald v. Duluth*, 93 Minn. 206, 100 N. W. 1102; *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57.

And where a city constructed a sidewalk, and defects in it were then apparent, no subsequent notice to the city of such defects is necessary to render it liable for a resulting injury, since it was itself the author of the defects. *Covington v. Webster*, 33 Ky. L. Rep. 630, 110 S. W. 878; *Chicago v. Langlass*, 66 Ill. 361; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Mansfield v. Moore*, 21 Ill. App. 326, affirmed in 124 Ill. 133, 16 N. E. 246; *Evans v. Iowa City*, 125 Iowa, 202, 100 N. W. 1112; *Alliance v. Campbell*, 17 Ohio C. C. 595; *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90.

Nor is a city relieved from liability for an injury caused by a defective sidewalk by the rule that it must have notice of defects to be liable therefor, when it is charged with knowledge that the material of which a walk is composed is insufficient for the purpose, and omits the duty of making the walk safe, but adopts the policy of attempting to discover and repair breaches that may be occasioned because of such insufficiency of the material, before anyone is injured. *Paxton v. Frew*, 52 Ill. App. 393.

And, if the defect in a sidewalk which caused an injury consisted in repairing the walk with defective materials, the city is liable for the acts of its agents and employees in making such defective and dangerous repair, and is chargeable with notice of such defective repair from the time it was made. *Moore v. Platteville*, 78 Wis. 644, 47 N. W. 1055.

And, where repairs are made by the municipality to a sidewalk, the municipality is bound to take notice of the character of the same and the condition of the walk when repaired, whether safe or unsafe. *Brownlee v. Alexis*, 39 Ill. App. 135.

So, if a city constructed a bridge of loose planks in a street, or, when a city reconstructed the bridge, if such planks were left unfastened by its employees, the knowledge of the employees was notice to the city. *Atlanta v. Buchanan*, 76 Ga. 585.

And, where a plank in a bridge in a street breaks and causes an injury, and the city is 20 L.R.A. (N.S.)

sought to be held liable therefor on the ground of positive misfeasance on its part or that of its officers or servants in doing acts which cause the street to be out of repair, no notice to the corporation of the condition of the street is essential to liability. *Brunswick v. Braxton*, 70 Ga. 193.

So, where city authorities prescribe a plan of constructing a crossing between a street and a railroad, and the railroad company follows the plan, and the plan is defective, both are chargeable with knowledge of the plan; and the question of notice is immaterial to their liability. *Carroll v. Louisville*, 117 Ky. 758, 78 S. W. 1117.

And, where a city maintains a water cock connected with its water pipes, extending several inches above the level of the pavement, and an injury results from a foot passenger stumbling thereon, the city is the original wrongdoer, and its negligent act causes the injury; and it is not entitled to any notice before being sued for the injury. *Baltimore v. Walker*, 98 Md. 637, 57 Atl. 4.

Nor is the want of notice of a defect in a street, required by statute, available as a defense for persons who were the active agencies in placing the obstruction in the street. *Cairncross v. Pewaukee*, 86 Wis. 181, 56 N. W. 648; *Stedman v. Rome*, 88 Hun, 279, 34 N. Y. Supp. 737; *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131.

And a charter provision of a city that the corporation shall not be liable to any person for damages caused from streets, ways, crossings, bridges, or sidewalks being out of repair, unless the same shall have so remained for ten days after special notice in writing, has no reference to defects growing out of the manner of construction of streets, bridges, or sidewalks; and written notice is unnecessary in such cases. *Houston v. Owen* (Tex. Civ. App.) 67 S. W. 788.

So, where a water way or opening existed in a street, and it had previously been the habit of the city to light the street, its negligence in failing to maintain a light consists in a failure to discharge a known duty, and not in a failure to know that a duty was required; and the principle that a city is entitled to notice of a defect in a street and a reasonable time in which to make repairs before it can be held for damages resulting from such defect does not apply. *Davenport v. Hannibal*, 108 Mo. 471, 18 S. W. 1122.

The mere existence of a defect or obstruction in a street, however, affords no evidence of original defective construction for which the city would be liable without notice. *Stein v. Council Bluffs*, 72 Iowa, 180, 33 N. W. 455.

And it cannot be held, as a matter of law, that a municipal corporation would have notice of a defect in a cesspool built within the limits of a public way, if it was in fact defectively built and put in by others than the municipal corporation itself. *Hoey v. Natick*, 153 Mass. 528, 27 N. E. 595.

So, if a defect in a sidewalk occurred after

the original construction of the sidewalk, the original construction having been proper, and an injury results from such defect, the municipality, before being liable for the injury, is entitled to actual notice thereof, unless the defect was of such a character, or had continued for such a length of time, that notice is presumed. *Alliance v. Campbell*, supra.

And a complaint in an action against a city for a personal injury, alleging the presence of an obstruction on its streets, without stating by whom the obstruction was placed there, or for what purpose it was so placed, must be construed as a complaint seeking recovery for damages caused by an obstruction of the street, not made or authorized by the town, but created by the act of a third person. *Royal Center v. Bingaman*, 37 Ind. App. 626, 77 N. E. 811.

(b) By officers, agents, or servants.

If a municipal corporation, by its officers, agents, or servants, placed an obstruction in a public street which was open to travel by the public, and which was dangerous, no notice to the city of its existence need be proved, in an action for a resulting injury. *Ringelstein v. San Antonio* (Tex. Civ. App.) 21 S. W. 634; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *McDermott v. Kingston*, 19 Hun, 198; *Wilson v. Troy*, 135 N. Y. 96, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44; *Yearance v. Salt Lake City*, 6 Utah, 398, 25 Pac. 254.

Where an obstruction in a street is created by an agent or quasi agent of the city by an authorized act, the law imputes notice to the city of the existence of the obstruction. *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630.

And the city is liable, in a civil action, to the person injured, if he was in the exercise of due care. *Ludlow v. Fargo*, 3 N. D. 485, 57 N. W. 506.

So, where an obstruction was created in a street by persons engaged in doing work which the laws require the city to do, and apparently in the pay of the city at the time, the city is liable for an injury resulting from the obstruction, though it does not appear technically that the obstruction in question was created under official authority. *Ibid*.

And, where a trench is made in a street, and a duly authorized agent of the city is present watching the progress of the work, who sees the obstruction of a culvert and gutter and the danger to be reasonably apprehended therefrom, the city has actual notice that property in the immediate neighborhood of the trench, gutter, and culvert will be threatened with injury if a rain occurs; and it is liable in such case if no effort to protect against it is made. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773, affirming 40 App. Div. 320, 57 N. Y. Supp. 968.

So, where a street commissioner digs a ditch in a city street, his knowledge is notice to the municipal corporation. *Childs v. West Troy*, 23 Hun, 68, 20 L.R.A. (N.S.)

And, where the superintendent of water commissioners was also superintendent of highways of a village; and his duty was to keep the streets in repair, or, in case they were necessarily out of repair, so to guard and protect the public that no injury should come therefrom; and this superintendent directed an excavation to be made in a street for the purpose of making repairs to pipes,—his knowledge of the excavation was the knowledge of the village, and his neglect to repair the highway or guard against accident fixes the village with liability for resulting damage. *Deyoe v. Saratoga Springs*, 1 Hun, 341, 3 Thomp. & C. 504.

Nor can a city escape liability for an injury to a person who drove against a rope stretched across one of its principal streets for the purpose of stopping travel at that particular point, on the theory that it is not liable for the act of the police officer who placed it there, if he was acting under the mayor's instructions. *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542.

And, where a rope was strung across a street by a park policeman under the supervision and control of the park commissioners in order to carry out instructions to prevent travel upon the street at that place, and an injury was caused thereby, the cause of the injury was the direct act of the servant of the board, and the city cannot escape liability on the plea that it had no notice of the obstruction, or that the obstruction had not continued for such a length of time as to have given the city constructive notice thereof. *Kleopfert v. Minneapolis*, 93 Minn. 118, 100 N. W. 669.

And a charter provision for the election of an executive board with power to let all contracts to be made by the city pursuant to ordinances, and to superintend their execution, and giving it superintendence and control of all work and improvement ordered by the common council, and control of construction, improvement, repairing, and cleaning of streets, and making them commissioners of highways of the city, makes the executive board one of the instrumentalities employed to execute the power and carry out the business of the corporation; and the executive board is the agent or representative of the city as distinguished from a public officer, as such; and the city is chargeable with the negligence of the executive board; and, if such negligence causes an injury, there is no question of notice to the city. *Groves v. Rochester*, 39 Hun, 5.

So, a bridge across the sidewalk of a public street, 7 inches above the level of the sidewalk, and sloping on each side to the sidewalk, erected by the superintendent of streets of the city, which causes an accident, is an obstruction created by the city; and the city will be deemed to have had full notice of its existence. *Stedman v. Rome*, 88 Hun, 279, 34 N. Y. Supp. 737.

And a municipal corporation the civil engineer of which directed a property owner to erect a water spout so as to run the water onto a sidewalk is chargeable with notice that ice would be formed by reason

thereof, and would make such sidewalk dangerous. *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250.

And, where a defective grating covering a cesspool in a street was placed there by a street commissioner of the city; and he knew its condition from the beginning,—no notice of it is necessary to establish the liability of the city for a resulting injury. *Buck v. Biddleford*, 82 Mo. 433, 19 Atl. 912.

And a complaint in an action against a city, charging that the agents of the city knowingly and carelessly allowed a street to be obstructed by an exhibition of wild animals; and that such exhibition was authorized by the city,—sufficiently alleges that the city had due and sufficient notice of the exhibition. *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435.

Nor does a statutory or charter provision that no action against a city for injuries sustained by reason of any defect in any street shall be maintained unless written notice of the injury was given to the proper officers within a specified number of days of the occurrence thereof apply where the injury was caused by a nuisance created by the positive acts of the city's agents. *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407; *Adams v. Oshkosh*, 71 Wis. 49, 36 N. W. 614; *Jones v. Deering*, 94 Me. 165, 47 Atl. 140; *Stedman v. Rome*, supra; *Houston v. Isaacks*, 68 Tex. 116, 3 S. W. 693.

Such as leaving a large wooden roller in a street. *Hughes v. Fond du Lac*, supra.

Where a street commissioner directed a subordinate to construct a cross walk across a street, and, in doing so, the subordinate created an obstruction in the street which resulted in an injury to a traveler, however, the question of actual notice under Me. Rev. Stat. chap. 18, § 80, it not one of general legal principles, but is purely one of statutory interpretation, since the injured party's right of action, if any, is based solely on the statute, and the doctrine of principal and agent, and master and servant, in this respect, is not applicable. *Emery v. Waterville*, 90 Me. 485, 38 Atl. 534.

And the mere fact that a street commissioner directed a subordinate to construct a cross walk across a street does not of itself charge the commissioner with actual notice that the cross walk was so constructed as to become a defect and obstruction in the street, where the commissioner, while cognizant of the existence of the cross walk, was ignorant of any defect in it. *Ibid*.

So, where a boy sixteen years of age who was employed to light and extinguish street lamps in a city, having received general directions from his superior to shut off the gas at midnight, was told of the existence of a defect in a street just before an accident caused thereby, as he was in the act of extinguishing the lights, his knowledge thereof was not notice to the city. *Monies v. Lynn*, 119 Mass. 273.

And a city is not chargeable with notice of a pile of snow in a street, left there by an employee in cleaning a sidewalk, no of-

ficer of the city knowing of it, and the employee not being a person whose knowledge of a defect is sufficient to charge the city. *Rich v. Rockland*, 87 Me. 188, 32 Atl. 872.

(c) By contractor.

A municipal corporation which rightfully causes an improvement to be constructed or other work to be done in its streets, whether by an independent contractor or otherwise, is bound to take notice of the character of the work, and its condition, whether safe or dangerous, and is bound to take notice of the condition, whether safe or dangerous, of its streets as affected by the prosecution or performance of such improvement or work. *Beatrice v. Reid*, 41 Neb. 214, 59 N. W. 770.

And, if a street has been rendered unsafe or insecure by the act of the city's own contractors in making a public improvement, the city must be held to have knowledge of the resulting consequences. *Smith v. St. Joseph*, 42 Mo. App. 392.

And, where a city contracts for the performance of work, and, to do the work contracted for, necessarily requires the creation of obstructions or excavations dangerous to public travel, it is charged with notice of the necessity for guards or signal lights; and notice that the duty of properly placing such guards or signal lights has not been performed is not required to charge the city with liability for the nonperformance. *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231; *Smith v. St. Joseph*, supra.

So, no actual notice of the dangerous condition of a street, caused by an excavation therein, is necessary to be brought home to the officers of the city, where the city had, by contract, allowed ditches and excavations dangerous to the traveling public to be made in its streets, and left unguarded by barriers or danger signals. *Oklahoma City v. Welsh*, 3 Okla. 288, 41 Pac. 598; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Sterling v. Schiffmacher*, 47 Ill. App. 141; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; *Kinsey v. Kinston*, 145 N. C. 106, 58 S. E. 912.

And, where a trench was made in a street under a contract by the city with a contractor by which the contractor was to furnish material and labor for the reconstruction of sewer inlets in any part of the city; and, when ordered, the work was to be done in the presence of an inspector, the city reserving the right of absolute control and direction,—if there is negligence in the manner of filling the trench, and an injury results from the surface of the street sinking at that point, the city, through its agents appointed to supervise and inspect the work, has notice of it, and is liable for the injury. *Burger v. Philadelphia*, 196 Pa. 41, 46 Atl. 262.

Nor can a city which employed an independent contractor to cut an opening in an asphalt pavement on a street, who, during a suspension of the work, put in a temporary filling, escape liability for the de-

fective condition of such opening, on the ground that it had no time in which to remedy the same, where the temporary filling was done under the supervision of the city inspector. *Newman v. New York*, 57 Misc. 636, 108 N. Y. Supp. 676.

And a city is chargeable with notice of an excavation extending into a sidewalk, made for the purpose of a basement window, under the direction of a member of a firm of building contractors who was a member of the city council and chairman on streets and alleys, notwithstanding the fact that he had not obtained a permit to make the excavation, where it does not appear that such permit was necessary. *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227.

So, a municipal corporation is liable for an injury to a traveler on a highway, caused by negligence in guarding trenches for laying water pipes, although the defect had not existed twenty-four hours and the town had no notice thereof, where the trenches were made by a contractor with whom the municipality had agreed that he should make all trenches needed for laying water pipes in such streets, as the committee might from time to time direct, and that he should guard and light trenches by night for the protection of travelers. *Brooks v. Somerville*, 106 Mass. 271.

And where a contract between a city and a water company engaged in laying water pipes in the streets of the city provided that, upon failure of the water company for twenty-four hours after laying its pipe to put the street in the required order, the city, by its proper officer, should notify it to do so; and, upon further failure of twenty-four hours, that the city should do the work itself,—the city was obliged to know for itself whether the work was properly done or not; and it will be conclusively presumed to have had knowledge of a defect in such work, and cannot be heard to say that it did not receive notice thereof. *Denver v. Aaron*, 6 Colo. App. 232, 40 Pac. 587.

(d) Under permit or license.

Where work is being done in the public streets by permission of the municipal body, of a kind likely to cause, or that may cause, injury to individuals, it is the duty of the municipal body to exercise a vigilant supervision of the work to see that no such injury takes place; and a failure to do so is negligence for which it is liable to the party injured. *Anderson v. Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509; *McPherson v. District of Columbia*, 7 Mackey, 564; *Godfrey v. New York*, 104 App. Div. 357, 93 N. Y. Supp. 899.

And a municipal corporation which authorizes or acquiesces in the obstruction of a street has notice of the obstruction. *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270.

The law charges a city which grants permission for an act to be done in the streets, with notice of everything that is done pur-

suant to the permission. *Mehan v. St. Louis* (Mo.) 116 S. W. 514.

And where a defect or obstruction in a street was occasioned by the act of a party authorized by the city to make use of the street, which resulted in producing the defect, the city is liable for a resulting injury without notice. *Taubman v. Lexington*, 25 Mo. App. 218; *McPherson v. District of Columbia*, supra; *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255; *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 So. 452; *Uhrichsville v. Fisher*, 45 Ohio L. J. 229; *Oklahoma City v. Welsh*, 3 Okla. 288, 41 Pac. 598.

And, if a nuisance is placed or erected in a street of a city by an individual in pursuance of a license or permission granted for that purpose by the corporation, its responsibility for the structure commences from that instant as though it was its own work. *Herfurth v. Washington*, 6 D. C. 289.

And a city which grants a permit to repair a sidewalk is chargeable with notice of the work and with the duty to see that the work is properly conducted. *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912.

So, where an obstruction is placed in an alley by permission of the city, and an injury results therefrom, that the city had notice of the obstruction need not be alleged in a complaint in an action for the injury. *Mehan v. St. Louis*, supra.

It is only when a city is the actor in placing an obstruction in a street, or in cases of license by the city to do an intrinsically dangerous thing in the street, and not in cases properly of mere regulation, however, that the city is liable without notice, or is charged with notice by the fact that it gave the permit to do the thing in the street. *Columbus v. Penrod*, 73 Ohio St. 209, 3 L.R.A. (N.S.) 386, 112 Am. St. Rep. 716, 76 N. E. 826.

And a city which, for compensation, granted the right to erect a booth on one of its public squares for the use and exhibition of an animal, is not liable for an injury occasioned by the animal frightening a horse, where at the time the animal was not in the place for the use of which the city received compensation, or in charge of any agent of the city. *Cole v. Newburyport*, 129 Mass. 594, 37 Am. Rep. 394.

c. Constructive or implied notice.

1. General rules.

Actual knowledge or express notice of an obstruction in a street need not be brought home to a municipal corporation in order to hold it liable for an injury resulting therefrom; constructive or implied notice is sufficient. *Mosey v. Troy*, 61 Barb. 580; *Walker v. Lockport*, 43 How. Pr. 366; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Weed v. Ballston Spa*, 76 N. Y. 329; *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Downs v. Smyrna*, 2 Penn. (Del.) 132, 45 Atl. 717; *Larmon v. District of Columbia*, 5 Mackey, 330; *Chapman v. Macon*, 55

Ga. 566; *Atlanta v. Perdue*, 53 Ga. 607; *Idlett v. Atlanta*, 123 Ga. 821, 51 S. E. 709; *Sterling v. Merrill*, 124 Ill. 522, 17 N. E. 6; *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578; *Streator v. O'Brien*, 103 Ill. App. 85; *Fairfield v. Hornick*, 53 Ill. App. 558; *Reid v. Chicago*, 83 Ill. App. 554; *Springfield v. Doyle*, 76 Ill. 202; *Hearn v. Chicago*, 20 Ill. App. 249; *Murphysboro v. Baker*, 34 Ill. App. 657; *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474; *Linton v. Smith*, 31 Ind. App. 546, 68 N. E. 617; *Newcastle v. Grubbs* (Ind.) 86 N. E. 757; *Montgomery v. Des Moines*, 55 Iowa, 101, 7 N. W. 421; *Madisonville v. Pemberton*, 25 Ky. L. Rep. 347, 75 S. W. 229; *Campbell v. Kalamazoo*, 80 Mich. 655, 45 N. W. 652; *Dotton v. Albion*, 50 Mich. 129, 15 N. W. 46; *Whitfield v. Meridian*, 66 Miss. 570, 4 L.R.A. 834, 14 Am. St. Rep. 596, 6 So. 244; *Rusher v. Aurora*, 71 Mo. App. 418; *Market v. St. Louis*, 56 Mo. 189; *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96; *Walker v. Point Pleasant*, 49 Mo. App. 244; *Bonine v. Richmond*, 75 Mo. 437; *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Walker v. Springfield*, 3 Ohio Dec. Reprint, 567; *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95; *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386.

And an instruction on actual knowledge of a hole in a street, in an action against a city for injuries caused by it, is harmless although actual knowledge was not proven, where the evidence was sufficient to charge the city with constructive notice. *Dallas v. Muncton*, 37 Tex. Civ. App. 112, 83 S. W. 431.

Constructive notice in case of a defective or obstructed street is an inference of notice drawn from official opportunity to obtain it and from official obligation to be reasonably vigilant in keeping the public streets safe for travel. *McNally v. Cohoes*, 53 Hun, 202.

It exists where the municipal corporation, by the exercise of ordinary intelligence, could have discovered the defect in time to have made the necessary repairs before the injury in question, and is inferred from the circumstances, by the jury. *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90.

By constructive notice of a defect or obstruction is meant that, there was a defect or obstruction which was so patent and obvious as to be generally noticed by persons passing over it, and this continued to exist for such a length of time prior to the time of the accident in question that it might be reasonably inferred that some person whose duty it was to keep the streets in repair knew of such defect. *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57.

Negligent ignorance on the part of a city is no less a breach of duty than wilful neglect. *Whitfield v. Meridian*, supra; *Hazard v. Council Bluffs*, 87 Iowa, 51, 53 N. W. 1083.

And, if there existed a set of facts with which ignorance was not compatible, except 20 L.R.A. (N.S.)

by a failure to exercise reasonable official care, then there is sufficient ground for presuming notice. *Dotton v. Albion*, supra.

It is sufficient to prove that the obstruction or defect had existed such a length of time that the corporation, in the exercise of proper care and diligence, should have known of it. *Muncie v. Hey*, supra; *Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632; *Larmon v. District of Columbia*, supra; *District of Columbia v. Payne*, 13 App. D. C. 500; *Domer v. District of Columbia*, 21 App. D. C. 284; *Idlett v. Atlanta*; *Sterling v. Merrill*; and *Chicago v. Dalle*,—supra; *DeKalb v. Ashley*, 61 Ill. App. 647; *Frankfort v. Coleman*, supra; *Indianapolis v. Scott*, 72 Ind. 196; *Newcastle v. Grubbs*; *Montgomery v. Des Moines*; *Hazard v. Council Bluffs*; *Madisonville v. Pemberton*; *Rusher v. Aurora*; and *Walker v. Point Pleasant*,—supra; *Sherman v. Oneonta*, 49 N. Y. S. R. 267, 21 N. Y. Supp. 137; *Fitzgerald v. Concord*, supra; *Toledo v. Center*, 16 Ohio C. C. 308, *Walker v. Springfield* and *Dallas v. Moore*, supra; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273.

Or so long as to make it public and notorious. *Mosey v. Troy*; *Walker v. Lockport*; and *Weed v. Ballston Spa*,—supra; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414; *Thomas v. Brooklyn*, 58 Iowa, 438, 10 N. W. 849.

Or as to justify the presumption that its existence was known to the agents of the corporation, charged with the duty of keeping the streets in repair. *Weed v. Ballston Spa*, supra; *Chenoweth v. Kramer*, 109 Ill. App. 85; *Hearn v. Chicago*, supra; *Brownlee v. Alexis*, 39 Ill. App. 135; *Montgomery v. Des Moines*, supra.

And this is true, though in point of fact the proper officers of the city did not know of such obstruction. *Boulder v. Niles* and *Domer v. District of Columbia*, supra.

If it had existed for such a period of time that, by the exercise of ordinary care and diligence, the city authorities ought to have discovered and could have repaired the defect or obstruction, and placed the street or sidewalk in a reasonably safe condition; and it failed to do so,—it is liable for any injuries that may have been occasioned thereby, provided the injured party was in the exercise of ordinary care. *Norman v. Teel* and *Atlanta v. Perdue*, supra; *Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454; *Senhenn v. Evansville*, 140 Ind. 675, 40 N. E. 69; *Smith v. Sioux City*, 119 Iowa, 50, 93 N. W. 81; *Cook v. Anamosa*, 66 Iowa, 427, 23 N. W. 907; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Cincinnati v. Frazer*, 18 Ohio C. C. 50; *Cowie v. Seattle*, supra; *Fairfield v. Hornick*, 53 Ill. App. 558; *Michigan City v. Phillips*, 163 Ind. 449, 71 N. E. 449, affirming (Ind. App.) 69 N. E. 700; *Miller v. Canton*, supra; *Lynch v. Buffalo*, 6 Misc. 583, 27 N. Y. Supp. 303.

If a defect or an obstruction in a street was, at the time of an injury therefrom, palpable, dangerous, and in a public place,

and had existed for a considerable period of time, knowledge upon the part of the city authorities may be presumed. *Bill v. Norwich*, 39 Conn. 222; *Downs v. Smyrna*, 2 Penn. (Del.) 132, 45 Atl. 717; *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451; *Chapman v. Macon*, 55 Ga. 566; *Hogan v. Chicago*, 168 Ill. 551, 48 N. E. 210, reversing 59 Ill. App. 446; *Springfield v. Doyle*, 76 Ill. 202; *Reid v. Chicago*, 83 Ill. App. 554; *Fairfield v. Hornick*, supra; *Powell v. Bowen*, 92 Ill. App. 453; *McLeansboro v. Lay*, 29 Ill. App. 478; *Belvidere v. Crichton*, 81 Ill. App. 595; *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255; *Shipley v. Bolivar*, 42 Mo. App. 401; *Todd v. Troy*, 61 N. Y. 506; *Rife v. Middletown*, 32 Pa. Super. Ct. 68; *Philadelphia v. Smith*, 1 Monaghan (Pa.) 147, 16 Atl. 493.

In such case it is proper to infer either negligent supervision and ignorance consequent upon the negligence, or notice of the defect and a disregard of the duty to repair it. *Manchester v. Hartford*, 30 Conn. 118.

And a prima facie case against a city is made out by evidence showing the defective condition of a sidewalk, where the injury in question occurred after the lapse of such a period of time that notice thereof should be inferred, where the defect was not so glaring that a prudent man would not have undertaken to use the walk. *Huff v. Marshall*, 97 Mo. App. 542, 71 S. W. 477.

Nor need a complaint in an action against a city for an injury caused by an obstruction in a street directly allege that the city had notice of the defect complained of; it is sufficient if it states facts from which such notice would be inferred. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978; *Evansville v. Wilter*, 86 Ind. 414; *Padelford v. Eagle Grove*, 117 Iowa, 616, 91 N. W. 899.

And a complaint in such an action, charging that the street was obstructed by a large mowing machine which then and there stood in the street, of which, on the day of the injury and for a long time previous, the city had knowledge, sufficiently charges notice to withstand a demurrer. *Mt. Vernon v. Hoehn*, 22 Ind. App. 282, 55 N. E. 654.

And a charge in an action against a city, that the defendant allowed a dangerous hole to remain in one of its sidewalks, imports that the defect had existed sufficiently long to have been discovered and remedied by the exercise of due care on the part of the defendant. *Anniston v. Ivey*, 151 Ala. 392, 44 So. 48.

Nor is a complaint in an action against a city for a personal injury objectionable because it charges that the city had actual notice of an obstruction in a street, causing the injury complained of, when the evidence shows that it had constructive notice only. *Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947.

And, where an injury was caused by a ditch dug by a contractor across a sidewalk for the purpose of laying a water pipe, an allegation in an action against the city for 20 L.R.A. (N.S.)

the injury that the city well knew of the dangerous condition sufficiently charges constructive notice of such excavation. *Pace v. Webster City*, 138 Iowa, 107, 115 N. W. 888.

And an allegation that notice of the dangerous condition of a sidewalk was had by the city for a long time prior to the date of the accident in question is sufficient. *Linton v. Smith*, 31 Ind. App. 546, 68 N. E. 617.

And proof of circumstances from which it appears that a defect or obstruction in a street ought to have been known and remedied by the city or its proper officers is sufficient, in an action for damages for the injury, on the question of notice. *Lindholm v. St. Paul*, 19 Minn. 245, Gil. 204.

Nor will a recovery for an injury caused by a defective street be disturbed for want of notice to the city of the condition of the street, where the evidence tends to show a set of facts which charges it with presumptive notice that the sidewalk at the place of injury was out of repair. *Goodno v. Oshkosh*, 28 Wis. 300.

And a city in the streets of which a dangerous obstruction had existed for such a length of time that it was chargeable by law with notice and with the duty of removing it cannot complain, in an action against it for an injury resulting therefrom, of an instruction given upon the question of notice. *Denver v. Murray*, 18 Colo. App. 142, 70 Pac. 440.

To constitute constructive notice of a defect or obstruction in a street, however, the defect or obstruction must be so patent that it can be found out by the corporation by the use of reasonable care and diligence. *Hunt v. New York*, 20 Jones & S. 198; *Ryan v. Chicago*, 79 Ill. App. 28.

And, in the absence of actual notice of a defect in a highway, the town or city is not liable for an injury caused by it, unless it had existed so long that notice or knowledge thereof should be imputed to the municipality. *Franklin v. House*, 104 Tenn. 1, 55 S. W. 153; *Nokomis v. Farley*, 113 Ill. App. 161.

Where a defect in a sidewalk was hidden, and the city had no actual notice of its existence, and it is not shown to have existed for a sufficient length of time to justify the assumption that, by the exercise of ordinary care, the city might have known of its existence, there is no such negligence as will justify a recovery for an injury caused thereby. *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210.

And a plank sidewalk is not so unsafe as to render a municipal corporation liable to one who falls upon it because his cane goes through it, although it is so old that the edges of the plank have become decayed, and, adjacent to the cracks, they will not withstand the pressure of a cane, where the defect is not such as to attract attention, and obvious defects have been repaired as they occurred. *Harden v. Jackson*, 137 Mich. 271, 66 L.R.A. 986, 100 N. W. 389.

2. Duration of existence of obstruction as affecting.

(a) Generally.

Length of time during which a defect or obstruction in a street existed and was visible may justify a jury, in an action for an injury resulting therefrom, in finding notice to the city of the defect. *Dundas v. Lansing*, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011; *Aurora v. Bitner*, 100 Ind. 396; *Donaldson v. Boston*, 16 Gray, 508; *Davenport v. Ruckman*, 10 Bosw. 20, 16 Abb. Pr. 341, affirmed in 37 N. Y. 568; *Magee v. Troy*, 48 Hun, 383, 1 N. Y. Supp. 24.

And evidence tending to show how long a hole in a sidewalk was left unguarded is admissible in such an action. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

But there is no fixed or definite rule as to what length of time a defect or obstruction must have existed to furnish notice to the municipal authorities thereof; each case must depend upon the facts and circumstances attending it. *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709; *Gerber v. Kansas City*, 105 Mo. App. 191, 79 S. W. 717; *Reed v. Mexico*, 101 Mo. App. 155, 76 S. W. 53; *Ottawa v. Hayne*, 114 Ill. App. 21, affirmed in 214 Ill. 45, 73 N. E. 385; *Cutter v. Des Moines*, 137 Iowa, 643, 113 N. W. 1081; *Colley v. Westbrook*, 57 Me. 181, 2 Am. Rep. 30; *Hoyer v. North Tonawanda*, 79 Hun, 39, 29 N. Y. Supp. 650.

And very much depends upon the character of the defect or obstruction. *Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454; *Reed v. Mexico*, supra.

And upon the circumstances and surroundings. *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96; *Aurora v. Bitner*, supra.

Where a defect or obstruction in a street or sidewalk has remained such a length of time that the city officers whose duty it is to examine streets and repair them should, in the use of reasonable diligence, have discovered the danger, then notice to the city will be inferred. *Tucker v. Salt Lake City*, 10 Utah, 173, 37 Pac. 261; *Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403; *Chicago v. Gillett*, 108 Ill. App. 455; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Birch v. Charleston Light, Heat & P. Co.* 113 Ill. App. 229; *Brown v. Chillicothe*, 122 Iowa, 640, 98 N. W. 502; *Louisville v. Brewer*, 24 Ky. L. Rep. 1671, 72 S. W. 9; *Henderson v. Reed*, 23 Ky. L. Rep. 463, 62 S. W. 1039; *Cutcher v. Detroit*, 139 Mich. 186, 102 N. W. 629; *Rodda v. Detroit*, 117 Mich. 412, 75 N. W. 939; *Market v. St. Louis*, 56 Mo. 189; *Clark v. Brookfield*, 97 Mo. App. 16, 70 S. W. 934; *Knight v. Kansas City*, 113 Mo. App. 561, 87 S. W. 1192; *White v. New Bern*, 146 N. C. 447, 13 L.R.A. (N.S.) 1166, 59 S. E. 992; *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; *Archer v. Mt. Vernon*, 57 App. Div. 32, 67 N. Y. Supp. 1040; *Strobel v. New York*, 15 Misc. 115, 36 N. Y. Supp. 814; *Byrne v. Syracuse*, 79 Hun, 555, 29 N. Y. Supp. 912; *Davenport v. Ruckman*, 10 Bosw. 20; *Walker v. Springfield*, 3 Ohio Dec. Reprint, 567; *Philadelphia v. Smith*, 1 Monaghan (Pa.) 147, 16 Atl. 493; *Waxahachie v. Connor* (Tex. Civ. App.) 35 S. W. 602; *Lynchburg v. Wallace*, 95 Va. 640, 29 S. E. 675; *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; *Devenish v. Spokane*, 21 Wash. 77, 57 Pac. 340; *Larsen v. Sedro-Woolley*, 49 Wash. 134, 94 Pac. 938; *West v. Eau Claire*, 89 Wis. 31, 61 N. W. 313; *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532; *Gaffney v. Montreal*, Rap. Jud. Quebec, 16 C. S. 260.

Where a street is thrown open for public use, those who travel upon it have the right to assume that it is in a reasonably safe condition; and if, without default on their part, or without knowledge of some existing obstruction, they are injured while lawfully using the street, the city is liable, unless the defect which has caused the injury has existed for so short a time that the city officials, by the exercise of reasonable care and supervision, could not have known of it. *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344.

And a declaration in an action against a city for an injury caused by stepping into a hole in a sidewalk in the night, alleging that the defendant well knew, or by the exercise of reasonable care ought to have known, of the existence of the defect, is not subject to the objection that it does not allege that the defect existed for such a length of time before the accident as to justify a presumption of notice, which takes the place of actual notice. *Germaine v. Muskegon*, 105 Mich. 213, 63 N. W. 78.

Nor is a complaint against a city for a personal injury caused by a defective board sidewalk alleged to have been permitted to become out of repair bad when questioned for the first time on appeal, for failing to allege that it had been out of repair for any designated period, or that the city had knowledge or notice of its decayed condition for any specified period before the time of injury. *Evansville v. Frazer*, 24 Ind. App. 628, 56 N. E. 729.

So, where mortar boxes had been permitted to remain in a street at least three or four weeks, and an accident resulted therefrom, the municipality will be deemed to have had notice thereof; and it will be held liable for the injury. *Munley v. Sugar Notch*, 215 Pa. 228, 64 Atl. 377.

And, where a person was injured by driving in the nighttime into a pile of stones of the presence of which in the street no warning was given by a light, and it appears that the stones had been in the street for at least three days, the question whether the city had constructive notice of the obstruction, in an action against it for the injury, is properly submitted to the jury. *Koch v. Williamsport*, 195 Pa. 488, 46 Atl. 67.

So, where a counter was placed on a sidewalk in front of the owner's building, leaning against the building, on Tuesday, and it

remained there without falling until Saturday afternoon, when it was pushed over by one of three children playing around it, and a person was injured thereby, it is for the jury, in an action for the injury, to say whether the time during which the counter had stood on the sidewalk was enough to make the city responsible therefor. *Kunz v. Troy*, 16 N. Y. S. R. 459, 1 N. Y. Supp. 596.

And, where a pile of dirt was deposited in a street by the procurement of the owner of adjacent premises for the purpose of having it taken on his lot, and it had remained there three or four days and nights continuously up to the time of an accident caused thereby, the city is chargeable with notice of the obstruction, and therefore with negligence in permitting it to remain. *Briel v. Buffalo*, 90 Hun, 93, 35 N. Y. Supp. 359.

And a complaint, in an action for damages resulting from a horse being frightened by a stump lying in a street, and running over an unguarded side of the street into a river, charging that the stump was there and the side of the street was without barricade for two weeks; and that the city knew thereof and failed to remedy it,—sufficiently charges notice to the city of the obstruction and defect. *Huntington v. Lusch*, 33 Ind. App. 476, 70 N. E. 402.

So, the existence of a defect in a sidewalk for a year or more is sufficient to charge the city with constructive notice thereof. *Rodda v. Detroit*, 117 Mich. 412, 75 N. W. 939; *Michigan City v. Phillips*, 163 Ind. 449, 71 N. E. 205, affirming (Ind. App.) 69 N. E. 700.

And evidence that a visible defect has existed in a sidewalk of a principal street of a city for several months is sufficient to warrant a jury in finding that the city was negligent in relation thereto. *Salina v. Kerr*, 7 Kan. App. 223, 52 Pac. 901; *Hoover v. Mapleton*, 110 Iowa, 571, 81 N. W. 776.

And a complaint in an action against a city for an injury alleged to have been caused by a dangerous sidewalk will not be dismissed upon the ground that there was no evidence of any knowledge brought home to the city of the condition of the sidewalk, where the case was such that the jury were at liberty to find that the sidewalk had been for two weeks dangerous to passers-by from the snow and ice upon it. *Smid v. New York*, 17 Jones & S. 126.

And evidence of the condition of a sidewalk and repairs thereof for many years prior to an accident thereon is admissible, in an action against the municipal corporation for injuries caused by the accident, to show not only the actual condition of the walk, but that the municipal corporation had knowledge thereof. *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095.

So, a dangerous condition of a sidewalk caused by an accumulation of ice and snow existing for three or four days prior to an accident caused thereby constitutes sufficient evidence of constructive notice to the borough authorities to carry the case to the jury. *Reed v. Schuylkill Haven*, 22 Pa. 20 L.R.A. (N.S.)

Super. Ct. 27; *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523.

And, where ice was formed by water flowing down from an embankment and freezing; and it alternately thawed and froze for two or three weeks; and the ice was in several layers; and at the time of an accident thereon it had a slight covering of snow; and it did not appear that the streets were in a generally icy condition,—notice to the city might be presumed from the long-continued accumulation. *Re Nay*, 19 N. Y. S. R. 259, 3 N. Y. Supp. 679, affirmed in 123 N. Y. 628, 25 N. E. 952.

So, where a hole has existed in a sidewalk for several months, actual notice to the city authorities thereof is not necessary to a right of recovery against the city for an injury resulting therefrom. *Ottawa v. Stricklin*, 45 Ill. App. 288; *Chicago v. Davies*, 110 Ill. App. 427; *Chicago v. Crooker*, 2 Ill. App. 279; *Larmon v. District of Columbia*, 5 Mackey, 330; *Robinson v. Wilmington*, 8 Houst. (Del.) 409, 32 Atl. 347; *Idlett v. Atlanta*, 123 Ga. 821, 51 S. E. 709; *Rosenberg v. Des Moines*, 41 Iowa, 415; *Lorenz v. New Orleans*, 114 La. 802, 38 So. 566; *Hunter v. Durand*, 137 Mich. 54, 100 N. W. 191; *Moore v. Minneapolis*, 19 Minn. 300, Gil. 258; *Bradford v. Downs*, 126 Pa. 622, 17 Atl. 884; *Lorenz v. Ellensburg*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978.

And the existence of a trench in a sidewalk, excavated by a private individual, for eight days, is sufficient to justify a jury in finding that the city authorities should have known of its existence. *O'Hara v. Buffalo*, 39 App. Div. 443, 57 N. Y. Supp. 367.

And evidence tending to prove that a hole about 3½ inches in depth and about 4 feet 4 inches wide, in a sidewalk, had existed for eight or ten days before an accident caused thereby; and that a witness had stumbled into it during that time,—is sufficient to permit the jury, in an action for the injury, to infer that the city authorities, by the use of reasonable diligence, had or should have obtained information of its existence, and to charge them with carelessness in not restoring the walk to a safe condition. *Ryan v. New York*, 28 N. Y. Week. Dig. 129, 13 N. Y. S. R. 550.

So, where a crossing was dangerous because it was oval shaped, and not level, and by long use it had become worn smooth and slippery; and it was located in a public and much-traveled street; and this condition had existed for ninety days,—the city is liable for an injury caused thereby. *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128.

And a municipal corporation is chargeable with constructive notice of defects in a public alley which had existed for the period of six weeks preceding an injury caused thereby. *Indianapolis v. Murphy*, 91 Ind. 382.

And a charge that an excavation in a street was in existence on the 10th of a named month, and that the injury therefrom was sustained on the 14th of the same month, sufficiently imputes knowledge there-

of to the city. *Ft. Wayne v. Duryee*, 9 Ind. App. 620, 37 N. W. 299.

And, where a trench dug for laying water pipes in a street is improperly filled, and the street is rendered defective thereby, and, six months afterwards, a person is injured by reason of such negligent filling of the trench, a finding, in an action for the injury, that the municipality either had notice of the defect, or by the exercise of reasonable diligence might have had notice of it, is warranted. *Stoddard v. Winchester*, 157 Mass. 567, 32 N. E. 948.

So, the existence for two or three weeks, of a hole about a foot wide in a highway bridge, into which a person stepped in the daytime without seeing it, justifies a finding, in an action for the injury received, that the highway commissioner was guilty of negligence. *Foels v. Tonawanda*, 75 Hun, 363, 27 N. Y. Supp. 113.

And a municipal corporation sued by one who fell into a drain which had been dug in a much-frequented place, and which had been under process of construction for nearly a month, and had remained in an unprotected state for some time, cannot defend on the ground that it did not authorize the drain to be dug, since it must be deemed to have had full notice. *Adair v. Kingston*, 27 U. C. C. P. 126.

And, where an injury occurs because an excavation authorized by the city was left unguarded during the night, it is not necessary to show, in order to recover of the city, that on previous nights the excavation had also been left unguarded. *Gable v. Toledo*, 16 Ohio C. C. 515.

And, where a trapdoor of a cellar way projecting into a sidewalk of a city street was open, and a person fell in and was injured at noon, evidence that it was open early in the morning, and that it could be raised only from the inside, and the testimony of the occupant of the building that he did not open the door or cause it to be opened or know that it was open, is sufficient to go to the jury in an action against the city for the injury, on the question whether the proper officers of the city, whose duty it was to attend to municipal affairs, either knew, or with proper vigilance might have known, of the open door, in time to have prevented by reasonable effort the injury complained of. *Harriman v. Boston*, 114 Mass. 241.

To recover for an injury alleged to have been caused by a defective or obstructed sidewalk, however, it is essential that the defect which caused the injury should have existed for a sufficient length of time to enable the proper officers of the municipality, by the exercise of ordinary care, to discover it. *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Montezuma v. Wilson*, 82 Ga. 206, 15 Am. St. Rep. 150, 9 S. E. 17; *Ince v. Toronto*, 27 Ont. App. Rep. 410; *Gunlack v. Montreal*, Rap. Jud. Quebec, 17 C. S. 294.

And, when a defective condition of a street is produced by some sudden cause, or by the act of a trespasser, or by some means not anticipated, the lapse of a reasonable time is necessary to raise the implication. (N.S.)

tion of notice to the municipal authorities, so as to hold them liable for a resulting injury. *Hoyer v. North Tonawanda*, 79 Hun, 39, 29 N. Y. Supp. 650; *Warsaw v. Dunlap*, 112 Ind. 576, 11 N. W. 623, 14 N. E. 568; *Franklin v. House*, 104 Tenn. 1, 55 S. W. 153.

And, if a sidewalk was repaired and placed in a condition reasonably safe for pedestrians, and a traveler was injured thereon on the next day, it cannot be said that a sufficient length of time had elapsed from which notice of the condition of the sidewalk could be inferred, or that the city had a reasonable time within which to repair the defect. *Dittrich v. Detroit*, 98 Mich. 245, 57 N. W. 125.

So, the fact that a sleigh was left standing in a street for ten or fifteen minutes will not raise a presumption of knowledge of the obstruction upon the part of the town officers. *Sikes v. Manchester*, 59 Iowa, 65, 12 N. W. 755.

And a municipal corporation is not liable for injuries to a person caused by the fright of the horse she was driving at an object in the street but outside of the traveled way, which had been put there two hours before without the knowledge of the city authorities. *Butler v. Oxford*, 69 Miss. 618, 13 So. 626.

Nor can it be held to be actionable neglect for a city to fail to discover in three hours an obstruction in one of its streets, caused by a lot of rock screenings being dumped there, so as to charge it with liability for an injury resulting therefrom. *Hazelrigg v. Frankfort*, 29 Ky. L. Rep. 207, 92 S. W. 584.

And, where a city contracted with a contractor for the paving of a street, the contractor agreeing to place proper guards around the work for the prevention of accidents; and the contractor left a pile of stones in the road without sufficiently lighting it, and an injury resulted therefrom; and there is no evidence that the city had any express notice of the obstruction; and the pile of stones was placed there the night before the accident,—the time between the accident and the placing of the pile of stones was not sufficient to justify a finding that the city was negligent in not knowing the condition of the street and removing the obstruction. *Godfrey v. New York*, 104 App. Div. 357, 93 N. Y. Supp. 899.

Nor is a lapse of less than forty-eight hours between a snowstorm and an accident caused by the slippery condition of the sidewalk resulting therefrom sufficient, as a matter of law, to establish constructive notice to the city authorities of the dangerous condition of a sidewalk, resulting from a deposit of fallen and unremoved snow. *Hawkins v. New York*, 54 App. Div. 258, 66 N. Y. Supp. 623; *Leipsic v. Gerdeman*, 68 Ohio St. 1, 67 N. E. 87; *Springer v. Philadelphia*, 9 Sadler (Pa.) 395, 12 Atl. 490.

And, where water flowed from a hydrant and froze upon a sidewalk on Monday night, and on the succeeding Friday night a person was injured by falling on the ice, no pre-

sumption of knowledge, upon the part of the city officers, of the obstruction, arises. *Corey v. Ann Arbor*, 134 Mich. 376, 96 N. W. 477.

So, the mere lapse of about five hours from the time a barrier was erected at a dangerous place in a street to the time of an injury caused thereby does not raise a presumption of notice to the city of the removal of the barrier, where it was not known when the barrier was removed, and nothing is shown as to the relative situation of the street, or the part of the street, in which the barrier had been placed. *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162.

And, where a hole in a sidewalk was first seen at about 5 o'clock in the morning; and it caused an injury at about 8 o'clock in the evening of that day; and no actual notice upon the part of the city of its existence appears,—a verdict should be directed for the defendant in an action against the city for the injury, upon the ground that the hole had not existed long enough to constitute constructive notice. *Reed v. Detroit*, 99 Mich. 204, 58 N. W. 44.

And a municipal corporation should not be held liable for an injury caused by the removal of a plank from a sidewalk by the wilful act of an unknown person less than an hour before the accident, the time being too short for the defect to become known and notorious. *Ferguson v. Waverly*, 128 App. Div. 697, 112 N. Y. Supp. 891.

So, where cellar doors in a sidewalk were properly constructed and safe when they were shut; and a pedestrian passed over them about 8 o'clock in the evening, when they were closed; but when she returned a little later one door was open, and she fell in and was injured,—the city is not liable for the injury in the absence of evidence that it had any actual notice that the door was open, or that it had ever before been open in the nighttime, or that it had ever before been open in the same manner or for like purposes. *Fehlhauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843.

And, where a manhole in a street was properly constructed, and the cover was a proper and sufficient one, and the only defect charged was the misplacement of the cover, evidence that, two or three days before the accident, which consisted of falling into the manhole, two men were cleaning out the sewer through this manhole, is not sufficient to go to the jury as tending to show that the defect had existed so long that the municipal corporation should have had notice of it. *Whitney v. Lowell*, 151 Mass. 212, 24 N. E. 47.

(b) Visible and notorious defects as distinguished from latent ones.

A much shorter period of time would be required to impose constructive notice upon a municipal corporation of a defect or obstruction in a street where the obstruction was prominently plain and visible in a much-frequented and public place than if it were some slight defect partially hidden

from view and readily and easily overlooked by both the authorities and the traveler. *Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454; *Powell v. Bowen*, 92 Ill. App. 453; *Reed v. Mexico*, 101 Mo. App. 155, 76 S. W. 53.

A city must be held to have constructive notice of a defect in a sidewalk where the defect was a matter of public notoriety in the neighborhood, and well known by almost everyone traveling over the walk. *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394; *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475; *Moon v. Ionia*, 81 Mich. 635, 46 N. W. 25.

And, if an obstruction in a street was one of such long duration as to be generally observable, the city is chargeable with constructive notice thereof. *McLaughlin v. Corry*, 77 Pa. 113, 18 Am. Rep. 432; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Colby v. Beaver Dam*, 34 Wis. 285; *Balls v. Woodward*, 51 Fed. 646.

And, where it has existed for such a length of time as to be generally known to the people in the neighborhood, it may be assumed that the officers of the city, whose duty it is to keep the streets in safe condition, have notice of such obstruction. *Evansville v. Wilter*, 86 Ind. 414.

So, evidence of the declarations of other persons with reference to the condition of a cross walk upon which a person fell and was injured is competent, in an action against the city for the injury, as tending to prove notice to the city of the condition of the sidewalk. *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

And the existence of defects and obstructions in a street may be shown in an action for an injury resulting therefrom, by proof that they were known to travelers and persons not citizens, as well as to citizens. *Varnham v. Council Bluffs*, 52 Iowa, 698, 3 N. W. 792.

And an instruction, in an action for an injury caused by a defect in a sidewalk, that, if the defect was open and notorious, the city is chargeable with notice thereof, means that the defect was not concealed or hidden but exposed to view and apparent; and is not subject to the objection that it would lead the jury to understand the reference to be to an open hole in the sidewalk. *Kelleher v. Keokuk*, 60 Iowa, 473, 15 N. W. 280.

So, a hole in a sidewalk which could be discovered at a distance of 2 rods, and which had existed for a number of months, cannot, as matter of law, be said to be a latent defect, but is such a defect as would be notice of itself to the city. *Urtel v. Flint*, 122 Mich. 65, 80 N. W. 991.

And, where a defect or depression in a sidewalk is a patent one, and has existed five or six weeks, the jury, in an action against the city for an injury caused by it, is warranted in finding that the city had notice of it. *Philadelphia v. Smith*, 1 Monaghan (Pa.) 147, 16 Atl. 493.

And the existence of a depression in a city street for thirty days prior to an injury

resulting therefrom is sufficient to charge the city with notice thereof. *Apker v. Hoquiam* (Wash.) 99 Pac. 746.

So, constructive notice of a washout in the edge of a sidewalk, which caused an injury, may be inferred from the notoriety of the defect, and its continuance for such length of time as to raise the presumption that the proper municipal officers did in fact know, or with due vigilance and care ought to have known, of it. *Montgomery v. Wrigut*, 72 Ala. 411, 47 Am. Rep. 422.

And the existence of a hole in a street, from 3 to 5 feet wide, from 1 to 2½ feet long, and 1 foot deep, caused by the settling of the paving stones, apparently, by the ground settling in front of a fire hydrant, and extending some distance across the highway; which had been in existence for a month before the accident,—requires the court, in an action against the city, by a person who drove into the excavation and was injured, to submit to the jury the question as to whether or not the defendant had notice of the existence of this condition of the pavement, or whether it was negligent in not having ascertained the condition of the street before. *Smith v. New York*, 17 App. Div. 438, 45 N. Y. Supp. 239.

So, the testimony of a witness that he passed an opening in a street to light and ventilate a cellar, daily for some time, and had always found it open, is sufficient to go to the jury, in an action for the injury caused by the hole, on the question whether, by the exercise of proper care, the town might have had notice of the hole. *Purple v. Greenfield*, 138 Mass. 1.

And evidence, that, before the accident in question, someone telephoned to the city hall that the street was in a dangerous condition because an approach to a bridge was undermined by water and contained openings, crevices, and holes is admissible in an action against the city for an injury caused by such defect as tending to show such a publicity or notoriety of the existence of the defect as would indicate that the city had, or with reasonable diligence could have had, notice thereof. *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95.

Likewise, a pile of dirt in a street might properly be found by a jury to be such an obstruction, when continued about ten hours, as would attract attention; and that, in the exercise of ordinary care, the city would have discovered and remedied it before an accident therefrom. *Parsons v. Manchester*, 67 N. H. 163, 27 Atl. 88.

And, where a pile of brush 2 feet high projected 8 feet into one of the principal streets of a town near the business portion thereof, and remained in such position for three days, the corporation was chargeable with notice of the obstruction and with liability for damages resulting from such negligence, where the person injured was free from contributory negligence. *Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454.

It cannot be presumed, however, that a city had notice of a latent defect in one of 20 L.R.A. (N.S.)

its streets when the defect was not made by it or under its direction. *Hunt v. New York*, 20 Jones & S. 198; *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

A city is not liable for latent or unseen defects in its sidewalks, not discoverable by the exercise of ordinary care; and no recovery can be had against a city for an injury on a city sidewalk where the sidewalk was at the time in a reasonably safe condition for ordinary travel by persons using such degree of care and caution as reasonably prudent persons would use under the circumstances, so far as they were discoverable by the city by the use of ordinary care. *Karczenska v. Chicago* (Ill.) 88 N. E. 188.

And notice to the proper authorities of a city of a sidewalk being out of repair cannot be inferred or presumed unless the defect was open and notorious and of long standing, and of such a character as would naturally arrest the attention of the passer-by. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

A city is not liable for injuries caused by a latent defect in a street or sidewalk where it had no actual notice of its existence and the authorities had used all ordinary and reasonable means to discover it. *Powell v. Bowen*, 92 Ill. App. 453.

And a defect in a highway that is discovered by only one of a thousand or more persons who pass in the ordinary pursuit of business or pleasure is not notorious, or such that the municipality is bound to take notice of it. *Burns v. Bradford*, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997.

But refusal to instruct, in an action against the city, that the city is not liable for latent or unseen defects in its sidewalks not discoverable by the exercise of ordinary care, though a correct proposition, is not error where the jury is told that it is only for a failure to exercise ordinary care that the city is liable, the two statements being substantially the same. *Karczenska v. Chicago*, supra.

Nor is a city chargeable with notice of a defect in a sidewalk which is not apparent to the ordinary observer, and the existence of which is not known to the inhabitants of the city generally. *Cook v. Anamosa*, 66 Iowa. 427, 23 N. W. 907.

And, where persons passing along a defective or obstructed street failed to observe that it was in bad condition, it cannot be assumed that the city officials, by the exercise of ordinary diligence, would have noticed its condition. *Broburg v. Des Moines*, 63 Iowa. 523, 50 Am. Rep. 756, 19 N. W. 340; *Williams v. Carterville*, 97 Ill. App. 160.

And it has been held that, if a defect in a sidewalk is not such as to make it easily observable to one passing by as dangerous, it is not of a kind which the municipal authorities are bound to notice and remedy. *Cole v. Scranton*, 4 Lack. Leg. News, 287.

So, the existence of an obstruction in a street for from only two to four hours, at

a place where it would in all probability not be at once observed by the public officers of the city, is not sufficient to establish constructive notice thereof to the city. *Vance v. Kansas City*, 123 Mo. App. 644, 100 S. W. 1101.

And the knowledge of two or more citizens that a sidewalk having an offset in it is in a dangerous condition is not notice thereof to the city; to render the city liable for resulting injuries it must either have express notice of a defect not in the original construction, or the fact of such defect must be notorious. *Cramer v. Burlington*, 39 Iowa, 512.

And evidence that a sidewalk at a place where an accident took place was near the ground and level, that the boards were in place and apparently sound, and that in walking over it there was no noticeable defect in it, does not charge the municipal corporation with implied notice of a defect in it. *Lohr v. Philipsburg*, 165 Pa. 109, 30 Atl. 822.

So, the existence in a plank sidewalk 6 feet wide, of a hole 17 inches long, 7 inches wide, and 2½ inches deep, where one of the planks had broken off at the end and been forced downward at a place where the walk had been repaired three months before, to which the attention of no witnesses had ever been called, though they had frequently been over the walk, is not enough to charge the city, which had no actual notice of the defect, with negligence. *Jones v. Sioux Falls*, 18-S. D. 477, 101 N. W. 43.

And the testimony of a witness that she was tripped by a loose board in a sidewalk two or three weeks before the accident in question is insufficient to charge notice to the corporation, where it appears that the occupant of abutting property, who frequently passed over the walk, put the board in proper position and nailed it to the stringers when he discovered that it was out of place, and that the witness went over the walk several times between the day she was tripped and the day of the accident in question, and did not observe any defects in it. *Lohr v. Philipsburg*, supra.

Nor can a municipal corporation be held liable for an injury to a person who stepped on a board which covered a hole in a sidewalk in such a way that the hole was not visible, when the board turned and the person injured was precipitated into the hole, where the hole covered by the board had been in that condition only twenty-four hours. *Yeager v. Berwick*, 218 Pa. 266, 67 Atl. 347.

And, where an excavation is made in a city street by permission of the municipal authorities but without their supervision, and it is afterwards filled and the street is restored to an apparently safe condition, the city is not liable for injuries from hidden defects in filling until after express or implied notice of defects, and a lapse of a reasonable time to make repairs. *Scanlon v. New York*, 12 Daly, 81; *Fitzpatrick v. Darby*, 184 Pa. 645, 39 Atl. 545.
20 L.R.A. (N.S.)

And a hollow beneath a sidewalk, caused by the ground being washed out, is not such an obvious defect as to impute notice to the city, where nothing is shown as to when the washout occurred. *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921.

And, where a water-meter box situated in a sidewalk was entirely without fastenings, and was loose and liable to become displaced and removed; and dirt and *débris* had accumulated in the flanges and grooves and under the cover so that the cover was liable to slip and give way under the weight of a person walking across it; and a person was injured by stepping on the cover and the sliding of the cover to one side, thereby letting her foot drop down in the hole,—the defect must be regarded as a hidden or latent one, and not an open and notorious one, with reference to rules with relation to notice. *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210.

Nor is a city liable for the breaking of a liberty pole erected in a street, causing an injury where the breaking occurred by reason of a defect in the pole unknown to the city authorities, and which could not have been discovered by careful examination of the pole as it stood. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649.

A municipal corporation is not, however, exempt from liability for injury caused by defects in its streets or sidewalks because the defects were latent, where they could have been discovered by the exercise of reasonable diligence. *Owen v. Chicago*, 10 Ill. App. 465; *Buckley v. Kansas City*, 95 Mo. App. 188, 68 S. W. 1069.

Knowledge of a defect upon the part of a municipal corporation may be inferred notwithstanding it may have escaped the attention of all travelers, or even of an officer frequently passing by. It is not a question whether all passers-by actually notice a defect, but whether it is noticeable. *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Rosevere v. Osceola Mills*, 169 Pa. 555, 32 Atl. 548.

City officers whose duty it is to use ordinary care to keep streets in a reasonably safe condition cannot shut their eyes to a condition which would be made plain to them by the use of common faculties and the intelligence of ordinary men, and then claim, when an injury occurs, that they had no notice of such condition. *Mattoon v. Worland*, 97 Ill. App. 13.

And that persons living in the immediate vicinity of a defect in the street which had existed for several days had not noticed the defect is immaterial and inadmissible in an action against a city for an injury from a defective highway. *Grand Rapids v. Wyman*, 46 Mich. 516, 9 N. W. 833.

And that a person injured by a loose plank in a sidewalk had passed over it twice a day for eight months before the accident does not necessarily show that the city should not be charged with notice of the

defect. *Krisinger v. Creston* (Iowa) 119 N. W. 526.

So, where a sidewalk was old, rotten, and unsafe, the defect cannot be considered a latent one with reference to rules with relation to constructive notice to the city of the defect. *Ripon v. Bittel*, 30 Wis. 614.

And, where the stringers of a sidewalk, holding the boards, were decayed so as insecurely to hold nails driven in them through the planks, the defect is a danger which ought to have been foreseen by the exercise of reasonable care, so as to render the municipal corporation liable for injuries to pedestrians therefrom. *Aslen v. Charlotte*, 35 App. Div. 625, 54 N. Y. Supp. 754.

And evidence, consisting of the testimony of four witnesses, that boards in a sidewalk were loose from two to four weeks prior to the accident in question, and of eight witnesses that they never had noticed any loose boards, and of one witness that he noticed the loose board first on the day of the accident, though not conclusive, is sufficient to justify a finding by a jury that the defect had existed for a sufficient length of time, and was of such a nature, that the city could, in the exercise of reasonable diligence, have ascertained its existence and repaired it. *Streator v. Chrisman*, 182 Ill. 215, 54 N. E. 997, affirming 82 Ill. App. 24.

It is the duty of a city, and not of travelers, to notice defects in the sidewalks and repair them; and it does not follow, because a defect is not of a character necessarily to attract the attention of travelers, that the city, by the exercise of due care, would not have discovered it. *Squires v. Chillicothe*, 89 Mo. 226, 1 S. W. 23.

And it is incumbent upon a city to use ordinary caution to anticipate danger that could come into existence by way of defects or obstructions in a street without manifesting itself to ordinary observation. *Vosper v. New York*, 17 Jones & S. 296.

But the rule that a city is liable for defects, though latent, if they could have been discovered by inspection, observation, or otherwise, is not applicable to latent defects in structures over dangerous places, over which sidewalks are constructed. *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

So, a city is bound by its knowledge, or obligation to gain knowledge, as to the intrinsic qualities of a tree growing in a sidewalk, and its liability to rot without exterior sign of the rottenness, and though these things were not manifested in the outward appearance of the tree. *Vosper v. New York*, supra.

And the declarations of persons as to the dangerous character of a shade tree in a street, made while looking at its decayed roots at a time when they were exposed while the street was being paved, are competent, in an action against the city for an injury caused by the tree falling on a traveler, on the issue of notice to the city of the defective condition of the tree. *Chase v. Lowell*, 151 Mass. 422, 24 N. E. 211.
20 L.R.A. (N.S.)

And, where an abutting owner constructed a coal hole in the sidewalk for the convenience of his property, and it became defective so that the cover would tip over if stepped on on one side, and remained in this condition for a long time, the walk being one much traveled upon, it is for the jury, in an action for the injury, to say, under all the circumstances, whether, if ordinary care had been exercised on the part of the city, it would not have discovered before the time of the accident that the coal hole with its cover was in a defective and dangerous condition. *L'Herault v. Minneapolis*, 69 Minn. 261, 72 N. W. 73.

3. Cause naturally calculated to produce obstruction.

Where a defect or obstruction in a street is produced by some known, permanent cause which would naturally create a defect or obstruction, the existence of such cause may properly be considered by the jury in an action for an injury caused by the defect or obstruction, in determining whether the officers of the town or city might have had notice of it by the exercise of proper care and diligence. *Olson v. Worcester*, 142 Mass. 536, 8 N. E. 441.

The duty of municipal corporations to use ordinary care in keeping their sidewalks in a safe condition for travel involves the anticipation of defects that are the natural and ordinary results of use and climatic influences; and, where there is a neglect on the part of the proper officers to make a sufficiently frequent examination of the particular structure, the municipality will not be relieved from liability by the fact that the defect was not open and notorious. *Chicago v. Gillett*, 108 Ill. App. 455.

And, if work in a street was being done in such a manner and for such a length of time that the city authorities should have known of it if they had exercised reasonable care, actual notice to the city of the fact that such work was being done is not necessary to be proven to establish its liability for a resulting injury. *Joliet v. Seward*, 99 Ill. 267.

So, knowledge upon the part of a city of the manner in which a walk was constructed, and evidence that walks so constructed were liable to become unsafe, and that this walk had stood for a long time, is sufficient to charge the city with notice that this walk was defective. *Weber v. Creston*, 75 Iowa, 16, 39 N. W. 126.

And, where a hole in a sidewalk had existed for months; and the very dangerous character of the hole had existed for two or three days before an accident occurred therefrom,—it will be presumed that the city had implied notice of the dangerous character of the hole, although it may not be shown that any actual notice was given to any officer of the city. *Salina v. Trosper*, 27 Kan. 544.

So, a municipal corporation is chargeable with notice of the generally unsafe condition of a sidewalk which is old and out of repair

at many places, its stringers as well as its cross planks being in a condition of decay. *Shelbyville v. Brant*, 61 Ill. App. 153.

And, where a street commissioner had actual knowledge of a crack across the center of a large stone constituting the surface of a sidewalk, and a part of the stone dropped when stepped upon by a traveler and injured him, it is for a jury to decide from all the facts and circumstances whether or not the city was chargeable with either actual or constructive notice of the defect. *Joliet v. Walker*, 7 Ill. App. 267.

But, if a crack across the center of a large stone constituting the surface of a sidewalk was of such a nature, taken in connection with all the other facts and circumstances in the case, as not to cause a reasonably prudent man whose business it was to look after the repairs of the street to suspect there was danger on account of the crack in the stone; or if it would not, under such circumstances, put such a man on inquiry further to examine the condition of the sidewalk,—the city cannot be held to have had notice of the defect. *Ibid*.

So, a city is chargeable with knowledge of the natural tendency of timber in a gutter crossing to rot and decay by lapse of time and exposure to the weather. *Indianapolis v. Scott*, 72 Ind. 196.

And a city is chargeable with knowledge that continued rains will render the perpendicular banks of a trench in a street liable to cave; and that planks unfastened, lying loose upon the uneven surface of the ground, placed there for the purpose of furnishing a passageway over the trench, are liable to slip or give way under pedestrians, who by this action of the city are invited to use them. *Carver v. Jackson*, 82 Miss. 583, 35 So. 157.

And, where a sidewalk was defective because water flowed down from a lot across it under the brick and carried away a portion of the sand in which the brick were laid, thereby allowing the brick to settle; and the attention of the street commissioner was called to these defects; and places cut by wheels passing over it were repaired; and injuries caused by the overflow were also repaired; but the flow of water which caused the injury continued right along so that the same defect reappeared and an injury resulted; it being open and obvious that the water flowed down upon the sidewalk at that point all the time,—a finding of the jury that the city had knowledge of the defective condition is warranted. *Toledo v. Center*, 16 Ohio C. C. 308.

Nor is the right to recover for an injury caused by the falling of a pole which had been erected by citizens years before and had become rotten dependent upon notice to the municipal corporation of the condition of the pole. *Norristown v. Moyer*, 67 Pa. 355.

And evidence that a contractor for a sidewalk cut the roots of trees standing in a public street in front of the dwelling of an abutting owner, and that the trees were left without support, and, five or six 20 L.R.A. (N.S.)

days thereafter, they blew down against the dwelling and damaged it, justifies a finding that the city had constructive notice of the dangerous condition of the trees, rendering it liable for the damages sustained. *Morris v. Salt Lake City (Utah)* 101 Pac. 373.

And evidence of notice to a city that a steam engine and boiler used for hoisting purposes were in the street and apparently used in hoisting material into a building justifies a finding, in an action against the city for an injury alleged to have been caused by it, that the city had actual notice that the engine was in the street for the purpose of being operated; and such notice includes the common knowledge that such engine, in its ordinary and proper operation, would emit steam, thereby producing noise, thus operating as actual notice of the condition which caused the injury, where the noise frightened the horse of the person injured. *Ham v. Lewiston*, 94 Me. 265, 47 Atl. 548.

And, where a tradesman placed a showcase near the curb line of the sidewalk in front of his premises, and fastened the same to an awning post by means of a iron brace; and the same remained there without permission for several years, and a truck collided with the showcase, tearing off the brace; and the showcase was put back in position but without fastening; and the next day it blew down and injured a passer-by,—the city is liable for the injury because of having permitted the continuance of the unlawful obstruction, though it had no knowledge or notice that the brace which sustained the showcase had been broken or removed. *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143.

So, where a market company for many years rented to hucksters the privilege of using a sidewalk adjoining its market, and police officers had driven away hucksters who would not pay for such privilege, and the occupation of the sidewalk was unlawful, and an injury occurred to a traveler from slipping on refuse matter on the sidewalk, the municipality had notice of the unlawful occupation, and was guilty of negligence in not having suppressed the nuisance; and it is not necessary for the person injured to show that the municipality had knowledge of the particular vegetable or other matter which is alleged to have caused the accident. *O'Dwyer v. Northern Market Co.* 30 App. D. C. 244.

And, when an electric-light wire in a city breaks and falls, and remains in the street for three weeks, constituting a dangerous obstruction to travel, and causes an injury to a passer-by, both the electric light company and the city are presumed, from the lapse of time, to have knowledge of its condition and dangerous character; and both may be joined in an action for damages for injuries resulting from their negligent omission to cause the wire to be repaired. *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877.

And, where a person was injured by a discharge of electricity from a loose wire which

he took hold of with the intention of removing it from the highway, which wire was one used without electricity, but which touched an electric wire which had lost its insulation at the point of contact, and which had been hanging loose for three weeks in such position that the wind might bring it against the wire, and which at the time of the accident was caught on a glass insulator so as to be kept in contact with the electric wire; and the want of insulation could be seen from the street; and another accident had occurred from the same cause a few minutes earlier,—the question whether the city ought to have known of the defect is one of fact for the jury. *Bourget v. Cambridge*, 159 Mass. 388, 34 N. E. 455.

So, where a defect in the condition of a coal hole and cover in a sidewalk was permanent, and neglect of the occupant of the premises to fasten the cover was habitual, the fact that, half an hour before a person was injured thereby, the coal hole cover had been removed for the purpose of taking in coal by an occupant of the premises, and that the cover was replaced by the person putting in the coal, who neglected to fasten it on the inside, is not conclusive against the right of the person injured to maintain an action against the city therefor, there being nothing to show that the person putting in the coal did not leave the coalhole as securely covered as he found it. *McGaffigan v. Boston*, 149 Mass. 289, 21 N. E. 371.

And that the cover of a coal hole in a sidewalk was loose; and that the stone into which it was fitted was rounded underneath so that the cover would balance and tip up and turn over when stepped on; and that this was apparent from the street; and that, although the cover would be secure if fastened on the inside, it was usually left unfastened, and this condition had existed for a considerable time and was known to a police officer of the city, who had reported it at the station,—is evidence of a defect of which the city might have had notice by the exercise of proper care and diligence, even though the knowledge of the police officer was not in itself notice to the city. *Ibid.*

And, where a pedestrian stepped upon the lid covering a catch-basin leading to a sewer in a sidewalk and was injured, the accident being occasioned by the turning of the lid, the turning of the lid having been caused by the fact that one of two lugs which were necessary to keep it in position had been broken off, the fact that the broken surface of the iron was dry and rusted, and that it was known to the municipal authorities that lids of similar catch-basins were frequently tampered with by boys, and were liable to be broken, and that the particular basin in question was immediately adjacent to a police-patrol box at which policemen registered their rounds, is sufficient to go to a jury, in an action for the injury, upon the question of constructive or implied notice to the municipal authorities of the defect and their consequent negligence. *District of Columbia v. Payne*, 13 App. D. C. 500. 20 L.R.A. (N.S.)

Notice of a cause existing outside of a street, which is likely to produce a defect in the street, however, is not notice of the defect itself; and the existence of such a cause for twenty-four hours is not equivalent to the existence of the defect for that time. *Billings v. Worcester*, 102 Mass. 339, 3 Am. Rep. 460.

And, if a harmless defect exists in a public sidewalk long enough to be known to the municipal authorities, which defect becomes dangerous only in combination with snow and ice, of which the authorities has no notice at all, the municipality is not liable for an injury resulting therefrom because it had notice of the pre-existing defect in the sidewalk. *Free v. District of Columbia*, 21 D. C. 608.

Nor does the fact that a way is so constructed that it is not likely to keep in good condition for a great length of time impose liability on the municipal corporation bound to keep it in repair, unless the danger is so imminent that it can fairly be said to show a want of reasonable care and diligence to omit guarding against it at once. *Stoddard v. Winchester*, 154 Mass. 149, 26 Am. St. Rep. 223, 27 N. E. 1014.

And, where the only evidence, in an action against a city for injuries caused by slipping on ice on a sidewalk, of the existence of the ice prior to the accident, is that it snowed on the third day before, rained on the second day before, and froze on the night before, together with the testimony of the person injured that there was ice there on the night before, no inference of constructive notice to the city thereof can be reasonably made, and the question should not be submitted to the jury. *Davis v. Kingston*, 1 Silv. Sup. Ct. 536, 5 N. Y. Supp. 506.

But where a municipal corporation has knowledge of a defect in a pavement of a street, which will be dangerous when covered with ice or snow, the occurrence of a snow-storm is notice to the city that the pavement at that point is in a dangerous condition. *Corts v. District of Columbia*, 7 Mackey, 277.

Nor does consent on the part of municipal authorities for a telephone company to erect its poles along some of the streets of the municipality, and knowledge of the fact that it would dig holes for that purpose, without more, affect the municipal authorities with notice that a hole which caused an injury had been dug, or left unprotected after it was made. *Franklin v. House*, 104 Tenn. 1, 55 S. W. 153.

And, where a hole was made in the surface of a road by the foot of a horse, and the city's surveyors of highways repaired it, and, by the action of the elements, the same hole was reopened or another hole made in the same place, if the surveyor repaired it so as to make the road safe and convenient, and the storm afterwards produced a new defect in the same place, the town would not be liable unless such new defect had existed twenty-four hours, or

was known to the town. *Hutchins v. Littleton*, 124 Mass. 289.

And evidence that a defect in a street consisted in a softening of the earth under the influence of a heavy storm due to the digging of a trench for a water pipe about six months before the accident in question; and that the road had been used in the meantime without the earth softening or any danger or defect existing until within an hour of the accident,—does not entitle the person injured to go to the jury in an action for the injury, in the absence of any claim that the municipal corporation had notice, or might by the exercise of reasonable care and diligence have had notice, of the actual softening of the earth. *Stoddard v. Winchester*, supra.

Nor is a city liable for an injury resulting from an explosion caused by the ignition of gas which had accumulated and filled a manhole in one of its streets, which was constructed and owned by a heating and power company, there being no evidence that the city knew, or ought to have known, that the street was or was likely to get out of repair. *Hunt v. New York*, 20 Jones & S. 198.

4. General defectiveness or obstruction as affecting particular defect.

Notice of the general broken obstructed and unsafe condition of a street or sidewalk is sufficient to charge the municipality with negligence in not repairing it, although not shown to have notice or knowledge of the particular defect which caused the injury complained of. *Fuller v. Jackson*, 92 Mich. 197, 52 N. W. 1075; *Dotton v. Albion*, 50 Mich. 129, 15 N. W. 46; *Aurora v. Hillman*, 90 Ill. 61; *Brownlee v. Alexis*, 39 Ill. App. 135; *Evans v. Iowa City*, 125 Iowa, 202, 100 N. W. 1112; *Rusher v. Aurora*, 71 Mo. App. 418; *Nothdurft v. Lincoln*, 66 Neb. 430, 92 N. W. 628, 96 N. W. 163; *Fritz v. Watertown (S. D.)* 111 N. W. 630; *Ripon v. Bittel*, 30 Wis. 614; *Barrett v. Hammond*, 87 Wis. 654, 58 N. W. 1053.

And the generally bad condition of a street previous to the injury in question may be shown in an action against the municipal corporation for an injury caused by a particular defect or obstruction therein, upon the question of notice. *Gude v. Mankato*, 30 Minn. 256, 15 N. W. 175; *Lindholm v. St. Paul*, 19 Minn. 245, Gil. 204; *Lyons v. Red Wing*, 76 Minn. 20, 78 N. W. 868; *Chicago v. Chase*, 33 Ill. App. 551; *Neeley v. Mapleton (Iowa)* 117 N. W. 981; *Smith v. Des Moines*, 84 Iowa, 685; 51 N. W. 77; *Hoover v. Mapleton*, 110 Iowa, 571, 81 N. W. 776; *Lynch v. Buffalo*, 6 Misc. 583, 27 N. Y. Supp. 303; *Belton v. Turner (Tex. Civ. App.)* 27 S. W. 831; *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998; *Pumorio v. Merrill*, 125 Wis. 102, 103 N. W. 464; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Barrett v. Hammond*, 87 Wis. 654, 58 N. W. 1053.

It being, by the instructions of the court, 20 L.R.A. (N.S.)

properly confined to that issue. *Pumorio v. Merrill*, supra.

And, where a person was injured because of the absence or looseness of a plank from a sidewalk, evidence that the city knew that the entire walk was in a dangerous condition sufficiently proves notice to it. *Grattan v. Williamston*, 116 Mich. 462, 74 N. W. 668; *Riley v. Iowa Falls*, 83 Iowa, 761, 50 N. W. 33; *McConnell v. Osage*, 80 Iowa, 293, 8 L.R.A. 778, 45 N. W. 550; *Chacey v. Fargo*, 5 N. D. 173, 64 N.W. 932.

And, if a sidewalk at the place where an injury occurred was old, rotten, full of holes, and out of repair, and dangerous generally, and had been so for several months prior thereto; and such condition was the cause of the injury,—it makes no difference, as to the city's liability therefor, whether the injured person stepped into an existing hole or a hole made by her at the time of the injury; or, if she did step into an existing hole, whether that particular hole had existed for a long or a short period of time. *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383.

And a declaration describing a sidewalk as being defective at a point opposite and a little west of certain premises gives the plaintiff a right, upon the question of notice, to show a general bad condition of the walk in front of the premises described. *Rodda v. Detroit*, 117 Mich. 412, 75 N. W. 939.

So, where a defect in a street complained of was a hole in the sidewalk caused by the absence of the cover of a box in the sidewalk; and there was testimony that it was always loose, and that, on the day preceding the accident, it was found off, and was put on again; and a witness had seen it off before, within a month of two,—a finding, in an action for an injury resulting therefrom, that the city had, or by the exercise of proper care might have had, reasonable notice of the defective condition, is warranted. *Harrigan v. Worcester*, 198 Mass. 354, 84 N. E. 467.

Likewise, if there are apparent and obvious defects in a street, so near and closely related to a condition which is apparently safe, but in fact defective, that an investigation of the former would lead to a knowledge of the latter, it may be said that the city should take notice of the latter defect. *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95; *Osborne v. Detroit*, 32 Fed. 36.

And evidence as to the condition of a street in the immediate vicinity but at other places than the exact point where the accident in question occurred is admissible in an action for damages for an injury caused by a defective street, as bearing upon the question of constructive notice to the city, and for the purpose of showing whether the condition in the immediate vicinity was such that the city ought to have known of the particular defect. *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Laurie v. Ballard*, 25 Wash. 127, 64 Pac. 906; *Moore v. Kalamazoo*, 109 Mich. 176, 66 N.

W. 1089; *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96; *Barrett v. Hammond* and *Osborne v. Detroit*, *supra*.

And evidence that notice was given to the corporate authorities that a walk from one named place to another, which included the particular walk on which the accident in question occurred, was in a dangerous condition, is admissible in an action for the injury to charge the city with notice of the particular defect. *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616.

And, where a declaration counts on a defective sidewalk in a named block, evidence may be given of the general defective condition of the sidewalk in front of that block and in the immediate vicinity of the place where the injury occurred, for the purpose of showing notice to the municipal authorities. *Ibid*.

So, evidence of the defective refilling of a sewer ditch from which a hole in the street resulted, and that the city had filled other holes along the ditch near the one in question, warrants an inference, in an action for an injury caused thereby, of actual notice on the part of the city of the existence of the hole in question. *Dallas v. Muncton*, 37 Tex. Civ. App. 112, 83 S. W. 431.

And the decayed condition of the timbers in other parts of a bridge than that which collapsed may be shown in an action against the city for the injury caused by the collapse, for the purpose of showing constructive notice of the condition of the bridge. *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475.

Nor can a municipal corporation which permits its sidewalks to be rendered unsafe by a daily recurring nuisance, consisting of their being littered with vegetable refuse and peels or rinds from fruit, escape liability to a party who, while using a street without fault or neglect on his part, steps on some of the refuse, or peels, or rinds, and falls, and is injured thereby, on the claim that it does not appear that the particular refuse or peels which were the occasion of the injury were upon the sidewalk within the actual knowledge of the corporation, or had lain there for a length of time from which knowledge of their existence could be imputed to it. *Archer v. Johnson City* (Tenn.) 64 S. W. 474.

And, where the occupant of premises adjoining a street, on the morning of the accident in question, raised and propped up the cover of a coal hole in his sidewalk, and had done the same thing every day for some two months previous; and a pedestrian fell into the coal hole and was injured,—the city is chargeable with notice of such continuing act on the part of the abutting owner, and cannot escape responsibility for the injury on the ground that the raising of such cover by the owner caused the accident. *Drake v. Kansas City*, 190 Mo. 370, 109 Am. St. Rep. 759, 88 S. W. 689.

And, where an open space of about a foot in width between a brick sidewalk and a

stone crossing was left for the passage of water, and this was covered with a plank, and the plank was split and loose and liable to change, and unsafe for twenty-four hours before an accident caused by it, and continued so until the time of the accident, the city is liable for the injury resulting therefrom, although the position of the plank which was the immediate cause of the accident had not continued for an hour. *Winn v. Lowell*, 1 Allen, 177.

So, where a stone had been in a highway for two or three weeks, and it caused an injury to a traveler, whether it was in the exact position where the person injured found it during all of the two or three weeks has no bearing upon the question of notice to the city of the obstruction. *Orser v. New York*, 127 App. Div. 335, 111 N. Y. Supp. 670.

And the existence for two months of a dangerous depression in a street caused by the caving in of a sewer charges the city with notice of similar defects in other parts of the sewer, which ordinary care in repairing the original break would have discovered. *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173.

And, where it was the custom of the owner of a truck to leave it in the street at a particular point during the nighttime, which had existed for several months, and up to the time of an accident resulting therefrom; and this custom was known to the patrolman on the beat,—the city will be deemed to have had notice thereof, it not being a case of an isolated trespass which the officer might reasonably suppose would not be repeated, but one of a continuous invasion of the public right, habitually indulged in and known to the public officials. *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506.

So, where a person was injured by a defective frame constructed in a street for the purpose of decorating during a street fair, the city is liable for the injury though it had no notice of the particular defect of the frame which caused the injury, where it had notice that other frames, constructed for the same purpose and on the same general plan, were all defective and dangerous, and produced an unsafe condition of the sidewalk where they were used, thus charging the city with notice that the particular frame in question, constructed like the others, was dangerous. *Farrell v. Dubuque*, 129 Iowa, 447, 105 N. W. 696.

And, where a building was being erected on a lot abutting on a street; and a lot of large stone to be used in the building was hauled and piled in the street near the sidewalk; and a boy playing in the street ran upon the stone and received an injury; and the stone was being put in the street and taken out of the street by the contractor in proceeding with the work of construction,—the obstruction of the street was a continuous act from the time of the first lot of stone to the time of the injury, and the identity of the stone which caused the injury is of no moment, the continuity of the

obstruction not being broken; and the question of notice to the city is one for a jury. *Vance v. Kansas City*, 123 Mo. App. 644, 100 S. W. 1101.

So, where a stake was driven into the ground to fill up a hole in a plank sidewalk, and it worked up above the level of the walk, and a pedestrian stumbled upon it and was injured, evidence that there were other stakes in the same condition at other places in the walk is admissible in an action for the injury, not to prove negligence by the city, but as tending to show that the city had notice of the condition of the walk, and that stakes so driven would work up above the level. *Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624.

And evidence that boxes were on the sidewalk at various times prior to an injury received there, and the testimony of one witness that they were there all the time, warrants the inference that they had been there a sufficient length of time to charge the city with notice of their presence. *Galesburg v. Higley*, 61 Ill. 287.

So, evidence as to the condition of a sidewalk a week or more after an accident thereon is material, in an action for an injury resulting from the accident, as tending to prove notice to the city of the condition of the sidewalk, such evidence being merely cumulative, describing the condition of the walk at the time of the accident. *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394.

And testimony of a witness as to a defect in a sidewalk at the place of the injury in question and in the immediate vicinity, observed by him, a week or two after the injury, is admissible, in an action against the city therefor, to show that, if the city had inspected the walk within a reasonable time, it would have discovered its defective condition, where the evidence warranted an inference that no change had been made in the walk from the time of the injury to the time of the witness's observation. *Williams v. Lansing*, 152 Mich. 169, 115 N. W. 961.

And evidence, in an action against a city for an injury on a defective sidewalk, that, ten weeks after the injury happened, the boards in the sidewalk were so decayed that nails would not hold them together, and that the nails were so eaten by rust that they would not fasten the boards securely to the stringers, though of slight value, is competent as tending to support an inference that the walk was in a defective and insecure condition at the time of the injury. *Richardson v. Marceline*, 73 Mo. App. 360.

So, a person injured by a defective sidewalk may prove, in an action against the city for the injury, the condition of the sidewalk several months before the time of the injury, for the purpose of proving that the city had notice of its dangerous condition a sufficient length of time before the injury to have enabled it to repair the defect. *Ibid.*

Notice to a municipal corporation that a sidewalk is generally defective, however, is not necessarily notice of the existence of a 20 L.R.A. (N.S.)

particular defect which caused the injury. *Shelby v. Claggett*, 46 Ohio St. 549, 5 L.R.A. 606, 22 N. E. 407; *Boulder v. Weger*, 17 Colo. App. 69, 66 Pac. 1070; *Ruggles v. Nevada*, 63 Iowa, 185, 18 N. W. 866; *Dundas v. Lansing*, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011.

And a notice of a particular defect is not sufficient to prove municipal liability for an injury in a street, where it is different in kind from and in no way related to the one that produced the injury, and did not contribute thereto in any manner. *Nothdurft v. Lincoln*, 66 Neb. 430, 92 N. W. 628, 96 N. W. 163.

And, where a person was injured by an obstruction on a sidewalk, obstructions of the walk of a different nature at other times and in the same place, all of which were temporary, do not show notice to the city of obstructions complained of. *Lewisville v. Batson*, 29 Ind. App. 21, 63 N. E. 861.

In order to charge a municipal corporation as a matter of law with notice of a particular defect which caused an injury from its knowledge of the existence of the general defectiveness of the walk, the particular defect should be of the same character as the general defectiveness, or at least so related to it that the particular defect is a usual concomitant of the general one. *Shelby v. Claggett*, supra.

If a general defect in a street, known to the municipal corporation, was not of a character to make the street unsafe, or was of a character totally unlike that which caused the injury in question, so that the existence of one afforded no presumption of the existence of the other, notice of the general defect did not constitute notice of the particular defect, even though there was such relation between them that one would frequently be found in connection with the other. *Ibid.*

And there is no such close relation between the defectiveness of a wooden sidewalk which has become disbed by the settling of the middle stringers, and a loose plank in the sidewalk, which, upon being stepped upon, turned up and tripped a traveler, that from the first the other is necessarily, as matter of law, to be presumed. *Ibid.*

And, if a city notifies the owner of land abutting on a street of a defect in the cover of a coal hole in the sidewalk, and the owner replaces it with a new one which is defective in a different particular, and this causes an accident to a traveler on the highway, the city is not liable, unless the defect in the new cover existed for twenty-four hours before the accident, or the city had reasonable notice of the defect, although the city was notified of the defect in the old cover more than twenty-four hours before the accident. *Crosby v. Boston*, 118 Mass. 71.

And, where a cross walk had become seriously out of order and tottering several weeks prior to an injury thereon, and was liable to be more or less out of place and

unsafe, and, because of its condition, someone removed a plank therefrom with the probable view of attracting attention to the need of repair, and a person stepped into the hole and was injured, the question, in an action against the city for the injury, is, Did the city actually or presumably obtain notice that the walk was loose and out of order, and that the occasion was being used for dangerously tampering with it, and was there reasonable time and opportunity thereafter to put it in proper condition before the accident? *Dotton v. Albion*, 50 Mich. 129, 15 N. W. 46.

So, where a man was injured by being struck by a bale of hay that was thrown out of the second story of a building having a platform running out from the second story over the sidewalk, the fact that the occupant of the building had theretofore thrown bundles from the platform into the street is not sufficient to give the city notice that it was likely at some time to push one off the edge of the platform, which would be carried by the wind back so as to strike a passer-by upon the sidewalk. *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90.

And, where a city, in constructing an iron bridge in a street, placed iron plates at intervals transversely across the bridge to provide for the expansion and contraction of the iron of which the bridge was constructed; and, to provide for the laying of tracks of a street railway along the bridge, the plates were cut into sections and were thus laid across the bridge; and subsequently the travel upon the bridge caused the ends or corners of some of the plates where they had been cut to turn or roll up to a height of 2 to 2½ inches; and the wheel of a traveler's carriage caught upon one of these projections and caused an injury,—the knowledge of the city of the condition and position of the sections of plates as originally laid does not constitute actual notice of the identical defect which caused the injury, but was notice only of a cause which might produce a defect. *Bradbury v. Lewiston*, 95 Me. 216, 49 Atl. 1041.

And, where a runway had been maintained for many years across a street by an individual for the purpose of conveying goods from railroad cars on the other side of the street to his storehouse; and an ordinary beam which constituted the principal portion of the runway was maintained at such an elevation above the roadway as not materially to interfere with the passage of vehicles, but, on the occasion of the accident in question, it had been lowered for use; and an injury resulted to a passer-by,—a refusal to charge, in an action against the city for the injury, that, if the accident happened, not from the permanent portion of the structure, but from the lowering of the beam which was in temporary use, unless the city had notice that this temporary use had been so continued at any one time as to constitute a permanent obstruction, the city is not liable, is not 20 L.R.A.(N.S.)

error, where the court had instructed the jury that they were not to find a verdict for the plaintiff unless they found that the structure was a permanent and habitual obstruction of the street, interfering with its reasonable use, the proof showing that when in use as it had been for years the runway obstructed the street for hours at a time. *Wynn v. Yonkers*, 80 App. Div. 277, 80 N. Y. Supp. 257.

So, a person may notice obstructions in a street one or more times without being chargeable with knowledge that they are constantly maintained. *Gerdes v. Christopher & S. Architectural Iron & Foundry Co.* 124 Mo. 347, 25 S. W. 557, 27 S. W. 615.

And the fact that a truck had been left standing in a street for three or four nights in the week for a period of several months before an accident does not charge the city with notice, either actual or constructive, of the unsafe condition of the street caused by the presence of the truck. *Farley v. New York*, 9 App. Div. 536, 41 N. Y. Supp. 622, reversed in 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506.

And where a grocer made a practice of leaving his wagon, when not in use, in the street next to the curb in front of his store, with the thills tied up with a string; and, while thus standing, an iceman's wagon caught it and turned it around, and the string gave way and the thills came down upon the sidewalk and struck and injured a traveler,—evidence that the wagon was used two or three times a day; and that the thills were tied up after such use; and that it was in use on the day before the accident happened, and the thills were tied up that night; and that the accident happened early the next morning,—does not warrant an inference that the city had notice of the insecure manner in which the thills of the wagon were tied at the time of the accident in question, where there was no evidence going to show that the same fastening was used on every occasion. *Cohen v. New York*, 43 Hun, 346.

And, where a lot owner wanted to use dirt upon his lot, and had the dirt unloaded in the street, and employed men at once to wheel it to the lot, the only constructive notice which this act would give to the city would be that dirt was being drawn to a spot in the public street opposite the lot of the owner, and being taken away again and spread upon his lot; and the act of the lot owner, of permitting the dirt to remain in the street over night, from which an injury resulted, does not charge the city with negligence. *Breil v. Buffalo*, 144 N. Y. 163, 38 N. E. 977.

So, that a sidewalk was in an apparently safe condition, and that it was laid down in the ordinary way and constructed out of sound and suitable material, is admissible in evidence, in an action against the city for injuries resulting to a traveler from a hole in the sidewalk, as tending to rebut notice of defects by the city authorities. *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57.

5. Other accidents.

The publicity necessarily given to prior accidents caused by a dangerous condition or obstruction of a street is competent as tending to show that it was brought to the attention of the authorities. *Domer v. District of Columbia*, 21 App. D. C. 284; *District of Columbia v. Duryee*, 29 App. D. C. 327, 10 A. & E. Ann. Cas. 675.

And proof of other similar accidents caused by the same defect prior to the time of the injury in question is competent in an action against a city for an injury caused by a defect in a street,—at least for the purpose of proving notice to the municipality. *Burrows v. Lake Crystal*, 61 Minn. 357, 63 N. W. 745.

And that others had stepped into the same hole in a sidewalk or bridge is admissible in evidence in an action against the city for injuries received by stepping into such hole, as bearing upon the question of notice. *Moore v. Kalamazoo*, 109 Mich. 176, 68 N. W. 1089; *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253, 21 N. E. 977.

And the same rule applies to evidence that other persons had fallen on a defective or obstructed cross walk about or within a short time of the fall in question. *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

And this is so though the other accidents had produced no grave injury. *Cline v. Crescent City R. Co.* 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122.

But that other persons traveled by an obstruction on a sidewalk with safety is not competent as a defense in an action against the city, brought by a person who was injured by colliding with the obstruction, for damages for such injury. *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576.

So, evidence, in an action against a city for damages resulting from the death of a person who stepped off an approach to a bridge in the night while the bridge was swinging around to enable a vessel to pass, that another person had fallen through the same bridge under similar circumstances, is admissible as tending to show that the city had notice that its agents were inattentive to their duties in respect to lighting the bridge, and had failed to provide against such neglect. *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418.

But, where a person was injured by a wire charged with electricity hanging down from a tree in a street, evidence that, eight to ten months previous to the accident, a piece of telephone wire, at a point some distance away from the scene of the accident and at a place beyond the termination of the electric-light wires, had hung down from a pole, and several persons had been shocked thereby, is too remote to be competent, in an action against the city for the injury, for the purpose of charging the defendant with knowledge of the dangerous condition of the wires; and it cannot be admitted on the theory that the fact that persons had received shocks from the telephone wire at

that point should have apprised the trustees that the telephone wire and the light wires must have been in contact at some point and therefore dangerous, so that the trustees should have inspected both lines of wires. *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A. (N.S.) 474, 75 N. E. 1116.

6. Place, circumstances, etc.

Among the circumstances which may be considered in determining what is a sufficient time for an obstruction or defect in a street to exist in order to charge the municipality with notice are population of the city and the amount of business or travel at or near the place of such obstruction. *Ottawa v. Hayne*, 114 Ill. App. 21, affirmed in 214 Ill. 45, 73 N. E. 385; *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96; *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481.

The nature and character of the defect. *Scoville v. Salt Lake City*, supra.

The central position and publicity of the place where it exists. *Donaldson v. Boston*, 16 Gray, 508.

Whether it is in a populous or sparsely settled part of the city. *Scoville v. Salt Lake City*, supra.

And any other circumstances which tend to show notoriety. *Donaldson v. Boston*, supra.

Thus, where a dangerous hole in a street had existed in much the same condition for some weeks prior to the time of an accident; and it was located but a few feet from the main traveled and planked thoroughfare of the town, and immediately at the end of a bridge way leading down from it to a street crossing this main thoroughfare,—the municipality is chargeable with constructive notice of the defect. *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

And evidence that a walk was one of the principle thoroughfares in the city, and that a hole in it had existed there for several months, warrants the jury, in an action for an injury caused by stepping through the hole, in finding the city chargeable with notice of the defect. *Hall v. Fond du Lac*, 42 Wis. 274.

And, where a hole existed in a public street upon which there was a great amount of teaming, and which, aside from the gully in question, was in good condition; and the hole had been in substantially the same condition for from five to seven days previous to the accident in question; and the dimensions of the hole were claimed by some witnesses to be from 4 to 6 feet in length and from 1½ to 2 feet in depth and 30 inches in width, and by others to be 1½ feet deep and 2½ feet wide and about 3 feet long,—the court, in an action for an injury resulting from driving into the hole, is justified in submitting to the jury for their determination whether the city was chargeable with negligence in not discovering and filling the hole before the injury occurred. *Fitzgerald v. Troy*, 4 Silv. Sup. Ct. 62, 7 N. Y. Supp. 103.

So, where an obstruction was placed on a

sidewalk in a street in a busy and frequented part of a city on Tuesday, and it remained there until Saturday, the day of the accident in question; and in the meantime no measures were taken by the authorities to have it removed,—it is a question for the jury whether the city authorities charged with the care of the public streets ought to have known of the obstruction, and to have caused its removal before the accident. *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442.

And, where an injury was caused by a rope stretched across a street and attached to stakes set in the street, the street being one of the most fashionable and crowded thoroughfares in the city, and having been so obstructed for at least two days and nights previous to the accident, the city authorities are charged with notice of the existence of the obstruction. *Chicago v. Fowler*, 60 Ill. 322.

And, where a person was injured by falling into an excavation dug by a contractor for the purpose of laying a water pipe; and an accident occurred in the evening between 7 and 8 o'clock; and work on the ditch commenced the day before and continued through the day of the accident; and the place was in the business district of the city and presented a condition of danger if not properly safeguarded, apparent to the most casual observer,—a sufficient time elapsed under the circumstances within which the city, in the exercise of reasonable care for the safety of the traveling public, should have discovered and remedied the conditions. *Pace v. Webster City*, 138 Iowa, 107, 115 N. W. 888.

So, evidence as to the relative position of a place in a street where an injury was sustained by slipping on an icy sidewalk to such a building as the city hall is admissible in an action for the injury, on the question of constructive notice to the city. *Masters v. Troy*, 50 Hun, 485, 3 N. Y. Supp. 450.

And, where a city suffered a market to be carried on in a street in violation of law and the rights of the public; and it occupied a part of the sidewalk; and the part of the sidewalk left for the use of pedestrians was habitually kept in so filthy and dangerous a condition as to be a constant menace to the public; and it eventually caused an accident; and the dangerous condition was constant and had continued for many months, and existed in the midst of a well-populated section of the city, where there was incessant travel to and fro,—the question of knowledge and notice of the condition on the part of the city is one of fact for the jury, in an action for the injury. *O'Dwyer v. Northern Market Co.* 24 App. D. C. 81.

But the act of workmen engaged in repairing a cellar, in which, in order to get material into the cellar and to afford light, they removed three planks from the sidewalk above, thus making a hole $3\frac{1}{2}$ feet in width and 7 or 8 feet long and 6 or 8 feet deep, of, contrary to their usual custom, leaving the hole unguarded for an hour and a half, in 20 L.R.A. (N.S.)

which time a person fell into it and was injured, though it would be considered as negligence upon the part of a city if it were a populous one, does not furnish evidence sufficient to take the case of the defendant's negligence to the jury where the defendant was a town of small size where foot travel was slight. *Bender v. Minden*, 124 Iowa, 685, 100 N. W. 352.

And the fact that a hole in a sidewalk, made by workmen engaged in repairing a cellar, which they were accustomed to barricade, was left open and unguarded for an hour and a half in a town of 4,500 inhabitants, does not show sufficient evidence of negligence upon the part of the town to warrant submission of the question to a jury. *Ibid.*

And evidence that an obstruction in a street consisted of a pile of snow and ice; and that there were only four houses on the street; and that one witness saw the pile of snow and ice in the morning about twelve hours before the accident in question occurred,—is not sufficient to warrant a finding that the city had reasonable notice of the defect. *Whitehead v. Lowell*, 124 Mass. 281.

And the testimony of a witness in an action against a city for injuries caused by tripping over a loose stone in a street, that, during a period of two or three weeks before the accident, he had seen a loose stone of like character in the general locality, but not at the precise place where the injury occurred; that, during most of the time, the stone was near a telegraph pole, where it was not dangerous to travelers; and that on one occasion he had removed the stone from the street to the place near the pole,—is insufficient to show that the city had constructive notice of an unlawful obstruction, since the stone became an unlawful obstruction only when it was in the street. *Orser v. New York*, 193 N. Y. 537, 86 N. E. 523, reversing 127 App. Div. 335, 111 N. Y. Supp. 670.

So, the number of miles of street a city has is immaterial on the question of its liability for an injury resulting from a defective or obstructed street; and evidence as to the number of miles of street is inadmissible for the purpose of showing what was a reasonable time to impute notice of the defect complained of to the city, and what would be a reasonable time, under the circumstances, for the city to repair the defect after it had notice thereof. *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34.

Nor does the mere fact that a hole in a bridge on a public street, through which a person fell and was injured, had been there a month, the bridge having been closed on account of other defects, necessarily show constructive knowledge of the hole by the officers, in an action against the city for personal injuries received from falling through the hole. *Austin v. Colgate* (Tex. Civ. App.) 27 S. W. 896.

And knowledge, by a municipality, of an obstruction in a street will not be implied

where the municipality had a population of little over 400, and the street was obstructed by the act of a wrongdoer only a short time before dark, and about 9 o'clock of the same evening the injury complained of occurred, and the day was cloudy and the night was dark, and the obstruction was not of such notorious character that a person passing along the street, unless upon the walk itself, would necessarily see it. *Lewisville v. Batson*, 29 Ind. App. 21, 63 N. E. 861.

But evidence that a flagstone over which a person fell and was injured, which made the sidewalk unsafe, stood above the level of the surrounding ground, and evidently the earth had washed away or been worn away from the stone during a considerable period; and that two persons had fallen over the stone previously, and apparently another two years before; and that the attention of a policeman on duty in the neighborhood was called to the condition of the walk two years before,—warrants the submission to the jury, in an action for the injury, of the question whether the dangerous condition had existed long enough for the city authorities to discover it if they had exercised reasonable care in looking after the safety of the streets. *Williams v. Brooklyn*, 33 App. Div. 539, 53 N. Y. Supp. 1007.

So, where a person received an injury from coming into contact with an outward swinging iron gate originally constructed to swing inward, but which swung both ways by reason of a defective latch, testimony that several persons other than the person injured had been injured by it when similarly using the sidewalk during the year previous to the injury in question is sufficient to go to the jury in an action for the injury, as tending to show the dangerous character of the obstruction so caused, and to charge the city with constructive notice of it. *Domer v. District of Columbia*, 21 App. D. C. 284.

But in such case the jury, in connection with such testimony, should consider the peculiar character of the obstruction, and the fact that at times there would be no obstruction, so that the municipal agents might have passed and repassed without having recognized the existence of an obstruction. *Ibid.*

So, a resolution of a city council directing a sidewalk to be made passable at a particular place is competent evidence, in an action against the city for an injury occurring at that place, on the question whether the city had knowledge of its defective condition. *Erd v. St. Paul*, 22 Minn. 443.

And a preamble and resolution, passed by the common council of a city previous to the accident in question, reciting that, owing to insufficient lights and protection at the approaches of several bridges in the city, several accidents had happened, and appointing a committee to report a plan for preventing a recurrence thereof, are admissible in evidence in an action against the city for an injury resulting to a person who stepped off

an approach in the night while the bridge was swinging around to enable a vessel to pass, as showing notice to the city authorities of the insufficient lights provided. *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418.

So, ordinances of a city making it the duty of the police of the city to endeavor to remove obstructions from the sidewalks, streets, and alleys; and, in case they cannot be readily removed, and in case of defects in the sidewalks, to make report of them to the department of public works,—are admissible in evidence, in an action against the city for an injury resulting from the obstruction of a city sidewalk, as bearing upon the question of notice of the obstruction. *Bibbins v. Chicago*, 193 Ill. 359, 61 N. E. 1030, reversing 94 Ill. App. 319.

And an ordinance requiring owners of abutting property to repair a sidewalk, passed some months prior to the time a person was injured on such walk by stepping into a hole in it, is admissible in evidence in an action against the city for damages, as tending to show notice. *Beardstown v. Clark*, 204 Ill. 524, 68 N. E. 378, affirming 104 Ill. App. 568.

And an order given by a municipal corporation to a proprietor of land adjacent to a street, to repair the sidewalks thereon, is an admission of notice of the defects then known to the corporation, and of the one ordered to be repaired; but it is not as matter of law an admission of the existence of another defect different in character, or of one having no necessary connection with it, and of which the corporation had no knowledge. *Shelby v. Clagett*, 46 Ohio St. 549, 5 L.R.A. 606, 22 N. E. 407.

7. Removal of safeguard by unlooked-for event.

When a street being improved is made safe, so far as the public is concerned, by barriers or other proper precautions, if suddenly and without warning to or fault of the city it becomes unsafe by the removal of such barriers or other precautions by any means, the city should have notice thereof in order to be held liable for resulting injuries. *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162.

And, if an obstruction or excavation in a street was adequately protected when it was made, the city is not liable for any injuries resulting from the removal of the protection by some unauthorized person, occurring before it could, by the exercise of reasonable diligence, have discovered such displacement. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Torphy v. Fall River*, 188 Mass. 310, 74 N. E. 465; *Doherty v. Waltham*, 4 Gray, 596; *Parker v. Cohoes*, 10 Hun, 531.

Thus, a city is not liable to a person injured by falling into a sewer trench where it had inclosed that portion of the street in which the trench had been dug, and employed a watchman to see that the barriers were kept up, and during the temporary absence of the watchman, in the discharge of

his duties elsewhere along the line of the excavation, someone, without authority, wrongfully removed the barrier at the point where the person injured entered the inclosure. *O'Neil v. Bates*, 20 R. I. 793, 40 Atl. 236.

And a jury, in an action against a city for an injury received from falling into an open ditch or trench in a street, cannot find the city negligent because at the time the injury occurred the laborer engaged in digging the trench had absented himself from the work for a few minutes for a necessary purpose. *Jones v. Clinton*, 100 Iowa, 333, 69 N. W. 418.

And, where evidence in an action against a city for injuries caused by falling into an open sewer at night tends to show upon the part of the city that the workmen left the sewer trench at 5:30 P. M. properly barricaded and lighted, and that both barricades and lights were in place next morning; while the evidence of the plaintiff, who fell into the trench at 6:15 P. M. the same day, tended to show that, when the accident occurred, no lights or barriers were there,—the jury may properly infer that the lights and barriers were removed without the knowledge of the city; and an instruction defining the liability of the city if the lights and barriers had been so removed is proper. *Richmond v. Poore* (Va.) 63 S. E. 1014.

So, where an excavation was made along the margin of a public sidewalk, which was protected by a railing of which a gate formed a part; and the gate was secure on the evening before the injury in question occurred; and there was no evidence tending to show that the authorities had ascertained, or by ordinary care might have ascertained, that it had become insecure at the time of the injury,—a person who leaned against it, when it gave way and precipitated him into the excavation, is not entitled to recover of the city for the injury caused. *Jackson v. Boone*, 93 Ga. 662, 20 S. E. 46.

And, where a person, while driving at night, ran into a pile of cinders which had been placed on one side of a street by a paving company engaged in the construction of a pavement in the yard of an abutting owner, and the cinders had been in the street four or five days, and at night a red light had been placed by the company at one end of the pile, but at the time of the accident the light was out, the city is not liable for the injury. *Mills v. Philadelphia*, 187 Pa. 287, 40 Atl. 821.

Nor can notice to the city of the removal of a barrier placed to guard an opening in a sidewalk be inferred where the time between the removal of the barrier and the accident was at most less than one hour and in the night. *Theissen v. Belle Plaine*, 81 Iowa, 118, 46 N. W. 854.

And, where a street was being improved, and barriers had been erected to prevent its use, and an accident happened in the night five hours after the erection of the barriers, and in the interval such barriers had been removed, but it does not appear by whom the removal was made, it cannot be held, as a 20 L.R.A. (N.S.)

matter of law, that the city had notice of the removal, so as to be liable for the injury. *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162.

And, where an excavation was made in a street for purposes of sewer construction; and, upon leaving the work at night, barriers were erected; and a red light was put in such a position as to constitute an efficient signal of the presence of danger; and afterwards the lantern was smashed and removed; and, not more than one hundred and fifty-three minutes from its removal, a person drove into the excavation, and his horse was injured,—the city is not liable for the injury in the absence of evidence that any of the city's agents or servants had actual notice of the removal of the light. *McFeeters v. New York*, 102 App. Div. 32, 92 N. Y. Supp. 79.

So, where, in repairing a cellar, a hole was made in a sidewalk, and the workmen engaged upon it were accustomed to barricade the hole, the city is not negligent or chargeable with notice of their failure to erect the usual barricade, unless it should, in the exercise of ordinary care, have known of such failure. *Bender v. Minden*, 124 Iowa, 685, 100 N. W. 352.

Nor is a city liable for an injury caused by a traveler falling from a sidewalk into a passage in the basement of a building, which was protected by a removable iron grating covered with boards, the iron work of which was fitted to the opening in such a way that it was perfectly safe and could not accidentally or intentionally be misplaced, and could be left out of place only by gross carelessness; and which had been in that condition for forty years in one of the principal streets of the city, and was never known to be left out of place before; but on the occasion of the accident in question it had been used by a stranger, and the grating was not properly replaced. *Littlefield v. Norwich*, 40 Conn. 406.

And, where excavations were made in the streets of a village by a licensee of the village, and the licensee and others, having charge of the work of excavating and filling in, omitted to barricade the excavations or to place warning lights upon them, resulting in an injury to a third person, the city is not liable for the injury, unless it had actual knowledge, personal or implied, that the excavations were not sufficiently guarded at the time of the injury. *Morgan v. Penn Yan*, 42 App. Div. 582, 59 N. Y. Supp. 504.

So, a city permitting property owners to build sidewalks in front of their premises under an ordinance requiring that the owners shall prepare and place lights on material left in the street during the night so as to warn persons passing along the street of such obstruction is not liable for an injury resulting from a failure so to place such lights if the agents and officers of the city did not have notice of the omission of light the obstruction, and such omission did not continue for a sufficient length of time before the injury for them to have known of

it in the exercise of ordinary care and diligence. *Lewis v. Atlanta*, 77 Ga. 756, 4 Am. St. 168.

And, where an excavation had been made in a sidewalk in front of a building in course of construction in the business part of a city, across which stringers for a new sidewalk had been laid; and the excavation had been in this condition for several weeks, guarded at one end by a small scantling loosely resting upon a box or barrel and extending from the building to the outer edge of the sidewalk; and at the time of the accident in question, and for several hours prior thereto, this barrier had been removed, leaving no protection against persons falling into the excavation,—the question whether the city had notice of the dangerous condition of the sidewalk is one of fact for the jury, in an action for a resulting injury. *Sproul v. Seattle*, 17 Wash. 257, 49 Pac. 489.

The rule that a city, when it has once properly guarded a dangerous defect or excavation in one of its streets, and such guards have been removed without its consent or knowledge, cannot be held liable for an injury caused thereby, unless it is shown that it had notice, either actual or constructive, of the removal of the guards, and had reasonable time thereafter in which to replace them, however, has no application where lights were depended upon as guards to excavations, and were put in place during the nighttime only; since it is a required duty, so to place them on each recurring night, and the city is as much obligated to see to it that they are put in place on each night as it was at the commencement of the work. *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231.

And, where a person was injured by driving into an open trench which was left unguarded and unlighted at night, which trench was opened, not by the city, but by a property owner for the purpose of making connections between his house and the sewer and water mains along the street; and a person, noticing that there was no light to guard the excavation, notified the general sewer inspector of the neglect a half or three quarters of an hour before the accident and it would have taken the inspector not to exceed five minutes to put up a light after such notice was given,—the question whether the city was guilty of negligence in not putting up a light or barricade is one of fact for the jury. *Blakeslee v. Geneva*, 61 App. Div. 42, 69 N. Y. Supp. 1122.

So, where a hole was made in a pavement of a street by the foot of a horse, and the city's surveyors of highways repaired it by putting in stones and gravel, and, by the action of the elements, the same hole was reopened, or another hole made, in the same place, which caused an injury, if the surveyor insufficiently repaired the first defect so that the road still remained out of repair, it would be a continuing defect, and the town would be liable though the action of the elements had enlarged it and increased its 20 L.R.A. (N.S.)

dangerous character. *Hutchins v. Littleton*, 124 Mass. 289.

And, where an excavation was made in one of the most frequented and traveled streets of a city by an abutting owner, who was connecting his house with a water pipe; and it remained open for two or three days; and a traveler who was passing along the street at night and about an hour after it became dark drove into the unguarded excavation; and no lights had been placed there on that night, although the excavation had been guarded by a light on previous nights,—the question whether the city had notice of the defect, or whether the defect had existed for such a length of time that notice should be imputed to it, is one for a jury to decide, under proper instructions from the court. *Holitz v. Kansas City*, 68 Kan. 157, 74 Pac. 594.

8. The duty to inspect.

A city should exercise reasonable care to discover defects and obstructions in its streets and sidewalks, and the performance of this duty requires their inspection, and the existence of such a defect or obstruction for a long time warrants the conclusion of actual knowledge thereof. *Deland v. Cameron*, 112 Mo. App. 704, 87 S. W. 597; *Joliet v. McCraney*, 49 Ill. App. 381; *Lewisville v. Batson*, 29 Ind. App. 21, 63 N. E. 861; *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128; *Washington v. Small*, 86 Ind. 462; *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96; *Belken v. Iowa Falls*, 122 Iowa, 430; 98 N. W. 296; *Anderson v. Albion*, 64 Neb. 280, 89 N. W. 794; *Monroe v. Weihi*, 13 Ohio C. C. 689; *Koch v. Ashland*, 88 Wis. 604, 60 N. W. 990.

At least where there is any visible evidence of a defect dangerous to the traveling public. *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96.

If an unsafe condition has continued so long that, if the city officers had given it reasonable attention they must have discovered its condition, the city has notice of such condition. *Koch v. Ashland*; *Joliet v. McCraney*; and *Lewisville v. Batson*,—*supra*.

A city must be presumed to know every fact in respect to its sidewalks that, by the exercise of reasonable care, it could have discovered. *Buckley v. Kansas City*, 95 Mo. App. 188, 68 S. W. 1069.

And, if city authorities had no actual notice of an obstruction on a sidewalk, but their ignorance was owing to an omission of the duty of inspection, and of the degree of diligence which might reasonably be expected under all the circumstances, the opportunity of knowledge stands for the purpose of the case as actual knowledge; and the city is equally chargeable as if express notice had been actually proven. *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442; *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657; *Cusick v. Norwich*, 40 Conn. 375; *Boucher v. New Haven*, 40

Conn. 456; *Manchester v. Hartford*, 30 Conn. 118; *Chicago v. Gillett*, 108 Ill. App. 455.

Nor does the presumption that city officers do their duty with respect to the inspection of streets and sidewalks obtain where there is any evidence that they have neglected their duty. *Miller v. Canton*, supra.

And, where a diligent performance of the duty of supervision in the construction of a covering over a perilous excavation in a street would bring knowledge to the officers of the defect, and the dangerous character thereof, a want of such knowledge is negligence. *Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795.

Failure of a municipality to inspect, or to inspect properly, a sidewalk, does not prevent the application of the rule of presumptive notice from the continued existence of a hole in it. *Germaine v. Muskegon*, 105 Mich. 213, 63 N. W. 78.

And, where a defect in a street which caused an injury consisted of a hole in the walk which was obvious to mere inspection, and for the discovery of which no special skill was required, negligence of the street commissioner in failing to discover it is imputable to the city; and it cannot escape liability for an injury resulting therefrom by showing that it exercised due care in the selection of the officer. *Padelford v. Eagle Grove*, 117 Iowa, 616, 91 N. W. 899.

Nor has the rule that, before a municipal corporation charged with the duty of maintaining a highway can be made liable for a defect or obstruction therein, it must have notice, actual or implied, of such defect or obstruction, any application where it omits to supervise the construction of a sidewalk on one of its streets by the adjoining pro-who causes an obstruction. *Boucher v. New Haven*, 40 Conn. 456.

And evidence that a child engaged in innocent play stumbled and fell over a gas box located in a sidewalk and received serious and permanent injury, and that another person had noticed the condition of the gas box and surrounding bricks a year before, and had seen persons stumble on it, though the defect seemed to have been a slight one and one that may not have attracted the attention of the ordinary passer-by who did not come in contact with it, is sufficient to go to the jury on the question of negligence of the city, and knowledge or notice of the defect, in the absence of evidence tending to show that there had ever been an inspection or examination of the gas boxes located in the sidewalk at that or any other point, or that any supervision had been exercised over their construction and maintenance. *District of Columbia v. Boswell*, 6 App. D. C. 402.

So, it is the duty of a city to use due diligence in ascertaining whether there is an appearance of a street or sidewalk passing from a safe to an unsafe condition; and the more apparent the danger, coupled with the apparent gravity of it, and the more frequented and densely populated is the place, the more likely should be the danger to meet the observation of the city's agents soon

after it occurs. *Smid v. New York*, 17 Jones & S. 126.

And that the boards used in constructing a sidewalk were from culled lumber, and were nailed crosswise on stringers, and had become loose by reason of the nails having rusted off, and had been loose for five months; and that the city could have discovered the defective condition by inspection; and that a woman who did not know that the walk was out of repair walked upon it with her sister, carrying a babe in her arms, walking slowly and carefully and observing the sidewalk as she proceeded, and tripped on a loose board in the sidewalk by reason of her sister stepping on the other end of it, and fell and was injured,—warrant a recovery against the city for the injury. *Columbia City v. Langohr*, 20 Ind. App. 395, 50 N. E. 831.

And the capacity of white pine lumber for holding nails when sound, and its lasting qualities as compared with other timber, may be properly shown in an action against a city in which the defendant is claimed to have had constructive notice, by reason of the lapse of time, of the decay of a bridge built of such material. *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475.

A city is not required to patrol its streets, however, to look out for probable obstructions placed in them by third persons. *Lewisville v. Batson*, 29 Ind. App. 21, 63 N. E. 861.

And it is not required to keep constant guard and watch over sidewalks supposed to be safe and sufficient, to see that no one breaks holes into or destroys them, or to see that such breaches do not occur from other unexpected causes. *Paxton v. Frew*, 52 Ill. App. 393.

The law requires only that it shall be vigilant to observe them when they become observable to an officer exercising reasonable supervision. *Lehr v. Philipsburg*, 156 Pa. 246, 27 Atl. 133.

Nor, in the absence of anything to indicate that an examination of a street at a particular point was necessary, is the municipal corporation called upon to make one; and it cannot be charged with implied notice of what the examination, if one had been made, would have disclosed. *Miller v. North Adams*, 182 Mass. 569, 66 N. E. 197.

And, where there was nothing in the surface of a highway to indicate that a culvert under it was out of repair, or that an examination was necessary, the failure of the municipal corporation in which the highway lies to make an examination during a period of twenty years, does not justify a finding that the city, by the exercise of proper care and diligence, might have had notice that the culvert was out of repair, so as to make it liable to a traveler whose horse broke through the roadway into the culvert. *Ibid*.

And it is not bound to examine the condition of a coal hole in a sidewalk, in the absence of actual or implied notice that it was defective; and notice of its defect-

ive condition cannot be implied if the defect could not be seen without removing the cover and making an examination; and, in the absence of notice, the city is not liable for injury received by a traveler on the sidewalk, who fell into such a hole. *Duncan v. Philadelphia*, 173 Pa. 550, 51 Am. St. Rep. 780, 34 Atl. 235; *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

A city is chargeable only with such knowledge of the method of construction of a coal-hole cover and the attachments as would be acquired by properly inspecting the same from the street. *Matthews v. New York*, 78 App. Div. 422, 80 N. Y. Supp. 360.

But a city is liable for an injury caused by a hole in a sidewalk, made for access into a cellar of an abutting building, where the hole in question had long existed, and was frequently opened to put things into the cellar, and often left open, and, when covered at all, with only a loose plank liable to be removed or broken; though there was no evidence that any of the aldermen of the ward in which the accident occurred had knowledge of the defective condition of the sidewalk. *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826.

And active diligence upon the part of a municipal corporation is required to detect defects from natural decay in wooden structures like bridges, plank sidewalks, and the like, which will necessarily become unsafe from age; but the most that ought to be required is the use of ordinary diligence by making tests and examinations with reasonable frequency, to ascertain whether they are safe or not. *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309.

Though a defect in a sidewalk was a latent defect, the city may not sit silently by and say that it did not know of it. There should be some examination at some time, and it should be examined with reference to the whole walk; and an instruction, in an action for an injury by such a walk, that, if a person passing over it in the exercise of reasonable care and prudence would not discover the defect, the city cannot be held guilty of negligence for failing to know of it, is erroneous. *Matthews v. Toledo*, 21 Ohio C. C. 69.

And, where a plank sidewalk becomes old and worn, it is the duty of the city to cause it to be inspected; and such planks or boards as are found so worn or weak as to be insufficient should be taken out and replaced by planks strong enough for the ordinary purposes of a sidewalk. *Paxton v. Frew*, supra; *Joliet v. McCraney*, 49 Ill. App. 381.

And a city which, instead of removing all worn-out boards in an old sidewalk which has been in use for years, and replacing them with new, continues the walk in use, trusting that, by frequent inspection, it may discover all holes or defects before anyone is injured thereby, will be held to have notice of the condition of the walk. *Paxton v. Frew*, supra.

Nor is the fact that a sidewalk was in- 20 L.R.A. (N.S.)

spected by a village officer a few weeks before a pedestrian received an injury thereon a defense to an action for the injury; and in such case it is proper to submit to the jury the question whether the trustees used reasonable diligence in discovering whether the walk was out of repair. *Stebbins v. Oneida*, 1 Silv. Sup. Ct. 240, 5 N. Y. Supp. 483.

And, where there was evidence, in an action against a city for an injury caused by an opening or a displaced plank in a sidewalk, that, previous to the accident, a plank was out at times, and sometimes the walk was open, and sometimes the boards were close together, and that the planks were loose, in view of the active duty of inspection devolving upon the city's officers, there is sufficient evidence to go to the jury on the issue whether the city ought, in the exercise of reasonable diligence, to have discovered the defect prior to the accident. *Krisinger v. Creston* (Iowa) 119 N. W. 526.

And an instruction, in an action against a city for an injury resulting from a defective sidewalk, which takes from the jury the right to determine from all the evidence whether the city had exercised reasonable care to keep the sidewalk in question in a reasonably safe condition; and assumes that, if a street commissioner inspected it from three to ten days before the accident, and from such inspection it appeared to him to be reasonably safe, the city had discharged its duty,—is erroneous. *Savanna v. Trusty*, 98 Ill. App. 277.

But, where a sidewalk inspector, some ten days before an accident, went over the walk where it occurred, the accident having been caused by the tipping up of a loose plank in the walk, and tested the planks at the ends, and, finding some of them loose, nailed them down and left the walk in a reasonably safe condition for public travel, in order to charge the city with constructive notice so as to render it liable for any defect afterward developing in the walk, it must have been of such a character as naturally to arrest the attention of a passerby, and the city must have had reasonable time after such defect was noticeable to repair it. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

So, a city, in an action against it for damages claimed to have been received on account of a defective sidewalk, may show that it was the duty of a designated person to look after the walk in question, as bearing upon the probability of his having made the examination testified to by him. *Rogers v. Orion*, 116 Mich. 324, 74 N. W. 463.

And evidence tending to show that an agent of the city visited a fire plug every day during cold weather, and that it was cold weather at the time of the accident, is sufficient to go to the jury upon the question of notice, in an action against the city for an injury resulting from a dangerous condition of the street caused by water flowing from the fire plug. *Powers v. Chicago*, 20 Ill. App. 178.

To relieve a municipal corporation from liability for injury caused by a defective street, inspection of the street by the municipality must be reasonably frequent. *Revis v. Raleigh* (N. C.) 63 S. E. 1049.

And what is a reasonably frequent examination of streets for defects by a municipal corporation depends on the conditions of each case, and is a question of fact for the jury; and it cannot be said, as matter of law, that failure of a municipal corporation to inspect a street for a week was negligence. *Ibid.*

But an instruction that the failure of a corporation to inspect a street for a week was negligence, though erroneous, is not prejudicial to the municipal corporation where the evidence tends to show that the defect had existed for a much longer time than one week. *Ibid.*

9. Time to remove.

Unless a defect or obstruction in a street, causing an injury, was produced by the city itself, or by someone in privity with it, the city is not liable for damages caused by the defect, unless it had notice thereof, express or implied, for a sufficient length of time before the happening of the accident to have enabled it, by the exercise of reasonable diligence, to abate, repair, or remove it. *Walker v. Springfield*, 3 Ohio. Dec. Reprint, 567; *Denver v. Magivney* (Colo.) 96 Pac. 1002; *Anderson v. Wilmington* (Del.) 70 Atl. 204; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454, 56 Atl. 379; *Downs v. Smyrna*, 2 Penn. (Del.) 132, 45 Atl. 717; *Chicago v. Langlass*, 66 Ill. 361; *Lewisville v. Batson*, 29 Ind. App. 21, 63 N. E. 861; *Edwards v. Cedar Rapids* (Iowa) 116 N. W. 323; *Moore v. Minneapolis*, 19 Minn. 300. *Gil*. 258; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *Gerber v. Kansas City*, 105 Mo. App. 191, 79 S. W. 717; *Ball v. Neosho*, 109 Mo. App. 683, 83 S. W. 777; *Richardson v. Marceline*, 73 Mo. App. 360; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506; *Ferguson v. Waverly*, 128 App. Div. 697, 112 N. Y. Supp. 891; *Halum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Legault v. La Cote* St. Paul, Rap. Jud. Quebec 12 C. S. 479.

Or if, for any reason, it ought not to be immediately removed, to establish barriers, or signals, for the protection of travelers. *Walker v. Springfield*, supra; *McCarroll v. Kansas City*, 64 Mo. App. 283.

And failure to put a street or sidewalk in proper condition within a reasonable time after notice of a defect or obstruction therein is essential to the liability of the municipal corporation for personal injuries caused by such defect or obstruction, whether the notice thereof is actual or constructive. *Burleson v. Reading*, 110 Mich. 512, 68 N. W. 294; *Lynchburg v. Wallace*, 95 Va. 640, 29 S. E. 675; *Ferguson v. Waverly*, supra.

Merely notice to a city of the existence of 20 L.R.A. (N.S.)

a hole in a sidewalk would not be sufficient to render it liable for an injury caused thereby; its negligence would depend on its failure to exercise reasonable diligence in repairing the defect after knowledge of its existence. *Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403.

And where the question of negligence in not removing an obstruction unlawfully placed in a street by third persons depends upon implied notice, what is a reasonable time from which notice is to be inferred must be determined by all the circumstances, giving weight to the consideration that municipal authorities, with their multiplied duties, cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs. *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442.

And the celerity with which a city might be required to repair a defect in a sidewalk in order to relieve itself from liability for injuries therefrom might be qualified by various circumstances, such as the length of time the defect had existed, its cause, the location of the street, the amount and volume of travel over it, etc. *Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986.

So, where a street is out of repair from an unusual rain storm or any other sudden or unforeseen violence, the city cannot be held responsible for accidents occasioned thereby until the authorities have had a reasonable time to make the necessary repairs. *Market v. St. Louis*, 56 Mo. 189.

And, where a sidewalk is obstructed by ice, and, by reason of its recent formation and the condition of the weather, the city has not had reasonable time to remove the same, it will not be held liable for an injury resulting therefrom. *Lynchburg v. Wallace*, supra.

Nor is a period of less than forty-eight hours between the time of a snowfall and an accident due to a slippery street sufficient to charge the city with negligence in not causing the street to be cleared. *O'Connor v. New York*, 16 Daly, 58, 8 N. Y. Supp. 530, 9 N. Y. Supp. 492; *Blakeley v. Troy*, 18 Hun, 167; *Duncan v. Buffalo*, 18 N. Y. S. R. 841, 2 N. Y. Supp. 503.

And a city is not liable for an injury occurring on an icy sidewalk at 8.30 A. M., where ice and snow had accumulated on a cobblestone pavement in front of an alley within the sidewalk lines of a public street in the city, and the snowstorm which produced the alleged dangerous condition of the walk began at about 8 o'clock A. M. of the previous day and ended after 7 P. M. of that day, and was followed by sleet which lasted until about midnight when it began to rain and sleet, which continued at intervals until about 7.40 A. M. of the day of the accident, and was followed later by a snow fall of about 2 inches, which had been tramped down over the cobblestones so that the walk presented an uneven surface. *Moran v. New York*, 98 App. Div. 301, 90 N. Y. Supp. 596.

So, evidence that snow fell almost contin-

uously from the 24th to the 30th of November; and that there were 19 inches of snow; and a person was injured upon a city sidewalk on the 1st day of December; and during this period the temperature rose but little above freezing; and at no time, considering the amount of snow, was it possible for the city to clean the sidewalks where the owners of the abutting property had neglected to perform the duty,—does not justify a finding that the city was negligent in failing to clean walks in front of vacant lots upon which the accident happened. *Crawford v. New York*, 68 App. Div. 107, 74 N. Y. Supp. 261.

And a municipal corporation is not guilty of negligence, rendering it liable for an injury to a person who stepped into a hole which had been made on the side of a sewer in a sidewalk by a recent rain, where it had been raining in that vicinity for about three weeks, and, on the afternoon before the injury, was the hardest rain of the season, and, before this rain and afterwards, the marshal of the town went to the place of the injury and examined it carefully, and could detect no defect in the sidewalk, the injury having been caused by the dirt and sand becoming very wet from the rains and caving in on the side of the sewer. *Montezuma v. Wilson*, 82 Ga. 206, 14 Am. St. Rep. 150, 9 S. E. 17.

So, where a disastrous fire destroyed a number of buildings, and the sidewalk, which was of wood in front of the buildings consumed, was much damaged and rendered almost impassable by the fire, and, not more than eight or ten days after the fire, a person passed over the damaged walk and received injuries, the city will not be deemed negligent in not repairing the walk in the intervening period, where it had erected temporary guards, and it does not appear that there was any suitable weather in which the authorities could have made repairs to the walk. *Centralia v. Krouse*, 64 Ill. 19.

And notice of a defect in a sidewalk, given to the superintendent of repairs four days before a pedestrian sustained personal injury in consequence of the defect, is not sufficient to charge the city with liability under a charter provision by which the city authorities had no power to make repairs until they had given five days' notice to the abutting owner to make the repairs. *Touhey v. Rochester*, 64 App. Div. 53, 71 N. Y. Supp. 661.

Omission from the plaintiff's instructions upon the doctrine of constructive notice, of the requirement that a reasonable length of time to remove an obstruction from a sidewalk must have elapsed before the city would be charged with constructive notice of its presence, however, is not reversible error where the instructions of the city on the same subject also omitted that requirement. *Ottawa v. Hayne*, 214 Ill. 45, 73 N. E. 386; *Hitchings v. Maryville* (Mo. App.) 115 S. W. 473.

And failure of the court, in an action 20 L.R.A. (N.S.).

against a city for an injury caused by a defect in a street, to instruct that, after notice of the defective condition of the street had been brought home to the city, it should have had a reasonable time within which to repair the same before liability would attach for a resulting injury, is not error where the evidence shows that the street in question, for a considerable distance on each side of the place of accident, was in bad condition, and this had been known to the city for two or three months, though there is no testimony showing that the officials knew of the existence of the particular hole which caused the accident. *Frankfort v. Downey* (Ky.) 118 S. W. 284.

So, it is the duty of a city to know within a reasonable time of obstructions placed in the streets by others, and to cause the same to be removed. *Whitfield v. Meridian*, 66 Miss. 570, 4 L.R.A. 834, 14 Am. St. Rep. 596, 6 So. 244; *McCarroll v. Kansas City*, 64 Mo. App. 283; *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255.

And, where the approach to a bridge had been undermined by recent rains, the city would be charged with the duty of repairing the defective condition within a reasonable time after it had knowledge thereof, or within a reasonable time after it could and should have acquired knowledge that the washout had occurred. *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95.

And where a policeman discovered a hole in a bridge some time during the day before a person was injured by it at night, and immediately telephoned to the officer whose duty it was to have it repaired, the question whether or not the city had reasonable time in which to repair it after this notice, before the accident, is one for the jury, to be submitted under proper instructions. *Covington v. Gates* (Ky.) 117 S. W. 342.

So, a municipal corporation is liable to persons injured by its defective sidewalks, where the city, through its proper officers, knew, or might by the exercise of ordinary diligence be presumed to have known, that the walk was out of repair and in a dangerous condition, and a reasonably sufficient time had elapsed after such knowledge and before the injury within which to make the necessary repairs. *Reid v. Chicago*, 83 Ill. App. 554.

And the presence of an obstruction upon a sidewalk for twenty or thirty days, in violation of a city ordinance and known to the city authorities, is sufficient to render the city guilty of negligence, and liable to one injured by such obstruction. *Palestine v. Hassell*, 15 Tex. Civ. App. 519, 40 S. W. 147.

And the existence of a depression in a sidewalk, occasioned by the sinking of the earth following the setting of a telephone pole for a month or more prior to an injury therefrom, charges the city with negligence in failing to discover and remedy the defect. *Merritt v. Kinloch Teleph. Co.* (Mo.) 115 S. W. 19.

And, where the only sidewalk on one side of a street consisted of a platform erected

by the owner of an abutting store building; and in this was a hole through which a child fell and was injured; and the city took charge of the street in June, and the accident happened in the following September,—it is a question for the jury, in an action for the injury, whether or not this would have been time enough for the city officers to discover the dangerous place, and to have remedied it. *Bradford v. Downs*, 126 Pa. 622, 17 Atl. 884.

And the same rule applies where knowledge of a city touching a defect in a sidewalk was acquired not less than one or two weeks prior to an accident resulting therefrom. *Denver v. Magivney* (Colo.) 90 Pac. 1002; *Hitt v. Kansas City*, 110 Mo. App. 713, 85 S. W. 669.

So, where a horse died in a public street of a city about 2 o'clock P. M.; and the fact that the dead body was left in the street was known to a policeman of the city that night; and a horse was frightened about 3 o'clock P. M. of the next day without negligence upon the part of the driver, who was injured in consequence thereof,—the city is liable for the injury. *Chicago v. Hoy*, 75 Ill. 530.

And, where a complaint in an action for an injury caused by a large ditch washed out on the side of a highway avers that the highway was carelessly and negligently permitted to be out of repair, and that the city had knowledge that it was so out of repair, this implies that the city had notice of the bad condition of the street when the injury occurred; and, after verdict, it will be inferred that the notice was in time to have enabled the city to repair the street if it had desired to do so. *Madison v. Baker*, 103 Ind. 41, 2 N. E. 236.

The burden of proof rests with a person injured by an obstruction in a street to show that the city had reasonable time and opportunity after the street became unsafe and unfit for travel to put it in proper condition for use, and that it had not used reasonable diligence to do so. *McCool v. Grand Rapids*, 58 Mich. 41, 55 Am. Rep. 655, 24 N. W. 631.

d. Question for the jury.

The question of the actual knowledge or notice to a city of a defect or obstruction in a street or sidewalk must be left to the jury in all cases. *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90; *Joliet v. Walker*, 7 Ill. App. 267.

And it is for the jury, in an action against a city for an injury caused by a defective or obstructed street, to say, under all the circumstances of the case, what length of time a defect or obstruction must have existed to charge the city with constructive notice of its existence and render it liable to respond in damages for injuries caused thereby. *Sheel v. Appleton*, 49 Wis. 125, 5 N. W. 27; *Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632; *Harrell v. Macon*, 1 Ga. App. 413, 58 S. E. 124; *Enright v. Atlanta*, 78 Ga. 288; *Decatur v. Besten*, 169 Ill. 340, 20 L.R.A. (N.S.)

48 N. E. 186; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Savanna v. Trusty*, 98 Ill. App. 277; *Powers v. Chicago*, 20 Ill. App. 178; *Huntington v. Lusch*, 33 Ind. App. 476, 70 N. E. 402; *Evansville v. Senhenn*, 26 Ind. App. 362, 59 N. E. 863; *Ft. Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. 167; *Aurora v. Bitner*, 100 Ind. 396; *Washington v. Small*, 86 Ind. 462; *Cutter v. Des Moines*, 137 Iowa, 643, 113 N. W. 1081; *Garnetz v. Carroll*, 136 Iowa, 569, 114 N. W. 57; *Holitz v. Kansas City*, 68 Kan. 157, 74 Pac. 594; *Bromley v. Bodkin*, 25 Ky. L. Rep. 1245, 77 S. W. 696; *Madisonville v. Penberton*, 25 Ky. L. Rep. 347, 75 S. W. 229; *Covington v. Whitney*, 30 Ky. L. Rep. 659, 99 S. W. 337; *Welsh v. Amesbury*, 170 Mass. 437, 49 N. E. 735; *Gerber v. Kansas City*, 105 Mo. App. 191, 79 S. W. 717; *Shook v. Cohoes*, 23 N. Y. Week. Dig. 4; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657; *Avery v. Syracuse*, 29 Hun. 537; *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *Klein v. Dallas*, supra.

And it is for them to consider and decide in view of all the circumstances disclosed by the proof. *Turner v. Newburgh*, supra; *Duncan v. Buffalo*, 18 N. Y. S. R. 841, 2 N. Y. Supp. 503; *Boulder v. Niles*; *Aurora v. Bitner*; *Fitzgerald v. Concord*; and *Norman v. Teel*, supra.

And this is so though the obstruction was not in itself a nuisance. *Garnetz v. Carroll*, supra.

If conflicting evidence is given in a case, that there was a defective walk and the defect had existed for several weeks, it is for the jury to determine whether such conflicting evidence discloses knowledge of a defect upon the part of the city; and it is not a matter for instruction by the court. *Fleming v. Wilmerding* (Pa.) 72 Atl. 624.

So, whether a sidewalk has been so notoriously defective and out of repair for such a length of time as to put the city upon inquiry is a question depending upon the facts and circumstances of each particular case, and is usually one for the jury. *Fritz v. Watertown* (S. D.) 111 N. W. 630; *Smith v. Sioux City*, 119 Iowa, 50, 93 N. W. 81.

And the question whether municipal officers would have known of dangerous places in a sidewalk if they had exercised proper vigilance is one of fact for the determination of a jury. *Coffeen v. Lang*, 67 Ill. App. 359.

And refusal to instruct, in an action for injuries caused by falling over planks piled up in a street gutter, that, if the planks had not been in the gutter more than one day before the accident the verdict shall be for the defendant, is not error. *Covington v. Whitney*, supra.

It is not for the court, in such an action, to prescribe the length of time which will raise a presumption of negligence upon the part of the city in not taking notice of the defect. *Enright v. Atlanta*, supra.

And, in submitting the question whether

a defect in a sidewalk had existed long enough to enable the city, by the exercise of ordinary care, to discover and remedy it before the accident in question, the law applicable to the fact should not be embodied therein, as by asking whether the defect had existed long enough to make it the duty of the city to discover and repair it. *Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311.

And an instruction in an action against a municipal corporation, that, if the obstruction or defect in question had existed only one day prior to the accident, and the municipal corporation had no actual knowledge of its existence, and the verdict should be for the defendant, is properly refused. *Sheel v. Appleton*, *supra*.

So, an instruction that, if an obstruction was made on Friday and Saturday before the accident, which was on Sunday, the defendant was not guilty of negligence, is properly refused. *Shook v. Cohoes*, *supra*.

And one that, if the jury shall find a legal defect, and that it was open and visible during the whole of a certain month, such fact would constitute sufficient notice, is erroneous. *Colley v. Westbrook*, 57 Me. 181, 2 Am. Rep. 30.

So, whether a reasonable time has elapsed between the origin of a dangerous condition in a street and an injury to a traveler resulting therefrom to have enabled the city to remedy such condition is a question for the jury in an action for the injury. *Revis v. Raleigh* (N. C.) 63 S. E. 1049.

And the question whether a hole in a sidewalk had existed long enough to enable the city, by the exercise of ordinary care, to discover and remedy it before the accident in question, is a single question, proper to be submitted for special verdict without division. *Lyon v. Grand Rapids*, *supra*.

And, where the evidence in an action against a city is conflicting with respect to the existence of a hole in a sidewalk at the time of the accident, as well as to the length of time that it existed prior thereto, if at all, the weight of it is for the consideration of the jury; and the court cannot assume that there was no hole there until a horse stepped on the walk, the day before the accident; and it cannot base an instruction on such assumption to the effect that, as the city had no notice, it cannot be presumed to have had knowledge of its existence by the exercise of proper care. *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709.

So, whether a defective and dangerous condition of a bridge had existed for a sufficient length of time for the city, by its agents, to have discovered the same by the exercise of ordinary care in time to have made it reasonably safe before the accident in question, is a question for a jury to determine from the testimony. *Covington v. Gates* (Ky.) 117 S. W. 342.

And, while a person, while passing over a bridge in a sidewalk made by the placing of stones over a sluiceway, stepped into a hole between the separated stones, and his foot was caught, and he was injured; and there

was evidence that the bridge had been repaired and left in good condition a few days before; and also evidence that it had remained in precisely the same condition for a year or so previous,—it is a question for the jury, under all the circumstances, to determine how long the bridge had been in a defective and dangerous condition, and to determine whether it had been left in an improper condition for such a length of time as properly to challenge the notice of the municipal authorities. *Kirk v. Homer*, 77 Hun, 459, 28 N. Y. Supp. 1009.

So, whether, in view of the distribution of municipal powers, or methods of municipal business, and the time which would be required by a city, after notice, to cause an obstruction in a street to be removed if the city acted with reasonable diligence after notice to a policeman of the existence of an obstruction; and whether there was time after such notice to have removed the obstruction before the happening of an injury therefrom, are questions of fact for the jury, to be determined upon all the circumstances of the case. *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657.

But, while generally it is a question for the jury, in an action for damages, whether a city has notice of a hole or other obstruction in a street, where the facts are undisputed and but one reasonable inference can be drawn from them it becomes a question for the court to decide. *Bell v. Henderson*, 24 Ky. L. Rep. 2434, 74 S. W. 206.

And the question whether officers of a municipal corporation had notice that a street light near a defect in the street was out of repair is a mixed question of law and fact, which it is not proper to submit to the jury directly by interrogatories. *Newcastle v. Grubbs* (Ind.) 86 N. E. 757.

And an instruction that a very short time may be sufficient to constitute constructive notice considering the location of the defect in the street, the character of it, the extent to which the street is used, to what extent the defect or obstruction is permanent and prominent, and such other things as throw light on the question, is not objectionable as inviting the jury to consider everything they may think proper, where it also states that what the facts are and the reasonable inference therefrom are for the jury to determine under all the evidence and circumstances, considered in accord with the court's instructions. *Citizens' Street R. Co. v. Ballard*, 22 Ind. App. 151, 52 N. E. 729.

And an instruction that a municipal corporation will be presumed to have had notice of a hole in a walk if it rendered it out of reasonable repair, and it had existed from one to six months before the injury, and was of such a character as would naturally arrest the attention of persons passing by, if objectionable as determining as a matter of law what would be reasonable notice, is cured by a subsequent charge that, before plaintiff can recover, the jury must find that it, after constructive notice of such hole, had sufficient time to put it in repair,

and neglected to do so. *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141.

XIII. Injury as result of obstruction or defect.

a. Generally.

A recovery can be had against a municipal corporation on account of an obstruction in a street, only for an injury resulting directly and immediately from the obstruction. *Edwards v. Cedar Rapids*, 138 Iowa, 421, 116 N. W. 323; *Raymond v. Haverhill*, 168 Mass. 382, 47 N. E. 101.

And an instruction justifying a verdict for the plaintiff if there was a defect in the sidewalk, not confining it to the defect alleged in the petition, sufficient to have caused the injury complained of, and which did cause it, is erroneous. *Edwards v. Cedar Rapids*, *supra*.

To render a city liable in damages for injuries caused by a defective sidewalk, it must have been guilty of negligence through want of ordinary care, either in not ascertaining the defect and repairing it, or in not repairing after acquiring knowledge thereof, actual or constructive. *Cincinnati v. Frazer*, 18 Ohio C. C. 50.

A municipal corporation is not liable for personal injuries sustained from falling over an alleged obstruction, unless it appears that there was an unlawful obstruction, and that this caused the injury, and that the city had notice of the obstruction and was negligent in not removing it. *Davis v. Corry City*, 154 Pa. 598, 26 Atl. 621.

And the injury must have been a natural and probable result of the defect, as distinguished from the direct and natural result of it. *Collins v. Janesville*, 107 Wis. 436, 83 N. W. 695.

And, if a sidewalk had a ridge in it at or near the center of the walk, caused by the bulging of two planks where they met, which was from $2\frac{1}{2}$ to 3 inches in height; and a traveler slipped upon the walk near the ridge on a sound, safe part of the walk and fell on the ridge and thereby hurt himself, the ridge causing the physical injuries but not causing him to fall, the city is not liable for the injury. *Bloomington v. Read*, 2 Ill. App. 542.

So, a person who is injured by his carriage being upset by running against a pile of sand left on the highway cannot recover of the municipality for the injury in the absence of evidence to show how the obstruction came to be placed in the highway, and that it was done by somebody for whose acts the municipal corporation was responsible. *McGregor v. Harwich Twp.* 29 Can. S. C. 443.

And where, by the statute entitling a person to recover against a municipal corporation for an injury in a street, he is required to prove that he was injured by a defect which had existed for twenty-four hours, or was known to the town, it is not enough that a former defect had existed which had been sufficiently repaired, and 20 L.R.A. (N.S.)

that, by reason of natural causes, a new defect was produced in the same place, unless the new defect, which was the immediate cause of the injury, had existed twenty-four hours, or was known to the town. *Hutchins v. Littleton*, 124 Mass. 289.

Nor can a recovery be had against a city for personal injuries caused by a fall on an icy sidewalk, where the evidence of the person injured leaves the cause of the fall open to mere conjecture. *Dapper v. Milwaukee*, 107 Wis. 88, 82 N. W. 725.

But evidence that a boy who was crossing a bridge was seen near a hole therein; and that, a few seconds later, he had disappeared; and that his body was found in the water below, a short distance from the hole in the direction of the current,—is sufficient to justify a finding that he fell through the hole. *Strong v. Stevens Point*, 62 Wis. 255, 22 N. W. 425.

And, where a person was walking upon a dangerous sidewalk when he slipped and fell, and the precise cause of his falling was unknown, it would be attributed to the danger known to be present, and not to a possible danger not known to exist. *Higgins v. Glens Falls*, 33 N. Y. S. R. 111, 11 N. Y. Supp. 289, affirmed in 124 N. Y. 666, 27 N. E. 855.

b. Proximate cause.

1. General rules.

A city is not liable for an injury resulting from an obstruction placed in the street, unless the injury directly or proximately resulted therefrom. *Ringelstein v. San Antonio* (Tex. Civ. App.) 21 S. W. 634; *Taylor v. Manson* (Cal.) 99 Pac. 410; *Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315; *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90; *Raymond v. Haverhill*, 168 Mass. 382, 47 N. E. 101; *Vicksburg v. Hennessy*, 54 Miss. 391, 28 Am. Rep. 354.

And the rule has been asserted that a defect or obstruction in a highway cannot be held to have occasioned an injury when some other cause combined with it to produce the injury. *Anderson v. Bath*, 42 Me. 346; *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892; *Aldrich v. Gorham*, 77 Me. 287; *Swart v. District of Columbia*, 17 App. D. C. 407; *Alger v. Lowell*, 3 Allen, 402; *Shepherd v. Chelsea*, 4 Allen, 113; *Rowell v. Lowell*, 7 Gray, 100, 66 Am. Dec. 466; *Merrill v. Portland*, 4 Cliff. 138, Fed. Cas. No. 9,470.

But it has been held that a city may be liable for injuries resulting from its negligence in failing to keep a street in proper condition, even though the defective street is not the sole cause of the injury, provided the injured party is not in fault. *Belleville v. Hoffman*, 74 Ill. App. 503; *Templin v. Boone*, 127 Iowa, 91, 102 N. W. 789; *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17, 19 S. W. 284; *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653.

And that the municipality is not exonerated from liability for a defect or ob-

struction in a highway because other causes co-operated with the defect in causing the injury. *Hayes v. Hyde Park*, 153 Mass. 514, 12 L.R.A. 249, 27 N. E. 522; *Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548.

Or because some other incidental cause also contributed to the injury. *Hull v. Kansas City*, 54 Mo. 598, 14 Am. Rep. 487; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Fowler v. Linquist*, 138 Ind. 566, 37 N. E. 133.

And the prevailing rule would appear to be that, where several concurring acts or conditions of things, one of them a wrongful act or omission, such as permitting an obstruction in a street, produced an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if the person injured was without fault, and if the injury was one which might reasonably be anticipated from the act or omission, and which would not have occurred without it. *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320; *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Janes v. Tampa*, 52 Fla. 292, 120 Am. St. Rep. 203, 42 So. 729, 11 A. & E. Ann. Cas. 510; *Lacon v. Page*, 48 Ill. 499; *Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440; *Templin v. Boone*, 127 Iowa. 91, 102 N. W. 789; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Vogel v. West Plains*, 73 Mo. App. 588; *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143; *Harrington v. Buffalo*, 18 N. Y. S. R. 425, 2 N. Y. Supp. 333; *Hawley v. Gloversville*, 4 App. Div. 343, 38 N. Y. Supp. 674; *Storey v. New York*, 29 App. Div. 316, 51 N. Y. Supp. 580; *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; *Sherwood v. Hamilton*, 37 U. C. Q. B. 410.

And this is the rule, although the accident was the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been foreseen and provided against by the city or village. *Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440, affirming 65 Ill. App. 557; *Forney v. Melvin*, 130 Ill. App. 203; *Joliet v. Shufeldt*, 144 Ill. 403, 18 L.R.A. 750, 36 Am. St. Rep. 453, 32 N. E. 969; *Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Danville v. Makemson*, 32 Ill. App. 112.

And a municipal corporation cannot excuse its culpability in omitting to keep its streets and sidewalks in a reasonably safe state of repair for public use, upon the ground that the injury possibly, or even probably, would not have happened but for the intervention of a concurring cause, such as a horse becoming unmanageable through fright, for which neither party was responsible. *McLemore v. West End (Ala.)* 48 So 663.

20 L.R.A. (N.S.)

Within this rule, if a defect in a street is a direct proximate cause of an accident, other concurring conditions which do not involve negligence or culpability, even though they come into a casual relation to the accident, do not relieve the city or town from liability. *Block v. Worcester*, 186 Mass. 526, 72 N. E. 77; *Hawley v. Gloversville*, 4 App. Div. 343, 38 N. Y. Supp. 647.

And a person injured by an obstruction in a street is entitled to recover against the city therefor, where it was of such a character and so situated and so left unprotected that he could not escape injury by the use of ordinary care, notwithstanding the fact that there may have been a want of prudence on his part. *Herfurth v. Washington*, 6 D. C. 289.

And if, by a reason of the want of ordinary care and prudence, the curbing and guttering of a street became defective and out of repair, and this defective condition of the curbing and guttering became an active agency of an unprecedented storm in producing the damage, the city would be liable therefor; but the commingling negligence of the city must have amounted to a want of ordinary care. *Haney v. Kansas City*, 94 Mo. 334, 7 S. W. 417.

So, while, to entitle a person to recover against a city under the Massachusetts statute for an injury caused by falling into an excavation in the street, it must appear that the excavation was the sole cause of the accident, this does not mean that there must be no other innocent or incidental contributing cause; it means that there must be no other culpable cause. *Block v. Worcester*, supra.

And, where an injury is the combined result of the negligence of a municipal corporation in creating a defect or obstruction in a street, and an accident for which neither the city nor the person injured is responsible, the city must pay damages, unless the injury would have happened had it not been negligent. *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131.

And a municipality is liable where it permits the existence of an obstruction in a highway, amounting to a nuisance, which, by reason of the act of another person lawfully using the highway, is rendered dangerous, and which inflicts injuries. *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143.

So, a municipality is liable for damage from an imperfect highway if the immediate cause of the damage is the effect of a precedent cause arising from a neglect of duty by the municipality. *Hey v. Philadelphia*, 81 Pa. 44; 22 Am. Rep. 733.

And notice to a municipality of an unlawful obstruction in a public street, which it is in duty bound to remove therefrom, is notice that the safety of public travel is endangered or liable to be endangered; and, if the municipality takes the risk, and injury ensues, the presence of the obstruction is to be deemed the proximate cause thereof, since the injury could not have happened

if the municipal authorities had performed their duty to remove the obstruction. *Wells v. Brooklyn*, supra.

But a person receiving an injury alleged to have been caused by an obstruction in a street is not entitled to recover against the city therefor if the evidence discloses that the defect was the remote, and not the proximate, cause of the injury. *Childrey v. Huntington*, 34 W. Va. 457, 11 L.R.A. 313, 12 S. E. 536; *Phillips v. Ritchie County*, 31 W. Va. 447, 7 S. E. 427.

And, to render a city liable for an injury resulting from an obstruction in a street, it is not enough that the supposed defect or obstruction may have contributed indirectly to the injury; the injury must have been produced directly by the alleged obstruction or defect. *Swart v. District of Columbia*, 17 App. D. C. 407.

So, a defect in a street, when a concurring cause of an injury, to render the municipal corporation liable, must have been such that without its operation the accident would not have happened. *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Marble v. Worcester*, 4 Gray, 395.

And a municipality is not liable for an injury to a traveler on a highway by a defect or obstruction therein to which two causes contributed, for one of which it was responsible and for the other not, unless the injury would not have been sustained but for the defect for which it was responsible. *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Swart v. District of Columbia*, 17 App. D. C. 407; *Anderson v. Bath*, 42 Me. 346; *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538.

And, where an injury results from a defect in a street and from some other concurring cause, no recovery can be had therefor against the city if it is just as probable that the injury came from one cause as the other, since the person seeking to recover is bound to make out his case by a preponderance of evidence, and the jury must not be left to a mere conjecture, or to act upon a bare possibility. *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Hawley v. Gloversville*, 4 App. Div. 343, 38 N. Y. Supp. 647; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Safford v. Green Island*, 74 Hun. 306, 26 N. Y. Supp. 669; *Rowell v. Lowell*, 7 Gray, 100, 66 Am. Dec. 466.

Unless the concurring cause is pure accident. *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538; *Marble v. Worcester*, 4 Gray, 395; *Phillips v. Ritchie County*, 31 W. Va. 477, 7 S. E. 427.

The only exception to the rule that a person injured upon a highway or street cannot recover unless the defect in the highway or street was the sole cause of the injury exists where the contributing cause was a pure accident, and one which common prudence and sagacity could not have foreseen and provided against. *Rowell v. Lowell*, supra.

So, where several proximate causes con-

tribute to an accident in a street, causing an injury, and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to any or all of the causes; but it cannot be attributed to a cause unless, without its operation, the accident would not have happened. *Ring v. Cohoes*, supra.

And, in a statutory action against a city for injuries sustained by reason of an obstruction in a street, if the negligence of the plaintiff, or if any other efficient cause for which neither the plaintiff nor the municipality is responsible, contributes to produce the injury, the action against the city cannot be maintained. *Whitman v. Lewiston*, 97 Me. 519, 55 Atl. 414.

But a contributory fault which would bar a recovery against the town for an injury caused by an obstruction in a highway must be one of the efficient and proximate causes of the accident, and not a mere condition or occasion of it. *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892.

And, though a person who fell over an unprotected supporting wall on the side of a street, in the night, which was unlighted, and was injured, was guilty of contributory negligence, yet, if the intervening negligence of the city was the sole promoting and proximate cause of the injury, then, at most, the negligence of the person injured can be looked to only in mitigation of damage. *Knoxville v. Cox*, 103 Tenn. 368, 53 S. W. 734.

And the question of contributory negligence in such case goes to the jury, in an action against the city for the injury, upon all the facts; and they are to determine whether, granting such negligence, it in whole or in part proximately occasioned the injury. *Ibid*.

The negligence of a city in failing to remove an obstruction from a street, to be the proximate cause of an injury, however, need not be the last act or cause, or nearest act, to the injury; but it must be such an act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause; and it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances. *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17, 19 S. W. 284.

The test of proximate cause, where several causes unite resulting in an injury in a street, is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they may become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause. *Quinlan v. Philadelphia*, 205 Pa. 309, 54 Atl. 1026.

And the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. *West*

Mahanoy Twp. v. Watson, 112 Pa. 574, 56 Am. Rep. 336, 3 Atl. 866.

And, where the independent act of a responsible person intervenes between the negligence of a city in permitting an obstruction in a highway and the injury sustained therefrom, such acts breaks the causal connection between the negligence of the city and the damage; and the city guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury, unless the intervening act is such as might reasonably have been anticipated as the natural or probable result of the original negligence, in which case the original negligence will be regarded as the proximate cause of the injury, and will render the city chargeable therewith. *Mahogany v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860; *Yocum v. Trenton*, 20 Mo. App. 489.

And a complaint in an action against a city for an injury caused by a defective street, which charges that the accident was not due to contributory negligence, and that the injuries were caused solely by the negligence of the defendant, sufficiently charges that the injuries were not caused by the negligence of any third person. *Newcastle v. Gruggs (Ind.)* 86 N. E. 757.

Where the negligence of the third party is such that the roadmaking power ought to provide against it as a natural and usual occurrence, however, the liability for neglect in repairing is not suspended. *Yocum v. Trenton*, *supra*.

But if, between the cause of an injury from a defective highway and the effect, the negligence of the injured person intervenes so that the injury is the direct consequence of this negligence as well as of the defect in the way; and it is not possible to determine what portion of the injury is caused by either, or that any substantial injury would have been received except for the negligence of the person injured, no action can be maintained by him against the municipal corporation for such injury. *Horrigan v. Clarksburg*, 150 Mass. 218, 5 L.R.A. 609, 22 N. E. 897.

And questions of a special verdict, in an action against a city for negligence, as to whether a sidewalk at the time and place of the injury were insufficient and in want of repair, and, if so, whether such insufficiency or want of repair was the proximate cause of the injury, cover the question whether or not the injury was the result of a mere accident. *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26.

What was the proximate cause of an injury on a street must be determined from the particular facts of each particular case, and is a question of fact for the jury. *Flora v. Pruett*, 81 Ill. App. 161; *Newcastle v. Grubbs*, *supra*.

2. Immediate contact with obstruction.

The liability of municipalities for defects in a highway is not limited to injuries suffered by reason of a traveler or his horse

or carriage coming into immediate contact with the defect or obstruction, but extends to injuries to the horse while under the immediate impulse or impetus received from the obstruction, or during reasonable efforts to relieve him from the position into which he has been thrown by coming into contact with the defect or obstruction, or to the traveler by voluntarily leaping from the carriage, in the exercise of ordinary care and prudence, to avoid apparently imminent danger from being brought into contact with the defect or obstruction, or from the impending consequences immediately resulting therefrom. *Sears v. Dennis*, 105 Mass. 310.

So, a person using a public street, who is prevented by an obstruction therein from getting out of the way of a runaway horse, and who is injured thereby, when she could have avoided the injury had the street been in a reasonably safe condition, is entitled to recover therefor against the city. *Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440, affirming 65 Ill. App. 557.

And, where a person falls, and is run over by a train of cars before he can arise; and his fall is occasioned by a hole in a sidewalk of a city; and the city is guilty of negligence in not repairing it,—the city is liable for the immediate and proximate injuries following. *Schmidt v. Chicago & N. W. R. Co.* 83 Ill. 405; *Chicago v. Schmidt*, 107 Ill. 186.

Nor is a city which left a steam roller in a public street, which was calculated to frighten horses of ordinary gentleness, relieved from liability for an injury to a person whose horse was frightened by it, on the theory that the injury was produced, not by reason of any defect in the roadbed itself, or in consequence of the injured person's carriage coming in collision with the roller, but in consequence of her horse becoming frightened at it. *Young v. New Haven*, 39 Conn. 435.

And, where a horse was frightened by a steam roller in a street, and the bit was broken and control of the horse was lost, and a woman riding in the carriage attempted to jump out and was injured, the presence of the steam roller in the street, at which the horse was frightened, was the proximate cause of the injury, rendering the city liable therefor. *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518.

And, where a person was injured by his horse which he was attempting to assist after it had fallen or became entangled by an obstruction in a street, the obstruction was the proximate cause of the injury; and the driver is entitled to recover therefor. *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Stickney v. Maidstone*, 30 Vt. 738; *McKelvin v. London*, 22 Ont. Rep. 70; *Contra, Crowley v. West End*, 149 Ala. 613, 10 L.R.A. (N.S.) 801, 43 So. 359.

So, rules of law and statutory provisions that sidewalks must be kept in a reasonably safe condition for travel, and which give damages for a violation thereof, do not cover alone cases in which the traveler has

stepped directly into a hole or defect, but also cover cases in which, in the exercise of ordinary diligence, he has stepped near the hole, and, without fault on his part, has slipped into it. *Burrell v. Greenville*, 133 Mich. 235, 94 N. W. 732; *Hamilton v. Buffalo*, 55 App. Div. 423, 66 N. Y. Supp. 990, affirmed in 173 N. Y. 72, 65 N. E. 944.

And, where a traveler on a sidewalk was attempting to step around a hole in the walk which was occasioned by a piece being broken out of one of the planks of which it was constructed, and his foot slipped into the hole, and he was thus caused to fall, causing an injury, it is for the jury to say whether his slipping and falling was the proximate result of the defect. *Brown v. Chillicothe*, 122 Iowa, 640, 98 N. W. 502.

So, where the horses of a traveler, being frightened by the overturning of their load, caused by a defect in the highway, escaped from him, ran 90 rods, and collided with another traveler, the injury of the latter may have been a natural and probable consequence, of the defect, for which the town was liable. *Merrill v. Claremont*, 58 N. H. 468.

But, if the horse of a traveler became frightened at an object in the highway which was an obstruction and defect therein, and with which but for his fright he would have come in contact; and, by reason of such fright, without coming in contact with it, it ran away and overturned the carriage at a place where there was no defect,—the municipal corporation is not liable for an injury sustained by the traveler, since the injury was not directly produced by the defect, or by an attempt to avoid it. *Cook v. Charlestown*, 98 Mass. 80.

And, where a horse became frightened at a railway train, and commenced to run, and the driver lost control, and the horse ran against a telegraph pole standing in the street, and the driver was thrown out, and the horse broke loose from the wagon and ran about 60 rods, where she ran over a pedestrian crossing the street, the telegraph pole standing in the street cannot be said to have been the proximate cause of the injury to the pedestrian, so as to render the city liable to him therefor. *Gaudin v. Carthage*, 36 N. Y. S. R. 308, 12 N. Y. Supp. 796.

And where horses took fright because of the overturning of the sleigh to which they were hitched by an ash heap in the highway, and they ran away, the accident occurring in the evening; and the horses were not found until the next morning, and then at a point from 5 to 6 miles from the place where they started and about a mile from the highway, where they had been killed by a locomotive on a railway track, the negligence of the municipal corporation, if any, was not the proximate, but the remote, cause of the killing of the horses; and the owner is not entitled to recover of the municipal corporation therefor. *West Mahanoy Twp. v. Watson*, 112 Pa. 574, 56 Am. Rep. 336, 3 Atl. 866.

20 L.R.A. (N.S.)

So, where a horse drawing a sleigh along a street was frightened and ran away, because the sleigh ran into a hole in the ice on the street, and, after running a distance of 50 rods, struck and injured a footman, there was no such connection between the defect consisting of an accumulation of ice and a hole in it, and the damage sustained by the injured person by the accidental movements of the runaway horse, that the one must be considered as the necessary natural or direct result of the other; and the city is not responsible for the injury. *Marble v. Worcester*, 4 Gray, 395.

And, where a person driving a team at a railroad crossing found it necessary, to preserve his own life and the lives of his team, and save his wagon from destruction, to make a circuit and drive near to and upon a side track, and in so doing the wheels of the wagon struck a pedestrian, throwing him under the wheels of a moving train, the proximate cause of the injury was the intervening agency, and not the negligence of the railroad company and city in failing to provide suitable safeguards at the intersection of the street and railway. *Kistner v. Indianapolis*, 100 Ind. 210.

Nor can a person struck and injured by a trolley car recover of the city therefor on the ground that it failed to keep the street upon which the line was situated free from obstructions, so that the person injured was compelled, in passing around a post, to walk so close to the street-car track that she was struck by a passing car, where it appears that the collision with the car occurred during the daytime, and that the motorman in charge of the car could, by the exercise of ordinary care, have discovered her peril in time to have avoided striking her; since in such case her action should have been against the trolley car company, and not against the city. *Setter v. Maysville*, 114 Ky. 60, 69 S. W. 1074.

And, where a heap of earth was left in a street in front of an excavation in the adjoining lot and under the sidewalk, forming a mound 6 or 7 feet high, and reaching from the curb to the car track, and running through the street; and a boy traveling along the street started to go around the mound, and was knocked down and run over by a traveler's wagon, which, by reason of the mound, he was unable to see, and, by reason thereof, the driver was unable to see him, the city cannot be held liable for the injury on the ground that the existence of the mound so obstructed the view of the child and the driver of the cart that they could not see each other, since the mere presence of the mound, and the fact that it compelled the boy to pass around it, without the intervention of some other cause, would not have produced the injury. *Storey v. New York*, 29 App. Div. 316, 51 N. Y. Supp. 580.

And, where a city left in a street an object calculated to frighten horses; and travelers came to it without knowledge of the defect, when their horse was at rest, and

manageable; and they got out of the wagon apprehending difficulty in driving the horse by the obstruction; and the horse started up as one of them was dismounting, and an injury thereby happened to her,—the defect or obstruction in the street cannot be considered as the proximate cause of the injury, for which the city can be held liable. *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722.

So, where a construction company, with the permission of the city, dug a ditch in a street and piled the granite pavement which it had dug up in a large pile too close to a car track in the street; and a boy, in attempting to cross the street, was unable to escape, and, by the negligence of the railroad company, was run upon and knocked down by horses drawing one of the cars,—no recovery can be had for the injury, since the acts of the street car company or of the boy were the proximate cause of the injury, and that of the construction company, if at all, a most remote cause. *Stanley v. Union Depot R. Co.* 114 Mo. 606, 21 S. W. 832.

And, where a person driving a vehicle with due care ran into a deep hole by the side of a railroad track laid in the street, and was violently thrown from the vehicle against a loose rail and against a spike protruding therefrom, resulting in the fracture of his skull and his consequent death; and an action was brought against the city for damages suffered not in consequence of the bruise inflicted by the fall but for damage suffered in consequence of his death,—the railroad company, and not the city, is liable therefor, where, but for the loose rail and protruding spikes, the traveler would not have met with death, and this condition of things had not existed at the time of previous accidents to others; since in such case the proximate cause of the death was the violent coming in contact of the skull of the deceased with the loose rail and the protruding spikes. *Cline v. Crescent City R. Co.* 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122.

3. The primary or original cause as the proximate one.

There is a general rule that, where several acts or causes concur to cause the injury, the original act, if wrongful and causing injury in the ordinary course of events, though by the intervention of other causes, not wrongful, is taken as the proximate cause. *Dallas v. Jones*, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377; *Therien v. Montreal*, Rap. Jud. Quebec, 15 C. S. 380.

Within the theory of this rule, the proximate cause of an injury which results to a traveler on a highway from the presence of an unlawful obstruction therein is such obstruction, and not the failure of one maintaining it to use due care in guarding against accident which may result therefrom, although such care might have rendered the injury impossible. *Cohen v. New*

York, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700.

And, where a city negligently constructed and graded a sewer so that a hole washed out along the sidewalk, and failed to place guards along the same, and negligently bridged such hole with planks which became warped and insecurely fastened, recovery can be had for the original negligence in the construction and maintenance of the walk as a proximate cause of an injury, though the injury was immediately occasioned by defects in the plank of which the city had no notice. *Dallas v. Jones*, supra.

And a city is not relieved from liability for injuries received by a traveler who falls into an open hatchway in a sidewalk which a house owner had been allowed to locate and maintain in a dangerous position, by the fact that the immediate cause of the accident was the negligence of such house owner in not guarding the opening. *McClure v. Sparta*, 84 Wis. 269, 36 Am. St. Rep. 924, 54 N. W. 337.

So, the liability of a municipal corporation to a person injured while using a street, by a telephone wire which had become broken during a storm and negligently allowed to remain for four months suspended from a tree overhanging a street, is not affected by the act of a third person, a few minutes before the injury, in fastening the wire to an adjacent tree so as to form a loop in which the injured person was caught; this not being an independent sufficient cause which would preclude a recovery, but, at most, the addition of a further concurrent cause. *District of Columbia v. Dempsey*, 13 App. D. C. 533.

And, where a telephone wire maintained by a city broke and fell across a trolley wire, but did not reach the street, and an employee of the trolley company drew the wire down in an effort to remove it, but, while this effort was in progress, a person came in contact with the wire and was killed, though the act of the employees of the trolley company was a concurrent cause of the accident the negligence of the city was the proximate cause, rendering it liable, since, had not the line fallen upon the trolley wire, having been disconnected from the pole for want of proper construction or want of due care on the part of the city, the accident would not have occurred. *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131.

And, where a city granted a license to an individual to place his business wagon, when not in use, in the street in front of his store; and he kept it there while not in use with the thills turned up and fastened with a string; and, while it was thus standing, it was struck by a wagon and thrown against the sidewalk, when the thills dropped and injured a traveler on the sidewalk,—the mere granting of the license by the city was not the immediate cause of the injury, rendering the city liable, where the injury resulted from the negligent driving

of the one who collided with the wagon, and the insufficient manner in which the thills were fastened; to make the city responsible in such case it must appear that it had notice in some form of the insecure fastening of the thills. *Cohen v. New York*, 33 Hun, 404.

So, where a city maintained a culvert in a condition which caused a large and dangerous pool of water to form in close proximity to a street and sidewalk, and a child, attracted by this pool of water, fell into it and was drowned, the maintenance of the insufficient culvert was the proximate cause of the death; and the city is liable therefor. *Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47.

And, where a person was injured by falling into a neglected drain bordering one of the sidewalks of a city, which was out of repair and uncovered and unguarded, if there were broken bottles or other pieces of glass or sharp instruments in the ditch, without which the injury, notwithstanding the fall, would not have resulted, then, though these things could not have proved harmful without the fall, if the fall was caused by the defective condition of the sidewalk, it must be deemed to have been the proximate cause of the injury, for which the city is liable. *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

Likewise, where an open ditch or drain existed upon the side of a street, which was unprotected; and the opening was 2 feet 3 inches in depth, and the ditch 13 feet wide on the surface; and a railway track was in the street, and from the ditch to the track upon that side of the driveway it was 9 feet; and a traveler on the street, to avoid an approaching car, pulled his team toward the ditch, and one horse went over the bank, was frightened, and plunged to get out, and in so doing placed the wagon in such a position that the car struck it, and the wagon and team were thrown into the ditch and the driver injured,—the open ditch left by the negligence of the city must be deemed the proximate cause or responsible cause of the injury, since, although, except for the collision, the accident could not have occurred, still, except for the ditch and obstruction, the collision would not have occurred. *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621.

And, where a brewery wagon, before reaching a depression in a street, which tipped it over, slid several feet over the snowy surface of the street, the injury resulted from the slippery surface formed by the snow combined with the hole in the highway; and the municipality is liable, inasmuch as the accident would not have occurred in the absence of the hole, no matter how far the wagon might have slid over the snow. *Lehmann v. Brooklyn*, 30 App. Div. 305, 51 N. Y. Supp. 524.

And, where, on a principal street in a town of about 10,000 inhabitants, a railroad ran parallel with the street and about 12 feet below its level; and there was no railing

at the side of the street; and a team of horses became frightened at a passing engine and ran over the unguarded side of the street injuring the driver,—the direct cause of the injury was the want of a proper barrier at the side of the street; and the question of the negligence of the municipal authorities is one for the jury. *Pittston v. Hart*, 89 Pa. 389.

Nor is a city relieved from liability for an injury to a horse which stepped into a hole in the surface of a street by the fact that the horse had temporarily and momentarily escaped from the barn or inclosure of its owner, and was free from control, where it would have been liable had the accident happened while the horse was being driven. *Nocks v. Whiting*, 126 Iowa, 405, 106 Am. St. Rep. 371, 102 N. W. 109.

And a person passing with due care along a street, who, in attempting to avoid the kick of a mule, fell or jumped into an excavation upon the border of the street, which, to the knowledge of the city, rendered the street dangerous, is entitled to recover of the city for the injury received. *Bassett v. St. Joseph*, 53 Mo. 293, 14 Am. Rep. 446.

So, negligence of a city in suffering a dangerous place in a railroad track in a street, in which a child caught his foot, and, while so caught, was run over by a train, was the proximate cause of the injury, rendering the city liable, notwithstanding the negligence of the railroad company in the construction and of the child's parents in sending him to the place. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64.

Nor can a city escape liability for an injury caused by a hole in a sidewalk resulting from a missing plank, where the plank was in fact loose, though it was thrown out by a bicycle just as the person injured was about to step upon it. *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932.

And, where a woman stepped into the vacant place made by the absence of boards in a street crossing, and was injured, the city cannot excuse itself from liability for its negligence on the ground that the ground was covered with snow, and, if it had not been for the snow, the defect would have been seen and avoided. *Waters v. Kansas City*, 94 Mo. App. 413, 68 S. W. 366.

So, where a captain of a truck failed to notify the driver of the existence of an obstruction in a street, and the driver drove against it and was injured, though the captain was guilty of negligence in not so notifying him, and his failure to give the notice contributed to the injury, yet the negligence of the city in permitting the obstruction was the primary and proximate cause of the injury, without which the accident would not have occurred, and the negligence of the captain was the remote cause. *Kansas City v. McDonald*, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123.

And, where a lumber pile was unlawfully placed in a street and allowed to remain there, and a drayman drove his dray against it, and a child playing upon it was thrown

off and injured, if it was negligence upon the part of the city to have failed to remove the lumber pile from the street, and this failure and the act of the drayman both concurring caused the injury, the city is liable whether the act of the drayman was negligent or not. *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17, 19 S.W. 284.

Nor is a city relieved from liability for an injury caused by a hole in a sidewalk by the fact that the starting of the fall of the person injured was due to snow and ice making the sidewalk slippery, where the injury would not have been sustained but for the hole. *Covington v. Billiter*, 30 Ky. L. Rep. 650, 99 S. W. 318.

And, where a highway had been washed away in gulleys, and was slippery with frozen sleet, and a person was injured thereon, if the place where the accident happened was so defective as to render the municipality liable in case an accident had happened by reason of the defect in the absence of the obstruction caused by ice, and the accident happened by reason of such defect and would not have happened but for it, then the municipality is liable though the ice was one of the proximate causes of the accident. *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

So, where a person injured by stepping through a hole in a sidewalk was using ordinary care and diligence, the city, which constructed the walk and invited people to walk upon it and permitted it to remain in an unsafe and dangerous condition, is liable for the injury, although the slippery state thereof, for which no one was responsible, may have combined with the defect to produce the accident. *Atchison v. King*, 9 Kan. 560.

And, where an icy ridge was formed over the bricks of a sidewalk which had been upheaved by the roots of a large tree standing near, and the elevation and depression in the brick walk thus caused were of long standing and were covered with ice 2 or 3 inches thick, formed of the melted and trodden snow; and this was covered by snow which had fallen on the previous evening, upon which a person fell and was injured,—the proximate cause of the injury was the bad sidewalk, which, as should have been foreseen, had become dangerous by its covering of ice, and still more dangerous by the light snow hiding the ice. *Conklin v. Elmira*, 11 App. Div. 402, 42 N. Y. Supp. 518.

Nor can it be said, as matter of law, that the giving of a performance upon a wire stretched across a street under permission of the municipality was not the proximate cause of the injury of a pedestrian by the falling upon him of the performer, although the immediate cause of the fall was the weakness of an appliance used to support the performer's weight. *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057.

And, where the driver of a carriage drove into an obstruction, and a passenger was injured; and at that instant a street car col-

lided with the carriage,—it is a question of fact for the jury, in an action against the city for the injury, as to what was the proximate cause of the injury; and, if it was by reason of the obstruction in the street, and by reason of that the driver drove into it just as the car came along, and it all occurred by reason of the obstruction being there, the city would be liable if it was guilty of negligence. *Koch v. Williamsport*, 195 Pa. 488, 46 Atl. 67.

A hole or depression in a street, however, is not the proximate cause of an injury from slipping on smooth and level ice, which has formed therein, making the surface even with that of the remainder of the street. *Chamberlain v. Oshkosh*, 84 Wis. 289, 19 L.R.A. 513, 36 Am. St. Rep. 928, 54 N. W. 618.

And, where a sidewalk was entirely covered with ice for a considerable distance; and at the place of the accident in question the ice was between 2 and 3 feet deep; and there was a hole in it large enough to admit a person's foot; and a person was injured by stepping into it; and the person injured had passed over the place daily and had not observed the hole before; and the authorities had no actual notice of the existence of the hole; and the weather had been very severe, and so continuous that the ice on the pavement was constantly accumulating,—the hole, and not the accumulation of ice, was the proximate cause of the injury; and the person injured is not entitled to recover therefor. *McCabe v. Philadelphia*, 217 Pa. 140, 66 Atl. 247.

And where for many days ice and snow accumulated upon a sidewalk and was suffered to remain there, and had become rounded and ridgy along the center of the walk, and snow and sleet then fell to the depth of from 2 to 4 inches, and froze, covering this street and all others in the village with a hard crust of ice, and a person fell on the fresh ice, as to which the village was not chargeable with negligence, the jury, in an action against the village for the injury, will not be permitted to speculate whether the old snow and ice, as to which the village might have been charged with negligence, contributed to his fall. *Johnson v. Glens Falls*, 41 N. Y. S. R. 820, 16 N. Y. Supp. 585.

4. Active as distinguished from passive agency of obstruction.

Where two or more causes of an injury exist, and one of them is active in producing the injury and the others are passive and inactive, the active cause will be deemed to be the proximate cause. *Pinnix v. Durham*, 130 N. C. 360, 41 S. E. 932.

Thus, where a city piles bricks along the side of a street for the purpose of repairing the street, and is negligent in not having a light or danger signal on the pile at night, and a person riding a bicycle negligently runs against it and is injured, the negligence of the city is passive and inactive, while that of the person

injured is the moving active agency in producing the injury; and no recovery can be had therefor, the contributory negligence of the person injured being regarded as the proximate cause. *Ibid.*

And, where a pedestrian, while it was dark, kept the middle of a street to avoid the danger of falling into an excavation; and, when she reached a point in the street opposite the lot where the excavation was located, she mistook the lot for a road, and turned, and in doing so she fell on the sidewalk opposite the excavation, and then, supposing that she was coming to the road, fell into the excavation, which was about 2 feet from the sidewalk,—the absence of a rail guarding the excavation was not the proximate cause of the injury, and the municipality was not liable therefor; the proximate cause of her injury was her own mistake, and not the negligence of the municipality. *Lyons v. Watt*, 43 Colo. 238, 18 L.R.A. (N.S.) 1135, 95 Pac. 949.

And, where a street-car track was situated in a street; and the city omitted to keep the north side of the street free from obstruction; and a traveler was compelled by the obstruction to walk so close to the street car track that she was run over by a street-car,—the person injured is not entitled to recover of the city; her cause of action is against the street railroad company, if the motorman in charge of the car could, by the exercise of ordinary care, have discovered her peril in time to avoid striking her. *Setter v. Maysville*, 114 Ky. 60, 69 S. W. 1074.

And a person injured while climbing a fence across a highway cannot recover of the city for the injury received, though it was the duty of the city to cause the obstruction to be removed, where it was an ordinary board fence, and not a dangerous obstruction to anyone passing on foot, and not dangerous to undertake to get over either, in the daytime or night. *Aurora v. Pulfer*, 56 Ill. 270.

Nor can a person injured by a defect or obstruction in a highway recover against the municipal corporation therefor if there was a defect in the harness of the horse which he was driving, which did in fact contribute to produce the injury. *Anderson v. Bath*, 42 Me. 346.

And this is so whether or not he knew of the defect in the harness, or by the exercise of ordinary care and prudence would have discovered it. *Ibid.*

And, where a woman fell and received injuries in consequence of a defect in a sidewalk, and her ankle was weakened thereby so that at times it was likely to turn, and subsequently, because of such weakness, she fell and fractured her leg, the injury received in the second fall was not a direct and immediate result of the accident caused by the defect in the street; and the municipal corporation is not liable therefor. *Raymond v. Haverhill*, 168 Mass. 382, 47 N. E. 101.

And, where a traveler was injured by a fall on an alleged defective sidewalk; and

he subsequently sustained other injuries from a fall on another street due to snow and ice upon the sidewalk, for which the city was not responsible, through the second fall and the injuries caused thereby were occasioned by dizziness, which was the result of the previous fall,—the negligence of the city causing the first injury cannot be considered as the proximate cause of the second injury, so as to render the city liable therefor. *Watters v. Waterloo*, 126 Iowa, 199, 101 N. W. 871.

So, a city which permitted an owner of property abutting on a street to maintain a platform extending out from the second story of his building over the sidewalk is not liable to a person passing by under the platform, who was struck by a bale of hay which was being thrown out of the second story of the building by the occupant, where the injury was the result of carelessness and negligence of the occupant in throwing the bale of hay from the second story to the sidewalk, and the accident would have been just as likely to happen in the absence of a platform as in its presence, the platform being a condition, and not the cause of the accident. *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90.

And, where a wooden awning well and strongly built projected from a shop or building over a sidewalk, and at one end a signboard was attached to the awning in a safe manner; and, as a traveler was passing under the signboard, the awning was struck by the carriage of a teamster who was driving in the street, and the board fell and injured the traveler, the town cannot be held liable for the injury, since the court cannot determine whether it was caused by a defect or want of repair of the way, or not. *Merrill v. Portland*, 4 Cliff. 138, Fed. Cas. No. 9,470.

So, where a city builds a sidewalk elevated from the ground upon posts, and a person is injured by breaking through it, the question of the negligence of the city is in respect to the sidewalk, and not in respect to the existence of an area under the sidewalk, the existence of the area not being the proximate and direct cause of the injury though it may have enhanced it; and the city is not liable therefor. *Atchison v. Jansen*, 21 Kan. 560.

And, where a sidewalk was defective in that stringers were decayed, and, just before the time of the injury in question, a horse had been tied to one of the planks, and, just as the person injured came along, the horse jerked the plank out of place, and the person injured stepped into the aperture and fell, the defect in the walk cannot be said to have been the primary cause of the injury; and the person injured is not entitled to recover of the city. *Hembling v. Grand Rapids*, 99 Mich. 292, 58 N. W. 310.

So, where a wagon of a traveler collided with another wagon being driven at great speed, and the driver of the former wagon was injured, the city cannot be held liable therefor because it permitted the street car

tracks which were in the street to become out of repair to such an extent that the rails were so much above the surface of the street that, as the vehicles approached each other, the drivers could not turn them so as to avoid the collision, since, though the city was negligent in regard to the care of its streets, and this contributed to the injury, yet the reckless driving of the driver of the second vehicle was the proximate cause of the injury. *DeCamp v. Sioux City*, 74 Iowa, 394, 37 N. W. 971.

And, where it is not possible to distinguish the damage received in being thrown from a sleigh in consequence of a defective way from that received in falling upon a broken brace of the sleigh, which the person injured was negligent in using in that condition; or where it does not appear that any substantial damage would have been received if the brace had not been broken,—no recovery can be had against the municipal corporation for the injury. *Horrigan v. Clarksburg*, 150 Mass. 218, 5 L.R.A. 609, 22 N. E. 897.

And, where a person driving in a highway meets another also driving, and fails to turn out as required by statute; and the former is compelled to drive upon the side of the road to avoid collision, and is injured by colliding with a post in the highway standing outside of, but near to, the traveled track,—the town is not liable for the injury; but the person whose independent act was the proximate cause of the injury is liable therefor. *Mahogany v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860.

So, where a team became frightened by persons behind it making a noise, and ran away, whereupon the driver jumped out and the horses ran some distance along the street and into a hole or gully on the side of the street, causing an injury to a passenger, the injury was not the result of the defect in the street, but of the driver's losing or abandoning control of the horses, where the street at the point of the accident was of sufficient width for all the usual travel thereon. *Brown v. Glasgow*, 57 Mo. 156.

And the fright of a horse from a sound produced by the scraping of a carriage wheel against the sides of a stone in a road will not create a liability against a city for injuries caused by the freight, on the ground that the stone was a defect in the way. *Bowes v. Boston*, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633.

Nor does negligence of a city in excavating a street at a particular point create a liability against it for injury to a passenger on a street-railway car, where the negligence proximately causing the injury consisted in the carrier stopping the car at the point of excavation, and omitting to assist the passenger to alight. *Yecker v. San Antonio Traction Co.* 33 Tex. Civ. App. 239, 76 S. W. 780.

And, where a traveler attempted to cross a public street in a city after dark, and the gas lamps had not been lighted, and a street car approached, and its noise prevented his hearing the approach of a horse and wagon 20 L.R.A. (N.S.)

without a driver, and the failure to light the street lamps prevented him from seeing them, and he was run over and injured. the proximate cause of the injury was the runaway horse and the noise of the street car, and the city is not liable for the injury. *Gaskins v. Atlanta*, 73 Ga. 746.

And permitting a road to remain obstructed or out of repair so that fire apparatus is hindered in responding to an alarm is not the proximate cause of the destruction of property by fire; and the city is not liable to the property owner for his loss caused by such defect. *Hazel v. Owensboro*, 30 Ky. L. Rep. 627, 9 L.R.A. (N.S.) 235, 99 S. W. 315.

So, where a special constable was proceeding to take a prisoner to jail, and, passing along a street with him, he was seized by the latter in an attempt to escape, and thrown into a pit negligently permitted by the town authorities to remain in the street, and injured, the town is not liable for the injury, its negligence not being the proximate cause thereof. *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200.

And, where a swing was suspended in one of the streets of a village a few feet from the curb line, and, as a person was driving past in a covered buggy, a little girl gave the swing a push into the street, and the loop of the swing fell over the top of the buggy, which caused an injury to a passenger, the city is not liable for the injury, since it was not caused by the impropriety or illegality of leaving the swing in the street, but by the act of the child, which was not of such a nature that a person of reasonable prudence would have anticipated it. *Shotwell v. Reading*, 5 Ohio N. P. 241.

So, if a liberty pole erected in a street was sound, and so secured and protected that careful, prudent, and sagacious persons considered it safe, and it was broken by a wind of unusual violence, and a person was injured thereby, the injury was a result too remote from the erection of the pole to make the city liable in damages therefor. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649.

But, where a long ladder, the lower end resting in a village street outside a sidewalk inclined over and crossing the walk, the upper end resting upon a building, was blown down in an unusual wind, and injured a passer-by, the negligence of the owner and occupants of the building in allowing the ladder to remain there, and of the village authorities after having knowledge of the facts, was the proximate cause of the injury, and not the unusual wind. *Moore v. Townsend*, 76 Minn. 64, 78 N. W. 880.

Nor does a statute providing that a city shall be liable for injuries caused by its failure to keep its streets reasonably safe give a cause of action to a person who sustains injuries by descending into an uncovered catch-basin to rescue her child, who had fallen in, the absence of the cover of the catch-basin from its place not being the proximate cause of the injury sustained

from voluntarily descending into it. *Kelley v. Boston*, 180 Mass. 233, 62 N. E. 259.

A village is liable, however, for personal injuries to a pedestrian who, without fault on his part, falls from an unguarded sidewalk, although the direct cause of the fall is the negligence of a third person in pushing him off the sidewalk. *Carterville v. Cook*, 129 Ill. 152, 4 L.R.A. 721, 16 Am. St. Rep. 248, 22 N. E. 14.

And the intervening act of a third person cannot excuse a city for its negligence in failing to erect barriers along a street next to a river bank; and an instruction in an action against a city for such an injury, to find for the defendant if the accident was occasioned by bystanders endeavoring to assist the plaintiff by taking hold of the bridle, thereby causing the horse to back over the bank, is properly refused. *San Antonio v. Porter*, 24 Tex. Civ. App. 444, 59 S. W. 922.

And, where a person, in the exercise of reasonable care, was struck and injured by a car of an electric railroad, the tracks of which were located under the supervision of the municipality, while walking on a sidewalk negligently laid after the road was in operation, in such close proximity to the track that cars running thereon projected 1 or 2 feet over and upon the sidewalk at the point where the accident occurred, the negligence of the municipality cannot properly be said to be a remote, and not a proximate, cause of the injury; and the municipality is primarily liable. *District of Columbia v. Sullivan*, 11 App. D. C. 533.

Nor can a city escape liability for injuries sustained by a person by falling into an unguarded excavation in a street at night while attempting to board a street car, upon the ground that the street car company's negligence in stopping the car so near the excavation was the proximate cause of the injury. *Monje v. Grand Rapids*, 122 Mich. 645, 81 N. W. 574.

And a city which made a dangerous excavation in a public thoroughfare close to a much-used walk, without guards, barriers, or danger signals, cannot escape liability for an injury resulting therefrom because the person injured stepped from the cross walk beside the excavation to avoid a collision with persons who were approaching her on the walk from the opposite direction, thus causing her to fall into the excavation, and such a state of facts does not require a statement of the rule with reference to the proximate and remote causes of the injury. *Olathe v. Mizee*, 48 Kan. 435, 30 Am. St. Rep. 308, 29 Pac. 754.

So, where a pedestrian on a sidewalk near the entrance to a bridge was suddenly confronted by a bicycle coming with great speed, and jumped aside to avoid a collision, and fell down the embankment and was injured, the failure of the city to maintain guards at the place was the proximate cause of the injury for which the city is answerable, although a concurring cause of the injury was the unlawful act of the bicyclist in riding on a sidewalk of the 20 L.R.A. (N.S.)

bridge. *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292, 59 N. E. 347.

And that a wagon and car passing abreast in the same direction in which a bicycle rider was traveling narrowed the space, rendering his passage more hazardous, does not relieve the municipality of liability for injury to the bicycle rider, caused by a depression or excavation in the street, where the wagon and car were lawfully in the street. *Clinton v. Revere*, 195 Mass. 151, 80 N. E. 813.

5. *Fright of horses as affecting.*

Where an obstruction or defect in a street causes a horse to run away and collide with a wagon in the street, causing an injury to the driver, the obstruction or defect in the street which causes the fright of the horse is the proximate cause of the injury. *Quinlan v. Philadelphia*, 205 Pa. 309, 54 Atl. 1026; *Crawfordsville v. Smith*, 79 Ind. 408, 41 Am. Rep. 612; *Topeka v. Tuttle*, 5 Kan. 311; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

And the rule is the same where, from fright, the horse becomes momentarily unmanageable, and, by reason thereof, an accident occurs resulting in injury, provided the injury is one that might reasonably be anticipated as a natural result of such negligent and wrongful act or omission. *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Aldrich v. Gorham*, 77 Me. 287.

And, where bags of cement covered with white canvas, which were well calculated to frighten horses, were placed near a bridge by a highway commissioner, and the plank of the bridge had been removed, and no barrier or warning signs were erected to prevent people using the road across the culvert; and the horse of a person attempting to use the road was frightened at the bags of cement, and the driver could not stop him until he ran upon and was injured by the defective bridge,—it cannot be said, as matter of law, that the horse's fright was the proximate cause of the injury, because it was momentarily beyond the driver's control so far as stopping it was concerned. *Judd v. Caledonia Twp.*, 150 Mich. 480, 114 N. W. 346.

So, when a horse of ordinary gentleness merely swerved to one side so that the driver did not lose control over him, and he did not become temporarily unmanageable, and an injury to the driver was caused without his fault, in coming in contact with an obstacle or defect in the street, the city is liable for the injury. *Burnes v. St. Joseph*, 91 Mo. App. 489; *Janes v. Tampa*, 52 Fla. 292, 120 Am. St. Rep. 203, 42 So. 729, 11 A. & E. Ann. Cas. 510; *Spaulding v. Winslow*, 74 Me. 528; *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892; *Stone v. Hubbardston*, 100 Mass. 49; *Chicago & N. W. R. Co. v. Prescott*, 23 L.R.A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 239.

If the object which caused the horse to

step out of the traveled path was within the limits of the highway, and would have caused an ordinarily gentle and well-broken horse to do so. *Stone v. Hubbardston*, *supra*.

Nor is a person whose horse became frightened and ran away, and ran against an obstruction in the street, and caused an injury, deprived of the right of recovery because the fright of his horse was not caused by the defective condition of the street. *Belleville v. Hoffman*, 74 Ill. App. 503.

And a town is not liable, under a statute requiring towns to keep their ways in repair, to one whose horse, frightened by an object within the limits of the highway, sprang aside and was injured by collision with a passing carriage driven upon the proper side of the road, although upon the other side of the carriage, so that it could not be driven at a greater distance off, was a ridge which was a defect in the highway. *Bemis v. Arlington*, 114 Mass. 507.

So, where the sudden blowing off of steam by an engine while a team of mules was on a bridge over the engine slightly frightened the mules so that they got partly beyond the control of the driver and ran with the wagon they were drawing into a 10-inch excavation at the edge of the bridge, negligently permitted to be and remain there by the city, by reason of which the driver was thrown from the wagon and injured, the city is liable in damages for the injury. *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653.

And, where a person passing along a highway met a wagon loaded with lime casks; and her horse took fright at them and immediately backed over a bank precipitating the horse, carriage, and driver into a pond, inflicting the injuries complained of; and there was no railing on the side of the highway; and the distance from the rut nearest the bank to the edge of the bank was about 18 inches; and the bank was nearly perpendicular and about 4½ feet above the water; and the fright of the horse was sudden, and the loss of control but momentarily, the accident immediately following,—the efficient and proximate cause of the injury must be deemed to have been a want of a sufficient railing at the place of the accident; and the fright of the horse was merely an agency which induced or influenced the accident. *Morsman v. Rockland*, 91 Me. 264, 39 Atl. 995.

But when a horse, by reason of fright, disease, or viciousness, becomes actually unmanageable so that his driver cannot stop him, or direct his course, or exercise or gain control over his movements; and in this condition comes upon an obstruction in a highway by which an injury is occasioned,—the municipality is not liable for the injury unless it appears that it would have occurred if the horse had not become so uncontrollable. *Ritger v. Milwaukee*, 99 Wis. 190, 74 N. W. 815; *Spaulding v. Winslow*, 74 Me. 528; *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892; *Titus* 20 L.R.A. (N.S.)

v. Northbridge, 97 Mass. 258, 93 Am. Dec. 91; *Horton v. Taunton*, 97 Mass. 266, note; *Scannal v. Cambridge*, 163 Mass. 91, 39 N. E. 790; *Johnson v. Marquette* (Mich.) 15 Det. L. N. 655, 117 N. W. 658; *Schillinger v. Verona*, 96 Wis. 456, 71 N. W. 888; *Bell Teleph. Co. v. Chatham*, 31 Can. S. C. 61.

If, in such case, the thing which occasioned the horse's fright was the proximate cause of the injury, the person injured cannot recover; but if it, by chance, became merely an agency through which another defect operated to produce the injury, then he can recover. *Spaulding v. Winslow*, *supra*.

A road need not be kept in such a state of repair as to guard against injury caused by runaway horses whose riders or drivers have entirely lost control of them either in spite of ordinary care, or by reason of want of it. *Foley v. East Flamborough Twp.* 29 Ont. Rep. 139.

And one who leaves a horse attached to a wagon standing unhitched in a public highway, and without having the lines within reach, cannot recover for injuries caused by a collision with an obstruction in the highway in case the horse runs away. *Denver v. Utzler*, 38 Colo. 300, 8 L.R.A. (N.S.) 77, 120 Am. St. Rep. 108, 88 Pac. 143.

And, when a person securely fastens his horse to a post in a street, and the horse breaks the fastening and runs away and is killed because the city had failed to erect barriers along a declivity in the street, there can be no recovery against the city for the injury, since, if one was permitted, it would be based on the fact that the horse ran away. *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82, 15 N. W. 267.

And, where a person hitched his horse to a weight in an alley and left him to deliver goods in an adjoining house, and on his return he found the horse had fallen over an unguarded declivity on the opposite side of the alley, it is a question for the jury, in an action for the injury, whether the injury was the sole result of the backing of the horse, in which event the city would not be liable, or whether the injury was the result of the city's negligence in not guarding the alley, contributed to by the accidental action of the horse, in which event the city would be liable. *Ballentine v. Kansas City*, 126 Mo. App. 130, 103 S. W. 564.

So, the fact that a runaway team of horses while under full headway dashed over the side of a bridge at a point where the city had provided no guard rail does not render the city liable for the injury if the bridge was in a reasonably safe condition, and the fright of the horses was not caused by any negligence chargeable to the city. *Teater v. Seattle*, 10 Wash. 327, 38 Pac. 1006.

And, where the driver of a vehicle lost control of his horses, which ran away and caused the injury in question by their running the vehicle against an obstruction in the highway, the person injured cannot recover against the municipality, where notwithstanding the obstruction, the road was

in a reasonable state of repair for ordinary travel. *Foley v. East Flamborough Twp.* supra; *Butler v. Oxford*, 69 Miss. 618, 13 So. 626.

And, where a horse, being driven along a private way towards a city street from which it led at right angles, became uncontrollable at a distance of about 100 feet from the street; and, when the street was reached, the driver had not regained control sufficiently to enable him safely to turn and drive along it; and he drove across it and down a bank on the other side, which was unprotected by a railing; and a person with him was injured,—the uncontrollable condition of the horse contributed directly to the injury, and the city cannot be held responsible therefor. *Higgins v. Boston*, 148 Mass. 484, 20 N. E. 105.

So, the proximate cause of an injury to a horse frightened by the falling of an object from an upper window in a building in front of which he was hitched, when he broke away and ran into an obstruction in the street, was the frightened and runaway horse, and not the obstruction. *Bleil v. Detroit Street R. Co.* 98 Mich. 228, 57 N. W. 117.

And a pile of stones on the roadside leaving space enough for travel will not render the municipal corporation liable for an injury to a person thrown upon the stones by the fall of the horse he was riding, where the fall was occasioned by the struggles of another horse in his team, which was frightened by the shooting of guns near the road. *Kieffer v. Hummelstown*, 151 Pa. 304, 17 L.R.A. 217, 24 Atl. 1060.

Nor are the narrowness of a bridge and the insufficiency of its railings the proximate cause of an injury to an occupant of a cutter dragged off the bridge by a horse which fell and broke the railings in consequence of disease or choking by the harness. *McClain v. Garden Grove*, 83 Iowa, 235, 12 L.R.A. 482, 48 N. W. 1031.

And, although a city may be negligent in failing to maintain a barrier on the edge of a street, yet, when a horse drawing an omnibus in the middle of the street, which is 20 feet wide and in good condition, falls from choking or inability to draw the vehicle, and, in his struggles to regain his feet, plunges over the edge of the street, dragging the omnibus with him and injuring a person therein, a recovery against the city for the injury cannot be had, since the absence of the barrier is only the remote cause of the accident, the fall of the horse being the proximate cause thereof. *Herr v. Lebanon*, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 603, 24 Atl. 207.

And, where a person was driving a horse along a street, which horse had contracted the vicious habit of backing, and which became frightened at escaping steam from a locomotive, and stopped, and, on being struck with the whip, commenced backing, and, in spite of the whip, continued to do so some 25 feet on the surface of the street and then down a steep bank by reason of which an oc-

cupant of the carriage was injured, if sufficient time elapsed between the fright of the horse and the accident to permit a man of ordinary prudence, acting as driver, to make proper effort to regain control of the frightened animal, even though he should fail, the city would not be liable for its negligence in failing to maintain a rail or barrier along the embankment, since the injury must be attributed to the viciousness of the horse rather than to the defect in the street. *Hungerman v. Wheeling*, 46 W. Va. 761, 34 S. E. 778.

Where, however, a horse takes fright, without fault of the driver, at something for which the municipality is not responsible, and gets beyond the control of the driver, runs away, and comes in contact with some obstruction or defect in the street, which is there by the negligence of the municipality, the municipality is liable for the resulting injury if it would not have been sustained except for such negligence. *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A. (N.S.) 190, 116 N. W. 470; *Janes v. Tampa*, 52 Fla. 292, 120 Am. St. Rep. 203, 42 So. 729; 11 A. & E. Ann. Cas. 510; *Wilson v. Atlanta*, 60 Ga. 473; *Chicago v. McCabe*, 93 Ill. App. 288; *Joliet v. Shufeldt*, 144 Ill. 403, 18 L.R.A. 750, 36 Am. St. Rep. 453, 32 N. E. 969; *Mt. Vernon v. Hoehn*, 22 Ind. App. 282, 53 N. E. 654; *Manderschid v. Dubuque*, 25 Iowa, 108; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Emporia v. White*, 74 Kan. 864, 86 Pac. 295; *Meisner v. Dillon*, 29 Mont. 116, 74 Pac. 130; *Sherwood v. Hamilton*, 37 U. C. Q. B. 410.

This rule is based upon the principle that, where several concurring acts or conditions of things, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury if it is one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it. *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A. (N. S.) 190, 116 N. W. 470.

And, where a person was driving an ordinarily gentle horse along a street exposed to a river front, and the horse became suddenly frightened and backed the buggy into the river, injuring the driver, if the injury would not have occurred had there been a suitable barrier erected between the street and the river, the failure of the city to provide such barrier was the proximate cause of the injury, rendering it liable therefor. *San Antonio v. Porter*, 24 Tex. Civ. App. 444, 59 S. W. 922.

So, a person whose horses ran away without fault on his part, who sustained injury while endeavoring to recover control of them because of an obstruction in the highway close to the edge of the traveled track, is entitled to recover damages of the city for his injuries. *Foley v. East Flamborough Twp.* 26 Ont. App. Rep. 43.

Nor is the fact that the horse driven by the person injured became frightened, if without fault of the driver, a bar to a re-

covery by the person injured, against the city, where the injury resulted from an obstruction or defect in a street. *Peoria v. Gerber*, 68 Ill. App. 255, affirmed in 168 Ill. 318, 48 N. E. 152; *Manderschid v. Dubuque*, supra.

And, where a horse driven along a street ran away in consequence of a broken bit, without fault on the part of the driver; and the driver was thrown from the vehicle and injured by reason of an obstruction in the street,—the relation was direct between the obstruction in the street, occasioned by the negligence or omission of duty by the city, and the injury, without any intervening efficient cause; and the city is liable for the injury. *Joliet v. Shufeldt*, 144 Ill. 403, 18 L.R.A. 750, 36 Am. St. Rep. 453, 32 N. E. 969.

And, where a city is negligent in maintaining too narrow an embankment used as an approach to a railway crossing having banks of a precipitate character and no railings, such negligence is not prevented from being the proximate cause of an accident and rendering the city liable therefor by the fact that in producing the accident the fright of the horse of the person injured operated with the negligence of the city. *Harvey v. Clarinda*, 111 Iowa, 528, 82 N. W. 994.

So, where a person injured was driving a horse upon a narrow driveway between a car track and a ditch, the fact that the horse became frightened and participated in the injury in no way modifies the liability of the city. *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621.

And, where a team of horses ran away, and, coming to an opening in a fence or railing along a declivity, they bolted through it and down the precipice, the mere fact that the horses were running away and had become unmanageable will not prevent a recovery against the municipality for the injury, unless the driver was guilty of want of reasonable care or skill, the existence of which is a question for the jury. *Sherwood v. Hamilton*, 37 U. C. Q. B. 410.

And, where a city permitted a street railroad company so to construct its railroad along and upon one of its streets that a carriage driven over it would be in great danger of being overturned and broken; and the horse of a person driving along a street was frightened by a car moving along the track, and ran upon the tracks of the railroad company; and the carriage was overturned and the driver injured,—the city is not relieved from liability on the theory that the injury was sustained from the frightening of the horse by the moving car, and not from the neglect of the city properly to guard its street. *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320.

So, a person whose horse took fright and overturned his buggy throwing it down an embankment in a street upon which he was driving, is entitled to recover for his injury against the city, if the city was negligent in constructing the embankment, and in not 20 L.R.A. (N.S.)

providing it with necessary railings, or other means of protection, and in not keeping the street in a safe condition, such negligence being the real cause of the injury. *Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 396; *Augusta v. Hudson*, 94 Ga. 135, 21 S. E. 289; *Byerly v. Anamosa*, 79 Iowa, 204, 44 N. W. 359; *Olson v. Chippewa Falls*, 71 Wis. 558, 37 N. W. 575.

Whether the fright or misconduct of a horse is such as to be regarded as the direct, proximate cause of an injury in a defective highway is to be determined by the extent of such misconduct; it may in a remote degree bear upon, or even influence, the injury, though not in a legal sense be the cause of it. *Morsman v. Rockland*, 91 Me. 264, 39 Atl. 995; *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892.

And whether an obstruction in a highway, and not an object near the highway, which had caused a team to shy, was the proximate cause of an injury resulting from their running away, is a question of fact for the jury, in an action against the city for the injury. *Johnson v. Marquette* (Mich.) 15 Det. L. N. 655, 117 N. W. 658.

A horse is not to be considered uncontrollable, so that no recovery can be had for an injury caused by a defect or obstruction in a street, if he merely shies or starts, or is momentarily not controlled by his driver. *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91; *Horton v. Taunton*, 97 Mass. 266, note; *Aldrich v. Gorham*, 77 Me. 287; *Morsman v. Rockland* and *Johnson v. Marquette*, supra; *Macauley v. New York*, 67 N. Y. 602.

And the facts that a person's horse was so frightened at the time of an accident from a defect in a street as to be beyond the control of the driver; and that the accident happened after the driver had lost control,—do not prevent a recovery for a resulting injury, unless the loss of control over the horse was not momentarily but continued, or unless he was so frightened by something for which the city was not negligently responsible. *Macauley v. New York*, supra.

But, where a horse shied at an object in a road, and brought the carriage into contact with an obstruction, and the traveler was injured, if the shying of the horse was occasioned by a vicious habit, and was not at an object which would have startled a gentle and well-broken horse, the traveler cannot recover against the municipality for his injury. *Stone v. Hubbardston*, 100 Mass. 49.

And, where a horse had made several attempts to run away, and, after being driven to a road cart in which two men were riding for 26 miles on an August day, became wholly unmanageable and ran away, when the wheels of the cart came in contact with the rails of a railway in the street projecting above the surface thereof, making a scraping noise, the fright of the horse, rather than the negligence of the city in permitting the projecting rails, will be deemed to have been the proximate cause of the injury suffered,

where the cart came into collision with a wagon in consequence of the running away of the horse. *Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443.

A general averment in a complaint in an action for an injury resulting from the frightening of a horse by an object in a street, that the injury was not caused by any negligence or carelessness on the part of the plaintiff, but was caused wholly by the negligence of the town in permitting a person to maintain and carry on a business on the street, makes the complaint good as against a demurrer for want of facts. *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292.

And a complaint in an action against a city for an injury to a girl sixteen years of age, caused by the running away of a team of horses she was driving, and colliding with an obstruction in the street, is not bad for failure to allege that the team was an ordinarily gentle one, such as could be entrusted to the management of a girl sixteen years of age, where it was alleged that the injured person was without fault, and exercised care and skill. *Mt. Vernon v. Hoehn*, 22 Ind. App. 282, 53 N. E. 654.

And the amendment of a complaint alleging that the defendant, a city, negligently allowed a wire fence to be maintained in a street, and that the plaintiff was injured while riding along the street by his horse becoming unmanageable and running into the fence, by substituting the word "frightened" for the word "unmanageable" is not objectionable, as substituting a new cause of action. *McLemore v. West End (Ala.)* 48 So. 663.

The question of the liability of a municipality for injuries caused by a horse becoming frightened at an object in a highway is treated in a note to *Boves v. Boston*, 15 L.R.A. 365; and the effect upon the right of recovery, of fact that horse was frightened when the accident occurred on a defective highway, is considered in a note to *Schaeffer v. Jackson Twp.* 18 L.R.A. 100.

XIV. Right to redress of the person injured.

a. With reference to the person.

1. Nature of the injury.

A person cannot recover of a municipal corporation because of the obstruction of a public highway, in the absence of any showing of damage special and peculiar to him, and not suffered by the rest of the public. *Fisher v. Vaughan Twp.* 12 U. C. Q. B. 55; *Beaudéan v. Cape Girardeau*, 71 Mo. 392; *Stricker v. Hillis (Idaho)* 99 Pac. 831.

In such case he must resort to indictment. *Beaudéan v. Cape Girardeau*, supra.

A person living and doing business upon a street is not entitled to recover damages from the city for the obstruction of the street, where the injury which he suffers is common to the public generally. *Hobson v. Philadelphia*, 155 Pa. 131, 25 Atl. 1046. 20 L.R.A. (N.S.)

Before a private person can sustain an action on account of a public nuisance in a street, he must show that the damage suffered by him differs from that suffered by the public in kind as well as in degree. *Zettel v. West Bend*, 79 Wis. 316, 24 Am. St. Rep. 715, 48 N. W. 379; *Gold v. Philadelphia*, 115 Pa. 184, 8 Atl. 386.

And a municipal corporation charged with the duty of keeping the highways in repair is not liable to the owner or occupant of property fronting thereon for the loss of his business resulting from the neglect of such duty. *Gold v. Philadelphia*, supra; *Hale v. Weston*, 40 W. Va. 313, 21 S. E. 742.

Nor can a person maintain an action against a city for obstructing a public street when his only special damage is that in driving to and from his garden he is compelled to take a more inconvenient and circuitous route. *Zettel v. West Bend*, supra.

And a traveler who is forced to abandon his nearest route by reason of defects and obstructions in it, and seek his destination by a longer and more circuitous route, whereby he suffers injury in his business, does not sustain such a special damage as to entitle him to an action against the party charged with the duty of keeping the way in proper condition. *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516.

Nor does a person sustain a special injury not common to the public, which will give him a right of action against the city, on account of defects in that part of a street leading to his warehouse, by reason of the fact that his business suffers from the bad condition of the pavement, and his horses become strained and broken down, and his trucks racked and worn out in consequence thereof. *Megargee v. Philadelphia*, 153 Pa. 340, 19 L.R.A. 221, 25 Atl. 1130.

And where, for the protection of pedestrians on a street 30 feet wide and so steep that it was dangerous for vehicles to use it, the city erected platforms and steps occupying 14 feet in the width of the street on one side, a property owner on that side is not entitled to recover damages from the city for the obstruction of the street so that it could not be used by wagons. *Hobson v. Philadelphia*, supra.

So, a city placing a sewer in a street is not liable to an abutting owner because in doing the work it drained a spring on his land. *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274.

And the use of a street by an abutting owner for water pipes is not adverse to the right of the city to use the street for a sewer or other legitimate purpose; and no right by prescription to maintain the pipes vests in such owner, although he has enjoyed the use for more than twenty-one years and he is not entitled to recover damages accruing to him from the removal of the pipes. *Ibid.*

So, while the exercise by a city of a power to open and vacate its streets may tend to divert the public travel and direct it into new channels, it cannot subject the city to damages at the suit of a person outside of

the city, whose interests are affected thereby. *Prosser v. Ottumwa*, 42 Iowa, 509.

And a person who owns a ferry outside of a city, from which public travel is diverted by the failure of the city to keep a street in repair, suffers no injury other than that shared by the general public, and is not entitled to recover damages therefor. *Ibid.*

So, an owner of a lot abutting on a street has the right of ingress to and egress from his lot, subject to the right of the municipality to grade and repair the street, provided it is done in a careful manner. *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894.

And, where a city authorized to grade a street so managed the work as to prevent any caving in of the lot of an abutting owner while the work was in progress, so that damage to the abutting owner resulted, not from a want of ordinary skill and caution, but from the fact that, by reason of the grading, the lot was left higher above the level of the street so as to be more difficult of access and therefore less valuable, no right of recovery for the injury exists against the municipal corporation. *Meares v. Wilmington*, 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412.

If an injury to a person resulting from the obstruction of a street is special and peculiar to him, however, he is entitled to redress by private action. *Beaudean v. Cape Girardeau*, 71 Mo. 392; *Stricker v. Hillis (Idaho)* 99 Pac. 831; *Megargee v. Philadelphia*, 153 Pa. 340, 19 L.R.A. 221, 25 Atl. 1130.

If he sustains a direct injury to his person or property, for instance, having a limb broken or a horse disabled, by reason of a street being out of repair, he may recover damages of the municipal corporation for such injury by an appropriate action. *Hale v. Weston*, 40 W. Va. 313, 21 S. E. 742; *Brown v. Southbury*, 53 Conn. 212, 1 Atl. 819.

Where the injury sustained is not shared by the general public, and is different in kind from that inflicted upon the general public, and is direct and substantial, an action may be maintained. *Stricker v. Hillis*, *supra*.

And, where the flooding of land caused by a change of grade of streets by a city and insufficient drains did not cause any damage to the community at large, the right of the person whose land was flooded, to recover for his injury, is not affected by the fact that three or four neighboring property holders had their lots flooded at the same time. *Mayrant v. Columbia (S. C.)* 64 S. E. 416.

So, the owner of land abutting upon a street or alley, one end of which is obstructed so that he cannot cross from his property to other streets in that direction, suffers a peculiar injury to himself by reason of the public nuisance, which entitles him to injunctive relief. *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288.

And, where a road is the only one which a person can use in getting out and into the

place where he lives; and his buildings are so located that there is no other way of using them except through using the highway; and the obstruction of the highway would require him to move his buildings and would damage his orchard; and he would be compelled to build new ditches,—he suffers special injuries which entitle him to sue for the obstruction of the road. *Stricker v. Hillis*, *supra*.

And, where a city built a sewer in a street under legislative authority, and so obstructed the street in front of the premises of a grocer situated thereon as to interfere with his business, and to put him to extra trouble and expense in receiving and delivering goods, the injury to him is special and peculiar, and not one which he suffers in common with the rest of the public; and is one for which he may maintain an action for damages against the city. *Williams v. Tripp* 11 R. I. 447.

So, a municipal corporation may be held liable for negligently allowing a street gutter to fill up so that the water overflows and causes damage to an abutting property holder. *Beach v. Scranton*, 5 Lack. Leg. News, 25.

And if, by reason of the negligent and unskilful construction of a gutter by a municipality, or its negligent failure to keep the same in repair and free from obstructions, surface water is caused to flood a lot upon which it would not otherwise have flowed, the municipality is liable for the consequent damages, although the lot is below the grade of the street. *Gilluly v. Madison*, 63 Wis. 518, 24 N. W. 137.

And, where a city, in grading a street, did not use ordinary skill and caution in doing the work, so that the owner of an abutting lot was compelled to erect walls to prevent his lot from caving, which, with proper skill and caution it was the duty of the city to have erected, the lot owner is entitled to recover of the city therefor. *Meares v. Wilmington*, 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412.

Likewise, where a stone crusher owned by a city and operated under the direction of its superintendent of streets for the purpose of crushing rocks and stones to be used in keeping the streets of the city in proper condition for travel upon land belonging to the city, which land for a period of nearly three months was used exclusively in the preparation of materials for repairing the streets of the city, damages adjoining land by depositing dust thereon, the owner of such land may maintain an action therefor against the city. *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481.

And an adjacent house owner who is seriously annoyed by loud noises and offensive odors from hucksters selling their produce from wagons on the sidewalk in front of and near his house may enjoin the city from using or authorizing the use of the streets in question as a market-place or stand for the selling of goods, although the nuisance may be also a public one, to be remedied by

indictment, and although the city did not create the nuisance. *McDonald v. Newark*, 42 N. J. Eq. 136, 7 Atl. 855.

So, several persons who are affected in the same manner by way of damage to their property by a public nuisance in a street may join as plaintiffs in an action to have the nuisance abated. *Herrick v. Cleveland*, 7 Ohio C. C. 470.

And, where the statute enjoins upon a city, and likewise upon the city council, and also upon the director of public works, the duty of keeping the streets free from public nuisances; and, an action is brought to enjoin a nuisance in certain streets of the city and to enforce a trust which the statute places in the city alone as to such streets,—the city is the proper defendant in such action. *Ibid*.

So, persons who have been damaged in their property rights by the failure of a city to perform its legal duty, or to carry out a trust as to streets, may sue the city to enjoin such continuing injury to them, and to enforce such trust, without first requesting the city solicitor to bring the action, provided the injury to them is different from that done to the public generally; but such persons cannot bring their action on behalf of the public generally without first applying to the solicitor to bring the action in compliance with statutory provisions therefor. *Ibid*.

And, where an obstruction is unlawful; and it has been specially injurious to an individual as an occupant of property abutting upon the street; and no legal authority for the creation or the continuance of the obstruction exists; and it is the duty of the municipal officers to remove it and in that manner restore the street to the state of usefulness and convenience which it was designed to afford; and they have refused to perform that duty,—he is entitled to a writ of mandamus for the purpose of setting these officers in motion and securing the redress which he is legally entitled to receive. *People ex rel. O'Reilly v. New York*, 59 How. Pr. 277.

2. Character, capacity, and condition.

The doctrine that an employee must take the risk of his employment, and the risk of the negligence of his fellow servants, does not apply to the case of a policeman or other employee of a city, injured by its negligence in failing, after ample notice, to remove an obstruction in a street, which causes the injury complained of. *Klopper v. District of Columbia*, 25 App. D. C. 41.

Policemen do not assume risks incident to defective sidewalks and highways in the city in which they are employed, and do not stand in the same relation to the city that employees of private corporations do to their employers, and are not subjected to the restricted rights of such relation. *Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 823, 11 S. W. 29.

And a person who was injured by stepping into a hole in a sidewalk is not precluded from recovering against the city for his injury by the fact that he was a policeman, on the theory that he was required to keep in repair the streets within the district to which his employment was restricted, where he was a policeman for the special purpose of guarding from depredation the property of persons who paid him for his services, and it was not his duty to observe the condition of the sidewalk. *Klopper v. District of Columbia*, *supra*.

So, a fireman, in assuming the duties of his place, takes upon himself no risk arising out of negligence on the part of persons in charge of the streets in permitting defects or obstructions therein. *Turner v. Indianapolis*, 96 Ind. 51; *Palmer v. Portsmouth*, 43 N. H. 265.

And, where a hose cart ran against a stump in a street, and one of the firemen was injured, if the injury was caused by the combined negligence of both the driver and the city neither can plead the negligence of the other to avoid liability, the driver and the fireman not being fellow servants in such case. *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365.

Cities are held to as great a degree of care in keeping and maintaining their streets in reasonably safe condition for public travel for the benefit of a fireman driving over them in the discharge of his duties as they are for that of any other traveler. *Kansas City v. McDonald*, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123.

And a statutory duty imposed upon a city to keep its streets in repair and reasonably safe and fit for public travel extends to the members of the fire department the same as to others of the traveling public. *Coots v. Detroit*, 75 Mich. 628, 5 L.R.A. 315, 43 N. W. 17.

They take the usual risks of an employment of a dangerous character, but they do not assume the risks of the insecurity of streets resulting from the culpable negligence of the city. *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506.

So, the fact that a city having a paid fire department procured an accident policy for one of its firemen under a statutory provision authorizing it, and that the amount of the policy was paid to the widow of the fireman after his death, is no defense to an action brought by her against the city for its negligence in permitting the obstruction of a street, which caused the fireman's death. *Kansas City v. McDonald*, *supra*.

Nor does the fact that a person injured by an obstruction in a street was the servant of the city, driving a patrol wagon, impose upon him the duty to negative contributory negligence by averring in his petition, in an action against the city for the injury, that he did not know of the obstruction, since it was no part of his duty to examine streets and report upon their condition. *Louisville v. Michels*, 114 Ky. 551, 71 S. W. 511.

And a person employed and paid by one who has contracted with a town to light

and take care of its street lamps is not a servant or agent of the town, so as to be deprived of a right to recover of the town where he fell over an obstruction across a sidewalk and was injured, on the theory that the injury which he sustained was caused by the neglect of some fellow servant in omitting to remove the obstruction. *Eaton v. Woburn*, 127 Mass. 270.

And, where coal was being delivered to a city through a coal hole in a sidewalk, covered by a grating which hung on hinges, which was thrown back against the building when coal was being delivered, and which was dangerous when not securely fastened; and it was left insecurely fastened by a person delivering a load of coal, and fell upon a person delivering another load of coal immediately afterwards,—the rule that a master is not liable to his servant for damages occasioned to him through the negligence or unskillfulness of his coservant has no application, and cannot be invoked to shield the city from the consequences of its negligence in maintaining the dangerous grating without a secure fastening. *Galvin v. New York*, 112 N. Y. 223, 19 N. E. 675, reversing 22 Jones & S. 295.

So, that a person injured by a defect or obstruction in a street was a member of the city council will not prevent him from recovering damages for the injury if he was not a member of the committee having supervision of highways, and was not charged with the duty or given the power to make repairs. *Danville v. Robinson*, 99 Va. 448, 55 L.R.A. 162, 39 S. E. 122.

And a provision of a city charter forbidding members of the common council to contract with the city is of no effect on the right of a member of the council to recover against the city in case he is injured by a defect or obstruction in a street. *Ibid*.

Nor does the fact that it may have been the duty of a railroad company having tracks in a public street, under its contract with the city, to construct and keep its tracks in a suitable and safe condition for those who have occasion to pass over the streets, discharge the city from its duty to the public, including employees of the railway company, to keep its streets in a reasonably safe condition, or relieve it from liability for the consequences of its negligence in that respect. *Kansas City v. Orr*, 62 Kan. 61, 50 L.R.A. 783, 61 Pac. 397.

And, where a railroad is built upon a street by authority of the city, and an employee of the railway company, in the performance of his ordinary duty, walks over the street and is injured by a hole or defect in it, of which the city has or should have knowledge, the city is liable for the injury sustained. *Ibid*.

And a city the charter of which confers upon it the power to make and repair sidewalks, and imposes a duty upon every owner of real estate in front of whose premises a sidewalk or gutter has been heretofore made to keep the same at all times in suitable and proper repair, cannot escape liability for injuries sustained by a person

who fell while passing along a defective sidewalk, by the fact that he was a lessee of the premises abutting upon the street at the place where he fell, in the absence of anything to show that he had, by the terms of his lease, agreed to keep the sidewalk in repair, or that he had erected a nuisance or obstruction which caused the injury. *Avery v. Syracuse*, 29 Hun, 537.

So, streets and sidewalks are made for persons in ill health as well as good health; and the fact that a person injured on an alleged defective sidewalk had many physical ailments before the injury is of no effect as to her right of recovery. *Fulton v. Green*, 103 Ill. App. 96.

And the liability of a city for an injury to a woman by an obstruction or defect in a street, and its duty to keep its streets in such repair that they will be reasonably safe to travel over, are not affected by the fact that her physical condition was such as to render her more susceptible to injury than people generally. *Lewis v. Independence*, 54 Mo. App. 183.

And a person who is crippled and necessarily uses crutches has the same right to use a street or walk as one not in that condition; but he should use a higher degree of care consequent to his greater liability to danger in passing thereon. *Mt. Vernon v. Brooks*, 39 Ill. App. 426.

Nor do the facts that a person is old, and that his sight is defective, deprive him of the right to travel in the streets and upon the walks, or prevent him from recovering for an injury caused by a hole or obstruction therein, provided he uses such reasonable care and caution as a person laboring under such infirmities would ordinarily exercise. *Peach v. Utica*, 10 Hun. 477.

A person of impaired vision, who still has sufficient power of sight to go with reasonable confidence of safety through the streets if kept in such condition as it is the duty of the municipal corporation to keep them, may recover for injuries sustained by reason of an excavation which a person of good sight might have seen and avoided. *Davenport v. Ruckman*, 10 Bosw. 20.

But a municipal corporation owes no greater duty to a blind person to keep its sidewalks in a safe condition, than to others who can see. *Carter v. Nunda*, 55 App. Div. 501, 66 N. Y. Supp. 1059.

And evidence of the color or race of a person injured by a hole in a sidewalk, and of specified acts derogatory of his character, are irrelevant and inadmissible in an action by him against the city for damages for the injury. *Lord v. Mobile*, 113 Ala. 360, 21 So. 366.

So, the duty of a city so to construct its streets as to make the same safe for the traveling public includes keeping them in such condition that children may be upon them with safety. *Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528; *Waverly v. Reesor*, 93 Ill. App. 649.

Children are not restricted in passing and repassing upon the streets any more than

adults; and the same rules are to be applied equally to all regulating the use of the highways for objects for which they are designed. *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; *Waverly v. Reesor*, supra; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369; *Reed v. Madison*, 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547.

And a child seven years old, going along a street with its father, is a traveler for whose benefit it is the duty of the city to keep its streets free from defects and obstructions. *Gulline v. Lowell*, 144 Mass. 491, 59 Am. Rep. 102, 11 N. E. 723.

Wherever an adult may be without incurring the imputation of being an intruder a child may also go free from the like imputation; and the same circumstances which will justify a recovery by one who had reached years of discretion, and had sustained an injury from a defect or obstruction in a street while free from fault, would justify a recovery by an infant of such years as to be incapable of fault, provided its parents or guardians are also guilty of no neglect which can be imputed to the child. *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155.

And negligence cannot be imputed to parents who permit a child of tender years to go to a place where it has a right to be, like a street, and at which there is no reason to suspect danger, and which is safe, unless another is guilty of a breach of duty. *Ibid.*

Reasonable safety of village or city streets, however, is what the law requires, and no more; and an instruction laying down the rule that anything that is not safe for children is unlawful, is improper. *Shippey v. Au Sable*, 65 Mich. 495, 32 N. W. 741.

But, if a city failed to use reasonable care in keeping a bridge and sidewalk over which a child, between eleven and twelve years of age, was passing when injured in proper repair; and the accident resulted from that cause; and the child was exercising such a degree of care and caution as, under the circumstances, might reasonably be expected from one of her age and intelligence,—the city is liable for the injury. *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34.

And a city is not relieved, as a matter of law, from liability for negligently leaving a water tank in such a condition as to endanger the lives of children in the streets, by the fact that the person injured thereby was a child four years of age; in such case it must be left to the jury to determine whether the parents of the child have been guilty of negligence in suffering the child to be in the street. *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553.

The question of the rights of children to protection against dangerous conditions of a highway is considered in a note to *Gibson v. Huntington*, 22 L.R.A. 561, 20 L.R.A. (N.S.)

b. With reference to the use of the street.

1. General rules.

The general rule is that the duty of municipal corporations to keep their streets in repair is not limited to repair for travelers; they are to be kept in repair as streets for all the purposes to which streets may be lawfully devoted. *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267.

The duty of a city to keep its streets reasonably safe and convenient applies with reference to all those who rightfully use them, or who have occasion to pass over them for purposes of business, convenience, or pleasure. *Kansas City v. Orr*, 62 Kan. 61, 50 L.R.A. 783, 61 Pac. 397; *Bath v. Blake*, 97 Ill. App. 35; *Waverly v. Reesor*, 93 Ill. App. 649; *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281.

Or to gratify idle curiosity. *Bath v. Blake* and *Waverly v. Reesor*, supra.

And whether they pass with carriages or in other modes. *Stinson v. Gardiner*, supra.

A city is bound to keep its streets and sidewalks in a reasonably safe condition for the use of the public, and an instruction to this effect, in an action against the city for an injury from a defective sidewalk, is not rendered improper by the use of the words "all persons" instead of the words "the public" the two expressions being synonymous. *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34.

And in keeping its sidewalks reasonably safe is a duty of a municipal corporation relative not only to travelers but to any person lawfully upon a sidewalk using it for purposes for which sidewalks are designed. *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

So, under a statute providing that every public road or street shall be kept in repair by the corporation, and, on default the corporation shall be civilly responsible for all damages sustained by any person by reason of such default, while the primary purpose of the highway is for travel and passage, there are many other modes of use which are recognized as permissible and legitimate so long as public convenience is not interfered with; and a recovery thereunder is not barred by the fact that the highway was not being used for public travel and passage. *Ricketts v. Markdale*, 31 Ont. Rep. 610.

And, while a traveler's right to travel on the streets is a superior right, it is the duty of the traveler to take into consideration the rights not only of his fellow travelers but of others to use the highway for purposes other than those of travel, and to conform to those usages and customs which have grown up with the civilization or commerce of the city or country through which the road is constructed. *Rome v. Sudeth*, 116 Ga. 649, 42 S. E. 1032.

A municipal corporation cannot be held liable, however, for damages which are sustained by persons in consequence of improv-

er or unauthorized usage of the highway, which occasions or contributes to accidents. *Stickney v. Salem*, 3 Allen, 374.

And the rule, probably based largely on the language of particular statutory provisions, has been frequently asserted and acted upon, that only persons using a sidewalk or highway for purposes of traveling thereon, when injured by defects or obstructions therein, are entitled to recover against the city. *Reed v. Madison*, 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547; *Monmouth v. Sullivan*, 8 Ill. App. 50; *Blodgett v. Boston*, 8 Allen, 237.

And a statutory provision making towns liable in damages to persons or property, caused by the insufficiency or want of repairs of a highway, relates only to damages sustained by a traveler using the highway as such, and not to damages caused to adjoining property by the overflowing of water caused by an obstruction of the highway. *Harper v. Milwaukee*, 30 Wis. 365.

The term "traveler," as used to designate persons for whose use and benefit highways must be kept in proper condition, has no technical, legal signification; and, under proper instructions, it is for the jury to say whether a person receiving an injury was traveling upon the highway within the meaning of the statute. *Hardy v. Keene*, 52 N. H. 370.

And a person is traveling upon a highway, within the meaning of a statute with reference to keeping highways in proper condition for travel, when he is making a reasonable use of the highway as a way. *Varney v. Manchester*, 58 N. H. 430, 42 Am. Rep. 592.

Thus, a carpenter engaged in repairing a house with lumber deposited in the gutter in front of the house to be repaired, who is injured by stepping into a coal hole in the sidewalk while walking backwards in order to swing a long piece of timber around the trees to get it in position where he wishes to work with it, is a traveler upon the sidewalk, to whom the city owes the duty of keeping the sidewalk in a proper condition. *Stege v. Milwaukee*, 110 Wis. 484, 86 N. W. 161.

And, where a person, without fault or negligence on his part, is forced against a rail along the highway, or takes hold of it to aid his passage, or falls against it by accident, or has occasion to use it in any way in furtherance of the lawful and reasonable exercise of his right as a traveler; and, by reason of any defect or insufficiency, it gives way and causes an injury,—the municipality is liable to make compensation for the damages. *Stickney v. Salem*, supra.

But a person, who used a highway wholly for the purpose of horse racing, and in the same manner he would have used it if it had been a race course fitted and designed for the purpose, and met with disaster, cannot recover of the municipality merely because it had not afforded him and his horse a safe and more perfect track; but if he had been on his way to his business or home, or had been out riding for pleasure and recrea-

tion, and, while so doing, had speeded his horse to keep up with or pass other teams, he might still have been a traveler within the protection of the statute, in case of accident from a defective way. *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23.

And, while a city must keep its streets in a reasonably passable condition for travelers, it is not bound to keep them safe and passable for horses which have escaped from the control of their owners or drivers. *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82, 15 N. W. 267.

And a municipal corporation is not bound so to construct an avenue that a runaway horse can come upon it at right angles and leave it with safety. *Higgins v. Boston*, 148 Mass. 484, 20 N. E. 105.

So, the act of a person of putting his head between the rail of a drawbridge and that of the permanent structure constituting the stationary part of the bridge, where the gate was opened before the draw was fully in place, so that his head would be squeezed by moving the draw a few inches to its proper position, was not making an ordinary use of the bridge for the purpose of travel; and where, in so doing, he received an injury, the accident was one of such an extraordinary character that the municipal corporation was under no obligation to guard against it, and cannot be held liable therefor. *Nicholls v. New York*, 128 App. Div. 532, 112 N. Y. Supp. 795.

2. Lotterting, deviation.

The use of a highway as a way, which constitutes traveling upon a highway, includes motion from one place to another more or less distant; but continuous movement is not necessary; such use does not cease with every cessation of locomotion. *Varney v. Manchester*, 58 N. H. 430, 42 Am. Rep. 502.

And travelers on a street have not only the right to pass, but also to stop and rest, on necessary and reasonable occasions, so that they do not obstruct the street or doorways, or wantonly injure them; and they are entitled to recover if injured by a defect in the street while so doing. *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367.

And, where an excavation was made along the margin of a public sidewalk, and this was protected by a railing of which a gate formed a part, and a person leaned upon the gate and it gave way and he fell into the excavation, the fact that he intentionally leaned on the gate does not prevent a recovery on his part against the city for the injury; it is a question for the jury whether or not, under all the circumstances, he was making a proper and legitimate use of the gate in question. *Jackson v. Boone*, 93 Ga. 662, 20 S. E. 46.

In the above case the court refused to follow the holding in *Stickney v. Salem*, infra.

But, while it is the duty of a city to keep its streets in a reasonably safe condition for persons traveling thereon; and this obligation extends to an unsafe wall standing by

the side of the street, after notice of such fact,—a person injured by the falling of such wall cannot recover from the city for the injury where he was not using the street at the time for any purpose. *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443.

And a person passing along a street already in use as a highway, but which is being graded, who, instead of taking the carriage way, heedlessly uses as a path an embankment of 2 or 3 feet in width raised by contractors to sustain water pipes in the center of the street, never intended, or used, or authorized to be used, as a footpath, upon which he falls and is injured, cannot recover of the municipal corporation for the injury. *Carolus v. New York*, 6 Bosw. 15.

Nor is a municipal corporation liable in damages to one who, while stopping in the highway for the purpose of conversation, leans against a defective railing and is injured by reason of its insufficiency. *Stickney v. Salem*, 3 Allen, 374.

And the fact that a railing along a highway was defective, and would have proved an insufficient barrier in case it became necessary for a traveler to use it for a legitimate object does not give a person who stopped in the highway for the purpose of conversation, and leaned against the railing, and was injured by reason of its insufficiency, a right of recovery against the city. *Ibid*.

But the act of a person passing along a public street, of stopping to converse with another, and leaning against the railing of a bridge that forms a part of the highway, thus bringing about a fall because of a defect in the railing, does not *per se* and on the ground that he was not using the bridge for its proper purpose, forfeit the protection from injury that is enjoined upon cities properly to construct and keep in repair their streets. *Whitewright v. Taylor*, 23 Tex. Civ. App. 486, 57 S. W. 311.

Nor can a person who, on Decoration Day, went into a street to see a procession form, and stood there from three to five minutes near a pile of lumber, which fell on him and injured him, be said, as matter of law, to have been traveling upon the highway, within the meaning of the statute. *Varney v. Manchester*, *supra*.

So, a temporary or momentary withdrawal by a traveler from and a stoppage outside of the limits of a highway with intent to return to it and pursue his journey does not prevent him from being a traveler, entitled to recover for an injury caused by a defect in a highway. *Ward v. North Haven*, 43 Conn. 148.

And the mere fact that an obstructed or defective street was out of the way of the point at which the traveler was arriving, or that he might have taken a nearer way, does not affect his right to recover for an injury received, since it is the duty of the municipality to repair all its sidewalks. *Clayton v. Brooks*, 150 Ill. 97, 37 N. E. 574.

And, where a tenant of a building upon the corner of two intersecting streets found the entrance of his dwelling on one street

locked, and returned and went around the corner to an entrance on the other side, and on his way stepped into a hole in the sidewalk and was injured, he was a traveler upon the street, within the meaning of a statute giving travelers the right to recover damages for injuries sustained by reason of any insufficiency or want of repair in a street. *Strack v. Milwaukee*, 121 Wis. 91, 98 N. W. 947.

Nor can the ulterior purpose of a traveler in crossing a bridge affect his right to have it in a reasonably safe condition for such use. *Strong v. Stevens Point*, 62 Wis. 255, 22 N. W. 425.

And a man whose team was injured while running away, by reason of the failure of the municipality to provide a sufficient railing to a bridge, is not deprived of the right to recover for the injury by the fact that at the time the horses were frightened they were not upon the highway, but were hitched upon the owner's premises, a short distance from it. *Ward v. North Haven*, *supra*.

And, where sections of the roofing of a building were piled upon a sidewalk leaning against a tree, and a person went to a hydrant near the sidewalk for the purpose of drawing a drink of water, and while in the act of doing so, standing with one foot on the ground and the other on the sidewalk, the section of the roof was blown over by the wind, and he was injured thereby, he is entitled to recover of the city for his injury, since he had the right to go to the hydrant for the purpose for which he went there. *Duffy v. Dubuque*, 63 Iowa. 171, 50 Am. Rep. 743, 18 N. W. 900.

But one who had voluntarily departed from the traveled way and turned aside from his journey for a purpose in no way connected with his passage over the highway was not a traveler thereon entitled to recover against the city for an injury alleged to have been caused by a defect, notwithstanding the fact that he had but shortly before been using the street for travel, and intended soon to resume his passage over it. *O'Neil v. New Haven*, 80 Conn. 154, 67 Atl. 487.

And a person who departs from the used part of a highway, and is injured while attempting to regain the highway, by reason of his horse balking and backing into a ditch or falling over a bank, cannot recover against the city for the injury. *Hannibal v. Campbell*, 30 C. C. A. 63, 57 U. S. App. 484, 86 Fed. 297.

And a person whose horse backed into a gulf some 20 feet from the traveled track of a highway cannot recover of the municipality for the injury received, where the backing into the gulf was not the result of an accident that occurred in using the highway for travel, but resulted from using a shed by the side of the highway in an interval of cessation from travel, and attempting to get back into the road after a voluntary departure from it. *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295.

3. Play.

A person who, while using a highway simply for the purpose of play, meets with a personal injury by reason of a defect or obstruction therein, cannot maintain an action to recover damages therefor, against the municipality bound by law to keep the same in repair for the use of travelers. *Blodgett v. Boston*, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472.

And a child between three and four years old, permitted by her parents to go out into a public highway, who sat down upon the sidewalk near some stone which had been placed there to be used as curbstones, which were overturned by the act of other children playing there, causing her injury, was not a traveler upon the highway entitled to recover of the city for the injury. *Lyon v. Brookline*, 119 Mass. 491.

Nor can a child using a sidewalk in going from one place to another, who was diverted from her purpose and stopped to play with other children, and was injured by an obstruction or defect on the sidewalk while engaged in play, recover of the city for the injury. *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087.

So, where the statute provides that highways are to be opened and kept in repair and amended from time to time for the use of travelers and their horses, carts, and carriages, when children appropriate a part of a road for their sport and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged, although the injuries may take place through a defect in the road. *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281.

But a child while using a sidewalk in going from one place to another is a traveler in the eye of the law, for whose benefit a city must keep its streets in a safe condition, though she is accompanied by children who are playing and incidentally indulges in some play or pastime, but is not thereby diverted from going straight to her destination. *Collins v. Janesville*, supra.

And a boy may be a traveler within the protection of the statute while running upon a street if going to or returning from school, but not if participating at the time in a game of ball being carried on in the highway. *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23.

And, where several boys had been playing on their way home in a public street, and had stopped to rest; and one of them, while continuing on before the others, came in contact with an electric wire which had been allowed to hang within a few feet of the street, and received a severe shock,—the fact that, just before the injury, he had been using the street for the purpose of play did not divest him of the character of a traveler, for whose benefit streets are required to be kept reasonably safe. *Graham v. Boston*, 156 Mass. 75, 30 N. E. 170.

Nor does the act of rolling a hoop on a

sidewalk while going to meet playmates prevent a child from being a traveler, entitled to recover for injuries from defects or obstructions in the walk, where the playing with the hoop does not divert the child from going straight on toward her destination. *Reed v. Madison*, 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547.

And a boy seven years of age, going along the street with his father, does not cease to be a traveler for whose benefit it is the duty of the city to keep the street free from defects and obstructions, when he steps aside for an instant to clasp in play a post in the highway and almost in his path. *Gulline v. Lowell*, 144 Mass. 491, 59 Am. Rep. 102, 11 N. E. 723.

The prevailing rule, independent of statutory provisions, however, would seem to be that persons using streets for recreation and pleasure or through mere idle curiosity, when they do not impinge upon the rights of others to use them, are within the protection of the law while using them, and entitled to have them in a reasonably safe condition, to the same extent as those who are passing along them as travelers in the pursuit of their daily avocations. *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Birmingham v. Dorer*, 3 Brewst. (Pa.) 69.

And that it is not unlawful, wrong, or negligent for children to play upon a sidewalk; and, where a child was injured in consequence of an unlawful obstruction on a sidewalk, it is not a defense that the child was playing upon the street instead of using it for ordinary purposes of travel. *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389; *Chicago v. Keefe*, supra; *Caskey v. La Belle*, 101 Mo. App. 596, 74 S. W. 113; *Straub v. St. Louis*, 175 Mo. 413, 75 S. W. 100; *Birmingham v. Dorer*, supra; *Ricketts v. Markdale*, 31 Ont. Rep. 610.

And this is so though the playing was not merely incidental to the use of the way as a traveler. *Augusta v. Tharpe*, supra.

A child may be lawfully on a sidewalk for play; and the municipality owes the same duty to have it in a reasonably safe state of repair in respect to such use by a child, that it does in respect to the use of persons passing over it in going to and from their places of business and abode. *Bath v. Blake*, 97 Ill. App. 35; *Waverly v. Reesor*, 93 Ill. App. 649; *Chicago v. Keefe and Caskey v. La Belle*, supra.

Within this rule, a city guilty of negligence in leaving for some time a precipitous bluff in a street, which caved in and killed a child who was playing in the street, cannot avoid liability in a suit by the parents on the ground that the child was a trespasser. *Vicksburg v. McLain*, 67 Miss. 4, 6 So. 774; *Donoho v. Vulcan Iron Works*, 75 Mo. 401, affirming 7 Mo. App. 447.

And, where an embankment on the side of a road was adopted by the city and maintained as a barrier to prevent travelers from driving into a creek, and the bank became

dangerous, and a person was killed by falling off of it, the liability of the city therefor is not affected by the fact that the person killed, who was a child four years and five months old, was out of the beaten path, and there for play only. *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447.

So, the act of a boy in running along a sidewalk to escape from snowballs thrown by others is not contributory negligence which will prevent him from recovering from the city for an injury received by falling, while so running, into an excavation in a street, made by the city. *Penrose v. Fehr*, 113 Mich. 517, 67 Am. St. Rep. 479, 71 N. W. 862.

And a city which, while constructing a bridge, made an excavation in the bed of a shallow stream where it was crossed by a street, and constructed a levee from the bank of the pit, and, knowing that children of persons residing near were accustomed to play in the vicinity, left it in the absence of workmen without safeguard of any kind, by reason of which a child five years old, while at play, without fault on the part of its parents, fell in and was drowned, is liable in an action for damages therefor. *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155.

Nor does the fact that a child receiving a serious and permanent injury from stumbling and falling over a gas box located in a sidewalk was engaged in innocent play upon the sidewalk adjacent to its home constitute contributory negligence which will bar a recovery for the injury. *District of Columbia v. Boswell*, 6 App. D. C. 402.

A man of full age, playing with a dog on a sidewalk, and not going anywhere, however, is not so using the walk as to entitle him to recover for injuries caused by defects or obstructions therein. *Jackson v. Greenville*, 72 Miss. 220, 27 L.R.A. 527, 48 Am. St. Rep. 553, 16 So. 382.

And, where the obstructed part of a street was closed against travel and guarded against accident to persons in the ordinary use of the street, and a child was attracted by machinery employed in the construction or operation of a work thereon, and thereby induced to climb upon or over the barriers or guards into the excavation, no recovery can be had for an injury received by him. *Hamilton v. Detroit*, 105 Mich. 514, 63 N. W. 511.

Nor is a boy ten years of age, who, while running along by the side of a slowly moving train of cars with his hand on one of the cars, stumbled over blocks of stone which had been placed in the middle of a street crossing by the railroad company, for the purpose of holding the safety gates in place when open, and was injured thereby, entitled to recover damages from the city therefor. *Shannon v. Philadelphia*, 185 Pa. 347, 39 Atl. 1117.

And, where a heavy counter belonging to a private individual was tilted up against a house and allowed to remain upon a side-

walk for several days, when it fell over and injured a child, and there was evidence showing that the child was playing upon it at the time, no recovery can be had against the city for the injury. *King v. Troy*, 21 N. Y. Week. Dig. 558.

4. *Relative use of footways and carriage ways.*

While ordinarily a municipal corporation would be liable to foot passengers only for holes or defects in its sidewalks, when such a sidewalk is devoted to the common use of vehicles and foot passengers it is under obligations to make the passage safe for both classes of travelers. *Lacon v. Page*, 48 Ill. 499.

And a traveler may use any part of the highway, and use it in such direction as may suit his convenience or taste, provided he therein conforms to all laws and well-settled rules connected with such use of the street. *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; *Dallas v. Webb*, 22 Tex. Civ. App. 48, 54 S. W. 398.

And the liability of a municipal corporation for an injury caused by a hole in a street is not affected by the fact that the defect which caused the injury by frightening the horses of the person injured and causing them to run away was in that portion of the street set apart and intended as a sidewalk, when such portion, instead of being used for a footway alone, was devoted to the common use of both teams and foot passengers. *Lacon v. Page*, supra.

But municipal corporations are only required to keep their sidewalks reasonably safe for use in the usual manner. *Chicago v. Kohlhof*, 64 Ill. App. 349, affirmed in 192 Ill. 249, 85 Am. St. Rep. 335; 61 N. E. 446.

A city has power to designate portions of its streets to be used by horsemen and vehicles, and to reserve other portions thereof for the use of pedestrians, where horsemen and vehicles may not go, and prepare such portions of the street for such uses respectively; but no greater duty is cast upon the city than that it shall maintain the respective portions of streets in a reasonably safe condition for the purposes for which such portions thereof are respectively devoted. *Kohlhof v. Chicago*, 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446.

And one who chooses to use the portion of a street designed for vehicles, instead of the portion designed for pedestrians, is under the duty to exercise sufficient care to avoid an obstacle which does not make the street dangerous for horsemen and vehicles, such as a 2 by 4 scantling lying flat on the surface of the driveway. *Brown v. Chicago*, 135 Ill. App. 126.

And a person using as a carriage way land dedicated for a foot way cannot recover against the city for an injury to his horse by an obstruction therein, though he uses ordinary care and skill in driving along the way, whether the dedication has been accepted or not. *Hemphill v. Boston*, 8 Cush. 195, 54 Am. Dec. 749.

But the designation of a portion of a street as a sidewalk for the use of footmen, and the preparation of the same for such use, do not deprive those who may desire to move goods or articles of personal property from buildings abutting on the street to or from vehicles in the roadway of the street at the edge of the sidewalk of that right. *Kohlhof v. Chicago*, *supra*.

And a person has the right to go upon the driveway of a street for the purpose of carrying a package to put it in the carriage of a friend who has stopped in the street a short distance from the curb stone; and where, in so doing, he steps in a hole in the driveway and is injured, the city is liable for the injury if it is caused by a defect that renders the driveway unsafe for usage as such. *Finnegan v. Sioux City*, 112 Iowa, 232, 83 N. W. 907.

But the use often made of sidewalks in loading or unloading goods or articles is not an ordinary use, to accommodate which the city is charged with the duty of constructing and maintaining a walk; and the right of footmen to use the sidewalk is superior to the right of such use. *Kohlhof v. Chicago*, *supra*.

And the moving of a safe weighing 1,400 pounds over a wooden sidewalk raised several feet above the ground is an extraordinary use, and not such as is contemplated by law. *Chicago v. Kohlhof*, 64 Ill. App. 349, affirmed in 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446.

Nor is a pedestrian injured by stepping into a negligently constructed grating in a street deprived of his right of recovery against the city by the fact that it was away from the usual street crossings provided there. *Dallas v. Webb*, *supra*.

A pedestrian is not confined to the foot-way crossing, but, if ignorant of any danger, may cross a street at any point that suits his convenience, without imputation of negligence. *Louisville v. Johnson*, 24 Ky. L. Rep. 685, 69 S. W. 803.

And a person going from a sidewalk toward a street car for the purpose of boarding the car, and following a ditch dug for the purpose of laying water pipes to supply the inhabitants with water, is not using the street for an illegitimate purpose, or in a way which would deprive her of the ordinary rights of travelers. *Fox v. Chelsea*, 171 Mass. 297, 50 N. E. 622.

So, a traveler has the right to cross a street in the night at a place other than at a crossing; and if, in so doing, she steps into a hole made by the removal of an electric-light pole near the pathway used for foot passengers, which has been permitted to remain with notice for some time, she is entitled to recover of the city for the damages sustained. *Pana v. Taylor*, 56 Ill. App. 60.

But a person crossing a street at night at a point other than at a crossing, who is injured by stepping into a hole or depression in the pavement, cannot recover against the city for the injury if the street is not sufficiently out of repair to be dangerous to

horses or vehicles. *Belling v. Hamilton*, 3 Ont. L. Rep. 318.

A municipal corporation is not liable, however, where an injury was sustained by a party using the road for the purpose of passing to and from his private way or path, or his own land, although it was caused by a defect within the limits of the highway as located by law, but outside of the part of the road used for public travel. *Lynch v. Boston*, 186 Mass. 148, 71 N. E. 301.

And one who, in approaching a public street over private property, which he has no right to use as a traveled way, and over which the city has no control, is precipitated over an embankment into an excavation in the street and injured, cannot recover therefor from the city on the ground that the city failed to provide proper danger signals along such excavated street. *Mulvane v. South Topeka*, 45 Kan. 45, 23 Am. St. Rep. 706, 25 Pac. 217; *Chicago v. McKenna*, 114 Ill. App. 270.

Nor is a person who receives an injury while crossing planking placed over a gutter within the located limits of a public street, but outside of the wrought portion thereof, put there to facilitate access to and from the street and a private way or court, a traveler upon the street, who is entitled to maintain an action against the town liable to keep it in repair. *Philbrick v. Pittston*, 63 Me. 479.

But the duty of cities and towns to keep their streets and highways safe and convenient extends to that part wrought for travel of both the street and sidewalk, and protects alike travelers who pass along it and those who have occasion to pass across it in order to reach adjoining premises. *Street v. Holyoke*, 105 Mass. 82, 7 Am. Rep. 500.

And the liability of a city to a person who fell into a trapdoor left open in an area way not wholly within the street is not affected by the fact that the person injured by falling did not approach it from the street, but from abutting property, where the opening was such as to constitute a menace to all who used the street. *Earl v. Cedar Rapids*, 126 Iowa. 361, 106 Am. St. Rep. 361, 102 N. W. 140.

So, where a person drove into a city after dark, following a way that had been used by the public for years, although it had never been laid out as a road, and turned from that way into a street which the city was at the time grading and had excavated the same perpendicularly to a depth of 3 feet at the intersection of this road, placing no barriers or lights at or near the same, the city was guilty of negligence rendering it liable to the person injured. *Omaha v. Randolph*, 30 Neb. 699, 46 N. W. 1013.

And, where a person traveling upon a sidewalk stepped from the sidewalk bed over the curb into the gutter about 10 or 15 feet from the cross walk, with the intention of going diagonally to the cross walk, and fell over a board that was placed in the gutter by the agents of the city, it is a question for the jury, in an action against

the city for the injury, whether it was reasonable or negligent for the city so to dispose of the material of an old sidewalk; and whether plaintiff was negligent in crossing the street at the place and in the manner adopted under the circumstances. *Finch v. Bangor*, 133 Mich. 149, 94 N. W. 738.

But, while a municipal corporation is not required to erect barriers or place danger signals to prevent persons from receiving injury in entering its streets by private ways, it is bound to provide such guards or signal lights in the streets at dangerous places to prevent travelers from receiving injuries in entering such streets by a usually traveled public road, although such road was never laid out as a highway or street. *Omaha v. Randolph*, supra.

In the above case, *Goodwin v. Des Moines*, 55 Iowa, 67, 7 N. W. 411, supra, was distinguished upon the ground that in that case the person injured entered the street by a private way.

5. Use of bicycles and automobiles.

The use of a bicycle as a conveyance does not prevent the maintenance of an action by the user against the city for an injury resulting from a defect or obstruction in the street, if at the time of the accident he was using ordinary care. *Clinton v. Revere*, 195 Mass. 151, 80 N. E. 813; *Spring v. Williamstown*, 186 Mass. 479, 71 N. E. 949; *Fox v. Clarke*, 25 R. I. 515, 65 L.R.A. 234, 57 Atl. 305, 1 A. & E. Ann. Cas. 548.

If the highway was unsafe for ordinary purposes of travel. *Fox v. Clarke*, supra.

Or where the defect or obstruction was one for which the town or city would be liable in damages to a traveler passing over the way on foot, or on horseback, or in any vehicle of the usual kinds. *Spring v. Williamstown*, supra.

And a city is liable to a person injured while riding a tandem bicycle at night with a lady in front of him, by striking a dangerous obstruction in the street, where he had no knowledge of it, and could not, by ordinary care, have discovered it in time to avoid the injury. *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270.

But reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of the duty resting upon municipalities; and, while a bicycle is a vehicle, municipal corporations are not required to keep their streets in a reasonably safe condition for bicycles. *Leslie v. Grand Rapids*, 120 Mich. 28, 78 N. W. 885.

And a bicycle is not a carriage, within the meaning of a statute requiring towns and cities to keep highways in repair so that the same may be reasonably safe and convenient for travelers with their horses, teams, and carriages; and the rider of a bicycle cannot recover for injuries received by him, caused by a depression in a road. *Richardson v. Danvers*, 176 Mass. 413, 50 L.R.A. 127, 79 Am. St. Rep. 320, 57 N. W. 688; *Fox v. Clarke*, supra.
20 L.R.A. (N.S.)

The measure of the responsibility of a city to a person who avails himself of a privilege granted by ordinance to ride a bicycle upon the sidewalks of certain streets is precisely the same as it is to pedestrians, the city being required to keep its sidewalks in such a condition as to make them reasonably safe for pedestrians, and being under no obligation to go further and make them reasonably safe for bicyclists. *Morrison v. Syracuse*, 53 App. Div. 490, 65 N. Y. Supp. 939, affirmed in 175 N. Y. 523, 67 N. E. 1085; *Gagnier v. Fargo*, 11 N. D. 73, 95 Am. St. Rep. 705, 88 N. W. 1030.

A city bound by law to use reasonable diligence to keep its sidewalks in a reasonably safe condition, which gives permission to ride bicycles thereon, does not thereby assume toward a rider of a bicycle on a sidewalk any other or different obligation than that already existing. *Morrison v. Syracuse*, 45 App. Div. 421, 61 N. Y. Supp. 313.

It performs its duty toward persons using the sidewalks for bicycle riding when it keeps such sidewalks in a reasonably safe condition for travel thereon by pedestrians. *Gagnier v. Fargo*, supra.

And, where a woman was riding a bicycle upon a sidewalk under permission from the city, and, in an effort to pass pedestrians upon the sidewalk, she ran into a depression in the street about 4 inches in depth and was thrown and injured, the depression constituting a defective condition of the walk of such a character that a person unfamiliar with it would probably have met with an accident while attempting to walk over it on a dark night, but could have passed it with safety by daylight, she cannot recover of the city for the injury where she met with the accident in the daytime, since, under the circumstances, she would probably have escaped injury had she been on foot. *Morrison v. Syracuse*, 53 App. Div. 490, 65 N. Y. Supp. 939, affirmed in 175 N. Y. 523, 67 N. E. 1085.

Nor is a tricycle within the scope of an ordinance prohibiting the use of all vehicles known by the general name of bicycles on sidewalks; and the duty of a city to keep a sidewalk in suitable condition to walk over extends to a person rightfully riding on the walk on a tricycle; the test of the city's liability to him is the same as if he had been walking. *Wheeler v. Boone*, 108 Iowa, 235, 44 L.R.A. 821, 78 N. W. 909.

So, a traveler is not precluded from recovery for an injury caused by a defect or obstruction in a highway by the fact that the accident occurred while he was riding in an automobile, if the defect was one dangerous to ordinary travel. *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336.

But a municipal corporation owes no special duty with reference to its streets to those who ride in automobiles; the streets of a city may be as freely used by them as by pedestrians or travelers, but it is at all times bound to exercise due care to keep them safe and free from dangerous de-

fects. *Corcoran v. New York*, 188 N. Y. 131, 80 N. E. 660.

An automobile is not a carriage, within the meaning of a statute requiring towns and cities to keep their highways reasonably safe and convenient for travelers with their horses, teams, and carriages; and a town is not liable for failure to make special provisions required for the safety of automobiles if its ways are reasonably safe and convenient for travel generally. *Doherty v. Ayer*, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 83 N. E. 677.

And a town is not liable for an accident to an automobile beyond the limits of a highway on a surface of sand level with the road, although the marks of travel have been obliterated by the alteration of the road, since the town is not required to keep the adjoining land in repair, no such dangerous condition existing as requires the erection of a barrier to mark the limits of the way. *Ibid.*

The question of the right of cyclists to recover for injuries caused by defective highways is considered in a note to *Jones v. Williamsburg*, 47 L.R.A. 298.

XV. Notice of claim and cause of injury.

Rules of law with reference to notice of claim and cause of injury, given or required to be given, by a person injured by an obstruction in a street, to the municipal corporation, are general, applying to other torts of municipal corporations and injuries inflicted by them, as well as to injuries caused by obstructions in streets, and are more properly a part of the subject of notice or presentment of claim against municipal corporations for injury than that of liability of municipal corporations for defects and obstructions in streets; and cases involving or depending upon these rules have therefore been omitted from this note, including only such as are specially affected by the fact that they pertain to defects or obstruction in streets.

The legislative body of a state may constitutionally provide in a city charter, as a condition of the right to recover damages for injuries caused by a defective or obstructed street, that a claim therefor shall be presented to the council, and, in case of its disallowance, an appeal taken with bond for costs. *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280; *Schigley v. Waseca* (Minn.) 19 L.R.A. (N. S.) 689, 118 N. W. 259.

And a statute providing that cities of specified classes shall not be liable for injuries from defects or obstructions upon streets, unless notice in writing of the defect causing the injury shall have been given in a prescribed manner, is not in contravention of a bill of rights guaranteeing to every person a remedy for any injury done him in his lands, goods, person, or reputation. This constitutional guaranty is not a guaranty of a remedy for every species of injury in respect to such matters, but only for such as result from an invasion

or infringement of a legal right, or a failure to discharge a legal duty or obligation. *Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273.

Nor is such a provision in violation of a constitutional inhibition against special legislation. *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 256.

And such a provision is not repealed by implication by the enactment of a statute permitting joinder in such case of the city and others primarily liable for an obstruction in a street causing an injury, but remain applicable at least to proceedings against the city, where no other liability is asserted and no joinder attempted. *Morrison v. Eau Claire*, *supra*.

So, the conditions upon which a municipality shall be liable for damages to individuals caused by the defective condition of a street or sidewalk is a matter which belongs properly to the government of municipalities, and may be determined and regulated by a home-rule charter. *Schigley v. Waseca*, *supra*.

And a charter provision that no suit of any nature whatever shall be maintained against the city, unless the plaintiff therein shall aver and prove that, previous to the filing of his petition, he applied to the city council in writing for redress, satisfaction, compensation, or relief as the case may be, and that the same was, by the city council, refused, is applicable to a claim against a city for injuries received by colliding with an obstruction in a street; and such application is a condition precedent to recovery. *Luke v. El Paso* (Tex. Civ. App.) 60 S. W. 363.

So, failure of a city to remove from an otherwise sufficient sidewalk a pile of rubbish not originally placed there by its act or consent is a failure to perform its statutory duty to keep the highway reasonably safe for travel, and does not give rise to any common-law liability as for the maintenance of a nuisance for injuries resulting therefrom to a traveler on the walk; and requirements of the city charter of filing a claim and taking an appeal from its disallowance are conditions of the right to damages, and of the city's liability in an action for injuries so resulting, and must be alleged in the complaint. *Morrison v. Eau Claire*, *supra*.

And the intent of a charter provision of a city that, if any claim for unliquidated damage is made against the city for injuries to person or property from any defects in the sidewalks and streets, the claimant shall present the same to the common council within sixty days after the injury; and, if said claim arises from injury received by reason of any defect in sidewalks, streets, highways, etc., the claimant shall give notice to the city by written statement filed with the city clerk within ten days, specifying certain named things, was to provide for two notices in all cases of injuries from defects in sidewalks, streets, etc.: The one designed as a preliminary

notice to state briefly the location of the defect and its general character, and the other designed as a specific notice to specify in detail the plaintiff's claim. *Moulter v. Grand Rapids* (Mich.) 15 Det. L. N. 970, 118 N. W. 919.

But the demands spoken of in a statutory provision that all demands against a city shall be presented to and audited by the city council in accordance with such regulations as they may by law prescribe; and upon the allowance of any demand, the mayor shall draw a warrant upon the treasurer for the same,—are those arising out of the ordinary transactions of the city, and which may be examined and compared with the vouchers and audited, and not those resulting from a violation of municipal duties by failure to keep streets and sidewalks in a proper condition for travel. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475; *Cropper v. Mexico*, 62 Mo. App. 385.

And a charter provision of a city that all accounts or demands shall be verified by an affidavit by the comptroller before the same shall be acted upon or paid does not apply to a claim for damages resulting from a defect in a street or sidewalk, damage claimed for tort not being an account or demand within the meaning of such a provision. *Hill v. Fond du lac*, 56 Wis. 242, 14 N. W. 25.

Nor does a statutory provision requiring demands against a city to be presented for audit and allowance before suit brought thereon include actions or claims for personal torts, such as actions and claims for injuries by defective sidewalks. *Barrett v. Hammond*, 87 Wis. 654, 58 N. W. 1053.

And a claim against a village for damages for an injury caused by a defect in a street is not required to be audited under an act requiring the auditing of claims for expenditures made on behalf of the village, or for services rendered or goods or materials furnished to the village. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43.

Nor does a charter provision of a city that the common council has exclusive power to appropriate for any item of a city expenditure and provide for the payment of debts and expenses of the city; and no claim shall be paid until it is presented and allowed by the common council,—apply to a claim of damages for injuries received in consequence of a defective sidewalk. *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925.

And a claim of damages for injuries caused by an excavation in a street made by direction of the water department of the city is not a claim against the city growing out of the water department, within the meaning of a charter provision that all claims against the city growing out of the water department shall be presented to the water board for examination before they shall be presented to the common council for audit. *Brusso v. Buffalo*, 90 N. Y. 679.

Where the statute requires that a notice
20 L.R.A. (N.S.)

of injury received from an obstruction in a street shall be given describing the time, place, cause, and extent of the damage or injury, however, the notice should point as directly and plainly to the place of injury as is reasonably practicable, having regard to its character and surroundings. *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243.

But a notice to a city of an injury received from a defective or obstructed street need not point out the precise location of the mound, or stone, or hole, or depression that caused the injury; it is sufficient to specify the street where it occurred and the particular part of it, and to specify that the defective portion extended from one named place to another. *McDowell v. Auburn*, 126 App. Div. 173, 110 N. Y. Supp. 941.

And a notice to a city that a person was injured by falling on a cross walk at the intersection of two streets named sufficiently locates the place of injury, where it appears that there was but one cross walk at the intersection: *Buchmeier v. Davenport*, 138 Iowa, 623, 116 N. W. 695.

And a notice of claim for an injury by a defect in a street, describing the place as a defective sluice across the highway between two named points, is sufficient though there were three sluiceways between those points, of which the middle one only was defective. *Brown v. Southbury*, 53 Conn. 212, 1 Atl. 819.

So, a notice given to a city of injuries received at a designated time while walking along the sidewalk on a designated street, by falling into an open gully or trench running across the sidewalk, sufficiently states the place of the accident, though the designated street is over a mile in length, where it appears that there was only one place where there was a gully or trench running across the sidewalk. *Purdy v. New York*, 126 App. Div. 320, 110 N. Y. Supp. 822.

And a notice stating that the plaintiff was passing over the sidewalk of a street between two other named streets, and stepped in a hole in the sidewalk which was in a bad state of repair, is sufficient, although a space of two city blocks is described, there being no proof that a hole existed at more than one spot in the space described. *Lincoln v. O'Brien*, 56 Neb. 761, 77 N. W. 76.

And a notice of injury by falling into an open trench dug by workmen employed by the city for the purpose of laying water pipes, which does not specify the place of injury, except by stating that the plaintiff fell into this trench, where it appears that the trench was so long as to make the specification indefinite, is not defective as calculated to mislead the city, where it appears that, on the day following the accident, the superintendent of waterworks was notified of it, and the place where the plaintiff fell was pointed out to him. *Norwood v. Somerville*, 159 Mass. 105, 33 N. E. 1108.

Nor is a notice of an injury from a defect or obstruction in a highway, containing a variance of a few feet in describing the place of the accident, thereby rendered void where

there was no intention to mislead, and the city was not in fact misled, and, through other statements and notices, attention was directly called to the exact place of injury. *Hughes v. Lawrence*, 160 Mass. 481, 36 N. E. 485; *Johnson v. Fargo*, supra.

And evidence that the mayor's attention was called to the exact place of an accident three days after it happened is admissible in an action against the city for the injury, to show that the city was not misled by a defective description of the place in the notice of injury. *Owen v. Ft. Dodge*, 98 Iowa, 281, 67 N. W. 281.

And, where a notice of a defect in a cross walk located the same and the place of the injury about 25 feet north of a named store, and the complaint located the same at a point about 10 feet north of the northwest corner of that store, the variance is not fatal; and the notice is not so defective or uncertain as to defeat the action for want of a proper notice. *Barrett v. Hammond*, supra.

So, a notice of an injury caused by a defect in a street, describing the location of the defect as a hole in the sidewalk situated between two named buildings shown to be about 315 feet apart, states the location with sufficient certainty to warrant the admission of the paper in evidence to prove statutory notice. *Hutchings v. Sullivan*, 90 Me. 131, 37 Atl. 883.

And, where the statute provides that notice to a municipality of injury happening on a highway that is out of repair shall not be deemed insufficient solely by reason of any inaccuracy or failure to describe the place and the insufficiency or want of repair, in the absence of any showing that the defendant was misled in fact, of an intention to mislead on the part of the plaintiff, a notice is sufficiently particular where it describes the defect as consisting of missing planks from the sidewalk on the easterly side of the named street in front of premises, giving the street number and the name of the owner, even though such premises were 60 feet in length. *Collins v. Janesville*, 107 Wis. 436, 83 N. W. 695.

And a notice of injury, given to a city, stating that the person injured received her injuries while walking along the sidewalk on the west side of a named street, and attempting to cross an intersecting street at the southeast corner of the intersection, by reason of a defect in the crossing at said point, sufficiently describes the place of the injury, though it intended to refer to the corner bounded on the east by one street and on the south by the other, there being no evidence that there was any other crossing over the other street at or near that point. *Owen v. Ft. Dodge*, supra.

So, a notice of injury from a defect in a street, required by a charter provision to state the place where the injury or damage occurred, is not rendered invalid by a slight variation of the name of the street, and by giving the place as being a short distance away from the actual place, where, within all reasonable probability, the ordinary use

of the eye would readily have led to the discovery of the defect or obstruction causing the injury. *Kolb v. Fon du Lac*, 118 Wis. 311, 95 S. W. 149.

And a notice of claim against a city, reciting that the person injured fell through a sidewalk owing to its defective condition, into a hole thereunder about 7 or 8 feet deep, is not subject to the objection that it describes the hole under the sidewalk only, and not the defect in the walk. *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658.

A notice given to a city that the cause of an injury on a highway was a pile of stones extending into the traveled part in such grotesque and unusual shape that they constituted a nuisance by their liability to frighten horses, however, is not sufficient to sustain a claim that the injury was caused by collision with the pile of stones. *Bowes v. Boston*, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633.

And, under a statute providing that cities of a certain class shall not be liable for injuries unless notice of the time and place at which the injuries were received is served on the corporation council, notice that a person was injured while walking along the sidewalk on a named street in a named place, by falling into an opening, gulley, or trench running across said sidewalk does not sufficiently designate the place of the accident, where it appears that the designated street is at least a mile long. *Purdy v. New York*, 193 N. Y. 521, 86 N. E. 560, reversing 126 App. Div. 320, 110 N. Y. Supp. 122.

But a notice of a defect in a highway upon which a traveler was injured, in conformity to a statute requiring such notice, which is sufficient to describe the place in other respects, is not invalid because it states that the injury was caused by loose stones, when it was in fact caused by a stone partly embedded in the road. *Salladay v. Dodgeville*, 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696.

And, where a person steps into a drain running across the sidewalk of a street in a city, and stumbles and falls over an embankment by the side of the street, which is unprotected by a railing, into an adjacent sewer, and is injured, notice to the city, naming the lack of a railing as the cause of his injury, is a sufficient compliance with the statutory requirement of notice of the cause of the injury. *Grogan v. Worcester*, 140 Mass. 227, 4 N. E. 230.

So, a charter provision requiring a person claiming damages for injury on a sidewalk to give notice to the city, stating fully how the injury occurred, is sufficiently complied with by a notice stating the injury to have been caused by the torn-up and impassable condition of the sidewalk, and the absence of any lights or warning of impending danger. *Denver v. Bacon* (Colo.) 96 Pac. 974.

And a written notice to the mayor and city council of a city, given more than five days before an injury caused by a defective sidewalk, that said walk for a designated space of two blocks, including the point

where the injury occurred is in bad shape, and that people are tripping up and falling occasionally, and requesting an acknowledgment of the receipt of the communication in order that proper damages may be secured should accidents occur thereon, is sufficient under a statute requiring actual notice in writing describing fully the accident and the nature and extent of the injury complained of and the defects causing the injury, where the proof clearly shows that the sidewalk over the entire space referred to in the notice was at the time in a defective and generally dangerous condition. *Ruth v. Omaha* (Neb.) 118 N. W. 1084.

Nor does a substitute petition in an action against a city, alleging the general dangerous condition of the walk, when the original petition complained of specific defects, plead a new cause of action, for which no notice had been given to the city, under a statute requiring notice. *Woods v. Lisbon*, 138 Iowa, 402, 16 L.R.A. (N.S.) 886, 116 N. W. 143.

And, where there was a depression in a sidewalk an inch deep at the deepest place; and water collected in this depression and froze there and remained while the rest of the walk was clear; and a person fell on the ice and was injured; and the ice was smooth and did not of itself constitute a defect, but the depression as it naturally collected water and caused ice to remain in it constituted the defect,—a notice stating as the cause of the injury that the walk was out of repair and was coated with ice and very slippery and unsafe, by reason of which the traveler fell, is sufficient. *Spellman v. Chicopee*, 131 Mass. 443.

A statutory provision that no city shall be liable for damages arising from defective streets and sidewalks, etc., within such city, unless actual notice in writing of the accident or injury complained of, with a statement of the nature and extent thereof, and the time and place where the same occurred, shall have been given to designated officers within a named period, however, does not require an injured person to include within his notice a statement of the nature and extent of both the accident and the injury; but reference to either with full particulars as to the nature or extent thereof satisfies the statute. *Bemis v. Omaha* (Neb.) 116 N. W. 31.

So, where a city charter provides that, where any action is brought against the city to recover damages for death or personal injuries caused by defective streets or sidewalks, the plaintiff must show that notice in writing of the place where the accident occurred out of which the claim arises was given to a designated officer within forty-eight hours after the happening thereof in order to maintain such action, the service of a notice by a person who was disabled from doing business by the accident, at the earliest moment she was able to do so, substantially complies with the statute; and a delay of about twenty-four hours in serving a notice will not defeat an action where, during the

whole time between the accident and the notice, the claimant was incapable, by reason of her injuries, of transacting any business whatever with reference to the notice. *Walden v. Jamestown*, 79 App. Div. 433, 12 N. Y. Ann. Cas. 313, 80 N. Y. Supp. 65.

And a notice under a city charter absolving it from liability for injuries caused by a defective sidewalk unless notice of its unsafe condition shall have been given to the executive board a reasonable time before the accident, given two months before the accident, to a clerk, who made a note of the complaint, and who was at the only office of the executive board open to the public, and where the board was in the habit of receiving such notices by any clerk who happened to be behind the counter, sufficiently complies with the charter provision. *Elias v. Rochester*, 49 App. Div. 597, 63 N. Y. Supp. 712, affirmed in 169 N. Y. 614, 62 N. E. 1095.

XVI. Effect of concurrent liability of third person.

Municipal corporations are primarily liable for injuries occasioned by obstructions or defects in their streets or sidewalks, though such obstructions or defects were placed there or created without their agency. *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Rowell v. Williams*, 29 Iowa, 210; *Durant v. Palmer*, 29 N. J. L. 544; *Wilson v. Watertown*, 3 Hun, 508, 5 Thomp. & C. 579; *Rochester v. Montgomery*, 72 N. Y. 65, affirming 9 Hun, 394; *Kittredge v. Milwaukee*, 26 Wis. 46.

And this is so though the party placing or creating the obstruction or defect might be liable over to the city. *Kittredge v. Milwaukee*; *Rowell v. Williams*; *Wilson v. Watertown*; and *Robbins v. Chicago*,—*supra*.

Or might be liable to the person injured by the obstruction or defect. *Wilson v. Watertown* and *Durant v. Palmer*, *supra*.

And, where a temporary sidewalk is placed upon a sidewalk area of a street while the street is being regraded by a contractor, and a person is injured on such sidewalk, the city being primarily liable for the injury, the direction of a verdict for the contractor in an action therefor is not prejudicial to the city. *Jones v. Seattle* (Wash.) 98 Pac. 743.

The obligation of a lot owner to the city, and also to individuals, to keep the sidewalk in front of his lot free from obstruction and in a passable condition, and the consequent liability for injuries sustained, does not relieve the city of the duty to keep its sidewalks and streets in passable condition and free from obstruction, and to place the requisite guards around places of danger, the city having by its officers or agents, notice of such danger. *Rowell v. Williams*, *supra*.

And, where a person was injured by an opening in a sidewalk adjoining and for the benefit of an abutting owner, the question, in an action against the town for the injury, whether the owner of the adjoining

premises is liable over to the town in case of a recovery against the town, is immaterial. *Purple v. Greenfield*, 138 Mass. 1; *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683.

So, a party injured by a defect in a street, caused by a railroad company maintaining its tracks in the street by permission of the municipality, has a double action against both the city and the railroad company, regardless of the contract between them holding each as primarily responsible; and when the city is compelled to pay damages, it has the right to recover against the railroad company in the same action if both are defendants, or if the city has properly brought in the railroad company by a call in warranty or a distinct suit. *Cline v. Crescent City R. Co.* 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122.

And, where a contractor cut the roots of trees standing in a street, and left them without support, and they fell against the building of an abutting owner, injuring it, the abutting owner may sue the city and the contractor jointly, or may pursue them both or either of them so long as his claim for damages remains unsatisfied. *Morris v. Salt Lake City* (Utah) 101 Pac. 373.

And, where a town was sued for damages occasioned by the obstruction, insufficiency, and want of repairs in a road, and, by statute, the surveyor of a district where the injury occurred was liable over to the town for such damages as might be recovered against the town, the selectmen cannot, by their general power, release the surveyor so as to make him a competent witness in the case. *Carlton v. Bath*, 22 N. H. 559.

And a complaint in an action against a city and an independent contractor for a sidewalk, alleging that in constructing the walk the roots of plaintiff's trees standing in the street in front of his premises were unnecessarily cut, and the trees were left without support, in consequence of which they fell against the dwelling, damaging it, states a good cause of action as against a general demurrer. *Morris v. Salt Lake City*, supra.

But a legislative body has power to impose liability upon a lot owner for defects or obstructions in sidewalks abutting on his property, and to relieve the city from such liability until the injured party exhausts his remedy against the lot owner, the liability of the lot owner for damages, resulting from his failure to perform the statutory duty of keeping the sidewalk in front of his lot in repair, being in the nature of a penalty to enforce such duty. *Henker v. Fond du Lac*, 71 Wis. 616, 38 N. W. 187.

And, under a charter provision of a city making it the duty of lot owners to keep the sidewalk in front of their lots in a safe condition, and making them liable for all injuries resulting to any person from their neglect to perform that duty, and providing that the city shall not be liable for any such injury until after the injured party has exhausted his remedy against the lot owner, a 20 L.R.A. (N.S.)

person injured by a defect in a sidewalk cannot maintain an action against the city therefor, where no judgment has been obtained by him against the lot owner for the injury. *Ibid.*

And, under such a provision making the obligation of lot owners to keep the sidewalk in repair an absolute one not dependent on any notice from the city authorities, the burden is upon the plaintiff, in an action against the city, who had proved the facts which show the primary liability of a lot owner, to show further that he had exhausted his legal remedies against such owner. *Hiner v. Fond du Lac*, 71 Wis. 74, 36 N. W. 632.

And a finding that an abutting owner did not use ordinary care and prudence to prevent injury to travelers on the highway, without any finding that the injury to the traveler resulted from such failure, will not justify a judgment against such owner, where another special finding is that the injury was caused by negligence of the city alone, even though it is apparent that the negligence of the city must have been that of the abutting owner also. *Raymond v. Keseberg*, 84 Wis. 302, 19 L.R.A. 643, 54 N. W. 612.

Nor will inconsistent and contradictory findings to the effect that a city was negligent in not keeping a highway in a safe condition, and that an abutting owner was not negligent, where it is clear that the latter must have been negligent if the city was not, sustain a judgment against the city. *Ibid.*

And the liability, for an injury caused by falling into a sewer trench, of third persons, who, under license from the city, dug the trench, and who, by virtue of an ordinance and bond, were required by the city to take certain specified precautions and to reimburse the city for any damages which might fall upon it by reason of their default therein, is at best secondary, and a liability on contract to the city; and their presence or absence in an action by a person injured against the city can have no effect upon the rights of the plaintiff or the liability of the city to him; and refusal to join them as parties defendant in the action is not ground for the reversal. *McGowan v. Watertown*, 130 Wis. 555, 110 N. W. 402.

So, under a charter provision that no action shall be maintained against the city for damages caused by any obstruction or excavation in any street, placed there by any person or by his negligence in the management thereof or his failure to maintain guards or lights thereat, unless such person is joined as a defendant; and, in case of judgment against the defendant, execution shall first issue against such person; and, if the city pays the judgment, it shall be the owner of and may enforce it against the other defendant, under a complaint charging the individual defendant with having caused an obstruction, and the city with having permitted it to remain rendering the street dangerous,—if the evidence justifies it, a verdict may be had against both defendants,

or against one and in favor of the other; and the jury may find the individual defendant liable for having caused the obstruction, although the evidence is insufficient to charge the city with negligence in permitting it; or it may find the city liable for negligence in permitting the obstruction to endanger the street, although the evidence might fall short of proving that the other defendant created or caused it. *Clark v. Austin*, 38 Minn. 487, 38 N. W. 615.

And such a provision gives to the city the right to insist, when it is sued, that the party by whose act or negligence the injury was caused shall be joined with it as a defendant; and this may be done by demurrer to the complaint, if the facts giving it the right sufficiently appear from its allegations; and, if they do not, then it must set forth the facts and object to the nonjoinder by answer, and the name of the person whom the defendant claims should be joined must be given. *Jones v. Minneapolis*, 31 Minn. 230, 17 N. W. 377.

And where suit is brought against a city for an injury caused by an obstruction in a street, and also against the person who placed the obstruction in the street; and a verdict is rendered therein against the city,—the city cannot move for a new trial on the ground that the verdict ought to have been against the codefendant also, unless it makes the codefendant a party to the motion. *Clark v. Austin*, *supra*.

So, under provisions of a city charter that, in actions against the city for injuries caused by the negligence of any person primarily responsible to the plaintiff for his injuries, such person shall be made a party defendant, and the execution shall be first levied on his property, a judgment in favor of such person so primarily liable would, as between himself and the city, be conclusive as to his primary liability, and the city may, on appeal, assail a judgment so far as it affects such person's lack of liability; but a reversal of such judgment against the codefendant primarily liable on behalf of the city would not affect the plaintiff's judgment against the latter, but would have the effect only of relieving the city of the bar of the judgment, and of restoring its right to an action against its codefendant as being primarily liable for the plaintiff's injuries. *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528.

And an owner of property abutting on a city street may be charged with negligence in constructing and maintaining an unsafe cellar way in the sidewalk; and the city may be charged with negligence in permitting the cellar way to be so maintained, in the same petition. *Perrigo v. St. Louis*, 185 Mo. 274, 84 S. W. 30.

And, when a city and an individual are sued jointly for damages occasioned by the negligence of the individual in obstructing a street, and the suit is dismissed as to the individual, the record not showing that he is dead, a judgment taken thereafter against the city will be enforced. *Schweickhardt v. St. Louis*, 2 Mo. App. 571.
20 L.R.A. (N.S.)

So, if a person is joined as defendant with the city who is found upon the trial not to be liable, this will not prevent a recovery against the city if the case is one in which an action could have been maintained against the city before the adoption of the charter provision. *Donoho v. Vulcan Iron Works*, 75 Mo. 401, affirming 7 Mo. App. 447.

And, where a third party is liable with a city for negligence in obstructing a street; and the person injured sues the city and third party jointly,—the city is not compelled to give the notice required by the freeholders' charter in cases where the city alone is sued and the plaintiff has waived such notice. *Waltmeyer v. Kansas City*, 71 Mo. App. 354.

Liability of a city for failure to discharge its duty to the traveling public on its streets of keeping its sidewalks in a reasonably safe condition for travelers thereon, however, cannot be made contingent upon the liability of the citizen to the city for a failure to discharge his duty to the city in the matter of removing the snow from his sidewalk as required by ordinance. *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242.

And, where a street railroad company occupying the streets of a city by permission erects a trolley pole in a street which constitutes an obstruction, and an injury is caused thereby, the mere recovery of a judgment against the railroad company, without satisfaction, is not a bar to a suit against the city for the injury. *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892.

So, where a person received an injury from an excavation in a sidewalk, made by an individual under a permit from the city; and he elected to proceed against the city and the individual jointly, and recovered a judgment against them jointly, the fact that the judgment is reversed as to the city and a new trial ordered does not, because the plaintiff saw fit to reduce the judgment as to the individual instead of taking a new trial, destroy his cause of action against the city. *Parks v. New York*, 111 App. Div. 836, 98 N. Y. Supp. 94, affirmed in 187 N. Y. 555, 80 N. E. 1115.

And, where a city was compelled to pay damages for an injury to a person, caused by a pile of sand negligently left unguarded in a street by a person who was constructing a house upon a lot contiguous thereto, the city and the person engaged in constructing the house were not joint wrongdoers so as to prevent the city from maintaining an action against the person constructing the house for the recovery of the amount it was compelled to pay. *Rochester v. Montgomery*, 9 Hun. 394.

So, where a third person left an object in a street which was calculated to frighten horses; and it was negligently permitted to remain there; and the horse of a traveler was frightened and ran away, and an injury ensued; and the person injured brought an action against the person who placed the object in the street, and recovered

judgment against him,—a discharge in bankruptcy of the judgment debtor is not a bar to an action by the person injured against the municipal corporation for the injury, since the person who placed the obstruction in the street and the municipal corporation are not joint tortfeasors, the act of the individual being a common law tort, while the municipality is charged with the neglect of a statutory duty. *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17.

And, where a telephone company dug a hole in a street for a pole under an agreement with the city's electric-lighting superintendent to place a pole therein to carry the city's electric-light wires over the telephone company's telephone wires at an intersection; and the city neglected to put up the pole for three months, during which time the lighting superintendent made temporary provision for the wires, and several times, finding the hole uncovered, covered it; and a pedestrian thereafter fell into the uncovered hole, and was injured,—the city had notice of the defect through its lighting superintendent, and was solely negligent in permitting the hole to remain in the street unprotected, and therefore could not recover over against the telephone company any part of the damages recovered by the pedestrian. *Central Union Teleph. Co. v. Conneaut*, 167 Fed. 274.

XVII. Contributory negligence.

This is made the subject of an independent subject note in this series.

XVIII. Damages.

a. Generally.

The liability of municipal corporations for permitting obstructions to be placed in streets is based upon negligence; and generally rules of law with reference to damages in ordinary negligence actions are applicable to actions against municipal corporations for damages for injuries caused by obstructions in streets, except as modified by statute in some jurisdictions and as affected by the peculiar circumstances of cases of this class.

The damages in an action against a city for an injury caused by an obstruction in a street ought to be assessed with a view of compensating the plaintiff for the loss and suffering which resulted to him in consequence of the injury, which loss and suffering shall be determined from the evidence. *Stafford v. Oskaloosa*, 64 Iowa, 261, 20 N. W. 174.

The rule for the measurement of damages in actions against a city for injuries occasioned by its streets being out of repair is substantially that the damages must be measured by the loss of time during the cure, and expenses incurred in respect to it, the pain and suffering undergone by the person injured, and any permanent injury, especially when it causes a disability for further exertion in whole or in part, and 20 L.R.A. (N.S.)

consequent pecuniary loss. *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Anderson v. Wilmington* (Del.) 70 Atl. 204.

The damages recoverable are those arising from pain, suffering, distress, anxiety of mind, and the immediate medical and other expenses growing out of the sickness and confinement of the party injured, and the permanent pecuniary loss or injury growing out of total or partial disability to attend to or engage in business. *Goodno v. Oshkosh*, 28 Wis. 300.

And including also loss of time and expenses in endeavoring to obtain a cure. *Anderson v. Wilmington*, *supra*.

And loss of health resulting from such injuries. *Chicago v. Davies*, 110 Ill. App. 427.

And a man whose wife was injured by a defect in a street, consisting of a washout in the approach to a bridge, can state the facts, in an action for the injury, relating to his services in attending his wife and the value of such services and the time lost; and he may testify as to the value of his time and services devoted to his wife, and the reasonable amount of drug bills, nurse hire, and hospital bills; but evidence of the general trouble that he was put to by reason of her injuries is not admissible. *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95.

So, bodily and mental suffering caused by an injury from a defective or obstructed highway may be considered in awarding damages, in an action against the city for the injury. *Sheel v. Appleton*, 49 Wis. 125, 5 N. W. 27; *Anderson v. Wilmington* and *Chicago v. Davies*, *supra*.

And, where an injury from an obstruction or defect in a street is permanent, the person injured can recover prospective as well as past damages. *Weisenberg v. Appleton*, 26 Wis. 56, 7 Am. Rep. 39.

And the jury, in an action for injuries caused by an uncovered excavation in a street, may take into consideration as an item of damage the probable consequences, so far as proved, of the personal injuries received by the plaintiff. *Snook v. Anacosta*, 26 Mont. 128, 66 Pac. 756.

Such consequences of an injury from an obstruction in a street as it is reasonably certain will result in the future, to the person injured, from the injury, should be considered in an action against the municipality for the injury, and damages awarded therefor. *Stafford v. Oskaloosa*, *supra*.

And, where a person injured by a defect or obstruction in a street is permanently injured; and he alleges, in an action for the injury, the actual nature and extent of the injury and the amount of damages,—it is not necessary to state that a part of such damages will accrue in the future, in order to entitle him to recover them. *Weisenberg v. Appleton*, *supra*.

And, while it is the duty of a person injured by an obstruction in a street to use reasonable care to promote a recovery, yet, if she was guilty of no negligence in this respect, and an accident subsequently happens to her in which the result is more

serious because of her then condition than it would have been if she had not already been afflicted, such more serious result in reality is the result of the first accident; and the city is liable therefor. *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256.

But an instruction, in an action against a city for damages for injuries caused by an obstruction in a street, that the plaintiff can recover the damages caused by the injury, impliedly excludes those caused by her own negligence and imprudence after the injury in failing or neglecting to obey the directions of the physician. *Weisenberg v. Appleton*, supra.

If a person tripped upon a stone or hole in a sidewalk constituting an obstruction, and was inadvertently thrown upon a nuisance therein created by himself, however, if he was in the exercise of ordinary care he may recover such damages as were the direct and natural result of the obstruction, but not for any increase of damage occasioned by the nuisance which he himself maintained. *Lavery v. Manchester*, 58 N. H. 444.

And an instruction in an action against a city for injuries caused by stepping into a hole in a sidewalk, limiting the right of recovery of the person injured to such injury as she might have received from stepping into a hole while walking along the sidewalk, and making the city responsible for the consequences of such injury only in the event of its failure to use ordinary diligence in maintaining the sidewalk reasonably safe for the persons using the same, sufficiently limits the plaintiff's right to recover to the injury sustained by stepping into a hole, and does not permit a recovery on account of any other defect. *San Antonio v. Wildenstein* (Tex. Civ. App.) 109 S. W. 231.

So, where a person is forced by defects or obstructions in a highway to take a more circuitous road, whereby he suffers injury in his business, the damages are not the immediate consequences of the wrong, but are remote; and, the street being intended primarily for travel and not trade, the recovery, if any is permitted, must be limited to the injury sustained in its use for travel, consisting of delay and loss of time, and cannot include a loss of the profits of trade. *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516.

And, while a municipal corporation is liable for injuries received from obstructions placed in a street by a railroad company occupying the street under agreement with the city, though the statute provides that the railroad corporation shall be answerable for obstructions maintained by it in the street, the municipal corporation is not answerable to a property holder for damages arising from the use of the street by a railroad corporation, which are in the nature of compensation for additional burdens in the street arising from the proper construction and operation of the railway 20 L.R.A. (N.S.)

therein; such as adjacent property owners would be entitled to in an appropriation proceeding instituted by the railroad company to compel appropriation. *Zanesville v. Fannan*, 53 Ohio St. 605, 53 Am. St. Rep. 664, 42 N. E. 703.

So, the loss by a husband of his wife's services, comfort, and conjugal society, and the expenses incurred by him for her medical care and treatment, caused by personal injuries received by her by reason of a defective or obstructed highway, is not an injury to his person or property, within the meaning of a statute giving a right of action against the city in such case for injury to person or property; and consequently he has no right of action therefor. *Lounsbury v. Bridgeport*, 66 Conn. 360, 34 Atl. 93; *Roberts v. Detroit*, 102 Mich. 64, 27 L.R.A. 572, 60 N. W. 450.

Nor can recovery for the loss of the services of a wife and expenses incurred by her personal injury on a defective sidewalk be had against a city under a statute authorizing recovery only by a person sustaining bodily injury, or by the owner of a horse or vehicle or other property injured by defective or obstructed highways or sidewalks. *Roberts v. Detroit*, supra.

But, where the statute makes municipal corporations liable to all persons who may in any wise suffer injury to their persons or property by reason of any neglect to keep the streets in a safe and convenient condition for travelers, it covers a consequent injury to property, and makes the municipal corporations liable, not only for injuries to persons and property suffered by persons using the highway, but also for damages suffered by persons in consequence of not being able to use it, or in consequence of not being able to use it without additional trouble and expense. *Williams v. Tripp*, 11 R. I. 447.

A city sued for flooding a lot by raising the grade of streets and by insufficient drains cannot offset against any liability for negligence in that respect the increase of the market value of the property due to the general advance in real-estate values in the city. *Mayrant v. Columbia* (S. C.) 64 S. E. 416.

In actions for injuries resulting from obstructions and defects in streets, the assessment of damages is a matter within the sound discretion of the jury; and courts should not interfere to revise their findings, unless they are so clearly and manifestly excessive as to give evidence of passion and prejudice on the part of the jury. *Chicago v. Crooker*, 2 Ill. App. 279; *Mayrant v. Columbia*, supra.

b. Exemplary damages.

Compensatory damages only should be given in an action against a city to recover damages for injuries occasioned by its streets being obstructed or out of repair; vindictive, exemplary, or punitive damages cannot be recovered in such cases. *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep.

780; *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51; *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590; *Decatur v. Fisher*, 53 Ill. 407; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519.

Except in cases of malice or wilful negligence. *Chicago v. Martin* and *Decatur v. Fisher*, *supra*.

Or unless the jury should find gross negligence on the part of the municipal corporation, in which case it may increase the amount, considering the expenses of the plaintiff's suit, not including taxable costs. *Wilson v. Granby*, *supra*.

A recovery of punitive or vindictive damages is allowed only when the act causing the injury for which the recovery is sought has been wilfully done, and there was a deliberate, preconceived, or positive intention to injure, or a reckless disregard of the safety of the person or property, which is equally culpable; and a person injured by falling into a hole in a sidewalk cannot recover punitive or vindictive damages against the city where the hole in the sidewalk may have been the work or act of a private individual, not connected with the corporation, and there is nothing to show that the corporate authorities were notified of it, or had any knowledge of its existence. *Wallace v. New York*, 18 How. Pr. 169.

And municipal corporations may exercise a discretion as to the time of making repairs in streets which are little used by the public and are not in the business portion of the city; and they cannot be held guilty of gross negligence which will subject them to liability for exemplary damages because of their mere failure to make the necessary repairs in such case. *Chicago v. Martin*, *supra*.

So, while it is the duty of a municipal corporation to know of the condition of a street, and to see that it is safe for pedestrians, yet in the absence of proof of any knowledge of its unsafe condition, its non-attention to it cannot be charged as wilful negligence, for which compensatory damages may be imposed. *Decatur v. Fisher*, *supra*.

And, where an injury was caused by a defective sidewalk, and the case was one in which punitive damages could not be awarded, evidence is not admissible on behalf of the plaintiff in an action for an injury to show the value of the property owned by the municipal corporation, or the assessed value of property situate in the city, or the amount of salary paid the mayor of the city. *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

XIX. Conclusion.

At common law municipal corporations, such as cities, villages, etc., like quasi municipal corporations, such as counties, towns etc., were not liable to individuals for injuries from defects or obstructions in highways or streets, unless they amounted to a nuisance. Such liability has been expressly imposed, however, in many of the 20 L.R.A. (N.S.)

American states, either by a general statute or by charter provision. And the prevailing rule, though no such statutory imposition has been made, is that a grant to a municipal corporation of control over streets and of means of maintenance charges it with the duty of using ordinary and reasonable care in their proper construction and repair and in keeping them free from obstruction so as to be reasonably safe for use in the ordinary methods; and that a failure to perform this duty will subject it to liability for resulting damages. The theory of this rule is that the acceptance of the grant of power implies an agreement to perform for the benefit of all who may have occasion to use the streets, the agreement inuring to the benefit of individuals interested in the performance of the duty. This liability has been elsewhere imposed, and municipal corporations have been exempted therefrom by statute in specific instances, and such exemption is not in contravention of constitutional principles but to be effectual the intent to exempt must be clear and specific.

Power to perform, however, is a prerequisite to liability for failure to act; and the absence of funds and legal means to procure them has been held to be an excuse for failure to remove a defect or obstruction. But this has been denied and it seems to be settled that absence of funds is no excuse if there is power in any legal way to procure them. Nor will difficulties attending the removal of a defect or obstruction, or an overpressure of other duties, excuse the failure to remove it.

So, a municipal corporation is not liable for injuries caused by defects or obstructions in streets where their creation or continuance results from the exercise by it of the functions of the general government in which its acts are quasi judicial or discretionary, in making an erroneous estimate of the public needs, such as errors in determining the necessity of an improvement or in establishing the grade of a street. When the estimate as to the public needs has been made, however, and questions of necessity, requisite capacity, location, etc., have been determined, and the street or other improvement has been made, the duty of the municipal corporation of keeping it from being or becoming dangerous to the public from obstructions or otherwise is a ministerial one, for a negligent omission to perform which the municipal corporation is liable. The line of distinction seems to be that a municipal corporation acts judicially when it selects and adopts a plan for the construction of a public improvement; but in carrying out such plan and in maintaining the structure after it is furnished it acts ministerially, and is liable for negligent performance. And the position is well supported and seems to be growing in favor that the whole duty of a municipality to keep its streets in a reasonably safe condition for travel in the ordinary modes is ministerial, and not governmental, in its nature; and that

it requires the removal of obstructions irrespective of the cause from which they arose; it being just as unlawful to plan and create a dangerous condition as to permit the existence of one otherwise created.

Nor can a municipal corporation, by any act of its own, devolve the duty of keeping its streets in a reasonably safe condition upon another, so as to relieve itself from liability resulting from its failure to perform it, unless authorized by statute. And the imposition of the duty to keep a street or sidewalk in repair and in a safe condition, either by the municipal corporation or by statute, upon a railway company occupying the street or an abutting owner, does not relieve the municipal corporation from liability for nonperformance of this duty, unless it is so provided by statute.

A municipal corporation is not responsible for every accident that may occur on its streets, however, and it is not an insurer against all injury which may result from obstructions or defects in its streets; what is required and all that is required is reasonable and ordinary care and diligence to keep the streets in a reasonably safe condition. And what constitutes reasonable and ordinary care and diligence depends upon the facts of each case. It is care and diligence proportioned to the danger likely to ensue from its omission, and such as persons of ordinary prudence would be likely to use under the same or similar circumstances. And whether, under the facts, such care and diligence was used, is a question of fact for a jury. The absence of such care and diligence constitutes negligence, and the liability of a municipal corporation to persons injured by reason of obstructions in streets is based on negligence.

Nor is the cause or creation of a defect or obstruction in a street of any effect upon the liability of the municipal corporation for an injury caused by it. If it was created by the city itself or by the act of an agent or servant, the city is, of course, liable for its consequences; and the same rule applies to things done by permission or license of the city, though when the license was for a lawful and proper purpose it is not liable for the results of an abuse of the license by the licensee or a contractor. Nor is the rule changed by the fact that the obstruction was created, by a trespasser or wrongdoer. But, when the unsafe condition occurs through some other agency or instrumentality than that of the city, negligence cannot be imputed to the city, unless it is chargeable with knowledge or notice of the unsafe condition. Nor is the fact that the work which creates the obstruction was done by an independent contractor of any effect upon the liability of the municipal corporation for injuries caused thereby, where the work contracted for was necessarily or inherently dangerous. But, where there is no danger involved in the work itself, the municipal corporation is not responsible for an injury caused by an obstruction in a street placed there by

the negligence of the contractor in the execution of his contract, though, where the municipal corporation retains control over the conduct or the work contracted for, it is liable as a principle for the act of his agent. So, where the law requires a municipality to enter into a particular kind of contract, it is under no responsibility for the acts of the person taking the contract. These rules apply to all existing streets and highways legally established, whether by proceedings in court, or by municipal authorities, or by dedication, or by improvement and use; and they apply alike to bridges, sidewalks by whomsoever made, walks outside of a highway, and crossings, the only escape from liability being by abandonment, which must be made effectual and proved.

Absolute perfection in a street and entire absence of defect or obstruction, however, is not required; a reasonably safe condition for public use in the ordinary modes of travel is the rule of perfection required. The street must be safe and convenient in view of such casualties as might reasonably be expected to happen to travelers; and, in determining what obstructions will render a highway defective, its locality and uses and all the surrounding circumstances must be considered. A municipal corporation is under no duty with reference to a use of a street which reasonable care and prudence would never have anticipated. But the condition must be such that it may be safely traveled by night as well as by day; and, where a street is opened for travel its whole width, ordinary care must be exercised to maintain the whole width of it reasonably free from obstruction. But, where the amount of travel is small, a municipal corporation need improve and make passable only such portions of a street as is reasonably necessary for the needs of the public. This doctrine, however, is not applicable to sidewalks considered apart from the street; there is no traveled way of a sidewalk outside of which a city would not be liable for obstructions. So, a municipal corporation has the right to devote the sides of a street to other useful purposes provided it leaves an unobstructed way of ample width for travelers. And, while grass plots and shade trees on the sides of streets may be obstructions, where ample width is left to answer the demands of travel they may properly be maintained. But an obstruction outside the traveled track does not differ from one inside of it on the question of municipal liability, if it is so close to the margin of such track as to make the use of it dangerous, though a city is not bound to fence a highway merely to prevent travelers from straying out of it where there is no unsafe place immediately contiguous to it.

Ordinarily the obstructions in streets constituting a defect for an injury resulting from which the municipal corporation is liable include any object upon or near the traveled path which would necessarily obstruct or hinder one in the use thereof for

the purpose of travel, or which, from its nature and position, would be likely to produce that result. But they must be more than mere trifling defects; they must be such as to justify a careful and prudent man in anticipating danger from their existence. And that a structure in a highway, rendering it unsafe or inconvenient for travelers, was properly authorized by the legislature, is a sufficient defense in an action for an injury resulting therefrom. So, an obstruction in a street, constituting a necessary incident to the use of the street for purposes authorized by law, or which is intended for the protection of the general traveling public, is permissible and creates no municipal liability; and so of slight obstructions for the sake of general convenience and business. This rule includes obstructions for the purpose of the construction of sewers, drains, or waterworks, and by telegraph, telephone, electric-light and trolley poles, and by hydrants, hitching posts, awning posts, and horse blocks; and it even extends to include the right temporarily to entirely close a street on occasions of public interest. But such obstructions can be permitted to exist only while the need continues; and all reasonable precautions must be taken to prevent injury by them.

Nor is the temporary obstruction of a street for the purpose of improvement thereof unlawful, when a reasonable necessity exists therefor; and municipal corporations are not answerable in damages for permitting it. But the duty of a municipal corporation to improve and repair its streets and keep them free from obstruction is coupled with a duty to protect the traveling public while the obstruction exists, so far as is compatible with the temporary interference of those intrusted with their care. And obstructions of this class can be made only when a matter of necessity, and can be continued only for a reasonable time commensurate with the reasonable prosecution of the work; and the municipal corporation is bound so to guard and light the obstructions as to render the street reasonably safe for use, or to entirely close the street against the public if necessary to prevent accidents. Nor is municipal liability affected by the fact that the improvement is made by an abutting owner; in such case the municipal corporation must supervise the work and see that it is properly guarded and lighted; and, if due care in the performance of this duty is omitted, it is responsible for resulting injuries.

Within the rules, restrictions, and qualifications above mentioned, whenever an injury has been occasioned by an object in a street alleged to be a defect or an unlawful obstruction, whether the street was in a reasonably safe condition for the convenience of travel is a question to be determined by a jury in each case by the particular circumstances; and the rule is the same with reference to the question whether an obstruction was such that it was negligence upon the part of the municipality to permit

it to exist; and this applies to all classes of alleged defect, and obstructions in streets or on sidewalks, or so closely contiguous to streets or sidewalks as to be dangerous to travel, including unevenness, inequalities, slopes, and grades, as well as physical obstructions and holes and excavations, and anything that might interfere with or obstruct traffic. Where the existence of a particular thing in a street is admitted, however, or conclusively proven, whether or not it is such a defect or obstruction as to render the street unsafe and to subject the municipal corporation to liability is a question of law for the court. But, where different minds might honestly draw different conclusions as to the liability of a defect or obstruction to cause an accident and as to the danger that might be reasonably anticipated from its existence, the question should be submitted to the jury; and, where the fact is determined by a jury, its finding will not be disturbed unless absolutely unsupported by evidence.

Nor are these rules confined to defects or obstructions in or upon the streets and sidewalks; they apply, also, to structures or things hanging over them that might make travel unsafe, such as awnings, sheds, signs, billboards, electric wires and appliances, and trees, poles, etc. But an object suspended over a street and in no way attached to it, though dangerous because of its liability to fall, is not a defect or want of repair within the meaning of statutes imposing liability only for defects or want of repair. So, objects calculated to frighten animals may render a road or street unsafe, and impose liability for resulting injuries on the municipality, as well as obstructions or defective construction; and this is so though there was no actual contact or danger of it. To establish liability on this ground, however, it must appear that the horse which was frightened was one of ordinary gentleness, and the municipal corporation must have known of the obstruction or been under duty to remove it; and an object which might frighten horses, but not otherwise an obstruction, is not a defect within the meaning of statutes requiring municipal corporations to keep their ways free from defects, and in repair.

So, if a dangerous defect or obstruction in a street is not immediately removable, the municipality, having knowledge of the danger, is bound to exercise ordinary care for the protection of the traveling public by giving warning of the danger, and is liable for the consequences of its failure to do so; and this is the rule without reference to the question by whom the obstruction was created. And the warning must be such as would reasonably notify all persons having occasion to use the street that the danger is there. Knowledge that there is a probability of danger, however, is enough, and it is sufficient that the traveler has notice or knowledge enough of the facts to put him on inquiry; and if there is a sufficient guard or barrier it relieves the municipality from liability, no matter who erected it. And the

removal of a barrier or guard by a wrongdoer without the knowledge of the municipality imposes no liability upon it until the lapse of such a period of time that it should have known of and remedied it; and no guard or barrier at all is necessary unless one is needed to make the street reasonably safe and convenient for travelers who are themselves in the exercise of due care. Nor is the mere failure of a municipal corporation to light its streets, unless the duty is imposed by statute, usually regarded as negligence, though injury from an obstruction might have been avoided had they been lighted. But, if it assumes to light them, and fails to do so in such a manner as will afford proper security from danger incident to their use, it is liable for a resulting injury. And, where a street is partially obstructed, and might be reasonably safe if lighted, but dangerous if unlighted, the fact that it was not lighted may be material on the question of the negligence of the municipal corporation in failing to keep it in a proper condition; and it may be important on the question of the contributory negligence of the person injured.

So, the duty of a municipal corporation to remove defects and obstructions from its streets, the neglect of which will render it liable to a person injured thereby, must arise from knowledge of their existence and dangerous character. This knowledge or notice may be either express or constructive. But, when the obstruction was not occasioned by any act of the municipal corporation, its officers or agents, proof of actual notice, or of facts from which notice may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known or remedied, is essential to municipal liability, though where, by statute, an absolute liability is imposed for defects and obstructions, the question of notice to the municipality is immaterial; and, where express or actual notice is required, it is not sufficient that the municipality was negligent in not discovering the defect. Actual knowledge or notice to officers of the municipality clothed with general powers and duties with reference to supervision and control of corporate affairs, or with specific duties as to the care of streets, is notice to and binding upon the city; and it may be proved by evidence either direct or circumstantial; and its existence is a question of fact for the jury. Constructive notice is an inference of notice or knowledge of the obstruction in question, drawn from official opportunity to obtain it, or from official obligation to be reasonably vigilant in keeping the streets in a safe condition. A municipal corporation is bound to take notice of the character of its own work, and, if an obstruction is created by its own act, or by that of an agent or servant, notice will be inferred; and the same rule applies where the work was done by a contractor, or under permit or license of the municipality; and constructive notice may be inferred from the long existence

of the obstruction and from its conspicuousness and notoriety.

So, causes naturally calculated to produce defects or obstructions may be considered on the question of constructive notice, and so may actual knowledge of general defectiveness or obstruction on the question of notice of a particular defect or obstruction causing the injury complained of. And the place, circumstances, and surroundings of the accident may also be considered; and, in this connection, the corporation cannot close its eyes to existing conditions, but must inspect its streets, and, if its ignorance is due to an omission of the duty of inspection with the degree of diligence which might reasonably be expected under the circumstances, the opportunity of knowledge stands as actual knowledge. To fix the liability of the municipal corporation, however, not only actual or constructive notice of the defect or obstruction must appear; if it was not caused by the city itself or someone in privity with it there must also have been, after the notice, a sufficient lapse of time to enable it by the exercise of reasonable diligence to abate, remove, or protect it. Constructive notice, like actual, is a question for the jury, to be determined on a consideration of all the facts and circumstances of the case.

So, to hold a municipal corporation liable for an injury because of a defect or obstruction in a street, the injury must have resulted from the defect or obstruction. There are four elements necessary to sustain a recovery, an unlawful defect or obstruction, notice thereof, failure to remove, and injury caused by it; and the obstruction must have been the proximate cause of the injury, though it need not have been the sole cause. The general rule would seem to be that, where several concurring acts or conditions of things, one of them a wrongful act or omission such as permitting an obstruction in a street, produce an injury, the wrongful act or omission is to be regarded as the proximate cause of the injury if the person injured was without fault and the injury was one which might reasonably be anticipated from the act of omission, and which would not have occurred without it. The negligence of the municipality, to be the proximate cause of the injury, need not be the last act or cause or nearest act to the injury. Nor is the liability limited to injuries received from actual contact with the obstruction, but includes those received while under the immediate impulse or impetus received from it, or during reasonable efforts to escape from the position which it has occasioned. Where there are several acts concurring to cause the injury, the original act, if wrongful and calculated to cause the injury, is usually taken as the proximate cause though other causes intervene; and, where the obstruction was a cause active in producing the injury, it will be deemed the proximate cause, rather than another passive and inactive cause. The test would seem to be whether the facts constitute a continuous succession of events

so linked together that they become a natural whole, or whether the chain of events is so broken that they may become independent and the final result cannot be said to be the natural and probable consequence of the primary cause. This is well illustrated by the cases of frightened horses; if a horse is frightened by an obstruction, and runs away, doing damage, the obstruction is the proximate cause; if he shies against an obstruction while under control or only temporarily out from under control, the obstruction is the proximate cause of the injury. But where, through fright or otherwise, the horse becomes wholly unmanageable, and in this condition comes in contact with an obstruction in the street from which an injury results, the fright of the horse, and not the obstruction, is the proximate cause of the injury, and the municipality is not liable.

There are restrictions upon the right to redress of the person injured both with reference to the person and with reference to the manner of his use of the street. A special and peculiar damage to him, not suffered by the rest of the public, is necessary to a recovery by a person injured by an obstruction in a street. But the doctrine that an employee must take the risk of his employment and of the negligence of his fellow servants does not apply to an employee of a city injured by an obstruction, so as to relieve the city from liability to him for its negligence. This theory has been applied with reference to policemen, firemen, a patrol-wagon driver, a lamp lighter, and to members of the city council, and to employees of a railway company occupying the street which had contracted to keep it in a safe condition. Nor is the liability of a municipal corporation for an injury by an obstruction in a street affected by the fact that the physical condition of the person injured was such as to render him more susceptible to injury than people generally; and children have the same rights on streets as adults; and negligence cannot be imputed to parents for permitting a small child to go upon a street where there was no reason to expect danger.

With reference to the use of the street, streets are designed for purposes of travel, and of course a person using a street for the purpose of travel, who is injured by an obstruction on it, is entitled, in a proper case, to recover; and the general rule would seem to be that streets must be kept in a reasonably safe condition for all the purposes to which they may be lawfully devoted, it having been held that the duty attaches in favor of all persons having occasion to pass over the streets for the purpose of business, convenience, or pleasure, or to gratify idle curiosity. Some of the cases, however, have confined the right of recovery to persons using the street for the purpose of traveling thereon. But the word "traveler" has no technical legal signification, and a person is traveling on a street when he is making a reasonable use of it as a way, which reasonable use is a question of fact 20 L.R.A. (N.S.)

for the jury. Mere loitering or a slight deviation from a direct course does not prevent one from being a traveler, within these rules. But the rule is different with reference to a total cessation of travel and engaging in some other purpose or undertaking. Nor is being on a street merely for the purpose of play traveling,—at least within the meaning of many of the statutes. But, if the person is going from place to place, incidental play on the way does not affect his rights against the municipal corporation; and the general rule would seem to be that persons using streets for pleasure and recreation, or through mere idle curiosity, when they do not infringe upon the rights of others to use them, are within the protection of the law and entitled to have them in a reasonably safe condition; and that it is no defense to the municipal corporation that the person injured by an obstruction in a street was a child playing upon the street, instead of using it for ordinary purposes of travel. So, a traveler is entitled to use a street in such direction as may suit his convenience or taste, provided he conforms to the law and rules of the road. He may cross where he pleases and use the driveway for a footway; but, if he uses the street in an unusual way, he is entitled to only such protection as he would be entitled to if using it in the usual way.

Damages in actions of this class seem to be governed by general rules applicable to ordinary actions for negligence; but vindictive, exemplary, or punitive damages cannot be recovered except in cases of malice or gross or wilful negligence. F. H. B.

NORTH DAKOTA SUPREME COURT.

ABE SIEGEL, Resp't.,

v.

CASSEL MARCUS, Appt.

(— N. D. —, 119 N. W. 358.)

Partnership — dissolution — contract — restraint of trade.

1. Upon the dissolution of a copartnership between S. and M., it was mutually agreed that the latter's interest in the partnership assets, including cash and merchandise, was of the value of \$1,100, and, in consideration of S. paying to M. said sum in cash for his said interest, M. agreed

Headnotes by FISK, J.

Case Note. — *Entering another's employment as breach of covenant not to engage in rival business.*

While the decisions upon the question under discussion proceed primarily upon the construction of the language of the particular covenants involved, they appear to warrant the observation that such covenants are to be interpreted, so far as may be done, in the light of the purpose of the parties to

with S. "not to engage for the next two years" in the same business theretofore conducted by such firm, in the same city, "in the manner aforesaid, or with any partner, partners, firm, company, or corporation for the period aforesaid." Held, that such contract is based upon a sufficient consideration, and is in all respects legal and enforceable.

Same — breach.

2. After the dissolution of such copartnership and the entering into such contract, M. entered the employ as a clerk of one E., whom he was instrumental in procuring to open a rival business adjacent to that of S., and M. attended to the purchase of stock for such rival business, and to a large extent was the active managing agent for E. in the conduct thereof. Held, that M. thereby violated the terms of his said

provide against competition by the promisor. Accordingly, the mere engagement as an employee in a rival business is not determinative of a breach of such a covenant, but the inquiry must be as to the effect of such employment upon the business sought to be protected; and this effect will depend in part upon the nature of the business, and in part upon the participation of the employee in its control.

The test to be applied to the question whether an agreement not to engage in a certain business is violated by accepting employment in that business is stated in *Wilson v. Delaney*, 137 Iowa, 636, 113 N. W. 842, to be whether the scope and character of the employment is such as to result in all likelihood in substantial interference with the business which was the subject of the contract.

The nature of the business which the party abandons, and the natural and reasonable effect of the new employment upon it, are to be considered. *Nelson v. Johnson*, 38 Minn. 255, 36 N. W. 868.

Employment as a breach of covenant.

In *Jefferson v. Markert*, 112 Ga. 498, 37 S. E. 758, it was held that one who, in selling out his meat business and the good will thereof, contracted with the purchaser not to engage for a designated period in such a business in a named city, could not, without violating his contract, carry on in that city, during the period covered by the agreement, a similar business for another or in another name, of which he was the exclusive manager, and the success of which depended entirely upon his skill, efficiency, personal reputation and popularity,—especially if such arrangement was a mere pretext to cover a violation of his agreement.

In *Merica v. Burget*, 36 Ind. App. 453, 75 N. E. 1083, it was held that an agreement, upon sale of a banking business, "to quit the banking business, . . . and not to start another bank" in town so long as the vendee should own the bank purchased, was violated by one of the vendors taking stock in and becoming assistant cashier of 20 L.R.A. (N.S.)

agreement and in equity and good conscience ought to be enjoined from so doing.

(January 7, 1909.)

APPEAL by defendant from a judgment of the District Court for Cass County in plaintiff's favor in an action brought to enjoin defendant from engaging in the pawnbroker, secondhand clothing, or jewelry business within the limits of Fargo County for a certain period, in violation of his contract not to do so. Affirmed.

The facts are stated in the opinion.

Mr. J. W. Tilly, for appellant:

A contract whereby one sells the good will of a business and enters into a contract not to engage therein for a limited

a bank thereafter organized, where the evidence showed that the management of the new bank was largely dependent upon his acquaintance with the local situation.

In *Wilson v. Delaney*, supra, it was held that an agreement not to deal in stock, cattle, or horses for speculative purposes in a certain locality, was violated by purchases of horses and cattle, some of which were conducted by the promisor in his own name, and others in the name of his son-in-law, a member of a rival firm of dealers in cattle and horses, although the promisor had no financial interest in most of these transactions, but was acting solely on behalf of his son-in-law; the court saying: "But it does not matter that he had no expectations of making money for himself. In the interest of plaintiff he had agreed to go out of the business, and the effect of his disregard of that agreement by going about the country buying stock—sometimes giving his personal check in payment therefor, and sometimes the check of Hogan, as he says he was authorized to do—was equally potent, as far as plaintiff was concerned, whether he was doing this for pleasure, as a favor merely to Hogan, or for the purposes of personal gain."

In *Pohlman v. Dawson*, 63 Kan. 471, 54 L.R.A. 913, 88 Am. St. Rep. 249, 65 Pac. 689, it was held that a contract not to engage in the barber business in any manner in a certain town so long as another person should continue in business, made by the owner of a barber shop upon the sale of some of his furniture, tools, and fixtures to such person, was violated by working at the barber trade as an employee; the personal relation which a barber sustains to his customers making his employment in a rival shop resultant in greater harm to the promisee than if the parties had been carrying on a purely commercial business.

In *Meyer v. Labau*, 51 La. Ann. 1726, 26 So. 463, it was held that an agreement not to engage in mercantile business in a certain place for a stated period was violated by a promisor's taking part in the opening and conducting of a rival business establishment immediately adjacent, giving his aid and en-

period of time in a certain locality does not include an agreement on the part of the seller not to work as a clerk or an employee for a person engaged in a similar business.

Battershell v. Bauer, 91 Ill. App. 181; *Haley Grocery Co. v. Haley*, 8 Wash. 75, 35 Pac. 595; *Bishop, Contr.* p. 521.

Mr. T. H. McEnroe, for respondent:

By selling the good will of a business, the party selling warrants that he will not endeavor to draw off any of the customers.

Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713; *Kramer v. Old*, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513.

The sale of a business is sufficient consideration for a contract restraining the

vendor from the future exercise of his trade or profession.

24 Am. & Eng. Enc. Law, 2d ed. p. 853; *Mapes v. Metcalf*, supra.

One selling the good will of a business must live within the spirit as well as the letter of the agreement of sale.

Emery v. Bradley, 88 Me. 357, 34 Atl. 167; *Kramer v. Old*, supra.

Defendant should be enjoined from acting as clerk or agent.

Emery v. Bradley, supra; *Whitney v. Slayton*, 40 Me. 224; *Dwight v. Hamilton*, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111; *Jefferson v. Markert*, 112 Ga. 498, 37 S. E. 758; 20 Cyc. Law & Proc. p. 1280 and note 34, p. 1281; 24 Am. & Eng. Enc. Law, p. 859; *Meyer v. Labau*, 51 La. Ann. 1726,

couragement to it, lending to it the advantage of his presence, his experience, his knowledge of the business, and his acquaintanceship with prospective patrons in that neighborhood, even though he might have no interest as owner in the rival establishment.

In *Emery v. Bradley*, 88 Me. 357, 34 Atl. 167, an extensive excerpt from which may be found in the opinion in *SIEGEL v. MARCUS*, it was held that a covenant by the vendor of a photographic business that he would "never go into or carry on said business of photography in future" in said place would be violated by his going into and carrying on said business in said place as clerk or agent of any person, as he would be in direct competition with the business he had sold, as much as if he were doing the same acts in his own name.

In *Boutelle v. Smith*, 116 Mass. 111, an agreement, the grammatical construction and obvious intent of which was that the promisors, both and each, would neither engage in the business of bakers in a certain town, nor directly nor indirectly engage in any business, or do any act, that should interfere with the business purchased of them, was held to be violated by the driving of a bread cart by one of them on his former route, as a hired servant of a baker in another town.

In *Geiger v. Cawley*, 146 Mich. 550, 109 N. W. 1064, it was held that an agreement "not to engage" in certain mercantile business was sufficiently broad to prevent all engagements voluntarily undertaken, and was violated by carrying on business as trustee.

In *Nelson v. Johnson*, supra, it was held that to engage his services to or in assisting a rival dealer in the same business, to solicit and make sales, and to influence buyers in that market, including his old customers, would be fairly within the terms of an agreement by the vendor of a business not to engage therein directly or indirectly in a stated locality; but that such agreement does not extend merely to isolated acts which might tend to interfere with the purchaser of the business, or to occasional services voluntarily rendered for the convenience or accommodation of another in 20 L.R.A. (N.S.)

good faith; nor does it include subordinate employment, not affecting the management or control of the business, or directly influencing custom.

The case of *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S. W. 805, is not strictly in point, as it there appeared that the defendant, who had covenanted not to engage in business of the character of that sold, for a certain period, was doing more than following her trade as a jacket maker for wages, but had made an attempt to produce an impression that the old concern was continuing its business.

In *Finger v. Hahn*, 42 N. J. Eq. 606, 8 Atl. 654, a quotation from which setting forth the grounds of decision may be found in the opinion in the *SIEGEL CASE*, it was held that the vendor of a retail butcher business, who covenanted "that he will not carry on the retail butcher business on his own account, or operate any butcher business, except a wholesale butcher business, within the corporate limits" of a certain city; and who thereafter entered the employment of one carrying on a grocery and retail butcher business, at a salary, assisting in both branches of the business, and doing all the buying for the establishment,—thereby violated his covenant.

In *Corwin v. Hawkins*, 42 App. Div. 571, 59 N. Y. Supp. 603, it was held that, where a retiring partner covenanted not to engage in a like business for a certain period in a certain village, the language of the covenant was broad enough to include business or trade, of the kind agreed upon, no matter for whom or who should be the owner of it; so that the purpose and object of the contract should be considered in determining its meaning; and that it therefore might be applicable to the solicitation of business for a relative in whose business he had no pecuniary interest.

In *American Ice Co. v. Meckel*, 109 App. Div. 93, 95 N. Y. Supp. 1060, it was held that an agreement by the vendors of an ice business "that we will not at any time or times within the period of ten years from the date hereof engage directly or indirectly, or concern ourselves, in carrying on or con-

26 So. 463; Angier v. Webber, 92 Am. Dec. 765, note; Nelson v. Johnson, 38 Minn. 255, 36 N. W. 868.

Flisk, J., delivered the opinion of the court:

This litigation arose in the district court

of Cass county, and comes here for trial *de novo*. The action was brought to obtain a perpetual injunction restraining defendant from engaging in any manner in the pawnbroker, secondhand clothing, and jewelry business in the city of Fargo for the period of two years from and after February 13,

ducting the business of selling ice at retail or wholesale, either as principals, agents, servants, or otherwise," was violated by one of them in entering the employ of a competitor and soliciting the patronage of the customers of the buyer of the business.

In Peterson v. Schmidt, 13 Ohio C. C. 205, it was held that, where a vendor of a bakery business agreed not to engage in the same business in a certain locality, such agreement was violated by his re-engaging in such business in the name of his wife, by whom he claimed to be employed.

In Anderson v. Ross, 14 Ont. L. Rep. 685, it was held that an agreement not to carry on or engage or be interested, directly or indirectly, in any business in a certain town, which should compete or interfere with the business of the other party, was violated by entering into the employment of another as manager, at a salary, of a competing business.

When not a breach of covenant.

In Battershell v. Bauer, 91 Ill. App. 181, it was held that an agreement never to start in the dry-goods, clothing, boot or shoe business in a certain place, directly or indirectly, as long as the other party continued in business in said place, was not violated by the promisor's acceptance of employment as clerk by another person engaged in a similar business, assisting and advising both in purchases and sales, but not being himself directly or indirectly interested in the business. The court said: "The contract did not prohibit appellant from accepting employment as assistant or clerk to others engaged in the like business mentioned in the contract, and we do not understand it is contended by appellees that it did; and in this view we think appellees failed to prove the case." This case is distinguished in SIEGEL v. MARCUS as being based on the particular wording of the contract there under consideration and the tacit admission of appellees that the contract did not prohibit appellant from accepting his employment as assistant or clerk to others.

In Grimm v. Warner, 45 Iowa, 106, it was held that the covenant of the vendor of an ice business, not to engage in the ice business in the city, was not violated by the personal service rendered by him to others, if he acted in good faith and was not interested in the business further than as an employee; the court saying: "He does not engage in the ice business by working for those who were so engaged. The covenant is intended to bind him not to carry on the business." In commenting upon this decision in the case of Wilson v. Delaney, 137 20 L.R.A. (N.S.)

Iowa, 636, 113 N. W. 842, as stopping short of the true rule, it was said: "We may concede that, where one has contracted to remain out of a certain business, the prohibition is not to be taken as absolute in the sense that it extends of necessity to every branch of employment. Thus, it might be held that assisting in the manual labor of putting up ice should not be construed into a contract violation. So, also, where one enters the service of a rival concern as book-keeper, stock keeper, watchman, to have charge of machinery, or other like employment. And this is so because it is not likely that out of these there could come any substantial mischief."

In Eastern Exp. Co. v. Meserve, 60 N. H. 198, it was held that a promisor, by entering into the service of another for wages, did not violate his agreement "to do no express business, or in any way be connected with or interested in any express," which might run over certain railroads; the court saying: "The intention of the parties, as gathered from the written instrument, seems to have been that the defendants should no longer carry on the express business on their own account over the plaintiffs' route, or over other roads to competing points on their line. It excludes them from interest or profit in the business, but there is no stipulation excluding them from personal employment in it in the service of another; and hence we think that entering the service of another as employee merely is not engaging in or carrying on the business of expressmen within the meaning of the agreement."

In Tabor v. Blake, 61 N. H. 83, an agreement by one not to open, or cause to be opened, for himself, a billiard or eating saloon in a certain place, was held not violated by opening and managing such a saloon as the agent and servant of another. This decision proceeds upon the ground that, if engaging in the business for any other person had been intended, it would have been added.

In Haley Grocery Co. v. Haley, 8 Wash. 75, 35 Pac. 595, it was held that an agreement of the vendor of a grocery business not to engage in such business either in his own name or in that of another, or conduct or engage in any such business for any other firm, person, or corporation, with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits, for his benefit, or for compensation regulated on the basis of profits or sales of property or stock, was not violated by engaging in such business as a salesman at a monthly salary.

1907; it being plaintiff's contention that defendant entered into a lawful and binding contract to abstain during such period from engaging in such business in said city.

The facts are not seriously in dispute, and may be summarized as follows: Prior to February 18, 1907, respondent and appellant were copartners engaged in the secondhand clothing, jewelry, and pawnbroker business at 218 Front street in Fargo. On that date, by mutual consent, such copartnership was dissolved, and a full settlement was effected between them, whereby it was agreed that appellant's interest in the copartnership property, which consisted partially of cash and partially of merchandise, was of the value of \$1,100, which sum respondent agreed to pay, and did pay, appellant in cash as consideration for the execution and delivery by appellant to respondent of the following agreement:

For and in consideration of the sum of eleven hundred dollars (\$1,100), to me in hand paid by Abe Siegel, I hereby specifically agree as a part of the consideration for said money, not to engage for the next two (2) years in the pawnbroker, secondhand clothing, and jewelry business within the city of Fargo, Cass county, North Dakota; and I also hereby sell, assign, set over, and deliver all my right, title, interest, and lien in, to, and upon the secondhand clothing, jewelry, and pawnbroker business now owned and conducted by Abe Siegel & Company, at No. 218 Front street, Fargo, North Dakota, and every claim thereto and thereunder, and waive all right to the use of the said name or any part thereof in any business whatsoever. And I further agree, as a part of the consideration herein, not to engage in the said business aforesaid, in the manner aforesaid, or with any partner, partners, firm, company, or corporation for the period aforesaid. The receipt of said eleven hundred dollars (\$1,100) is hereby specifically acknowledged. Said sale and purchase being made at my request and all of said goods being delivered unto said Abe Siegel free and clear of any and all encumbrance and indebtedness on my account or through me. And in execution hereof, and in agreement hereto, I have hereunto set my hand and seal the day and year first above written, that is to say, this 18th day of February, A. D. 1907, in the presence of the witnesses whose names are hereunto attached.

Cassel Marcus.

Witnesses:

Matt Siegel
E. Siegel.

In September, following, one Sam Epstein embarked in a similar pawnbroker business 20 L.R.A. (N.S.)

two doors east of respondent's place of business on Front street in said city, where he has continued said business ever since. Appellant, at or prior to the opening of said store by Epstein, entered into a contract of employment as clerk to work for and manage said store for said Epstein at a salary of \$60 per month, and appellant at the time of the commencement of this action was thus engaged in conducting said business as aforesaid, he being experienced in the business, while Epstein was inexperienced. There was considerable testimony tending to show that appellant was a partner with Epstein in such business; and, while it was admitted by said parties that they had certain preliminary negotiations looking towards the consummation of a copartnership arrangement between them, such negotiations were never consummated. Appellant and the said Epstein both testified, and the trial court found, that such negotiations were never completed. At the conclusion of the trial, the district court made findings of fact and conclusions of law favorable to plaintiff, and judgment was rendered perpetually enjoining appellant from engaging in said business in the city of Fargo in any manner whatever "as hireling, clerk, agent, or with a partner, partners, firm, or corporation," until after February 18, 1909, and for costs and disbursements, to reverse which judgment this appeal is prosecuted.

The only controversy between the parties arises on account of a disagreement between them regarding their legal rights under the agreement above stated; it being appellant's contention that his employment as a clerk in the store of Epstein did not and does not violate the terms of said agreement, while respondent contends to the contrary. Minor questions are raised which we will consider later. It is conceded at the outset by appellant's counsel, and in this respect the law is well settled, that where a person, on the sale of a business or his interest in a business, contracts with the purchaser that he will not engage in that particular line of business in a certain locality for a certain period of time, he is bound by such contract; and a court of equity, on a proper showing, will restrain him from violating such agreement. This court, in *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713, in effect so held. Among other things, the court there said: "It has always been held lawful for the vendor of the good will of a business to bind himself to refrain from conducting a like business within a limited territory and for a limited period, provided, only, that his agreement to refrain shall be no more extensive than is necessary to secure to the vendee the fruits of his purchase." Section 5374, Rev. Codes 1905, provides:

"Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."

It seems also to be reasonably well settled, and we think correctly so, that parties to such contracts must not only comply with the letter, but with the spirit, thereof as well. It was so held in the late case of *Kramer v. Old*, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650; 25 S. E. 813, where the court, among other things, said: "Where injunctive relief is asked, it is the duty of the court to restrain the contracting parties from violating the spirit as well as the letter of the agreement." In *Emery v. Bradley*, 88 Me. 357, 34 Atl. 167, we find the following language: "It must be evident that for the defendant to get into and carry on the business . . . as clerk or agent of any person would violate the spirit and purpose of his agreement with the plaintiff. He would be carrying on the business, though as clerk or agent. It does not matter how or in what manner and what name he acts, if he in fact carries on the business he agreed not to carry on, he is acting, he is breaking his promise, whether he acts as principal or agent. Located at Bar Harbor and carrying on the photograph business there as clerk or agent, he would be in direct competition with the business he had sold to the plaintiff,—as much so as if he were doing the same acts in his own name. The spirit of his agreement requires that he should not compete in this business with the plaintiff, either directly, in his own name, or indirectly, as clerk or agent of someone else. In equity and good conscience he should abstain from both modes of competition. Under the allegations in the bill, he can and should be enjoined from both,"—citing *Whitney v. Slayton*, 40 Me. 224; *Dwight v. Hamilton*, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111. In *Finger v. Hahn*, 42 N. J. Eq. 606, 8 Atl. 654, we find this language: "I cannot perceive that the mere fact of his being employed at the salary protects him against this covenant. In my judgment, the letter and spirit of the covenant are just as certainly violated as though he were in partnership with Horst, or had the entire ownership and control of the business himself. In common sense or reason, the object of every such covenant is to get rid of the competition which endangers the business of the purchasing party, to remove beyond reach the influence of the vendor's popularity, business integrity, knowledge, or skill, and to make it impossible for personal influences and friendly considerations, arising from long-continued

20 L.R.A. (N.S.)

business acquaintance, exerting themselves to the prejudice of such purchaser. Without these considerations, such contracts are quite meaningless. But not one of these influences is there which will not be felt or brought to bear, to a greater or less extent, if the vendor engage in business even as a clerk." To the same effect, see *Jefferson v. Markert*, 112 Ga. 498, 37 S. E. 758; *Meyer v. Labou*, 51 La. Ann. 1726, 26 So. 463; *Nelson v. Johnson*, 38 Minn. 255, 36 N. W. 868; 24 Am. & Eng. Enc. Law, p. 859; 20 Cyc. Law & Proc. p. 1280, and cases cited.

Appellant's counsel rely upon *Grimm v. Warner*, 45 Iowa, 107, *Battershell v. Bauer*, 91 Ill. App. 181, *Haley Grocery Co. v. Haley*, 8 Wash. 75, 35 Pac. 595, and *Bishop on Contracts*, p. 521, as supporting the contrary rule. We have examined these authorities, and, with the possible exception of the Illinois case, we do not consider them at all in point. In the latter case the agreement was, "To never start in the dry-goods, clothing, boot or shoe business in Milton, Pike county, Illinois, directly or indirectly," as long as appellees continued in business in said place. It was said: "The contract did not prohibit appellant from accepting employment as assistant or clerk to others engaged in the like business mentioned in the contract, and we do not understand it is contended by appellees that it did; and in this view we think appellees failed to prove the case." This case, when considered in the light of the particular wording of the contract there under consideration and the tacit admission of appellees that the contract did not prohibit appellant from accepting employment as an assistant or clerk to others, cannot be deemed an authority in support of appellant's contention in the case at bar.

In the light of the above well-established rule, it is entirely clear to our minds that, under the facts, the trial court very properly held that appellant was violating his said contract with plaintiff. The facts in the case at bar disclose a clear violation by appellant of the spirit, if not the letter, of the contract, and render it a plain case for equitable relief. The record fairly discloses that appellant was instrumental in causing such rival business to be established; that he went to Minneapolis, where he purchased stock with which to start the business; and that he was the active agent in the conduct and management thereof after it was started. The testimony further shows that appellant at times stood on the sidewalk in front of respondent's store soliciting his prospective patrons away from him and urging them to become patrons of Epstein's place of business.

But appellant contends that, if the contract be given the construction herein given to it, it would violate paragraph 23 of article 1 of our state Constitution, which provides: "Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor." We think such contention devoid of merit. Such constitutional provision is not applicable to the facts in this case, and was not intended to abolish the long and well-established rule recognized by the foregoing authorities and others too numerous to mention.

Appellant also contends that there was no adequate consideration for the contract in question. This contention is supported by the argument that, inasmuch as appellant's interest in the cash and stock of the copartnership existing between plaintiff and himself was of the value of \$1,100, he was entitled to such sum as a matter of law without executing and delivering to plaintiff the agreement aforesaid. But the fallacy of such argument is apparent for the reason that there was no legal duty resting on plaintiff to purchase appellant's interest in the merchandise. By the voluntary agreement of the parties plaintiff purchased such interest paying cash therefor, and, as a part of the consideration for such contract of purchase, the execution and delivery of the contract in question was made a condition thereof. This was perfectly legitimate, and there was ample consideration therefor. Rev. Codes 1905, § 5374; *Kramer v. Old*, supra; 24 Am. & Eng. Enc. Law, 2d ed. p. 853.

Judgment affirmed.

All concur.

OKLAHOMA SUPREME COURT.

ARKANSAS INSURANCE COMPANY,

Appt.,

v.

J. M. COX.

(— Okla. —, 98 Pac. 552.)

Fire insurance — separable contract — breach of condition — recovery.

1. Where an insurance policy is issued, and different classes of property insured, each class being separated from the others and insured for a specific amount; and there is a breach of the condition of the contract as to one class of the property in-

sured, the contract should be considered, not as one entire in itself, but as one which is separable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more without regard to the other items, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase in the risk of the property insured.

Same — insurable interest — ownership.

2. A vendee of land, occupying the same under an executory contract of purchase, on which he has paid a portion of the purchase price, is an "unconditional and sole owner" in fee simple of the equitable title, within the condition of a policy providing that it shall be void if the interest of the insured is other than unconditional and sole ownership of the fee simple title.

Same — contract conditions — estoppel.

3. Where it is shown that the insured truthfully and correctly stated the nature and condition of his title in making the application for insurance, he will not be precluded from recovering in case of loss, on account of a contrary title stated in the policy of the underwriter.

Same — proofs of loss — waiver.

4. Where an insurance company did not object, within a reasonable time, that proofs of loss furnished it by the insured were defective (as that the notary public before whom the same was sworn to did not designate his official title nor attach his seal), it must be held that the company waived all defects therein.

Same — premium note — nonpayment — effect.

5. Where two notes are given in payment of the premium on a fire-insurance policy, and no reference is made to them in the policy, nor the validity of the policy is in any way made contingent upon the payment of the notes, the policy is not invalidated by nonpayment of the notes at their maturity.

(September 10, 1908.)

Case Note. — Insurance; vendee under executory contract as owner, where vendor holds legal title.

The proposition that the vendee under a contract for the purchase of land, or under a bond for the conveyance of title, is a sole and unconditional owner within the meaning of a policy of insurance, is supported by well-nigh all the authorities, only a few cases being found to dispute it.

Thus, in *Baker v. State Ins. Co.* 31 Or. 41, 65 Am. St. Rep. 807, 48 Pac. 699, it was held that a warranty that the assured was the sole and unconditional owner of the insured property, and that the title to the land was in her name, was not broken by the fact that the legal title had not been conveyed to the assured, where she had gone into possession under a contract of purchase.

APPEAL by defendant from a judgment of the United States Court for the Central District of the Indian Territory in plaintiff's favor in an action brought to recover on a fire insurance policy. Affirmed.

Statement by **Hayes, J.:**

Appellee, who was plaintiff below, sued appellant, who was defendant below, on a policy of insurance issued by defendant to plaintiff in the sum of \$600; dated December 1, 1905, and expiring December 1, 1906. This suit was originally brought in the United States court for the central district of the Indian territory at McAlester. Plaintiff recovered judgment for the sum of \$486.86, from which judgment appeal was taken to the United States court of appeals

of the Indian territory, and it is before this court for final disposition under the provisions of the enabling act.

Plaintiff, in his complaint, alleges the issuance of the policy, and attaches a copy of same to his complaint as an exhibit, and alleges that a portion of the property insured by said policy was, on the 8th day of December, 1905, destroyed by fire. Defendant, in its answer, admitted the execution of the policy for the amount and on the date stated in the complaint, but sought to avoid the policy upon the ground that misrepresentations were made in the application of plaintiff therefor, which application was made by the terms thereof and by the terms of the policy made a part of the policy.

and had performed on her part all the conditions thereof to the date of the application.

And in *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723, it was held that the vendee of property, who was in possession of it under a contract whereby the former owner had absolutely agreed to sell, and the buyer absolutely to buy, on definite terms, was the sole and unconditional owner, within the true meaning of the clause upon this subject in insurance policies, because the vendor could compel the purchaser to pay for the property notwithstanding its injury or destruction.

And in *Insurance Co. of N. A. v. Erickson*, 50 Fla. 419, 2 L.R.A.(N.S.) 512, 111 Am. St. Rep. 121, 39 So. 495, 7 A. & E. Ann. Cas. 495, it was held that the interest of a purchaser of property which he unqualifiedly agreed to buy, and which the former owner had absolutely contracted to sell to him upon definite terms, was the sole and unconditional ownership within the true meaning of such a clause in an insurance policy, though the vendor retained possession of the property sold.

So, in *Milwaukee Mechanics' Ins. Co. v. Rhea*, 66 C. C. A. 103, 123 Fed. 9, it was said that it was "hardly the subject of debate" that the vendee in possession under a written agreement for the sale and purchase of property was the equitable owner thereof, and authorized to represent himself in a contract of insurance as the sole and unconditional owner.

And in *Evans v. Crawford County Farmers' Mut. F. Ins. Co.* 130 Wis. 189, 9 L.R.A.(N.S.) 485, 118 Am. St. Rep. 1009, 109 N. W. 552, it was said that the fact that one was in possession of land under a land contract, and was not in default, made him to all intents and purposes the owner of the premises, so that his interest was of sufficient dignity to satisfy a stipulation in a policy of insurance as to his interest being the entire, unconditional, and sole ownership.

This rule finds support, also in the following cases: *Rumsey v. Phoenix Ins. Co.* 17 Blatchf. 527, 1 Fed. 396, same case and opinion 20 L.R.A.(N.S.)

ion sub nom. *Ramsey v. Phoenix Ins. Co.* 2 Fed. 429; *Arkansas Ins. Co. v. McManus*. 86 Ark. 115, 110 S. W. 797; *Bonham v. Iowa Cent. Ins. Co.* 25 Iowa, 328; *Clay F. & M. Ins. Co. v. Huron Salt & Lumber Mfg. Co.* 31 Mich. 346; *Hamilton v. Dwelling House Ins. Co.* 98 Mich. 535, 22 L.R.A. 527, 57 N. W. 735; *Knop v. National F. Ins. Co.* 101 Mich. 359, 59 N. W. 653; *Martin v. State Ins. Co.* 44 N. J. L. 485, 43 Am. Rep. 397; *Millville Mut. F. Ins. Co. v. Wilgus*, 88 Pa. 107; *Chandler v. Commerce F. Ins. Co.* 88 Pa. 223; *Carey v. Allemania F. Ins. Co.* 171 Pa. 204, 33 Atl. 185; *Ambrose v. First National F. Ins. Co.* 19 Pa. Super. Ct. 117; *Franklin F. Ins. Co. v. Crockett*, 7 Lea, 725; *Liverpool & L. & G. Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 31 S. W. 248, *Hamburg-Bremen F. Ins. Co. v. Ruddell*, 37 Tex. Civ. App. 30, 82 S. W. 826; *Johannes v. Standard Fire Office*, 70 Wis. 196, 5 Am. St. Rep. 159, 35 N. W. 298; *Davis v. Pioneer Furniture Co.* 102 Wis. 394, 78 N. W. 596; *Matthews v. Capital F. Ins. Co.* 115 Wis. 272, 91 N. W. 675; *Wolf v. Theresa Village Mut. F. Ins. Co.* 115 Wis. 402, 91 N. W. 1014.

Policies of insurance generally contain, in addition to the clause in regard to the sole and unconditional ownership of the assured, the further stipulation that the latter owns the ground upon which the insured buildings are situated in fee simple; and it has been almost universally held that the fact that the assured has not the legal title, but holds the land under a contract of purchase, will not render such stipulation untrue.

Thus, in *Dooly v. Hanover F. Ins. Co.* 16 Wash. 155, 58 Am. St. Rep. 26, 47 Pac. 507, it was held that breach of the condition in a policy of fire insurance that the policy should be void if the interest of the assured was other than unconditional or sole ownership, or if the subject of insurance was a building on ground not held by the assured in fee simple, would not prevent a recovery by the assured for loss, where the application for the policy was an oral one, and no questions were asked concerning the title, and no intentional misrepresentation in regard thereto was made by the assured.

And such was the conclusion reached in

Mr. H. F. George, for appellant:

The insured misrepresented his interest in the property and cannot recover.

2 Cooley, Briefs on Insurance, p. 1129; 2 Clement, Ins. p. 35, rule 3; Rohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451; Westchester F. Ins. Co. v. Weaver, 70 Md. 536, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034; Citizens' Fire Ins. Secur. & Land Co. v. Dall, 35 Md. 89, 6 Am. Rep. 360; Pelican Ins. Co. v. Smith, 107 Ala. 313, 18 So. 105; Deming Invest. Co. v. Shawnee F. Ins. Co. 16 Okla. 1, 4 L.R.A. (N.S.) 607, 83 Pac. 918.

Messrs. Campbell & Wright, for appellee:

Where different classes of property are insured, and each class is separated from

the following cases: Lewis v. New England F. Ins. Co. 24 Blatchf. 181, 29 Fed. 496; Pennsylvania F. Ins. Co. v. Hughes, 47 C. C. A. 459, 108 Fed. 497; Loventhal v. Home Ins. Co. 112 Ala. 108, 33 L.R.A. 258, 57 Am. St. Rep. 17, 20 So. 419; Boulden v. Phoenix Ins. Co. 112 Ala. 422, 20 So. 587; Dupreau v. Hibernia Ins. Co. 76 Mich. 615, 5 L.R.A. 671, 43 N. W. 585; Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 340, 47 N. W. 587; Hall v. Niagara F. Ins. Co. 93 Mich. 184, 18 L.R.A. 135, 32 Am. St. Rep. 497, 53 N. W. 727; Barnard v. National F. Ins. Co. 27 Mo. App. 26; Imperial F. Ins. Co. v. Dunham, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668; East Texas F. Ins. Co. v. Dyches, 56 Tex. 565; Queen Ins. Co. v. May (Tex. Civ. App.) 35 S. W. 829.

Upon the same principle, it was held in the following cases that, though, in the contract of insurance, the assured stipulated that the property was "his," or that he was the owner thereof, such contract was not avoided by the fact that he was only a vendee under a contract for the purchase of land, and did not hold the legal title thereto: Southern Ins. & T. Co. v. Lewis, 42 Ga. 587; Gilman v. Dwelling-House Ins. Co. 81 Me. 488, 17 Atl. 544; Wainer v. Milford Mut. F. Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; Farmers' Mut. F. Ins. Co. v. Fogelman, 35 Mich. 481; Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Martin v. Jersey City Ins. Co. 44 N. J. L. 273; Ætna F. Ins. Co. v. Tyler, 16 Wend. 385, 30 Am. Dec. 90, affirming 12 Wend. 507; McCulloch v. Norwood, 58 N. Y. 562; Chase v. Hamilton Mut. Ins. Co. 22 Barb. 527, reversed on other grounds in 20 N. Y. 52; Acer v. Merchants' Ins. Co. 57 Barb. 68; Dohn v. Farmers' Joint Stock Ins. Co. 5 Lans. 275; Pelton v. Westchester F. Ins. Co. 13 Hun. 23, affirmed in 77 N. Y. 605; Lorillard F. Ins. Co. v. McCulloch, 21 Ohio St. 176, 8 Am. Rep. 52; Brogan v. Manufacturers' & M. Mut. F. Ins. Co. 29 U. C. C. P. 414.

The same result was reached in Hough v. City F. Ins. Co. 29 Conn. 10, 76 Am. Dec. 581, where the assured, a vendee under a contract of purchase, stipulated that he was 20 L.R.A. (N.S.)

the others, and insured for a specific amount, the contract is separable.

Miller v. Delaware Ins. Co. 14 Okla. 81, 65 L.R.A. 173, 75 Pac. 1121, 2 A. & E. Ann. Cas. 17.

An insured who makes a true statement as to title is not bound by a contrary statement in the policy.

German-American Ins. Co. v. Paul, 5 Ind. Terr. 703, 83 S. W. 60; Allen v. Phoenix Assur. Co. 12 Idaho, 653, 8 L.R.A. (N.S.) 903, 88 Pac. 245, 10 A. & E. Ann. Cas. 328.

The insurer waived all defects in the proof of loss by not objecting thereto within a reasonable time.

Robinson v. Palatine Ins. Co. 11 N. M. 162, 66 Pac. 535; 16 Am. & Eng. Enc. Law, 2d ed. p. 959; Killips v. Putnam F.

the absolute owner of the property; in Bonham v. Iowa Cent. Ins. Co. 25 Iowa, 329, where the ownership of the assured was described as absolute as well as unconditional and sole; and in Elliott v. Ashland Mut. F. Ins. Co. 117 Pa. 548, 2 Am. St. Rep. 703, 12 Atl. 676, where the policy was to be void if the assured's interest in the property was not fee simple absolute.

The rule here under discussion was carried still further in Williams v. Buffalo German Ins. Co. 17 Fed. 63, in which it was held that the sole and unconditional ownership clause was not breached by the fact that the assured did not have the legal title, but was a vendee under a bond for title, even though his vendor had only a life estate in the property and six-sevenths of the remainder.

Whether or not the fact that the assured is in default in the payments stipulated in the contract of purchase under which he is in possession of the insured property would affect the rule here under discussion would seem to be questioned, though in the following cases in which such was the fact the rule was applied: Loventhal v. Home Ins. Co.; Boulden v. Phoenix Ins. Co.; Chase v. Hamilton Mut. Ins. Co.; and Pelton v. Westchester F. Ins. Co.,—supra.

This conclusion, however, would seem to be opposed by the following Wisconsin cases, in which the fact that the assured was not in default in his payments was one of the circumstances to which the court drew attention in holding that he was an unconditional and sole owner. Johannes v. Standard Fire Office, 70 Wis. 196, 5 Am. St. Rep. 159, 35 N. W. 298; Davis v. Pioneer Furniture Co. 102 Wis. 394, 78 N. W. 596; Evans v. Crawford County Farmers' Mut. F. Ins. Co. 130 Wis. 189, 9 L.R.A. (N.S.) 485, 118 Am. St. Rep. 1009, 169 N. W. 952. See also Baker v. State Ins. Co. 31 Or. 41, 65 Am. St. Rep. 807, 48 Pac. 699.

And in Roberts v. State Ins. Co. 26 Mo. App. 92, the fact that the assured was in default in his payments seems to have been a material circumstance in arriving at the conclusion that he was not the "sole and undisputed" owner of the insured property,

Ins. Co. 28 Wis. 472, 9 Am. Rep. 506; 4 Joyce, Ins. §§ 3360, 3362; Eagle Fire Co. v. Globe Loan & T. Co. 44 Neb. 380, 62 N. W. 895.

In the absence of a stipulation in the contract for forfeiture or suspension of the risk in case of nonpayment of a note given for the cash premium when due, payment is not a condition precedent to the validity of the policy.

2 Joyce, Ins. § 1212, p. 1290; Franklin L. Ins. Co. v. Wallace, 93 Ind. 7; McAllister v. New England Mut. L. Ins. Co. 101 Mass. 558, 3 Am. Rep. 404; Trade Ins. Co. v. Barraciff, 45 N. J. L. 543, 46 Am. Rep. 792; Michigan Mut. L. Ins. Co. v. Bowes, 42 Mich. 19, 51 N. W. 962; Shaw v. Republic L. Ins. Co. 69 N. Y. 286.

though it must be admitted that the court's language is broad enough to sustain the inference that in any event it would have arrived at the same conclusion.

And there are three cases decided by the Missouri court of appeals, in which it appeared that the assured, who had no legal title, but was a vendee under an executory contract of purchase of the insured premises, owed a small portion of the purchase price, though it is not shown whether or not his payments were past due; and in which it was held that he was not the unconditional and sole owner within the meaning of an insurance policy; though in the first case the court also held that, if a purchaser had a title bond which provided for an absolute and unconditional deed upon payment of the purchase price, this would constitute him an owner in fee simple within the meaning of a clause in a policy avoiding the same if the subject of insurance is a building on ground not owned by the assured in fee simple. The cases referred to are Hubbard v. North British & M. Ins. Co. 57 Mo. App. 1; Harness v. National F. Ins. Co. 62 Mo. App. 245; Cole v. Niagara F. Ins. Co. 126 Mo. App. 134, 103 S. W. 569.

But in *Barnard v. National F. Ins. Co.* 27 Mo. App. 26, in which it was held that the vendor, under an executory land contract, was not the sole, entire, and unconditional owner in fee simple, the court said that the vendee might have properly described the property as his in a policy of insurance, unless the policy required the true state of the title to be disclosed.

There are some other cases which deny that a vendee under an executory contract for the purchase of land is the unconditional and sole owner within the meaning of a policy of fire insurance; but these have either been overruled by later cases, or are opposed to all the other decisions in the same jurisdiction. The cases referred to are: *Liberty Ins. Co. v. Boulden*, 96 Ala. 508, 11 So. 771 (specifically modified upon this question in *Loventhal v. Home Ins. Co.* 112 Ala. 108, 33 L.R.A. 258, 57 Am. St. Rep. 17, 20 So. 20 L.R.A. (N.S.))

Heyes, J., delivered the opinion of the court:

Numerous assignments of error were made by appellant, but its counsel in his brief states that all propositions raised by the various assignments of error, in so far as this appeal is concerned, are abandoned except three. It is contended that the policy was void, and plaintiff was not entitled to recover: First, because of misrepresentations made by him in the application; second, for failure to furnish proper proof of loss; third, for failure on the part of plaintiff to pay the premium notes given by him in settlement of the premium for the policy. These propositions are raised by appellant by different assignments of error, some of which go to instructions given by the court and excepted to, some to instructions re-

419); *Mott v. Citizens' Ins. Co.* 69 Hun, 501, 23 N. Y. Supp. 400 (unnecessary to the decision, and undoubtedly opposed to the other New York cases hereinbefore cited); *Reynolds v. State Mut. Ins. Co.* 2 Grant, Cas. 326 (disapproved in *Millville Mut. F. Ins. Co. v. Wilgus*, 88 Pa. 107, and *Imperial F. Ins. Co. v. Dunham*, supra, in which it was said that the *Reynolds Case* was correctly decided on other grounds).

The following cases would seem at first sight to be also opposed to the prevailing rule; but, upon closer investigation, it will be noticed that the peculiar circumstances of each case prevented the application of the rule.

In *Brown v. Commercial F. Ins. Co.* 86 Ala. 189, 5 So. 500, it was held that, where a policy was issued to the assured on property of which he was said to be the sole and unconditional owner, and it appeared that he in fact had only a leasehold estate in the land on which the building stood, though he had an executory contract of purchase by which, upon the payment of a certain sum, the vendor was to convey to him the property, the contract was avoided. It is true that the language of the opinion is broad enough to warrant the deduction that a vendee under a contract, who did not have the legal title, could not be the sole and unconditional owner; but the fact was that the assured never paid any part of the purchase money, and held the property as lessee rather than a vendee, and there was nothing to show that he ever exercised the option of purchase.

A similar conclusion was reached in *Walroth v. St. Lawrence County Mut. Ins. Co.* 10 U. C. Q. B. 525, in which it also appeared that the assured had leased the property, with a covenant from the lessor that he would convey the same to the lessee on the payment of a certain sum, which contract and lease were assigned to the plaintiff, neither the assignor nor assignee being shown to have exercised the option of purchase.

So, in *Fire Asso. of Philadelphia v. Cal-*

quested by the appellant and refused by the court, and others to the admission of testimony; but we shall not discuss in detail the various assignments of error by which these three different propositions are presented, for all the assignments or error not waived by appellant, taken collectively, present these three propositions of law. If appellant is correct in his contention as to any of them, then the case should be reversed; otherwise, the case should be affirmed.

The policy sued upon was issued by defendant at the office of its general agent at South McAlester, upon a written application of plaintiff which was procured by Foster & Dalton, agents of defendant residing at Stigler, Indian territory. The application was made upon a printed form furnished by the agents of the company. The proper-

ty to be insured, the valuation and amount of insurance on each item thereof, is stated and described in the application as follows:

	Valuation.	Sum to be insured
On dwelling house	\$450 00	\$300 00
On household furniture therein...	150 00	100 00
On bed and bedding therein...	150 00	100 00
On wagons, buggies and harness in barn and shed	150 00	100 00

The policy issued upon the application was for an amount not exceeding \$600 on property described in the policy as follows:

\$300.00 on one story frame building with shingle roof and communicating additions,

houn, 28 Tex. Civ. App. 409, 67 S. W. 153, it was held that, under a policy in which the assured warranted himself to be the sole owner of the insured building, there was a breach of such warranty, where it appeared that the assured owned only an undivided one-half interest therein, and had verbally agreed with his co-owner to buy the other half, but no part of the price was ever paid, and the situation of the parties never changed, upon the ground that the assured had no enforceable contract for the purchase of the interest of his co-owner.

And in *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159, in which the assured not only warranted that he was the sole and undisputed owner of the insured property, but further stated that he held the land under a contract of purchase, and that no one other than himself had any substantial interest in the property, the court held that this was equivalent to the statement that he had fully paid for the land, and was the sole owner thereof by an equitable title in fee, with a right to enforce the transfer to himself of the naked legal title outstanding in the former owner; and the fact that he was in default made the statement untrue, and was fatal to the validity of the policy. The case was so distinguished in *Johannes v. Standard Fire Office*, supra.

So, in the following cases, in which policies of insurance were issued by mutual companies, which were by law entitled to a lien for the premium upon the insured property, and in which the policies provided that they should be void unless the true title of the assured should be expressed in the application, it was held that the assured could not recover if he had no legal title, and was in possession of the premises under a contract of purchase, and failed to disclose the same to the insurer. *Smith v. Bowditch Mut. F. Ins. Co.* 6 Cush. 448 (in which the court said that the general rule was well established so far as "common insurance companies" were concerned); *Brown v. Williams & T. Mut. L. Ins. Co.* 28 Me. 252; *Merrill v. Farmers' & M. Mut. F. Ins. Co.* 48 20 L.R.A. (N.S.)

Me. 285; *Falis v. Conway Mut. F. Ins. Co.* 7 Allen, 46; *Marshall v. Columbian Mut. F. Ins. Co.* 27 N. H. 157.

As to personal property, the great majority of the cases hold that where, by a sale, the seller retains title in himself until the full amount of the purchase price is paid, the purchaser is not a sole and unconditional owner within the meaning of a policy of fire insurance, though the decisions are not put upon the ground that the insured property consists of chattels. Such was the conclusion reached in the following cases: *Phoenix Ins. Co. v. Public Park Amusement Co.* 63 Ark. 187, 38 S. W. 959; *Hartford F. Ins. Co. v. Enoch*, 72 Ark. 47, 77 S. W. 899; *Dumas v. Northwestern Nat. Ins. Co.* 12 App. D. C. 245, 40 L.R.A. 358; *Westchester F. Ins. Co. v. Weaver*, 70 Md. 536, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034; *Lasher v. St. Joseph F. & M. Ins. Co.* 86 N. Y. 423; *Lasher v. Northwestern Nat. Ins. Co.* 57 How. Pr. 222, reversing 55 How. Pr. 324; *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 480, 2 S. E. 258; *Dow v. National Assur. Co.* 26 R. I. 379, 67 L.R.A. 479, 106 Am. St. Rep. 728, 58 Atl. 999; *McWilliams v. Cascade F. & M. Ins. Co.* 7 Wash. 48, 34 Pac. 140.

On the other hand, an opposite conclusion was reached in the following cases, and the purchaser of chattels under a contract by which the seller retained the title was held to be the sole and unconditional owner within the meaning of a fire-insurance policy. *Pennsylvania F. Ins. Co. v. Hughes*, 47 C. C. A. 459, 108 Fed. 497; *Scottish Union & Nat. Ins. Co. v. Strain*, 24 Ky. L. Rep. 958, 70 S. W. 274; *Light v. Greenwich Ins. Co.* 105 Tenn. 480, 58 S. W. 851.

The question whether the existence of a vendor's lien upon the insured property would be a breach of a clause requiring the insured to have the entire, unconditional, and sole ownership, is discussed in *Insurance Co. of N. A. v. Pitts*, 7 L.R.A. (N.S.) 627, and the case note thereto.

including foundations, on water, gas, and steam pipes and fixtures, on electric wires and annunciators, while occupied as a dwelling house or ———, and situated town of Garland, I. T.

\$100.00 on household and kitchen furniture, useful and not ornamental, beds, bedding, linen, stoves, provisions, and family wearing apparel in good condition.

None on sewing machine, all while contained in the above described building. None on piano or organ all while contained in the above described building.

Barn and Contents.

\$100.00 on one story frame barn with shingle roof building including foundations and stalls, situated in the rear of the above described building.

Miscellaneous.

\$100.00 on wagons, buggies, and harness in barn or shed.

\$600.00 total concurrent insurance permitted, including this policy.

The first alleged misrepresentation in the application for which defendant seeks to avoid the policy is that the policy covers one buggy which was not owned by plaintiff at the time of the issuance of the policy, but that plaintiff, by the terms of the application and policy, represented that he owned same. By the terms of the application plaintiff's answers therein were made his warranties, and the policy contained the following clause: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact, or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

By virtue of this clause of the policy, it is contended by defendant that the policy is void and of no effect because of plaintiff's misrepresentations as to his interest in the buggy. There is no specific reference in the application or in the policy as to any buggy or buggies, except as has been set out hereinbefore in the clauses quoted from the application and from the policy. Upon receipt of the policy by plaintiff, he read the clause "\$100.00 on wagons, buggies, and harness in barn or shed," and thereupon called the attention of defendant's agents, through whom the application for insurance was made, to the fact that he owned no buggy. It appears that plaintiff inferred from the language of said clause

in the policy that it was intended to insure a buggy,—and he had owned, prior to the giving of the application for insurance, a buggy, but he had sold the same some sixty days before that time. There is no explanation of how the clause in the application and in the policy came to include the word "buggies." The agents were unable to remember that any request for insurance upon buggies was made, or any representation by plaintiff that he owned any buggy at the time the application was given; and there is nothing in the policy or in the application that indicates that any such representation was made other than the clause quoted. Plaintiff owned a wagon which, however, was not destroyed by fire. He also owned some harness which was still in the barn and shed covered by the policy. There is no evidence whatever that the policy was made to cover buggies through any fraudulent act or procurement of plaintiff; nor was it shown that the risk of the company was increased by reason of the policy having included buggies when the insured owned no buggy. In order to forfeit this policy, the insurance company insists that these clauses in the application and policy should be construed to insure a buggy which plaintiff had at one time owned, but which he did not own at the time he made his application or at the time of the issuance of the policy, and that he represented that he owned the same. There was no evidence that plaintiff owned or represented that he owned any buggy, or that there were any buggies at the time of the issuance of the policy, kept by him in said barn and shed. There was no insurance on any buggy thus located, for none existed. The construction which the insurance company insists upon in this case is for the purpose of incurring a forfeiture of this policy. Forfeitures are not favored by the law. The reasoning that would support the construction that, by virtue of said clauses plaintiff represented he had one buggy and that one buggy was insured would also support the construction that he had more than one buggy, for the language of the clause is "buggies," not "buggy." This application and the policy were written upon printed forms of the company, and no doubt for the purpose of convenience to itself and agents. A mere failure of the company or of the applicant to strike from the application and from the policy the word "buggies," in the absence of any other showing by the terms of the application or of the policy, or of representations made by the insured that the insured owned a buggy, that the same was to be included in the policy and was included in the policy, should not be construed as a representation that he did

own a buggy. Plaintiff owned a wagon and harness, and it is not shown that the value of the same was not sufficient to entitle him to all the insurance he obtained thereon by virtue of this clause in the policy; but, if the policy and application were construed, as contended for by the insurance company, as including representations of plaintiff that he owned a buggy and that the policy insured the same, still this would not be sufficient to avoid the entire policy. Items of property insured by the policy were separately valued and insured in separate amounts, and, under the rule adopted by the supreme court of the territory of Oklahoma in *Miller v. Delaware Ins. Co.* 14 Okla. 81, 65 L.R.A. 173, 75 Pac. 1121, 2 A. & E. Ann. Cas. 17, a breach of the policy as to one item insured therein would not avoid the policy if the same was not affected by any question of fraud, act condemned by public policy, or any increase in the property insured; and this is true notwithstanding the policy contained a provision that "this entire policy shall be void if the insured has concealed. . . ." There is not an absence of authorities holding to the contrary, and this court, in *Sullivan v. Mercantile Town Mut. Ins. Co.* (Okla.) 94 Pac. 676, had occasion to cite some of the authorities holding on both sides of this proposition; but we were not called upon in that case to decide which rule this court would adopt, and did not do so. The authorities supporting the doctrine announced by the court in *Miller v. Delaware Ins. Co.* supra, are well collected by the court in that opinion; and we think that the rule adopted by the court in that case is the rule supported by the greater weight of authorities, and should not be overturned by this court, but should be adopted and followed.

Herzog v. Palatine Ins. Co. 36 Wash. 611, 79 Pac. 287, presents a state of facts similar to those in the case at bar. The policy in that case in one item insured a piano for the sum of \$200, but the insured did not, at the time of the fire or at the time the policy was issued, own any piano whatever. The record did not disclose how the piano came to be included in the policy of insurance. The court held that, where a policy of insurance is issued covering different classes of property, and each class is insured for a specific sum, a breach of the contract of insurance as to one or more of the items does not avoid the policy as to the other items not affected by the breach, in the absence of fraud, act condemned by public policy, or increase of risk to the property insured by reason of the breach as to the part. Plaintiff in the case at bar waives any claim for loss of property in-

cluded in the clause of the policy covering wagons, buggies, etc.

The second alleged misrepresentation for which it is sought to avoid the policy is that in the application the following questions and answers were made: "Q. Is your ownership of property to be insured absolute, unqualified, and undivided? A. Yes. Q. In whose name is the land on which property to be insured is located? A. R. L. Folsom. I have a contract for the land these buildings are on with a Choctaw Indian and have paid him for it." It was agreed that, at the time of the application and of the loss, plaintiff occupied the land upon which said improvements were located under a contract with R. L. Folsom to give him, the plaintiff, a deed to said land when said Folsom received his patent; that the entire consideration to be paid for the land was \$500; that, at the time the application was made by plaintiff, plaintiff had paid \$425 on the consideration, and the remaining \$75 was, by the terms of the contract, not to be paid until Folsom should deliver to plaintiff a deed to the land. The policy contained the following clause: "This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership, both legal and equitable; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage. . . ." Defendant insists that the answers of plaintiff in his application as to his interest in the dwelling house and barn insured and the land on which the same was situated were false, and that he did not have the unconditional and sole ownership, both legal and equitable, of the property, and that he was not the owner of the fee-simple title to the land on which said buildings were situated, and that, by reason of such facts, the policy, under the provision thereof quoted supra, was void. There was no misrepresentation by plaintiff in his application as to who owned the legal title to the land on which the property was situated. His answers to the questions in the application disclose that the same was held in the name of R. L. Folsom. This fact was known to the insurance company by the written application of plaintiff, containing such answer, being before the company at the time it issued the policy sued on; and the company, having with full knowledge issued the policy to plaintiff, cannot now insist upon the clause in the policy requiring the insured to be the unconditional and sole owner of the legal title, but will be held to have waived

such condition. The law will not permit it, with full knowledge of the condition of the legal title to the land on which the insured's property was located, to accept the application and the premium note given by the insured in payment of the premium on the policy, and to insert in the policy a provision contrary to the conditions of the title as represented by the application by which it may defeat the right of recovery in case of loss. *German-American Ins. Co. v. Paul*, 5 Ind. Terr. 703, 83 S. W. 60; *Allen v. Phoenix Ins. Co.* 12 Idaho, 653, 8 L.R.A. (N.S.) 903, 88 Pac. 245, 10 A. & E. Ann. Cas. 328.

Was plaintiff the unconditional and sole owner of the equitable title to the land on which the property insured was located? There is no denial that Folsom held the legal title to the land in controversy, or that the contract of sale between him and the plaintiff is valid; and, since the burden of proof is upon defendant to establish such facts as were necessary to avoid the policy, in the absence of any attack upon the validity of the contract between Folsom and plaintiff, it will be assumed that it was valid, and passed the interest in the land in controversy purported to have been passed by such contract. As to what interest in property answers the requirement of the provision of a standard fire insurance policy to the effect that "the entire policy shall be void if the interest of the insured be other than the sole and unconditional ownership, or if the subject of insurance be located on ground not owned by the insured in fee simple," has often received the consideration of and been determined by the courts. The authorities hold, almost without exception, that a vendee of land who occupies the same under an executory contract of purchase is the unconditional and sole owner of the same and of the fee-simple title thereto within the provision of policies of insurance above quoted, and that this is true although the entire purchase price has not been paid. This question was ably discussed in *Loventhal v. Home Ins. Co.* 112 Ala. 108, 33 L.R.A. 258, 57 Am. St. Rep. 17, 20 So. 419, in which case the court holds the rule herein announced, and supports the same with citations from numerous authorities. Other cases in which the same doctrine is announced are: *Franklin F. Ins. Co. v. Crockett*, 7 Lea. 725; *Matthews v. Capital F. Ins. Co.* 115 Wis. 272, 91 N. W. 675; *Tuck v. Hartford F. Ins. Co.* 56 N. H. 326; *Knop v. National F. Ins. Co.* 101 Mich. 359, 59 N. W. 653; *Baker v. State Ins. Co.* 31 Or. 41, 65 Am. St. Rep. 807, 48 Pa. 699; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668.

In *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 20 L.R.A. (N.S.)

569, 64 C. C. A. 251, 129 Fed. 723, it was held that the interest of a purchaser of property, which the purchaser has unqualifiedly agreed to buy, and which the former owner has absolutely contracted to sell to him upon definite terms, is a sole and unconditional ownership within the true meaning of the ordinary clause on that subject in insurance policies, because the vendor may compel the vendee to pay for the property and suffer any loss that may occur.

Plaintiff, at the time of the issuance of the policy, occupied the lands upon which the property insured was located, and he had placed thereon the buildings insured under the policy, and he had occupied the land under the contract of purchase, on which he had paid all the purchase price except \$75. He was the unconditional and sole owner in fee simple of the equitable title to said land, and had such an interest therein as was required by the conditions of the policy relied upon for a forfeiture, except that he did not own the legal title, but that portion of the condition of the policy was waived by defendant. Nor did the assured make any misrepresentations as to his interest in the property, although he stated that he had paid the person from whom he had contracted the land therefor. The fact that he owed a balance of \$75 to Folsom on the contract of purchase in no way affected his title to the land, or his unconditional and sole ownership thereof within the meaning of the condition in the policy; and this was true although the vendor had a lien upon plaintiff's interest in the land for the balance of the purchase price. A lien created or a mortgage executed by the insured upon his property does not affect his title to the property, or his insurable interest thereon, and, unless required to do so by the application for insurance or the conditions of the policy, the insured need not disclose the existence of such lien or mortgage. 13 Am. & Eng. Enc. Law, pp. 168-170, and authorities there cited; *Loventhal v. Home Ins. Co. supra*.

One of the provisions of the policy required the insured, in case of loss by fire, to render proof of loss to the company, signed and sworn to by him, within sixty days after the fire. Plaintiff, within eight or ten days after the fire, made out a statement of his loss, subscribed and swore to the same, and forwarded it to the company, but the notary public before whom plaintiff swore to the proof of loss omitted to indicate his official title and to attach his seal. The company made no response to plaintiff's proofs of loss. Plaintiff after a time, and before the expiration of sixty days, wrote the company inquiring why they gave no attention to his claim. To this

letter he received no response. Shortly after the expiration of sixty days after the fire the company, through its agents, began an investigation of the loss, but no objection was ever made to the proofs of loss submitted until this action was brought, and defendant cannot avail itself of the defect therein now. If the proofs of loss given by plaintiff were defective, and not in compliance with the policy, and not satisfactory to defendant, defendant should have notified plaintiff of such facts within a reasonable time, and pointed out to him the specific defects in order that plaintiff might remedy the same, and, having failed to do so, the defendant waived its right to have the proofs of loss submitted in the exact form and manner prescribed by the policy. 4 Joyce, Ins. § 3362; Hanover F. Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297; 16 Am. & Eng. Enc. Law, p. 959.

Plaintiff executed two promissory notes in payment of the premium on the policy. These notes were past due and unpaid at the time of the institution of this suit, and defendant contends for forfeiture of the policy for the nonpayment of said notes, but neither the notes nor the policy make the validity of the policy contingent upon the payment of the notes. These notes were given by plaintiff and accepted by defendant in payment of the premium just as so much cash, and plaintiff is liable thereon for the amount of the same. Plaintiff in fact has tendered payment of the same to the company, which was refused. In the absence of stipulation in the note or in the policy of insurance that failure to pay the notes given in payment of the premium should operate as a forfeiture of the policy or a suspension of the risk, the policy will continue in force after the maturity of the notes although the same are not paid. 2 Joyce, Ins. § 1212.

Finding no error in the matters complained of by appellant in its assignments of error relied upon, the judgment of the trial court is affirmed.

Williams, Ch. J., and Dunn, Turner, and Kane, JJ., concur.

TEXAS COURT OF CRIMINAL APPEALS.

B. S. MUCKENFUSS, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. App. —, 116 S. W. 51.)

Sunday — theater — single offense.

Only one conviction can be secured for 20 L.R.A.(N.S.)

giving several performances in the theater on Sunday, under a statute providing that any proprietor of any place of amusement who shall permit it to be open on that day shall be fined.

(February 3, 1909.)

Case Note. — Violation of Sunday law as a continuing offense.

This note is limited strictly to cases similar to MUCKENFUSS v. STATE, that is passing on the question whether two or more performances, sales, or other violations of the Sunday law constitute one offense, for which only one conviction can be had or fine imposed, or whether such performances, sales, etc., constitute different offenses, for which a conviction can be had or fine imposed for every violation of the law. It therefore excludes cases where the violations were committed on different Sundays, or which turn on the question whether the violations belonged to distinct and different classes of offenses, as, for instance, the selling and giving away of intoxicating liquors. Those cases also have been expressly excluded where the violations complained of were not of the Sunday law, but of laws governing the conduct of persons on election days or other legal holidays.

The question whether a person who gives two or more performances in a theater, or makes several sales during the day, in violation of the Sunday law, is guilty of more than one offense, seems to depend to a great extent upon the wording of the statute violated. If the statute contemplates the prevention of the opening for business of a place of amusement, saloon, or other place generally connected with the violation of the Sunday law, or a prevention of exercising one's ordinary trade on that day, it is held, in accordance with MUCKENFUSS v. STATE that a repetition of the same violation at another part of the day will not make the guilty party subject to two or more convictions; but such party is guilty of only one offense for which only one conviction can be had or only one fine imposed.

Thus, in State v. James, 81 S. C. 197, 18 L.R.A.(N.S.) 617, 62 S. E. 214, it was held that several sales by a merchant on the Lord's Day constitute but one offense, under a statute providing a penalty for exercising one's ordinary trade on that day.

To the same effect is Crepps v. Durden, 2 Cowp. 640, where a baker was convicted for selling loaves of bread at various times on the same Sunday. The court said: "On the construction of the act of Parliament, the offense is, 'exercising his ordinary trade upon the Lord's Day,' and that without any fractions of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration. So, whether it consists of one or of a number of particular acts. The penalty incurred by this offense is 5 shillings. There is no idea conveyed by the act itself that, if a tailor sews

A PPEAL by defendant from a judgment of the Dallas County Court convicting him of violating the Sunday law. Reversed.

The facts are stated in the opinion.

Messrs. Walker & Williams for appellant.

Messrs. Dwight L. Lewelling and F. J. McCord for the State.

Davidson, P. J., delivered the opinion of the court:

There are several very interesting questions in the case presented for revision, but,

on the Lord's Day, every stitch he takes is a separate offense; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day."

In *Friedeborn v. Com.* 113 Pa. 242, 57 Am. Rep. 464, 6 Atl. 160, it was held that, under a statute forbidding the performing of any worldly employment or business on Sunday, there can be but one violation by the same person on the same day; and consequently a tobacconist who makes several sales of his wares during that day can have but one fine imposed upon him.

A similar case, holding to the same effect, is *Com. v. Moses*, 15 Pa. Co. Ct. 224.

And see *People v. Cox*, 70 Mich. 247, 38 N. W. 235, sufficiently set out in *MUCKENFUSS v. STATE*.

Where, however, the statute aims at the particular offense, a conviction of one will not bar a conviction for another similar offense committed on the same day.

In *State v. Heard*, 107 La. 60, 31 So. 384, it was held that, under a statute requiring all stores, etc., to be closed on Sunday, and forbidding all selling, etc., a conviction for selling a drink of beer to one person on that day is not a bar to a prosecution for selling on the same day a flask of whisky to another. The court said: "The acts charged in the two informations, though both charged as of the same day, are not necessarily one and the same; the act of selling one drink of beer to Ben Barnes, for which the first conviction was had, is not the same as the act of selling a flask of whisky to Austin Montgomery, which is the act charged in the second information: proof of the one act could not support a conviction for the other, and this is the recognized test for determining whether the first conviction is a bar to the second prosecution. We do not say that the two acts might not, in fact, constitute one and the same transaction, out of which the prosecution might carve but one crime, but we say that on the face of the papers they constitute two distinct transactions. It would have been admissible for defendant to prove their identity; but the proof in the case, far from proving their identity, proves their severalty: there is in the record an admission to the effect that the two sales were 'to different parties at different times on the same day.' Hence they were, in fact, separate transactions. But defendant contends that what is made a crime by the statute is the opening of a saloon on Sunday, and not the making of sale on that day. We cannot agree with that view. Whether the opening and the selling are not both and each made a separate crime, and might not 20 L.R.A. (N.S.)

both and each furnish matter for separate prosecution and punishment, might be a question; but certainly the selling is made a separate crime. All that part of the statute relative to opening might be stricken out and a complete statute be left denouncing the making of sales; and, on the other hand, all that part of the statute forbidding the making of sales might be stricken out and a complete statute be left making it a crime to open. The statute, in its title, is stated to be one 'requiring all stores, etc., to be closed on Sunday, and forbidding all selling, etc.,' that is to say, the statute is stated to have a twofold object, first, to require stores to be closed; and, second, to forbid sales. It is very questionable whether stores may be kept open, even although sales are not made; but it is very certain that the business of selling cannot be carried on on Sunday, even behind closed doors."

In *Com. ex rel. Barth v. McCann*, 123 Ky. 247, 94 S. W. 645, it was held that a violation of the Sunday law by keeping open a barroom is not necessarily a continuous offense; and that, where one is arrested for keeping his barroom open on Sunday, and, after giving bail, he returns and opens it a second time, he has committed two offenses.

So, in *Albrecht v. State*, 8 Tex. App. 313, under a statute intended to prevent barter and sale of merchandise on Sunday, each act of barter and sale made on that day is an offense for which an independent prosecution will lie.

In *Com. v. Chesapeake & O. R. Co.* 32 Ky. L. Rep. 1400, 108 S. W. 851, it was held that, under a statute providing in certain cases a penalty for each offense in employing persons to labor on Sunday, and that the employment of every person shall be deemed a separate offense, a fine may be recovered for each person employed on that day.

In *Westfall v. State*, 4 Ga. App. 834, 62 S. E. 558, it was held that an indictment which charges in one count a violation of a statute relating to the running of freight trains on Sunday, in running six freight trains on a railroad in the county on Sunday, is not demurrable on the ground that it charges six distinct and separate offenses. The court said: "While, strictly speaking, the running of each train may have been a violation of the law, yet we think the running on the same day of six trains might well have been treated as but one offense. Certainly this did not embarrass the defendant in making his defense or deprive him of any right. In fact, this method of pleading could not be otherwise than beneficial to the defendant."

under the view entertained of the record, it is only necessary to consider one question.

It is disclosed by the transcript that appellant was charged with two violations of the Sunday law (article 199, Penal Code 1895) on the same day, to wit, Sunday, the 19th day of the month. A conviction resulted on the first trial, and proper judgment was entered. When the second case was tried, a plea of former conviction was filed. A second conviction resulted. The facts show there were two performances given at the theater, one at 2:30 and the other about 8:30 o'clock the same evening. There is evidence to the effect that the performance might be considered a continuing one, and parties who bought tickets for the matinee at 2:30 could remain to the one that occurred at night; but this phase of the testimony is not considered important.

The question, concisely stated, is: The state contends, under the statute, a conviction could be had for each performance; and appellant, that only one conviction could be obtained, no matter how many exhibitions were given on the particular Sunday. The statute reads as follows: "Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employee of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined," etc. The term "place of public amusement" shall be construed to mean circuses, theaters, variety theaters, and such other amusements as are exhibited and for which an admission fee is charged. The issue is tersely presented, whether or not a theater giving more than one exhibition on Sunday can be punished for each performance.

We answer this in the negative. "Sunday," as used in this statute, means the entire day; that is, from midnight Saturday night until midnight Sunday. It includes twenty-four hours. Such has been the construction of "day" in all the decisions of this state where simply a "day" is mentioned. This statute is totally unlike those which make each particular act a violation of the law. Had the statute provided that each exhibition should constitute a violation of the law, appellant's position would not have been well taken. It is unnecessary to cite authorities, we think, in Texas to sustain these positions. One conviction for opening places of business on Sunday is a bar to prosecutions for opening at other times on the same day. It has been the subject of discussion, and has been so decided, in other states. See, especially, 20 L.R.A. (N.S.)

People v. Cox, 70 Mich. 247, 38 N. W. 235. This was a decision by the supreme court of Michigan. The court, among other things, said: "We are all of the opinion that the law contemplates but a single offense upon Sunday. The saloon is to be closed all day, and the opening of the same once or a dozen times is the same in the eye of the law. If it is not closed all day, the law is infringed; and if it is open all day, the law is broken. The statute is violated by its not being closed, and the law does not ordinarily divide a day unless the intent of the legislature is clear." To the same effect is *Altenburg v. Com.* 126 Pa. 602, 4 L.R.A. 543, 17 Atl. 799.

Applying any test to this character of case under the statute and facts as disclosed by this record, appellant's contention is correct that the state can only carve one offense of opening a theater on Sunday. In order for the state to carve prosecutions in cases of this character, the statute must prescribe, or the legislative intent must be clear, that it was the purpose to make each act or performance punishable. This cannot be done under the general inhibition of the exhibition confined to one day. It is manifest that the legislative intent was not to carve offenses on this day, or permit prosecutions for each separate exhibition; and it is equally patent that it was intended to punish such exhibitions only when they occurred on Sunday, treating the day as an entirety. We are therefore, of opinion that appellant's plea of former conviction was well taken, and sustained by the law and the facts.

The judgment is reversed, and the cause is remanded.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

JAMES MALLORY HARDIE, Appt.,

v.

SWOFFORD BROTHERS DRY GOODS
COMPANY.

(— C. C. A. —, 165 Fed. 588.)

Bankruptcy — fraud — partnership — discharge.

1. That goods were procured by a partnership on credit through false representations in writing of one partner as to the

Case Note. — Right of bankrupt to discharge as affected by act of partner or agent.

Although the causes enumerated by the bankruptcy act for the refusal of a discharge vary, in that in some cases intent is made an element by the express language of the statute, an inquiry common to such

condition of the concern will not prevent the discharge in bankruptcy of his copartner, who had no knowledge of the wrongdoing.

Same — discharge of bankrupt — policy.

2. The release of the honest, unfortunate, and insolvent debtor from the burden of his debts, and his restoration to business activity in the interest of his family and the general public, is one of the main objects of the bankruptcy law of 1898.

(Shelby, Circuit Judge, dissents.)

(December 1, 1908.)

APPPEAL by applicant from a judgment of the District Court of the United States for the Western District of Texas

of them as are not wholly personal in character is whether such statutory provisions are to be construed strictly, with reference solely to the phraseology employed, or liberally, in the light of an assumed purpose to relieve honest, but insolvent, debtors. As it is sometimes otherwise put, Is the discharge of the debtor to be regarded as incidental, or is its refusal to be regarded as in the nature of a penalty for dishonest conduct? So, where intent, by the provisions of the statute, must accompany the act, the question arises whether the intent of an agent or partner of the bankrupt will preclude the granting of a discharge. And, where intent is not expressly made an element, the question arises, Is it by implication such, so as to relieve the bankrupt from the consequences, so far as his discharge is concerned, of the act of his partner or agent?

Commission of punishable offense (§ 14b. [1]).

In *Re Meyers*, 105 Fed. 353, it was held that a discharge should not be refused to a wife, notwithstanding a concealment of assets by her husband in managing her business; since, in order to make any concealment a bar to a discharge, the facts must constitute under § 14b, (1), "an offense punishable by imprisonment," i. e., a crime, to which the personal guilt is indispensable.

Failure to keep, or concealment of, books (§ 14b, [2]).

In *Re Hyman*, 97 Fed. 195, it was held that a discharge would not be refused to a married woman because her husband, to whom she had confided the entire management of her business, had, without her knowledge, failed to indicate in the books kept by the concern certain losses incurred through his speculation; and had concealed some of the assets. The court said: "The present act requires that the court shall discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and, in contemplation of bank-

refusing a discharge in bankruptcy. Reversed.

The facts are stated in the opinion.

Argued before Pardee, McCormick, and Shelby, Circuit Judges:

Messrs. Gordan Bullitt and Mason Williams, for appellant:

A false written statement made by one member of the firm without knowledge or consent of the other member will not preclude the innocent member from obtaining his discharge in bankruptcy.

Re Blalock, 118 Fed. 679; *Re Hyman*, 97 Fed. 195; *Re Schultz*, 109 Fed. 264; *Re Meyers*, 105 Fed. 353; *Re Dresser*, 13 Am. Bankr. Rep. 637; *Re Hixon*, 93 Fed. 440. Mr. M. L. Crawford for appellee.

ruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

. . . It will be seen that fraudulent intent is a necessary element of either offense. But fraudulent intent is a personal quality, and, although it existed in the mind of the husband, it may not, for that reason, be imputed to the wife. Constructive fraud does not exist for the purpose of punishment, and the statute in question is penal in its nature, as it involves the forfeiture, for misconduct, of a right of discharge. The wife confided the entire business to her husband, and, it may be assumed, not only gave affairs no personal attention, but blindly allowed him to conduct the same. She cannot be deemed either to have anticipated bankruptcy, or to have been guilty of fraud in keeping her books, for the single and only reason that her husband and agent was guilty in such direction. Negligence—at least negligence of the degree here involved—is not equivalent to fraud, within the meaning of the statute."

In *Re Meyers*, supra, it was held that a bankrupt who had no personal knowledge of any concealment or destruction of the books of account by her husband, who managed her business, should not be refused a discharge. The author of the opinion, however, although feeling himself constrained to follow *Re Hyman*, supra, expressed the opinion that, if the question were a new one, he should be inclined to consider, as no "offense" or penal element exists in the requirements of subdivision b, (2), § 14, that the principal is responsible, as respects a discharge in bankruptcy, for the fraudulent conduct of the agent to whom the whole business has been committed, as in civil cases generally, where the fraud has been committed for the principal's benefit.

In *Re Schultz*, 109 Fed. 264, it was held that a discharge would not be refused to a bankrupt because of the fraudulent acts of his partner in keeping the firm books of account so as to conceal his withdrawals of money. The court said: "If in any case fraud can be similarly imputed to an innocent partner on account of the fraud of his

Pardee, Circuit Judge, delivered the opinion of the court:

This is an appeal from a judgment in bankruptcy refusing a discharge. The facts of the case are undisputed and as follows:

On May 15, 1905, the firm of A. F. Hardie & Company, and the individual members thereof, to wit, Alva Finley Hardie, his son, James Mallory Hardie, and Max Kaliski, were, upon the petition of creditors, adjudged bankrupt. An application of discharge was filed by the members of the firm on the 27th of October following. Opposition to the discharge having been filed by the Swafford Brothers Dry Goods Company, two of the partners, A. F. Hardie and Kaliski, withdrew their prayer for discharge, leaving the application to stand in

behalf of J. M. Hardie alone. The principal ground of opposition urged by the Swafford Brothers Dry Goods Company was the following: "That on, to wit, the 13th day of February, 1905, the said firm made and delivered to the said Swafford Brothers Dry Goods Company a statement in writing, materially false, respecting the condition of the business of the said firm. By the said statement it appears that the said firm had assets of the value of \$115,116. Said statement further shows that the said A. F. Hardie had, in real estate and real-estate notes, \$60,000. The said Swafford Brothers Dry Goods Company shows that the said statement was absolutely false, in this: That the said A. F. Hardie did not have real estate or real-estate notes of the value

copartner or other agent as respects the false or improper keeping of books of account (see *Re Meyers* (D. C.) 105 Fed. 354). it can only be in cases where the fraudulent entries or omissions have reference to partnership transactions so as to fall within the general scope of the partner's or agent's authority. The frauds in the bookkeeping in this case related to transactions of a wholly different character, in which the partner was defrauding his copartner, as well as his creditors, in reference to transactions wholly outside of the partnership authority. As the bankrupt cannot be held to be charged with any wilful misconduct in regard to the books, either in fact or in law, and the other charges not being sustained, his discharge should be granted."

In *Re Garrison*, 79 C. C. A. 126, 149 Fed. 178, it was held that a discharge should not be denied for failure to keep proper books of account where the bankrupt, who resided in New York, intrusted the management of the business, which was in Port Huron, Michigan, to his partner. Considering separately the ingredients of the statutory cause for refusing a discharge,—the first being that the bankrupt failed to keep books of account, the second, that his omission to do so was with intent to conceal his financial condition,—the court said of the first-mentioned: "Granting that his conduct in not keeping a closer watch upon the business at Port Huron was careless and even reprehensible, we fail to see how it can be said that he failed to keep proper books showing the condition of a firm whose business was conducted by one of the partners in a distant state, and whose books were never under his control during the short life of the partnership. It would seem a sufficient answer to the charge against him to show that he never saw the books, did not keep them or direct their keeping, and, having confidence in his partner, supposed that the business was being properly conducted."

Making false statement (§ 14b, [3]).

The decisions considered under this head present an aspect of the broader question whether actual fraudulent intent is a necessity (I.R.A. (N.S.)

sary ingredient of this cause for refusing a discharge, which question, however, is of greatest practical importance in connection with the subject under discussion.

For the case of *Re Dresser*, 144 Fed. 318, 13 Am. Bankr. Rep. 637, reference may be made to the opinion in the case reported.

In *Re Collins*, 157 Fed. 120, it was held that a statement in writing, for the purpose of obtaining property on credit, made by the bankrupt upon examination of his books, and considered by him to be correct, would not prevent him from obtaining a discharge, although such statement was in fact erroneous through the failure of the books to show certain liabilities which had not been entered because of the absence of the bookkeeper on account of illness. The court said: "The bankrupt act was intended partly to relieve embarrassed, but honest, debtors from certain of their liabilities, unless they have been guilty of certain acts enumerated in § 14b of the act. The refusal of a discharge is clearly in the nature of a punishment for doing this act, and certainly must be construed as penal. The acts enumerated, which will debar a bankrupt from a discharge, are in most of the states violations of the Criminal Code, and all of them of a nature that every state might with propriety make them criminal offenses. The court is not prepared to say that, in order to prevent a discharge, the proofs must be sufficient to warrant a conviction in a criminal case; but it does hold that to justify such action it must appear that he was guilty of such acts as would sustain a civil action for fraud or deceit, and that the statements were either knowingly false or fraudulent, or made so recklessly as to warrant a finding that he acted fraudulently.

Any other conclusion would result in many instances in preventing a discharge of a worthy bankrupt, whose business was too large to permit him to attend to all the details thereof, including the keeping of the books. A man conducting a large mercantile business, employing a bookkeeper for the purpose of attending to the books, he attending to other branches of the business, has the right to rely on a statement

of \$60,000, or anything approximating that amount; that the value of the assets of the firm did not exceed \$60,000, and that the liabilities of the said firm were approximately \$100,000; that, while the said statement shows the firm to be worth, over and above all liabilities, the sum of \$90,000, still, in truth and in fact, the said firm was then insolvent. The said statement was made by the said firm to the Swafford Brothers Dry Goods Company for the purpose of inducing the said Swafford Brothers to sell to the said A. F. Hardie & Company goods, wares, and merchandise on credit, and that they relied upon the truth of the

said statement and did sell to the said A. F. Hardie & Company goods, wares, and merchandise, aggregating the sum of \$1,500 and upward, which said goods, wares, and merchandise have never been paid for."

After taking proofs, the referee found the facts substantially as set forth in the specification of opposition referred to, and made this additional finding: "I find that said statement was made by Alva Finley Hardie, and without the knowledge of said James Mallory Hardie; but at that time James Mallory Hardie was a member of the aforesaid partnership, and bound by its statements issued as aforesaid."

prepared from the books; and if, relying upon such a statement, he acts upon it in good faith, he is not guilty of such recklessness as amounts to fraud in the eyes of the law, or as should prevent his discharge.' Of this discussion it is said in *Re Gilpin*, *infra*, that it seems rather to be rested upon the assumption that it would be a hardship to deny a discharge unless the bankrupt has been guilty of false pretense or of deceit, than upon a preliminary application of the rules of statutory construction to the language of the clause in question.

The contrary view, that the statute puts the refusal of a discharge for the cause under consideration upon a civil liability, is maintained in *Re Gilpin*, 160 Fed. 171. It was there held that an intent to defraud is not either expressly or by implication, an ingredient of such cause; and that therefore a discharge should be refused to a bankrupt who had obtained credit at a bank upon the strength of a written statement made upon a blank furnished by the bank, which, after signing he gave to his bookkeeper to fill out and send to the bank, although the bankrupt either did not know what the statement contained, or did not know that it was materially false, and had no conscious intention to deceive the bank. The elaborate argument upon which this construction of the statute is based is too lengthy to be herein quoted, but may be summarized as follows: That, before the amendments of 1903, the causes specified by the statute as the only grounds for refusing a discharge already involved the element of conscious fraud, showing that, where the statute as originally drawn intended to make fraudulent intent the necessary element, it knew how to use appropriate and unmistakable language, as was also done in adding § 14b. (4); that there is no need to imply in clause (3) an intent to defraud, as § 17 deals effectively and completely with the matter of obtaining property by false pretenses by declaring that debts thus fraudulently created are not to be discharged at all; that the mischief at which clause (3) is evidently aimed is the obtaining of property by means of a written statement that is not true, whether fraudulent or innocent, two penalties being already provided—by

§ 17 a, (2) and by § b, (3)—for a false statement that is also fraudulent; that it is fair to require the bankrupt, in the interest of a high standard of commercial integrity and of scrupulously fair dealing between debtor and creditor, to know the important facts about his business, so as to be able to state them with substantial accuracy; and that there is obvious danger in permitting the bankrupt to take shelter behind a subordinate's act, while he profits by the error or fraud which his duly authorized agent has committed in his name.

Transfer or concealment of assets (14b. [4]).

In *Re Berry*, 146 Fed. 623, it was said, *obiter*, that, if employees of the bankrupts, who had complete control of the business of borrowing money for the firm on securities, had in fact transferred the bankrupts' property with intent to defraud the bankrupts' creditors, the bankrupts' discharge would have been barred.

But in the case of *Re Leavitt*, 1 Hask. 194, Fed. Cas. No. 8,169, under the act of 1867, it was held that a fraudulent preference given by one partner without the knowledge, authority, or consent of his copartner will not deprive the latter of his discharge in bankruptcy; the court saying: "Whilst one partner is ordinarily bound by, and responsible for, the doings of his copartner in behalf of the firm, this principle should not be extended to the fraudulent misconduct of a partner, and render a partner criminally amenable for his copartner's wrongful conduct, in which he was not personally a participant. A preference or payment, in violation of the provisions of the bankrupt act, . . . is, by the act, constituted and declared to be a fraud, and the most serious consequences result from its commission. Each partner ought to be held personally accountable and amenable to its provisions for his own fraudulent misconduct; but I do not think that it was ever the purpose of the farmers of this act to punish an innocent partner, by a refusal of his discharge, for a fraudulent preference given by his copartner without his knowledge, authority, or consent. It is a personal penalty, to which each party is to be made subject only for his own acts and deeds."

It is clearly shown by the record that, after A. F. Hardie made the statement, the Swafford Brothers Dry Goods Company shipped merchandise to the firm of A. F. Hardie & Company at San Antonio, amounting in value to about \$1,300, and that the merchandise was received by the firm and commingled with the stock on hand.

The matter to be decided upon this appeal is correctly stated by the trial judge as follows: "The only question of law to be determined is whether the fraud thus committed by A. F. Hardie may be interposed as a bar to the discharge of J. M. Hardie, who, it is conceded, did not participate in the wrongful act and had no knowledge of its perpetration."

The trial judge, in his opinion, found in the record, cites *Parsons*, Partn. 3d ed. 163; *Story*, Partn. 166; *Collier*, Partn. §§ 445, 447; and *Strang v. Bradner*, 114 U. S. 561, 562, 29 L. ed. 248, 250, 5 Sup. Ct. Rep. 1038, and cases there cited, all to the effect, as summed up in *Strang v. Bradner*, that each partner is the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the course of the partnership business and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility upon the ground that such misrepresentations were without their knowledge. The trial judge then proceeds to say as follows: "While the cases cited do not decide the very question involved in the present controversy, they nevertheless distinctly hold that a fraud committed by one partner in the course of the partnership business renders the firm pecuniarily liable to the aggrieved party for the wrongful act of the offending member. In the case before the court is shown by the record that A. F. Hardie was the financial agent of the firm and one of its buyers; that the false statement was made by him in the course of the partnership business, and for the benefit of the firm, and that the firm actually received and appropriated the fruits of the fraudulent transaction. If, under the facts stated, the law would impute the fraud of the delinquent partner to innocent members of the partnership to the extent of imposing upon the firm a pecuniary liability, no sound reason is perceived why the principle should not be applied to the present proceeding by refusing a discharge to a member not assenting to the fraud. The court is of the opinion that the principle is applicable to both cases. and, hence, that the 20 L.R.A. (N.S.)

prayer of J. M. Hardie for a discharge should be denied." [143 Fed. 609.]

The authorities cited above are indisputably correct as to the propositions declared, but we doubt if they should be permitted to control the case. So far as they go, the liability of the innocent partner for the torts of the wicked partner, committed within the scope of the partnership, is based on the application of the principles of agency, and is restricted to pecuniary liability alone. In this country, since the abolition of imprisonment for debt, the punishment of the innocent principal or the innocent partner for the wrong committed by the agent or partner has not been pushed further than to affect business reputation and to impose pecuniary liability. It is said that the discharge of a bankrupt under the present bankruptcy law is an act of grace, merely incidental to the general purpose, and in fact could be refused entirely; and it is argued from this that the provisions of the law relating to the discharge of bankrupts should be construed against the bankrupt, and all implications and doubts should be resolved against him.

Since the days of *Queen Anne* (4 & 5 Anne, chap. 17, § 19), the discharge of the *prima facie* honest bankrupt and his future estate and effects has been provided for in every bankruptcy law,—at first with many restrictions, even requiring the consent of creditors; and it is provided in our last act that the bankrupt, whether voluntary or involuntary, applying for a discharge, shall receive it, unless "he has (1) committed an offense punishable by imprisonment as herein provided; or (2), with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4), at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors; or (5), in voluntary proceedings, been granted a discharge in bankruptcy within six years; or (6), in the course of the proceedings in bankruptcy, refused to obey any lawful order, or to answer any material question approved by the court." [32 Stat. at L. 797, chap. 487, § 4, U. S. Comp. Stat. Supp. 1907, p. 1026.]

All of these exceptions, except the fifth, are based on criminal conduct, or actual dishonesty quasi criminal in nature; and this

great advance from the early days when insolvency was treated as a crime goes to show that the discharge of the honest bankrupt is favored, and the opposition to a discharge under the present law is burdened with the necessity of bringing the inculpatory facts alleged strictly within the exceptions enumerated in the law.

Originally, in bankrupt laws, the discharge of the bankrupt may have been incidental, and the main purpose the equal distribution of his goods among creditors; but to say it now, and of the present law, we must shut our eyes to the actual practice in our courts. In nearly all and every voluntary bankruptcy brought under the present law the administration or distribution of the bankrupt's property has been practically concluded before filing petition, and the sole object of the petitioner is to be relieved of his debts; and in number the voluntary cases are about four to one of the involuntary. See Report, Dept. of Justice, 1907. And the same may be said of the voluntary cases under the act of March 2, 1867, chap. 176, 14 Stat. at L. 517, which was passed mainly to relieve the unfortunate debtors ruined by and through the vicissitudes of the Great Civil War.

For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency; and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts, and restore him to business activity, in the interest of his family and the general public, is one of the main, if not the most important, objects of the law.

The adjudged cases called to our attention and bearing on the question herein favor a liberal construction of § 14 of the bankruptcy law in the matter of the discharge of honest bankrupts. Act July 1, 1898, chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3427. In *Boyd v. Arnold*, 79 C. C. A. 135, 149 Fed. 187, this court ordered a discharge under circumstances as follows: "The referee specifies the four grounds of objection that were made by the creditors to the application for discharge, and distinctly finds that the mistake, if any, that was made in the verified schedules, was not made wilfully and fraudulently, nor with the intention of concealing any interests from his creditors; that the 1,579 acres of land was not transferred to his wife, nor procured to be transferred to her, for the purpose of defrauding, hindering, or delaying his creditors; that the indefinite interest which the bankrupt (in the opinion of the referee) had in the 1,579 acres of land was not wilfully

and fraudulently concealed from his trustee; that the \$85 referred to in the fourth objection, which the bankrupt drew from the Boyd Mercantile Company, another bankrupt, and had same charged to his personal account, was not done by him for the purpose of defeating the bankruptcy act; that the bankrupt has fully complied with the requirements of Congress and the orders of the court touching his bankruptcy; and that all notices, wherever required, have been given in the manner and length of time required by the bankruptcy act and the rules of court. These findings of the referee, so far as they are disputed by the appellees, are, in our opinion, amply supported by the testimony."

And see *Re Blalock* (D. C.) 118 Fed. 679.

In *Re Hyman* (D. C.) 97 Fed. 195, the wife was held not to be liable for the fault of her agent (her husband) in not keeping true books of account; and, to the same effect, see *Re Meyers* (D. C.) 105 Fed. 353.

In *Re Schultz* (D. C.) 109 Fed. 264, the innocent partner was held not to be liable for the neglect of his copartner in not keeping true books of account.

Re Dresser (D. C.) 144 Fed. 318, 13 Am. Bankr. Rep. 637, is well reasoned, and is directly in point. The referee reported: "The bankrupt Riess seems to have had no share in making the later 'short statement' relied upon by the objecting creditors; and they do not claim that he was personally concerned in the alleged fraud other than as a partner of Dresser. It is true that, on principles of agency, Riess is liable *civilliter* for the fraudulent acts of Dresser which were clearly within the scope of the partnership business and for the firm's benefit. *Schroeder v. Frey*, 60 Hun. 58, 14 N. Y. Supp. 71; *Bradner v. Strang*, 89 N. Y. 299, affirmed in *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1038. The discharge in bankruptcy would not, therefore, affect a debt so created. The present act specifies, among nondischargeable debts, 'liabilities for obtaining property by false pretenses or false representations.' Act July 1, 1898, chap. 541, § 17a, cl. 2, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3428. But these considerations do not affect the right of an innocent partner to a discharge under § 14b, cl. 3, of the amended bankruptcy act of February 5, 1903, chap. 487, § 4, 32 Stat. at L. 797, U. S. Comp. Stat. Supp. 1907, p. 1026. The right to a discharge is distinct from the effect of a discharge. *Re McCarty* (D. C.) 111 Fed. 151, 7 Am. Bankr. Rep. 40; *Re Marshall Paper Co.* 43 C. C. A. 38, 102 Fed. 872, 4 Am. Bankr. Rep. 468. It was held, under the act of 1867, which in § 33

provided that 'no debt created by fraud or embezzlement of the bankrupt shall be discharged,' that 'fraud' as used in that section meant 'positive fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputations of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system.' *Neal v. Clark* (*Neal v. Scruggs*), 95 U. S. 704, 24 L. ed. 586 (by Mr. Justice Harlan). Therefore, although, on principles of agency and partnership, a discharge may not relieve Riess from 'liabilities for obtaining property by false representations' (a question not to be decided here), it is considered that, not having himself participated in the making of the 'short statement' relied on by the banks, the fraud of his partner cannot, under these circumstances, be imputed to him, and his discharge cannot, therefore, be refused. *Re Hyman* (D. C.) 3 Am. Bankr. Rep. 169, 97 Fed. 195; *Re Meyers* (D. C.) 105 Fed. 353, 5 Am. Bankr. Rep. 4."

This report and recommendation were confirmed by the court.

As we find no reason in the law (and, certainly, none in business or morals) why an honest bankrupt should not be discharged, we answer the question, stated by the trial judge in this case, in the negative.

It is therefore ordered that the decree of the District Court be reversed, and the decree now rendered here that the petition of James Mallory Hardie for a discharge in bankruptcy be, and the same is hereby, granted.

Shelby, Circuit Judge, dissenting:

After the bankruptcy act of 1898 (Act July 1, 1898, chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3427) had been in force nearly five years, Congress discovered that § 14 was too liberal in permitting discharges. It was found that the bankrupt could obtain a discharge when it seemed inequitable and unjust for him to have it. There were in the act only two grounds named on which the granting of the discharge could be opposed: When he has (1) committed an offense punishable by imprisonment as herein provided; or (2) when he has, with intent to conceal his true financial condition, destroyed, concealed, or failed to keep books of account or records from

which such condition might be ascertained. Section 14b. Clause 1 relates only to criminal offenses, and clause 2 involves intentional wrong. On February 5, 1903, the act was amended by adding four additional grounds upon which the right to a discharge might be contested. This case involves the construction of the third ground added by the amendment, which provides that the court must discharge the applicant, unless he has (3) "obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property on credit." Section 14b, as amended (chapter 487, § 4, 32 Stat. at L. 797, U. S. Comp. Stat. Supp. 1907, p. 1026). This clause involves no specific intent, nor offense punishable under the act. The court below held that it was applicable to a partnership and to the members thereof, and refused a discharge to a member because the firm, without the knowledge of the applicant, acting by another member, had obtained property on a false written statement, contrary to the terms of the clause. The question, when the principle involved is considered, is whether a person is barred of his discharge by clause 3 when he obtains the property by a materially false statement made by an agent acting within the scope of his authority.

Section 14 is applicable to "any person" who may be adjudged a bankrupt, including corporations and partnerships. Section 1 (19), and §§ 4 and 5. Clause 3 of the amendment is therefore, by the words of the act, made applicable to partnerships and corporations. A partnership, by the terms of the act, "during the continuation of the partnership business, or after its dissolution and before final settlement thereof, may be adjudged a bankrupt." § 5. The partnership is made a separate entity, and, as such, subject to the terms of the act. Under the act before its amendment, a discharge did not release the bankrupt from a debt for property "obtained by false pretenses or false representations." § 17. The amendment, therefore, was not to prevent a discharge from the liability for property obtained by the materially false statement, and the discharge, neither before nor since the amendment, releases the bankrupt from such liability. But it releases him from his general debts, and it was to prevent this release in the cases covered by the amendment that the several grounds of opposition to the discharge were enacted. The evil and wrong to be corrected by clause 3 was the obtaining property on credit by false written statements. Before its enactment, the bankrupt might add largely to his estate by making false written statements, and

yet obtain a discharge as to all of his debts (with the few statutory exceptions), except the debt to the person to whom he made the false representations. The purpose of the amendment was to prevent this, and to deprive the bankrupt who made such statement of his discharge. The evil is the same whether the bankrupt acts himself or by an agent. The creditor loses his property because of his reliance upon a materially false written statement. And it appears to me wrong to permit the bankrupt to take shelter behind his agent's act while he profits by the fraud committed in his name.

The construction placed on the statute by the opinion just read tends, I think, to defeat the purpose of the amendment. Mercantile business is to a large extent conducted by firms and corporations, and, if the doctrine of agency is to have no application in the enforcement of clause 3, the false written statement made to obtain credit can be made without risk as to obtaining the discharge. A firm may be composed of ten members, and only one, as managing partner, may make the false statement and obtain property for the firm, and nine members may be discharged, although the firm has reaped the benefit of the fraud. And every member can secure his discharge if the firm has an agent, who is not a member thereof, to make a false statement. The assets of the firm being distributed, and it dissolved and out of business, its failure to obtain a discharge as a partnership would not matter to the discharged members. Firm debts are provable debts also against each member as an individual bankrupt, and the partnership debts are discharged, so far as they are individual liabilities, by the discharge of the partner in individual proceedings. 2 Remington, Bankruptcy, § 2796. While a partnership is a separate entity, the substantial thing that makes it is the individual members, and to discharge them is to emasculate clause 3 so far as it is applicable to partnerships. A single person engaged in business may make a materially false statement in writing through his managing clerk or agent, and thereby obtain credit and property. Yet, on the principle announced, he would be entitled to his discharge on his denial of guilty knowledge of the false statement, although he had received the fruits of the fraud, unless his knowledge of his clerk's action could be affirmatively proved,—which, in practice, would usually be impossible.

And is clause 3 not to be applied to bankrupt corporations? If so, it can only be done by holding the principal, when he or it applies for a discharge, bound by the materially false written statement made by the 20 L.R.A. (N.S.)

agent within the scope of his authority. If the idea is to prevail that the discharge is not to be barred by the false written statement made by an agent acting within the scope of his authority, clause 3 of the amendment cannot be applied to partnerships at all, nor to corporations, for both must act by agents. And that view is in conflict with several provisions of the act. It seems to me that the only way to give effect to the intention of Congress, as shown by clause 3, is to hold that it is applicable to partnerships and corporations (Re Marshall Paper Co. 43 C. C. A. 38, 102 Fed. 872) which become bankrupts, and that when the former, or the individual partners, seek a discharge from the partnership debts, neither can be discharged if the partnership, acting by a duly authorized agent, has obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property on credit.

The cases cited in the opinion of the court, with one exception, relate to instances where the discharge of the bankrupt was opposed on a ground involving an "offense punishable by imprisonment" (clause 1), or where a forbidden act was done with a wrongful or fraudulent "intent." Such cases are distinguishable from a case arising under clause 3, where no question of punishable offense is involved, and where Congress has not used the word "intent," nor its equivalent, but has made a described act, done for the purpose of obtaining property, a bar to a discharge.

The only case cited that relates to the amendment in question is *Re Dresser* (D. C.) 144 Fed. 318, 13 Am. Bankr. Rep. 637. The excerpt from that case, quoted in the opinion of the majority, appears in the report of the referee. No exception was taken to this conclusion of the referee, and the court, in deciding the case, makes no allusion to that part of the referee's report (144 Fed. 318), nor was that part of the report mentioned when the same case reached the appellate court (74 C. C. A. 680, 145 Fed. 1021). The fact that this report of the referee was acquiesced in by the parties, and not sustained by the opinion of either court, is mentioned in *Re Gilpin* (D. C.) 160 Fed. 171, 182, a well-considered and learned opinion which clearly shows that the referee's report is not sound in principle.

I have found no case directly in point construing clause 3, but the general principle that each partner is the agent of the firm as to all business within the scope of the partnership, and that, if one partner makes false or fraudulent representations of fact, the other partners are bound by

such statements, although made without their knowledge, is recognized in the construction of the bankruptcy acts both in this country and in England. *Strang v. Bradner*, 114 U. S. 561, 29 L. ed. 250, 5 Sup. Ct. Rep. 1038; *Cooper v. Prichard*, L. R. 11 Q. B. Div. 351.

With all my deference for the opinion of my brethren, I cannot concur in their view that there is no reason in "law, business, or morals" for the construction the learned district court placed on the statute. *Re Hardie* (D. C.) 143 Fed. 607. The construction, I think, is good in law, because it is based on the apparent intention of Congress; in business, because it will tend to prevent false written statements to secure credit; and in morals, because it makes for fair dealing and righteousness.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES VICKERS, by Next Friend,
Plff. in Err.,

v.

KANAWHA & WEST VIRGINIA RAILROAD COMPANY.

(— W. Va. —, 63 S. E. 367.)

Master — independent contractor — liability.

1. The general rule, subject to exceptions, is that, where one has contracted with a competent and fit person exercising an independent employment to do a piece of work, not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods, and without being subject to control, except as to results of his work, will not be answerable for the wrongs of

Headnotes by MILLER, J.

Case Note. — Effect on master's liability to servant of delegation of personal duty to independent contractor.

The earlier cases upon the effect of delegation of personal duties to an independent contractor are collected in a note to *Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 52, where they are said to be so conflicting as to render it impossible to formulate any definite doctrine upon the subject.

As supporting, or tending to support, the rule that a master cannot relieve himself from the performance of a positive duty by the employment of an independent contractor, are cited *Macdonald v. Wyllie*, 1 Sc. Sess. Cas. 5th series, 339; *Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 482; 101 Fed. 530; *Central R. & Bkg. Co. v. Passmore*, 90 Ga. 203, 15 S. E. 760; 20 L.R.A. (N.S.)

such contractor, his subcontractors, or his servants, committed in the prosecution of such work.

Same — railroad company — place of work — nonassignable duty.

2. But, with respect to railroads, the nonassignable duty of the master to provide its servant a reasonably safe place to work extends to the entire track over which the servant is required to pass in the discharge of his duties; and this is a positive duty, which, although intrusted to an independent contractor, will not absolve it from liability for the nonperformance thereof.

Same — independent contractor — negligence — liability.

3. Where one is employed by a railroad company as an independent contractor, to do certain work in the construction of its roadbed, in all matters incident to the use of its tracks permitted by such company the contractor and his workmen represent the will of the company, and its responsibility remains.

Same — place of work — nonassignable duty.

4. Although a railroad company employs a competent independent contractor to do certain work, and, in the execution of his contract, permits him to suspend over its tracks guy ropes, the effect of such contract, with respect to such ropes, is simply to delegate to such independent contractor performance of a nonassignable duty of such company to maintain a reasonably safe place for its servants to work, rendering it liable for his negligent performance thereof.

Same — negligence of independent contractor — construction of railroad.

5. Where a railroad company has permitted the erection of guy ropes over its tracks, by an independent contractor employed to perform a part of the work of constructing its roadbed, it will nevertheless be rendered liable for any negligence on the part of such independent contractor in relation to such guy ropes, whether competent or not, although it may not

Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285; *Herdler v. Buck's Stove & Range Co.* 136 Mo. 3, 37 S. W. 115; *Burnes v. Kansas City, Ft. S. & M. R. Co.* 129 Mo. 41, 31 S. W. 347; *Bartley v. Trorlicht*, 49 Mo. App. 214; *Sackewitz v. American Biscuit Mfg. Co.* 78 Mo. App. 144; *Leslie v. Rich Hill Coal Min. Co.* 110 Mo. 31, 19 S. W. 308; *Trainor v. Philadelphia & R. R. Co.* 137 Pa. 148, 20 Atl. 632; *Moran v. Corliss Steam Engine Co.* 21 R. I. 386, 45 L.R.A. 267, 43 Atl. 874; *Conlin v. Charleston*, 15 Rich. L. 201; *Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133; *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538; and *Meier v. Morgan*, 82 Wis. 289, 33 Am. St. Rep. 39, 52 N. W. 174.

And, as supporting, or tending to support,

have had actual notice of such negligence in time to have avoided injury to its servant resulting therefrom. In such cases the law requires inspection and tests adequate to avoid dangers.

Same — Independent contractor — vice principal — liability.

6. Where a railroad company intrusts performance of any of its positive duties to its servants to an independent contractor, his relationship to the defendant becomes that of vice principal, and his negligent performance of those duties becomes notice to his principal, rendering it liable for injuries to its servants, resulting therefrom.

(December 9, 1908.)

ERROR to the Circuit Court for Kanawha County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to

the view that the master is not liable for the negligence of an independent contractor with respect to a duty generally regarded as nondelegable, are cited *Kiddle v. Lovett*, L. R. 16 Q. B. Div. 605; *Devlin v. Smith*, 25 Hun, 206, affirmed in 89 N. Y. 470, 42 Am. Rep. 311; *Wittenberg v. Friederich*, 8 App. Div. 433, 40 N. Y. Supp. 895; *Ardesco Oil Co. v. Gilson*, 63 Pa. 146; and *Norfolk & W. R. Co. v. Stevens*, 97 Va. 631, 46 L.R.A. 367, 34 S. E. 525,—of which it is said: "The cases absolving the master from responsibility for the negligence of an independent contractor in this connection clearly seem to have been decided upon a false theory of the circumstances involved. It is a contradiction in terms to speak of an absolute duty as being susceptible of delegation if it can be delegated in any particular instance, it ceases, *ex hypothesi*, to be absolute."

The cases decided since the compilation of such note disclose a trend of opinion toward the adoption of the doctrine applied in the case reported.

Thus, in *Shea v. Pacific Power Co.* 145 Cal. 680, 79 Pac. 373, where the accident causing the death in question was caused by the giving way of a nipple, which had recently been repaired, connecting a mud drum with the boiler, it is stated that the owner of a boiler is not absolved from all liability on account of the bursting of the boiler while in use, simply by procuring an independent contractor to repair it; but that, in addition to this, he must use reasonable diligence to see that it is kept in repair.

In *McBeath v. Rawle*, 93 Ill. App. 212, affirmed in 192 Ill. 626, 69 L.R.A. 697, 61 N. E. 847, where plaintiff's intestate, who was in the employ of a stone-setting contractor, was injured by the giving way of a scaffold constructed by the brick-mason contractor, which, in pursuance of an established custom was used in setting the stones, it was held that, by whatever means the decedent's employers acquired it, they

have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. **Wertz & Van Fleet**, for plaintiff in error:

It was the master's duty to inspect and warn the employees of unusual danger.

Newhouse v. Kanawha & W. V. R. Co. 62 W. Va. 562, 59 S. E. 1071; *Bailey, Personal Injuries relating to Master & Servant*, § 2571; *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 695; *Felice v. New York C. & H. R. R. Co.* 14 App. Div. 345, 43 N. Y. Supp. 922; *Cooper v. Pittsburgh, C. & St. L. R. Co.* 24 W. Va. 37; *Richmond & D. R. Co. v. Burnett*, 88 Va. 539, 14 S. E. 372; *Johnson v. Chesapeake & O. R. Co.* 38 W. Va. 206, 18 S. E. 573; *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538; *Erslew v. New Orleans & N. E. R. Co.* 49 La. Ann. 86,

were in any event bound to the duty imposed upon them by the law to exercise a reasonable degree of care in the furnishing of it as a place for their employees to work; and that the doctrine of independent contractor did not apply.

In *Bernheimer Bros. v. Bager* (Md.) 70 Atl. 91, where the employee of a concern engaged in the construction of a building was injured while at work, by the falling of a prop placed by his employers to support the wall of an adjoining building, it was held that the employers could not escape liability upon the theory that the fall of the prop was due to the act of an employee of independent contractors engaged in tearing down the old buildings on the lot and excavating the cellar; the court saying: "It would be carrying the doctrine of independent contractor beyond what the law authorizes to permit an owner of property to thus insecurely erect a dangerous instrument over where his employees were to work, and then escape the result of his negligence, by letting the work to be done to a contractor. The appellants were under obligation to use reasonable care in protecting their servants while they were engaged in the work, and could not thus shift the responsibility."

In *Morton v. William Barr Dry Goods Co.* 126 Mo. App. 377, 103 S. W. 588, where a fireman was killed by the explosion of a blow-off tank, which had been installed by an independent contractor, it was contended that his death could not be attributed to defendant's negligence, for the reason, being neither a manufacturer nor mechanical engineer, it did its full duty to furnish its fireman a reasonably safe place to work, by contracting with experienced and reputable people in the business, to furnish and install its machinery and appliances under the supervision of competent mechanical engineers employed by it, and by having installed blow-off tanks of approved patterns and in common use. In ruling adversely to this contention, the court said: "What-

21 So. 153; *Stoltenberg v. Pittsburg & L. E. R. Co.* 165 Pa. 377, 30 Atl. 980; *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737; *Cadigan v. Glens Falls Gas & Electric Light Co.* 112 App. Div. 751, 98 N. Y. Supp. 954; *Missouri P. R. Co. v. McEllyea*, 71 Tex. 386, 1 L.R.A. 411, 10 Am. St. Rep. 749, 9 S. W. 313.

Messrs. *Chilton, MacCorkle, & Chilton* for defendant in error.

Miller, J., delivered the opinion of the court:

This case is a companion of *Newhouse v. Kanawha & W. V. R. Co.* 62 W. Va. 562, 59 S. E. 1071. In that case, as in this, the court below sustained the motion of the defendant to strike out the plaintiff's evidence and direct a verdict for the defendant. We reversed the judgment below in the *Newhouse Case*, being of opinion that the

ever may be the rule in other jurisdictions, the law is well settled in this state that the master cannot delegate his duty to use reasonable care to furnish his servants with a reasonably safe place to work to an independent contractor. This duty is a personal one, which he cannot shift to the shoulders of someone else by contract, or otherwise."

In *Walton, Witten & Graham v. Miller* (Va.) 63 S. E. 458, an action for the death of a trainman caused by the running of a train into an obstruction on the track created by independent contractors in excavating along the right of way for a double track, it was held that an instruction that, if the persons creating the obstruction were independent contractors, and if they were well-known railroad contractors of good reputation and standing, and the work to be done was lawful and not inherently dangerous, and was constructed by the firm under the contract, then the railway company would not be liable, though the death of the plaintiff's intestate was caused by the negligent failure of the contractors to give proper notice of the obstruction, was erroneous; the court saying: "If it were competent for a railroad company, under such circumstances, to delegate to a contractor the duty of supervising and maintaining part of its track, it could relieve itself of all liability simply by deputizing its nonassignable functions to an independent contractor." The case of *Norfolk & W. R. Co. v. Stevens*, 97 Va. 631, 46 L.R.A. 367, 34 S. E. 525, which has generally been regarded as supporting the doctrine that an employee may be absolved from liability for a breach of duty which would ordinarily be considered absolute by the employment of an independent contractor, is explained and limited as follows: "In the latter case it was held not to be an essentially hazardous undertaking to substitute a new railroad bridge for an old one without the interruption of traffic; that it was the general custom of railroads to let such contracts to

evidence made such a prima facie case of negligence as entitled the plaintiff to have the same submitted to the jury. Since that decision, but pending a petition here for a rehearing, this case was tried and determined in favor of the defendant, as stated.

The plaintiff, an infant, was employed by defendant, along with *Newhouse* and others, as a day laborer in building a railroad from Charleston by the way of Elk river and Blue creek to a point on said creek. The road was not completed, but some trains were being run while the work of construction was still going on. The plaintiff, by arrangement with the company, was, with the other laborers, carried to and from his places of employment along the road, and to and from his boarding place, on the work train of the defendant, consisting of an engine and a flat car. At a point near the defendant's track on Blue

independent contractors, and, if the company used due care in the selection of a reliable contractor, it would not be liable for the negligence of such independent contractor in the faulty construction of the bridge. It is sufficient to observe that the *Stevens Case* rests upon its own particular facts, which are essentially different from the facts in this case, and was not intended to impair the established principle that a railroad company cannot escape liability for the neglect of duties imposed upon it by law, in the interest of the safety of its servants and the public, by delegation to an independent contractor or otherwise. It is the settled doctrine in this state that such duties are nonassignable."

The case of *McMillan v. North Star Min. Co.* 32 Wash. 579, 98 Am. St. Rep. 908, 73 Pac. 685, may also be noticed as bearing upon the subject under discussion. In holding a mining corporation, which had previously let a contract to certain persons to do specified work in its mine, liable to its employee for injuries received from an unexploded blast left by the contractor, it was said: "If appellant chose for the time being to turn over the work in its mine to others, knowing, as it must have known, that such hidden dangers, by oversight and lack of skillfulness, might be left by them to be encountered by other employees who should follow them, we think it should not be heard to say that it is in no way responsible for the conditions. Such persons must be held to have stood in the place of the appellant itself, since to them had been delegated the authority to conduct the operations in the mine for the time being."

And in *Brady v. Chicago & G. W. R. Co.* 57 L.R.A. 712, 52 C. C. A. 48, 114 Fed. 100, the proposition is laid down that a railway company running its trains over another road by permission is liable to its employees for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master.

creek was a stone quarry, and where, by permission of the company, a derrick used in loading stone had been erected by one Tully, an independent contractor. The derrick was supported by four guy ropes, two of which were stretched across and made fast on the opposite side of defendant's track. May 23, 1906, the day of the accident, about 3 o'clock P. M., the work train on which plaintiff was a passenger, on its outward trip, passed safely under these guy ropes, as it had been doing daily for two or three months, being delayed at that point, not, as shown in the Newhouse Case, by the sagging of the guy ropes over the track, but by the act of some workmen employed there in dragging a rope across the track. On the return trip that day, however, between 5 and 6 o'clock in the evening, in attempting to pass under the ropes the cab of the engine caught the first of the ropes, dragging the other down and causing it to sweep across the flat car being pushed by the engine, and to drag the plaintiff off between the car and the engine, the engine passing over both his legs, mashing them, and resulting in their amputation, one at the knee joint, the other between the knee and ankle. It was proven at the trial that on the day of the injury the derrick was being dismantled; that a car for removing it had been set there for that purpose, and that, some thirty minutes before the work train reached that point on its return trip, these guy ropes across the track had been loosened by some men employed by Tully, the contractor, causing them to sag, resulting in the injury to plaintiff, and for which this action is brought.

It did not appear in the Newhouse Case that the derrick in question belonged to Tully, and had been employed by him as an independent contractor, and, as now appears in this case, that the accident resulting in the injuries to plaintiff was directly traceable to the negligence of Tully, or his employees, in loosening the guy ropes and allowing them to sag and to remain in that condition, as stated, when encountered by the work train. The general rule relating to master and servant, requiring evidence of some affirmative acts of negligence of the master, either of omission or commission, pertaining to his duties to his servant in order to render him liable to the servant for injuries sustained, was thought, in the Newhouse Case, to be satisfied by the evidence tending to show the sagging of the guy ropes, and notice thereof to the defendant on the outward trip, which, until explained by defendant consistent with the exercise of due care, entitled the plaintiff to a submission of his case to the jury. In the Newhouse Case the defendant relied on the want

of evidence to show negligence of the defendant. In the present case negligence is not only shown, but admitted. But the defendant relies on the proposition that, the negligence being primarily that of Tully, an independent contractor, or his employees, its whole duty to the plaintiff to provide him with a reasonable safe place to work was discharged when it employed Tully, a competent person, and permitted him to suspend the guy ropes in question over its track; and, as counsel for defendant say in their brief, we are brought face to face with the question, What is the duty of a railroad company under the circumstances of this case?

The general rule with respect to the liability of the owner for the acts of an independent contractor, as stated in 1 Thompson on Negligence, § 621, is "that one who has contracted with a competent and fit person exercising an independent employment to do a piece of work not in itself unlawful or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods, and without being subject to control except as to the results of his work, and subject to other qualifications hereafter stated, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work." The general rule, stated in the Newhouse Case, is that one of the nonassignable duties of a master is to provide his servants a reasonably safe place to work, this rule, with respect to railroads, extending to the entire track over which the servant is required to pass in the discharge of his duties. And with respect to railroads this is a positive duty, which, although intrusted to an independent contractor, will not absolve it from liability for nonperformance. 1 Thompson, Neg. §§ 646-665; McCafferty v. Spuyten Duyvil & P. M. R. Co. 61 N. Y. 178, 19 Am. Rep. 267; Ryder v. Thomas, 13 Hun, 296. But let us inquire whether Tully, the contractor, stood in the relation of independent contractor with respect to the operation of the railroad and furnishing the plaintiff a reasonably safe place to work. Assume that he had an independent employment to build abutments, etc., and permission of the railroad company to stretch his guy ropes across the track of the company, can it be said he thereby extended his position to that of an independent contractor with reference to the operation of the railroad of the defendants? We think not. He was employed for no such purpose. The permission to stretch his guy ropes across the track undoubtedly implied a contract on his part to securely fasten them, and to protect

the defendant and its servants from all dangers resulting from the breach of such implied contract; but this implied agreement would certainly not absolve the defendant from liability for injuries to its servants. In *Ortlip v. Philadelphia & W. C. Traction Co.* 198 Pa. 586, 48 Atl. 497, it was held that, since the contract there involved was independent only as to the work of constructing the roadbed, in all matters incident to the use of the track the contractors and their workmen represented the will of the company, and its responsibility remained. 4 *Thomp. Neg.* § 4513. But, if we concede the independence of the Tully contract, and that by its terms, or by implication, it covered the discharge by the defendant of its duty to plaintiff to maintain a reasonably safe place to work, the effect of such contract was simply to delegate to Tully performance of the nonassignable duty of the defendant, rendering it liable for the negligent performance thereof by him. 4 *Thomp. Neg.* § 4931, citing, among other cases, *North Chicago Street R. Co. v. Dudgeon*, 83 Ill. App. 528, affirmed in 184 Ill. 477, 56 N. E. 796; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482; *Moran v. Corliss Steam-Engine Co.* 21 R. I. 386, 45 L.R.A. 267, 43 Atl. 874, and *Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 482, 101 Fed. 530. See also 2 *Bailey, Personal Injuries relating to Master and Servant*, §§ 2561, 2572, citing *Burnes v. Kansas City, Ft. S. & M. R. Co.* 129 Mo. 41, 31 S. W. 347; *Trainor v. Philadelphia & R. R. Co.* 137 Pa. 148, 20 Atl. 632, *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 626, 20 Am. St. Rep. 944, 20 Atl. 517, *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 93, 24 L.R.A. 50, 19 S. E. 571, *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 382, 383, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, and *McCreery v. Ohio River R. Co.* 43 W. Va. 112, 27 S. E. 327.

In the *North Chicago Street R. Co.* Case this rule was applied in an action for damages by a railway conductor for injuries sustained from granite blocks piled up along the tracks by an independent contractor engaged in repairing the tracks. The decision in this case is based in part, at least, on the exception to the general rule respecting the liability of employer for the negligence of an independent contractor, that, when a corporation is exercising some chartered privilege or power which could not be exercised independently of its charter, it cannot delegate such chartered privilege to anyone. But the case did not turn solely on this exception to the general rule; for besides this the court says: "It should not be forgotten, in addition to the foregoing rule, that the law 20 L.R.A. (N.S.)

requires that the master shall provide a reasonably safe place for the servants to work, and, failing so to do, is answerable for resulting injuries, unless the dangers are such as are reasonably incident to his employment, or of which the servant has equal knowledge, or means of knowledge, with the master, or where the danger is imminent."

In *Toledo Brewing & Malting Co. v. Bosch* the brewing company was held liable for injuries sustained by its servant from the negligence of an independent contractor, employed to repair a roof, in displacing and removing weights from an overhead beam resting on the roof, while engaged in repairing the roof. The decision is predicated upon the principle that "a positive personal duty cannot be delegated to an agent or contractor, and that the obligation in such cases is to do the thing required, and not merely to employ another to do it; and, to bring a case within the rule, it is sufficient if the duty is one to the public or a third person, and imposed by law or by statute." This is a well-considered case, and reviews many cases,—some of the same cases cited by us,—and among them *Burnes v. Kansas City, Ft. S. & M. R. Co.* 129 Mo. 41, 56, 31 S. W. 347, 350. In that case the court says: "The duty of keeping its road, track, and yards in a reasonably safe condition is a personal duty, which the master owes the servant; and it cannot delegate this duty to any servant, high or low; nor can it avoid liability by letting out a part of its duties as a common carrier to independent contractors. While, for many purposes, this relation of independent contractor will be recognized, it cannot be sustained to shield the master from those positive personal obligations cast upon him by his relation to his servant." This is the same doctrine applied in *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538; *Jacobson v. Johnson*, 87 Minn. 185, 91 N. W. 465; *Scandell v. Columbia Constr. Co.* 50 App. Div. 512, 64 N. Y. Supp. 232, and *Hustis v. James A. Bannister Co.* 63 N. J. L. 465, 43 Atl. 651,—all derrick cases.

Two other propositions are argued by way of defense: First, that, having employed a competent independent contractor to perform a part of the work of constructing its roadbed, and permitted the erection of the derrick ropes over its tracks, the defendant is not liable for his negligence without actual notice in time to avoid the injuries; and, second, that it is not shown that defendant had notice of the condition in which the guy ropes were left by the contractor shortly before the accident, and in time to have averted the danger; and consequently that the risk must be regarded as one assumed by the plaintiff, and for which defendant

cannot be rendered liable. To support the first proposition, defendant's counsel rely mainly on the case of *Norfolk & W. R. Co. v. Stevens*, 97 Va. 632, 46 L.R.A. 367, 34 S. E. 525, where it is held, agreeably to the general rule, but without any reference to the exceptions thereto, that "the negligence of a bridge company, as an independent contractor, in removing too soon the false work on a new railroad bridge which it had contracted to substitute for the old one without the interruption of traffic, in consequence of which the new bridge falls with a train, causing the death of a fireman, does not render the railroad company liable, if it had made a proper contract with the bridge company, and that was an established and reputable concern, largely engaged in such work, and having the confidence of the business public." In the opinion the court says: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man."

We do not think this case takes into consideration the well-recognized exceptions to the general rule we have referred to. The positive duties of a railroad company to its employees, already noted, in connection with citations of other cases, cannot be discharged by the delegation of those duties to others, whether competent or not. The Virginia case is reported in 46 L.R.A. 367, with an editorial note referring to a note to *Hawver v. Whalen* (Ohio) 14 L.R.A. 832, citing the cases with which it is in conflict. It is certainly in conflict, also, with our own cases, and the cases cited from other courts. Mr. Labatt says (1 Labatt, Mast. & S. § 153, pp. 327, 328): "There are at least two very weighty reasons why the theory that a master is entitled, as a matter of law, to rely on the quality of appliances obtained from a reputable manufacturer, should be rejected. One of these is that such a theory is essentially inconsistent with the doctrine of nondelegable duties;" and the other reason given is that, "according to the rule adopted by most of the authorities, the servant has ordinarily no right of action against the manufacturer, and if he cannot recover from his master, he cannot recover at all. Assuming the defect which caused the injury to have been discoverable by the exercise of proper care, someone ought, in fairness, to be held responsible for its existence, and it is a mere mockery of justice to ab-

solve the master simply on the ground that he was justified in trusting to the skill and diligence of a person who, if that skill and diligence were, as a matter of fact, not exercised, is not liable to the servant because there is no privity of contract between them." See also the discussion of the subject of delegation of personal duties to an independent contractor. 2 Labatt, Mast. & S. § 558, p. 1634. This writer criticizing the doctrine of *Ardesco Oil Co. v. Gilson*, 63 Pa. 146, as being in conflict with the later case of *Trainor v. Philadelphia R. R. Co.* 137 Pa. 148, 20 Atl. 632, already referred to, says: "It is worth observing that, as the doctrine of nondelegable duties had not yet been formulated with much distinctness at the time the earlier case was decided, it is extremely probable that the effect of such a conception as qualifying the rule with regard to independent contractors was not considered at all by the court. Indeed, the opinion delivered gives no indication that this aspect of the relations of the parties was taken into account." And at page 1635 Mr. Labatt also states, in the text, the doctrine in Virginia, announced in the case referred to, but in a note says, in reference to it: "The court does not refer to any of the authorities opposed to its own conclusion, and contents itself with applying the general rule as to independent contractors, without noticing the possibility of an exception to that rule in the case of absolute duties." In the Virginia case the accident was due to the act of the bridge company in removing the false work under the incompleting span, the other having been completed, on the supposition that it was safe to do so, the train on which plaintiff was at work passing safely over the completed span, but crashing through the other. We think the great weight of the modern authorities require inspection and tests adequate to avoid such imminent dangers. We must therefore negate the first proposition.

Did the defendant have notice sufficient to charge it with the negligence of the contractor? This is the difficult question in the case. It is true, as argued by defendant's counsel, that the master is not an insurer of his servant's safety, and is not "answerable at law for a failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care as would be characteristic of a prudent person so situated." 1 Labatt, Mast. & S. § 142. Knowledge, actual or obtainable by reasonable tests and inspections, is required to charge the master. 1 Labatt, Mast. & S. chaps. 10 and 11. In notes 2 and 3 to § 156, chap. 9, Mr. Labatt has collated a large number of cases where the servant, under varying facts and

circumstances, was not allowed a recovery, and in note 5 to the same section a great many other cases, more or less difficult of reconciliation with the former, where the servant was allowed to recover, and it would serve no good purpose here to attempt to harmonize these conflicting decisions. Many of them relate to defects in machines or instrumentalities actually in use by the servant, and not to the safety of the place of work, many to hidden defects. Assuming that the guy ropes over the track were and had been securely fastened during the operation of the derrick, and up to within a half hour before the accident, and did not, when thus used, render the track at that point unsafe,—as to which there is no evidence to the contrary,—was the defendant chargeable with notice of the dangerous condition in which they had been left by the servants of Tully, the contractor, a half hour before the accident occurred, so as to render it liable to plaintiff? No amount of inspection prior to the time when the ropes were loosened would have discovered the dangerous condition of the guy ropes a half hour later. Had sufficient time elapsed after the ropes were loosened to impute notice? Notice to a mere coservant, “not chargeable with the performance of the duties which supervened as a result of the acquisition of that knowledge,” will not do (1 Labatt, Mast. & S. § 149), but notice to a vice principal is notice to the master. (1 Labatt, Mast. & S. § 150.) If Tully be treated as vice principal, under an express or an implied contract with defendant to keep the railroad track at that point, as regards the derrick and guy ropes, in safe condition, then notice to him, or his servants in charge, would be imputable to the defendant. 4 Thomp. Neg. § 4961; 2 Labatt, Mast. & S. § 558. Another duty of the master, respecting proper inspection imposed by some cases, is “to keep a reasonably careful watch upon the various parts of his plant, to the end that they might not unduly imperil the safety of his servants by any of the temporary conditions which the progress of the work might create in their local relations to each other or to the servants.” 1 Labatt, Mast. & S. § 164, and cases cited in note 2. Now, the evidence of Jarrett, the brakeman, and of Morris, an employee of Tully, on cross-examination, though not quite so clearly as might be desired, tends to show that Tully was personally present himself during the dismantling and removal of the derrick. Jarrett says Tully was working his men there at the derrick; Morris that Tully and his men were dragging this block and tackle across the track at the same time the train went up in the afternoon. Morris also says he did not know

the guy ropes were sagging until about two minutes before the train ran into them.

We are disposed to hold, on these authorities and this evidence in this case, that, as to the maintenance of the track in a reasonably safe condition, at the point opposite this derrick, Tully's relation to defendant was that of vice principal, and that notice to him of the condition in which he had left the guy ropes must be imputed to the defendant. Besides the defendant evidently had notice, from the progress of the work of the contractor to completion, and by setting the car there to remove the derrick, that it was about to be taken down, and of the dangers incident thereto, calling for greater care and superintendence on its part. This rule was applied in Rhode Island, in *Moran v. Corliss Steam Engine Co.* The plaintiff sustained his injuries by coming in contact with an electric wire supplying a motor crane, installed on defendant's premises by an independent contract, but not yet turned over to defendant, the result either of defective connection between the hauling chain and motor, insufficient insulation, or by the wire on defendant's premises, by the action of a high wind, coming in contact with wires outside its premises more heavily charged. The court says: “The accidental crossing or contact of wires caused by their sagging or breaking, or by high winds and other causes, and the consequent charging of a wire carrying a light current with a dangerous current from a more heavily charged wire, is, in our opinion, a sufficiently frequent occurrence to have suggested to the defendant the liability of accident from that cause, and to have required it to take precautions against injury to its employees thereby.” The application of the same principle is further illustrated in *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 528; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, and other cases cited. In our opinion, therefore, the defendant, having permitted the erection of this derrick so near to its tracks, supported as it was by these overhanging guy ropes, was bound, in the discharge of its nondelegable duty to its servants, to keep a watchful supervision over it, and that, by the progress of the work, and by setting the car there for the removal of the derrick, it was thereby chargeable with sufficient notice to require vigilant supervision and inspection necessary to avert the dangers incident to the work. Otherwise it could not have discharged its duty to its servants. These views require a reversal of the judgment and awarding the plaintiff a new trial.

A petition for rehearing having been filed,

the following note was appended to the opinion:

In his petition for a rehearing defendant's counsel challenge the correctness of the opinion filed. They say it is in conflict with *Sanderson v. Panther Lumber Co.* 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368, and that, if it is intended to overrule that case, we should say so. That was a fellow-servant case. In reference to the facts recited, and the basis of the decision, it is said, at page 45 of 50 W. Va.: "So, the condition of the track cannot and should not have anything to do with the determination of this case,—especially as the plaintiff admits that it was the negligence of the engineer in reckless management of the train and engine, owing to bad temper, that caused the accident. Knowledge of the defect in the engineer's power to properly control his temper was not brought home to the defendant, nor the defect in the sand pipe or want of sand. Hence, the defendant could not be held liable by reason of these things, for it was not shown that it was guilty of negligence with regard thereto." It is apparent, therefore, that the act of negligence relied on in that case, and on which the decision turned, was purely an act of negligence of a fellow servant in the operation of the road, having no reference to the question of a safe place to work. In *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, cited in the opinion, Judge Brannon, referring to the nonassignable duties of the master, at page 383 of 43 W. Va., says: "These duties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation. For instance, the construction of the railroad or other work, the preparation of machinery and implements to be used in the business, the preservation of the track or working place, or machinery and appliances, in proper, safe condition, and the selection of proper servants to work." And at page 384 of 43 W. Va., he says: "You cannot make the master liable for an act of mere operation, no matter by what servant done. You cannot exempt him for an act not one of mere operation, but of his personal duty, though done by any servant." The first point of the syllabus in that case is: "The test whether a master is liable to one servant for the negligence of another servant is the character of a negligent act. If it be in the doing of an act incumbent on the master as a duty of the master to the servant, the master is liable; otherwise not."

On the question of what is sufficient notice to the master in the case of defective machinery, applicable also to a safe place to work, this court said, in *Riley v. West Vir.* 20 L.R.A. (N.S.)

ginia C. & P. R. Co. 27 W. Va. 160: "It may also be observed that, according to the rules and principles hereinbefore stated and discussed, the knowledge of the unsafe or defective condition of the machinery, etc., mentioned in said third proposition, if brought home to the servant or middleman, to whom the duty of remedying or repairing such machinery, etc., has been delegated, or if he, by the use of due care and diligence, ought to have discovered it, will be considered notice to or knowledge by the company. What is notice to such servant will be treated as notice to the company, and what he ought to know, and might know by due care and diligence, will be regarded as known by the company; and it will be held accountable in such case to the same extent that it would if it had the knowledge, or means of knowledge, possessed by such servant."

The doctrine of the case of *Norfolk & W. R. Co. v. Stevens*, 97 Va. 632, 46 L.R.A. 367, 34 S. E. 525, is again urged for consideration, and as propounding the correct rule of law applicable to this case. As we pointed out in the opinion, that case failed to recognize the exceptions to the general rule stated governing this case, and which in our opinion should have controlled that case also, and for which it has been criticized. No court, so far as we have found, has approved it, and it is opposed not only by our own cases, but by many other decisions.

Out of respect for the able counsel for defendant and on account of the vigor with which he has pressed the subject upon us, as well as our great desire to reach proper conclusions, we have carefully reconsidered the opinion, and re-examined the many textbooks and court decisions on the subject; and, after having done so, we have come again to the deliberate judgment that we have announced no new principle, nor departed from the well-beaten path marked out by the authorities cited and many others that might be cited in support thereof.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN EX REL. FIRE
& RUST PROOF CONSTRUCTION
COMPANY, Appt.,

v.

JOHN F. ICKE, City Engineer of Madison,
Respnt.

(136 Wis. 583, 118 N. W. 196.)

Mandamus — discretionary duty.

1. Mandamus will not lie to compel performance of a duty under a statute giving public officers discretion to grant contractors for public work estimates of work

completed from time to time, which shall entitle them to payment therefor.

Same—contractual duty.

2. Mandamus will not lie to compel a city engineer to furnish monthly estimates of the completion of work under a public contract in accordance with a provision in that contract that they shall be furnished.

(Siebecker, Timlin, and Barnes, JJ., dissent from proposition 2.)

(November 10, 1908.)

A PPEAL by relator from a judgment of the Municipal Court of Madison denying a writ of mandamus to compel the furnishing of estimates of the completion of por-

tions of a contract for public work. Affirmed.

Statement by Dodge, J.:

The petitioner, a Wisconsin corporation, contracted with the city of Madison to furnish all the labor and materials to lay gutters, to grade, macadamize, and otherwise improve Blount street of the city, and to build a concrete drain under this street from Dayton street to Lake Monona. The contract provided that during the first week of each month the defendant John Icke, the city engineer, should make an approximate estimate of the value of the work completed and the materials delivered; that, on or before the 16th of each month the contractor should be paid the balance due as shown by such esti-

Case Note.—Mandamus to compel municipal or other public officer or board to perform duty resting in contract alone.

This note includes cases in which the duty sought to be enforced rests solely in contract, and does not include cases in which the remedy of mandamus is sought to enforce duties imposed by law, although similar duties may be embraced within the terms of the contract. Decisions which are merely referred to the general rules that mandamus will not issue where the duty is not clear or is one of judgment and discretion are not within the scope of this note.

As to right to enforce by mandamus duty of public service corporation, arising wholly from contract, see case note to *Chicago v. Chicago Teleph. Co.* 13 L.R.A. (N.S.) 1084.

Most of the few reported cases which pass directly upon the question presented in the foregoing case hold with it that mandamus will not lie to enforce a duty on the part of a municipal or other public officer or board which rests wholly in contract.

Thus, in *Parrott v. Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439, it was held that mandamus would not lie to compel a city to perform its contract to build approaches to a bridge so as to protect plaintiff's ice pond.

And in *People ex rel. National Cigar Co. v. Dulaney*, 96 Ill. 503, in an action to compel the commissioners of a state prison to turn over certain convicts in accordance with the terms of a contract for the hiring of convict labor, the court said: "But there is another and equally conclusive reason why the peremptory writ should be denied in this case, and that is, this court has no jurisdiction by mandamus to compel the performance of executory contracts. It is an appropriate remedy to compel public officers to perform specific duties imposed by law; but that is not the case here. The duties which relator asks to have the commissioners compelled to discharge arise out of the alleged contract with them. But for the alleged contract it is not claimed the com-

missioners owe relator any duties to be performed."

So, also, in *State ex rel. Bohannon v. County Ct.* 39 Mo. 375, the relator prayed for the writ to compel the respondents to pay him a portion of his bounty as a volunteer, but the petition was denied. The court saying that it would not "undertake by writ of mandamus to enforce simple common-law rights between individuals, such as the payment of money, or where there is another adequate legal remedy."

And in *State ex rel. Ross County v. Zanesville & M. Turnp. Road Co.* 16 Ohio St. 308, the relators prayed for a writ compelling the respondents to contribute three-fourths of the expense of repairing a bridge upon the ground that they had contracted so to do; but the court denied the writ for the reason that it was not its office to enforce obligations arising upon contracts.

So, in *State ex rel. Little v. Union Twp.* 37 N. J. L. 84, it was held that mandamus is not the proper remedy to enforce the payment of money due from a municipal corporation for work and labor; but the court said that, if the statute should direct a certain sum of money to be paid to an ascertained person by the authorities of a township or other municipal precinct, mandamus might be used to coerce such payment in case of default. And to the same general effect were the decisions in *State ex rel. Cleveland v. Board of Finance & Taxn.* 38 N. J. L. 259; *State ex rel. Elmendorf v. Jersey City*, 41 N. J. L. 135.

So, too, in *State ex rel. Davis v. Mortensen*, 69 Neb. 376, 95 N. W. 831, 5 A. & E. Ann. Cas. 291, it was held that the courts will not, by means of mandamus, compel municipal or public corporations to perform specifically their ordinary business contracts.

And to the same general effect as the foregoing cases were the decisions in *Ingerman v. State*, 128 Ind. 225, 27 N. E. 499; *State ex rel. Mabon v. Halsted*, 39 N. J. L. 640; *Mt. Vernon v. State*, 71 Ohio St. 428, 104 Am. St. Rep. 783, 73 N. E. 515, 2 A. & E. Ann. Cas. 399; *Miller v. State Bd. of Agriculture*, 46 W. Va. 192, 76 Am.

mate, after 25 per cent had been deducted (any partial payment so made not to be construed as a final or partial acceptance of the work performed); and that final payment should be made within sixty days after acceptance of the work by the city. The petitioner alleges that on July 1, 1907, he had partly completed the cement curb and gutter and the grading, had partly excavated and put in the bottom and sides of the drain, and had delivered a large portion of the materials necessary for its construction. At or about July 8, 1907, the engineer made an estimate of the value of a portion of the work so claimed by the petitioner to have been completed, but included nothing therein for a concrete drain between Railroad street and Washington avenue and nothing for materials delivered for such drain. Petitioner alleges that such part of the drain had been completed and the materials were delivered as called for by the contract. Demand has been made on the engineer that he make an estimate for such work and materials, but he has refused so to do. Petitioner prays that peremptory mandamus may issue commanding the engineer to make an estimate of the value of the part of the drain so completed and the materials so delivered. The return asserts that, by reason of non-compliance with specifications and injury from floods, such work and material are of no value to the city. There was no traverse to the return, yet the case seems to have been tried as if at issue on the facts. The court found certain failures of relator to comply with the contract, and impossibility of estimating the value of his work to the city, which findings are assailed as not supported

by the evidence. Judgment denying the peremptory writ and dismissing the action, from which relator appeals.

Messrs. Kronshage, McGovern, & Fritz, with Messrs. Sanborn & Blake, for appellant.

Mr. R. M. Bashford, with Mr. John A. Aylward, for respondent:

No estimate for work completed was due. 30 Am. & Eng. Enc. Law, p. 1276; Kelley v. Syracuse, 10 Misc. 306, 31 N. Y. Supp. 283.

Dodge, J., delivered the opinion of the court:

At the very threshold of this case the court is confronted with the question whether mandamus is either a possible or a proper remedy, conceding that all the facts are as relator claims them. This question is at least akin to jurisdictional, for it must be resolved in the affirmative before the court can properly proceed to consider the controversy between the parties. Neither was this question considered by the court below, apparently, nor is any aid thereon given to this court by the briefs. Mandamus is an extraordinary remedy, and one of the most absolute conditions to it is that the duty sought to be compelled shall be a clear and absolute one imposed by law. State ex rel. Pfister v. Manitowoc, 52 Wis. 427, 9 N. W. 607; State ex rel. O'Donnell v. Benzenberg, 108 Wis. 435, 438, 84 N. W. 858; State ex rel. Board of Education v. Hunter, 111 Wis. 582, 588, 87 N. W. 485; State ex rel. Wisconsin Metropolis Teleph. Co. v. Milwaukee, 132 Wis. 615, 619, 113 N.

St. Rep. 811, 32 S. E. 1007; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 30 S. C. 579, 3 L.R.A. 777, 9 S. E. 661; State ex rel. Charleston, C. & C. R. Co. v. Harper, 30 S. C. 586, 9 S. E. 664.

A few cases, however, are to the contrary.

Thus, in *R. v. York Justices*, 6 N. B. 273, it was held that a person to whom money was due on a contract with public officers was entitled to mandamus where the money was clearly due and plaintiff had no adequate legal remedy. And to the same effect was the decision in *Quaintance v. Howard Twp.* 18 Ont. Rep. 95.

And in *State v. New Orleans*, 29 La. Ann. 863, it was held that mandamus would lie to compel a municipality to assess and levy a sum sufficient to satisfy the requirements of a contract for improvements which had been fully executed.

In *Comer v. Bankhead*, 70 Ala. 136, it was held that mandamus would not lie to compel a warden of a prison to deliver convicts under a contract of hiring after the time of the contract had expired. There is an implication in this case that the court would have issued the writ had the time of the 20 L.R.A. (N.S.)

contract not expired; but the exact question did not come before the court.

In the following cases mandamus was issued to enforce duties which apparently arose from contract, in part at least; but there is no discussion of the question whether mandamus is the proper remedy to enforce purely contractual duties. *Board of Public Works v. Hayden*, 13 Colo. App. 36, 56 Pac. 201; *People ex rel. Ready v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006, affirming 65 Hun, 321, 20 N. Y. Supp. 236; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, affirming 56 App. Div. 98, 67 N. Y. Supp. 701; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776, affirming 56 App. Div. 459, 68 N. Y. Supp. 767; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 A. & E. Ann. Cas. 39, reversing 96 App. Div. 607, 89 N. Y. Supp. 1113; *People ex rel. Peck v. Buffalo State Asylum*, 28 N. Y. S. R. 886, 8 N. Y. Supp. 395; *Chapin v. Osborn*, 29 Ind. 99; *Wren v. Indianapolis*, 96 Ind. 206; *Greenfield v. State* 113 Ind. 597, 15 N. E. 241.

W. 40; *Fox v. Workman*, 6 Cal. App. 633, 92 Pac. 742; *Eberle v. King* (Okla.) 93 Pac. 748. A careful examination of all laws and ordinances relating to the city engineer or city surveyor of the city of Madison fails wholly to disclose any provision of law requiring him, as an absolute duty, to make certificates of partial performance of contract work. Indeed, the only provision we find with reference to estimates at all is contained in § 925-94, Stat. 1898—a portion of the general charter apparently adopted by the city of Madison—to the effect that, as the work progresses, “the board of public works, or such officers as shall be designated to discharge its duties, may, from time to time, at their discretion, grant to the contractor an estimate of the amount and proportionate value of the work done, which shall entitle the holder to receive the amount thereof,” etc. This is not a command to the city engineer or surveyor, but to a board of which he is only one member. Besides, it does not impose an imperative duty, but a discretionary one. But presumably the relator would contend that a duty to issue intermediate certificates arises by virtue of the contract provision that the city engineer will make an estimate during the first week of each month as the work progresses, and that payments will be made thereon. We shall not deem it necessary to decide whether a contract was competent to the city providing absolutely for such certificates and payment, thus in advance forestalling the discretion which § 925-94 vests in the board of public works, but shall proceed on the hypothesis of the existence of such power. Even in that case, however, the duty resting on the engineer is only a contractual one, and not one imposed by law; and as to such duties and obligations, which depend wholly upon a contract, the authorities hold with practical unanimity that courts will not exercise their power by the extraordinary writ of mandamus to compel performance, even by a municipal or other public corporation or its officers. *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 3 L.R.A. (N.S.) 1115, 116 Am. St. Rep. 21, 106 N. W. 116, 8 A. & E. Ann. Cas. 407; *Chicago v. Chicago Telegraph Co.* 230 Ill. 157, 161, 13 L.R.A. (N.S.) 1084, 82 N. E. 607, 12 A. & E. Ann. Cas. 109; *Mt. Vernon v. State*, 71 Ohio St. 428, 453, 104 Am. St. Rep. 783, 73 N. E. 515, 2 A. & E. Ann. Cas. 399; *Putnam Foundry & Mach. Co. v. Barrington*, 28 R. I. 422, 67 Atl. 733; *United States ex rel. Greenbrier Coal & Coke Co. v. Norfolk & W. R. Co.* 74 C. C. A. 404, 143 Fed. 266, 268. It is not an absolute duty imposed by law.

The result is that the court should have dismissed the writ and the proceedings without considering and deciding upon the facts 20 L.R.A. (N.S.)

in controversy. The present judgment correctly disposes of the action and proceeding and should not be reversed in that respect; but it should not stand as a conclusive adjudication of the facts or other controverted questions which should not have been considered.

With that qualification, therefore, judgment affirmed.

Siebeck, J., concurring:

I concur in the affirmance of the judgment, but I cannot accede to the grounds upon which it is placed. I understand the grounds of decision expressed in the opinion of Mr. Justice Dodge are, in substance, that mandamus will not be granted in this case for the reasons (1) that the duty imposed on the engineer of the city is not a statutory one; and (2) the duty sought to be enforced, though assumed to be an absolute one, is a contractual obligation, and the courts will not exercise their power by the extraordinary writ of mandamus to compel performance of an obligation arising out of contract. I am of opinion that this extraordinary power of the court should be exercised to enforce contract obligations wherein this remedy is appropriate, and when there is no adequate and efficient remedy, either at law or in equity, to prevent failure of justice. As to whether or not the duty imposed and sought to be enforced is a statutory duty, it seems to me that, under the portion of § 925-94, quoted by the court, the duty is one imposed by law. The city has no power or authority to make such payments, except as it is granted by this statute. The contract with plaintiff does not create such a duty, but is the medium by which the engineer is designated by the board of public works and the plaintiff to exercise the power authorized by this statute. The duty thus imposed, under which the board of public works or an officer designated by it “may, from time to time, at their discretion” grant estimates of the amount and the value of work done, is a discretionary one. Since it is a discretionary duty, mandamus will not lie, because this remedy is never employed to enforce duties resting in discretion. The judgment should therefore be affirmed.

Timlin, J.: I concur in the foregoing.

Barnes, J., concurring:

I assent to the correctness of the conclusion reached by the court, but do not concur in the reasons given for such conclusion. I see no reason why an action at law might not be maintained to recover the amount of the partial payment to which plaintiff may be entitled, upon showing an arbitrary refusal on the part of the engineer to make

the estimate provided for in the contract. In the event of such refusal, I think the facts which the engineer was called upon to determine could be proved by other competent testimony. In no event would mandamus lie unless the right sought to be enforced was clear, and, if it was clear, the action of the engineer was necessarily arbitrary. Hence the plaintiff had an adequate remedy by action at law, and mandamus would not lie. I base my concurrence solely on the ground above stated.

MAINE SUPREME JUDICIAL COURT.

DORA L. SPEAR

v.

CITY OF WESTBROOK.

(— Me. —, 72 Atl. 311.)

Municipal corporation — negligence — notice of injury.

A notice to a municipal corporation of an injury through its alleged negligence, stating that the injured person sustained an injury to his person, badly bruising himself, and sustaining other bodily injury of a serious nature, does not comply with a statute requiring the notice to specify the nature of the injuries.

(December 4, 1908.)

EXCEPTIONS by defendant to rulings of the Supreme Court for Cumberland County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Mr. William Lyons, for defendant:

The notice was insufficient as it did not

specify the nature of the injuries as required by statute.

Ham v. Lewiston, 94 Me. 269, 47 Atl. 548; Low v. Windham, 75 Me. 113; Lord v. Saco, 87 Me. 231, 32 Atl. 887; Joy v. York, 99 Me. 237, 58 Atl. 1059; Jackman v. Garland, 64 Me. 133; Sawyer v. Naples, 66 Me. 453; Perkins v. Oxford, 66 Me. 547; Veazie v. Rockland, 68 Me. 511; Bradbury v. Benton, 69 Me. 194; Hubbard v. Fayette, 70 Me. 121; Wagner v. Camden, 73 Me. 485; Rogers v. Shirley, 74 Me. 144.

Mr. Frank P. Pride, for plaintiff:

The notice was sufficient, as the real injury was not specific and apparent, but was uncertain at the time.

Wadleigh v. Mt. Vernon, 75 Me. 79; Joy v. York, 99 Me. 237, 58 Atl. 1059; Blackington v. Rockland, 68 Me. 332; Low v. Windham, 75 Me. 113; Goodwin v. Gardiner, 84 Me. 278, 24 Atl. 846.

Whitehouse, J., delivered the opinion of the court:

This is an action on the case to recover damages for personal injuries received by the plaintiff on the 5th day of August, 1907, by reason of an alleged defect or want of repair in the sidewalk on the easterly side of Seavey street in the defendant city.

The liability of the town in this class of cases is created solely by statute, and, among the conditions precedent to the plaintiff's right of recovery prescribed by § 76, chap. 23, Rev. Stat., is, the following requirement respecting notice to the town after the injury, namely: "Any person who sustains injury or damage as aforesaid, or some person in his behalf, shall, within fourteen days thereafter, notify one of the . . . municipal officers of such town by letter or otherwise, in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury."

Case Note. — Sufficiency of description of injury in notice given thereof as a condition of municipal liability.

This note is confined to the sufficiency of the description of the nature, character, and extent of the injury, and is not concerned with the sufficiency of the description in respect to the cause, time, place, or other circumstances attending the injury.

A provision of a municipal charter requiring notice as to nature of an injury is not satisfied by a statement that compensation is claimed for "damages sustained by me by reason of personal injuries received . . . by my falling on a defective sidewalk." Tattan v. Detroit, 128 Mich. 650, 87 N. W. 894.

But such charter provision is satisfied by a statement that "the injury suffered

was a severe wrench, sprain, and bruise of the hip and back, together with other internal injuries." Oesterreich v. Detroit, 137 Mich. 415, 100 N. W. 593.

A requirement that the notice of injury shall set forth substantially the extent of the injury sustained, so far as the same has become known, is complied with by an itemized statement specifically claiming designated amounts for loss of time, for medical attendance and medicines, bodily and mental pain and suffering, together with permanent injuries, but without designating the amount of damage sustained by reason of the latter; as such notice sufficiently indicates a possibility of permanent injuries for which it was intended to hold the municipality liable. Henry v. Pinckney (Mich.) 119 N. W. 1099.

So, in Hawley v. Suranac (Mich.) 121

In attempting to comply with this requirement of the statute, the plaintiff in this case seasonably gave to the mayor and aldermen of the defendant city the following written notice signed by her: "You are hereby notified that on Monday, the 5th day of August, 1907, while walking along Seavey street in said city, on the sidewalk on the easterly side of the street, and myself being in the exercise of due care, I sustained an injury to my person by falling into a hole in the sidewalk nearly opposite the premises of Albion Senter, badly bruising myself and sustaining other bodily injury of a serious nature. I hereby give notice that it is my intention to hold the city of Westbrook responsible for the injury I have sustained, in damages."

The defendant's counsel seasonably objected to this notice on the ground of insufficiency, and requested the presiding justice to give the following instruction, to wit: "That the statute notice given by the plaintiff to the defendant as required by chapter 23, § 76, of the Revised Statutes was and is wholly insufficient, in that it wholly fails to specify the nature or kind of her bodily injuries alleged by her to be sustained, that it wholly fails to specify whether the injuries, or any of them, were upon her head or back, or upon her arms or legs, and that no part of her head, body, or limbs are specified as having been injured, and therefore she cannot recover in this action."

The defendant's counsel further requested the court to direct the jury to return a ver-

N. W. 393, a similar notice was held sufficient where also a designated sum was claimed for "future damages, pain, and suffering."

A notice that one's injuries consisted of a dislocated and broken right shoulder blade will not, under a statute requiring that the extent of such injury shall be set forth as far as the same has become known, permit evidence to prove a broken and dislocated left collar bone. *Ridgeway v. Escanaba*, 154 Mich. 68, 117 N. W. 550.

The requirement of notice of injuries sustained by reason of a defective sidewalk, as required by § 9, p. 233, Colo. Sess. Laws 1893, limits the right to recover to the injuries growing out of those set forth in such notice; and, where the only claim is for a broken leg, it is improper to permit testimony as to other injuries. *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 15 L.R.A. (N.S.) 775, 92 Pac. 922.

A charter provision requiring notice as to the extent of an injury will not permit evidence of a miscarriage suffered by a married woman under notice stating that she "was severely injured internally, was in bed for a period of ten days, and is now in the care of a physician, and will probably never entirely recover from the effects of her fright and injury." *Denver v. Barron*, 6 Colo. App. 72, 39 Pac. 989. The court said: "It is only insisted that, with reference to plain injuries and those which the layman can easily locate, determine, and describe, he must set them down in his notice. Internal injuries which he can neither diagnose nor describe otherwise than by his sensations would probably be sufficiently stated if the sensations were given. In the case of a broken bone it would be enough to state that his leg, his arm, or his limb were fractured, without stating the kind and description of the fracture he had sustained; but, wherever the trouble is readily appreciable and easily described, it must be stated in the notice, or else there can be no recovery for that particular injury." 20 L.R.A. (N.S.)

A requirement that notice be given of the accident or injury complained of, with the nature and extent thereof, is satisfied by a full statement of the particulars as to either the nature and extent of the accident or injury, such requirement being in the disjunctive. *Bemis v. Omaha* (Neb.) 116 N. W. 31.

And such statutory requirement is sufficiently complied with by a statement that a falling billboard broke "both bones of my left leg between the knee and the ankle and greatly lacerating my leg at the said place, the bones of my leg being splintered and badly broken by reason of the force of said billboard or sign striking me in the manner it did, causing what is known and usually termed a 'compound comminuted fracture;' which said injury is serious and permanent, and has caused a great shock to my nervous and physical system." *Ibid*.

A requirement that the notice shall contain "a general description of the injury" is complied with by a statement that one was "greatly injured in that the back of his head was badly cut and bruised and he was internally injured." *Wood v. Stafford Springs*, 74 Conn. 437, 51 Atl. 129.

And a notice that one was thrown from a sleigh, and that her "back, hips, head, spine, and body were greatly and permanently bruised, strained, injured, and wrenched, her left hip dislocated, and she was otherwise greatly and permanently injured internally and externally in and upon her back, head, hips, spine, and body," is sufficient. *Dean v. Sharon*, 72 Conn. 667, 45 Atl. 983.

A statement: "I slipped and fell and was permanently injured, . . . said injuries consisting of wounds and bruises of the sciatic nerve of my left hip and thigh," is a sufficient statement of the injury to admit evidence under an allegation of the declaration that, by reason of the injuries the plaintiff "is and was thereby greatly bruised and injured about and upon her body and limbs, injuring and bruising the sciatic

dict in favor of the defendant. The presiding justice declined, *pro forma*, to give either of the requested instructions, and the case was thereupon submitted to the jury, who returned a verdict for the plaintiff for \$900. The case comes to the law court on exceptions.

It is the opinion of the court that, upon the authority of the previous decisions in this state upon similar notices, the exceptions must be sustained and the notice held insufficient.

In *Goodwin v. Gardiner*, 84 Me. 278, 24 Atl. 846, the plaintiff's injuries were described in his notice to the town as "severe bodily injuries;" and it was held that this was not a sufficient specification of the "nature of his injuries." In the opinion of the

court it is said: "The statute requires more than a bare statement that a bodily injury was received. The nature of the injury must be stated. . . . It would have been more natural for the plaintiff, if really injured severely, to state how and to what extent the injury affected him—whether upon the head or back, upon his arms or legs, and whether general or particular. The assertion is that he met with injuries, and not one of them is named. No kind of inquiry is either included or excluded by the notice. One object of the statute requiring notice within fourteen days after an injury is alleged to have been received is that the injured person shall thus early commit himself to a statement of his condition, when he would be more likely to describe it frankly

nerve along the left hip and thigh, and bruising and causing an enlargement of the bones of the left hip by reason whereof." *Reno v. St. Joseph*, 169 Mo. 642, 70 S. W. 123. The court observed that such notice is required only to state the character and circumstances of the injury, and that it is not necessary that the injury to its fullest extent, scope, and effect be set forth in the notice; but a substantial compliance with the statute is all that is necessary.

So, such statutory requirement is sufficiently complied with by a statement that one's "left limb [was] severely and permanently injured at the knee and hip; at the same time her side and abdomen were severely bruised and wounded, causing severe, painful, and permanent injuries to her stomach and digestive organs." *Burnette v. St. Joseph*, 112 Mo. App. 668, 87 S. W. 589.

A notice that one's injury was to the "right leg at and about the knee, [and that] a severe shock" was sustained so as to disable her and compel her to lie in bed and incapacitate her from attending to ordinary duties is, in the absence of any intention to mislead, a sufficient compliance with a requirement that "a verified statement of the cause of action" shall be given, to permit evidence of injuries other than those specified, and especially of a serious injury to the hip. *Eggleston v. Chautauqua*, 90 App. Div. 314, 86 N. Y. Supp. 279, affirmed without opinion in 183 N. Y. 514, 76 N. E. 1094.

A requirement that such notice shall describe the extent of an injury so far as practicable is satisfied by a statement that, by reason of a fall, the claimant "broke her left arm, and was, in consequence thereof, made to suffer great pain, and was disabled and prevented from performing her usual avocations for some time, and will be so prevented for an indefinite period in the future." *Stedman v. Rome*, 88 Hun, 279, 34 N. Y. Supp. 737.

And a claim for "severe and permanent injury to my head and body" is a sufficient description as to the extent of an injury to permit evidence of an injury to an eye. 20 L.R.A. (N.S.)

Place v. Yonkers, 43 App. Div. 380, 60 N. Y. Supp. 171.

As the Vermont statute requiring the notice to state "the part of the body injured, . . . together with the extent and effect of the injuries upon the health of the person injured," does not require an accurate diagnosis of one's injury to be given, but is satisfied by a description of its character as one understands it, the following descriptions have been held to be sufficient:

"A severe cut and bruise on the back of my head, and my head was otherwise injured. My left hip was bruised and made sore and lame. I was hurt and made lame through my chest and bowels; and I was badly jarred and shaken up and bruised, so that my whole body was badly affected and my nervous system was injured." *Graves v. Waitsfield*, 81 Vt. 84, 69 Atl. 137.

And a statement that "the back of my head was injured by striking thereon, with resultant shock, and, in consequence of said injuries have been unable to labor," is a sufficient compliance with such statute to admit evidence that the plaintiff's head was bloody and had a bruise and bump on the back, and that, from the time of the accident to the time of the trial, she had been subject to headaches. *Lynds v. Plymouth*, 73 Vt. 216, 50 Atl. 1083.

So such statute is complied with by a notice that "my back and spine were injured and made lame for the whole length thereof, including neck, and my back was badly strained and made stiff,—so much so that I have not been able to raise or move my head since the injury; . . . and I have suffered . . . great pain in my head, brain, jaw, spine, neck, etc.;" so that evidence as to an injury to the neck may be introduced thereunder. *Willard v. Sherburne*, 59 Vt. 361, 8 Atl. 735.

And, as the Vermont statute above mentioned is satisfied with a statement of one's injuries with reasonable certainty, a notice that I was "severely injured in my spine near my shoulders, so that I have had no use of my arms since that time, but have been, and am now, confined to my bed, entirely helpless; and I was otherwise injured

and fairly than at a later period. There is a great temptation to magnify and exaggerate such personal injuries, and the town is entitled to as particular a notice as can reasonably be given."

In *Low v. Windham*, 75 Me. 113, the plaintiff's notice was "of injuries I received in going through the bridge at Great Falls," and it was rejected by the court as insufficient because the nature of the bodily injuries was not stated.

In *Lord v. Saco*, 87 Me. 231, 32 Atl. 887, the plaintiff's notice stating that his horse was "greatly injured by reason of the defect" was declared to be defective, because it "fails utterly to state the nature of his injuries;" thus in effect overruling *Blackington v. Rockland*, 66 Me. 332.

in and about my back and spine, and internally," is sufficient to admit evidence of an injury to the spine between the shoulder blades, and for damaging consequences resulting therefrom, including partial paralysis of the hands and arms. *Fassett v. Roxbury*, 55 Vt. 552.

So, under such statute, a description of one's injuries as the fracture of four ribs and an injury to the lungs is sufficient to admit evidence of a permanent injury consisting of a thickening of the pleura or lining membrane of the chest and lung, and an adhesion thereof to the lungs and walls of the chest, the result of inflammation caused by the injury to the lungs, although the lungs were not permanently injured. *Reynolds v. Burlington*, 52 Vt. 300. The court said that "the resulting consequences to other occult and unknown organs may not have been within the knowledge and skill of the plaintiff, or of his counsel, at the time the injury was inflicted and the notice drawn;" and whatever damaging consequences resulted from the breaking of the ribs may be properly proved, although the pathological process by which that damage comes to pass is not specified in the notice.

But a statement that "four of my ribs upon my right side were fractured, my right hip was badly bruised, and I was also badly injured about the back and kidneys, and my whole body was shaken, bruised and injured, and my health greatly impaired" will not permit evidence to be given to the effect that, after the expiration of about six months, an enlargement appeared on the abdomen, and that one afterwards suffered from general nervous prostration, due to the nervous shock to the system. *Perry v. Putney*, 52 Vt. 533. The court said that the statute contemplates that the party should state in his notice the condition, disability, and parts of the body more especially affected, so far as he may be able to do so, from sensation, feeling, or otherwise, and must give his condition a character so far as practically he may be able to; and, in the case of internal injury, he must give the location so far as he can, from the nature of the case, from pain, sensation, and 20 L.R.A. (N.S.)

In *Wadleigh v. Mt. Vernon*, 75 Me. 79, the plaintiff stated in his notice that he was "thrown violently from his wagon and seriously injured in the thigh, and internally injured in his right lung, and otherwise injured by being violently shaken up and jarred in his fall to the ground." The court says in the opinion: "The declaration is comprehensive enough to warrant the introduction of proof of any bodily injury resulting from his 'being violently shaken up and jarred in his fall to the ground.' It is not necessary to detail all the results thus accruing in the declaration nor in the notice." See also *Joy v. York*, 99 Me. 237, 58 Atl. 1059, in which the recent decisions of the court upon this question are critically analyzed and compared.

feeling, and the effect of such injury by his consciousness, of his condition of the parts affected, and his general condition as to prostration and health; and, having done this, if ultimate serious results become manifest which are traceable to such injury, that are developed by latent causes and hidden processes which are both invisible and intangible, the party shall not be barred from recovery for all he has suffered as the consequence of his injuries.

Nor is such statute satisfied by a statement that "my back is badly injured, also my head and other parts of my body, so that I am unable to sit up but very little at this time;" and no recovery may be had thereunder. *Pratt v. Sherburne*, 53 Vt. 370.

So, a notice describing one's injuries as being "greatly injured in her head, neck, back, hips, limbs, so that her life was greatly dispaired of," is not a sufficient compliance with the Vermont statute. *Bartlett v. Cabot*, 54 Vt. 242.

The case of *Nourse v. Victory*, 51 Vt. 275, is sufficiently stated in the opinion to SPEAR v. WESTBROOK.

It was held in *Robin v. Bartlett*, 64 N. H. 426, 13 Atl. 645, that the trial court is to determine, as a matter of fact, whether an injury is sufficiently described in a notice, and its finding will not ordinarily be reversed by the law term if there is evidence upon which it could properly be made; and the court accordingly declined to review the finding of the trial court, that a notice stating that one received injury "in the small of the back, and upon the side and hip, and received internal and other injuries which I cannot describe," sufficiently satisfied a statutory requirement that a dull description of the injuries, and the extent thereof, be given, to admit proof of rectocele and womb difficulties. The court said: "A personal injury need not be described with scientific precision. Selectmen are not ordinarily skilled in surgery. A description of an injury, in the accurate language of that science, might convey to them little or no information. The full description required by the statute, of a personal injury, is such a reasonably complete and comprehensive account of its na-

In the case at bar the language of the plaintiff's notice is: "I sustained an injury to my person, . . . badly bruising myself and sustaining other bodily injury of a serious nature." As in *Goodwin v. Gardiner*, 84 Me. 278, 24 Atl. 846, and *Low v. Windham*, 75 Me. 113, this notice fails to give a sufficient specification of the nature of the plaintiff's injuries. This statutory requirement of the fourteen days' notice has never been construed to impose upon the sufferer any unreasonable or burdensome duty. He is only required to give the defendant town the benefit of all the information he possesses relating to the bodily injuries for which he claims damages. He is not compelled to specify or predict the effects and consequences which may or may not flow from such injuries. The results may be neither known nor anticipated at the time of preparing the notice. But he may reasonably be required to describe the physical conditions caused by his injuries fully and frankly according to the best of his knowledge and information. The plaintiff, it is true, states that she was badly bruised, but a bruise is only a bodily injury without laceration, and, like other bodily injuries, has the attribute of locality. The notice fails to specify upon

what part of the body the bruises were received, whether upon the head or back, the arms or legs, or to state in what manner or to what extent the bruises affected her. The severity and critical nature of the injury obviously depend largely upon its locality, and it is important for the municipal officers to be informed whether the bruises are upon a vital or other less vulnerable part of the body. She could not be expected to anticipate nor reasonably be required to specify in her notice that she would suffer from "traumatic neurasthenia" or nervous prostration, as the result of her bruises and injuries, but it would not have been difficult for her to state upon what part of her body the bruises and injuries were received. The sufferer can recover damages arising from such injuries as are thus specified in his notice and for the results actually flowing from such injuries, although those results may not be anticipated or described in the notice. A sufficient specification of the nature of the injuries themselves is a sufficient notice of the results which actually flow from them. The fatal defect from the plaintiff's notice is its failure to specify the nature of her injuries.

Exceptions sustained.

ture and extent as a person of common intelligence is capable of giving and naturally would give to his neighbor, whom he desired fully to inform in what part of his person and how badly he was hurt. The statute does not expressly require the effect of the injury to be stated,—differing in this particular from the similar statute of Vermont. . . . Consequences or results of the injury need be stated so far only as may be necessary to describe its extent. The statement must be filed within ten days after the damage is received, may be filed the same day, and is sufficient if it describes the injury as it then exists. Although apparently slight, it may prove to be serious. A supposed trifling bruise may result in paralysis, or render necessary the amputation of a limb. The plaintiff may recover damages not only for the injury described, but also for all the directly resultant injurious consequences, though they may not appear until long afterwards. . . . He can bring but one suit, and hence may recover not only for what he has suffered, but also for all that he will suffer in the future as a direct result of the injury."

A statement in a notice that "said injury consists of a fracture of both wrists" will not permit evidence showing an injury to the shoulder as well, under a statutory requirement that the notice shall specify the nature of the injury. *Joy v. York*, 99 Me. 237, 58 Atl. 1059.

But a declaration alleging one's injuries to be "a dangerous contusion of the muscles of said leg; and the bones of said leg were then and there . . . badly injured and displaced, and his back strained, and a gen-

eral shock to his nervous system . . . received," is not too broad where the notice described the injury as "inflammation of the periosteum (periostitis) of the tibia at and about the junction of the middle and lower thirds of the right leg." *Bradbury v. Benton*, 69 Me. 194. The court said that it was not necessary that the injuries should be specified in the notice as they were alleged in the declaration, the plaintiff not being confined and limited to the precise statement of his injuries contained therein, as the true nature and extent thereof may not be developed so as to be known until after the time in which the notice is required to be given; and the notice is sufficient if it will enable the municipal officers to investigate the case and acquire a full knowledge of the facts.

And such notice is not rendered insufficient because not expressed in the English language as the words "periosteum and tibia" have become anglicized, and are now used as English words and found in English dictionaries in use. *Ibid*.

And in *Sawyer v. Naples*, 66 Me. 453, a recovery was sustained under a verbal notice of "injuries received in the back."

So, "the nature" of one's injuries is sufficiently stated by a notice that he was hurt "on the back, shoulder and head very bad." *White v. Vassalborough*, 82 Me. 67, 19 Atl. 99.

The cases of *Wadleigh v. Mt. Vernon*, 75 Me. 79, and *Goodwin v. Gardiner*, 84 Me. 728, 24 Atl. 846, which pass upon the sufficiency of a description of one's injuries in such a notice as required by the Maine

statute, are sufficiently set out in the opinion to **SPEAR v. WESTBROOK.**

A charter requirement that a notice shall state the cause and extent of an injury is satisfied by a statement that an injury was received, "causing a partial dislocation of the joint between the coccyx and the sacrum, and rupturing the ligaments, causing a displacement of the right ovary, producing great pain and inflammation, causing more or less concussion of the spine, together with internal injuries," so as to admit proof of a prolapse of the womb. *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95. The court said: "It is almost impossible in every case of this nature to accurately designate all of the injuries that may arise, for some, which might be the proximate result of the accident, might not be developed until long after the time that the law requires notice to be given. There can be no technical or fixed rule in determining when a notice is sufficient. All that should be required is that it is sufficient if it in a general way apprises the defendant of the nature and general extent of the injuries suffered."

So, a requirement that the nature and extent of the injuries received shall be set forth is complied with by a statement that the injuries received by falling on a defective sidewalk consisted of "dislocation and fracture of the right ankle, fracture of one bone in her right leg, dislocation of her hip, strain and shock through the pelvis and back, strain and shock to the spine" causing a miscarriage, so as to admit evidence concerning resulting urinal and bowel troubles, and that they were caused by her injury. *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383. The court said that, while it is manifestly just that all known effects of an injury upon which a claimant intends to rely should be stated, yet such requirement will not be construed with technical strictness, or that a general statement of injuries received will preclude at the trial evidence of the nature and proximate results of the injuries described. And, where proximate injuries not described in the notice develop after the expiration of the time in which the notice may be presented to the municipality, evidence thereof is admissible at the trial.

A notice stating one's injuries as "the bruising, wounding, and laming of my person" satisfies a requirement that such notice shall describe the nature of one's injury; and a demurrer to a complaint alleging the giving of such notice will not be sustained. *Lilly v. Woodstock*, 59 Conn. 219, 22 Atl. 40. The court observed that such specification may have been as specific and accurate a notice of the nature of the injury as it would be reasonably possible to give, and such as may turn out upon the trial to be the only practical description; and, unless it appears upon the face of the notice that the statement of the injury is so loose, general, and indefinite as to be of necessity unreasonably inaccurate, a demurrer on that point ought not to be sustained. 20 L.R.A. (N.S.)

Lilly v. Woodstock, was followed and applied in *Manning v. Woodstock*, 59 Conn. 224, 22 Atl. 42, where the injury was described as "the breaking of my collar bone, . . . being a continuing and lasting injury."

NORTH CAROLINA SUPREME COURT.

EVA ROSENTHAL

v.

CITY OF GOLDSBORO, Appt.

(149 N. C. 128, 62 S. E. 905.)

Highway — trees — removal.

A municipal corporation acting in good faith may, under its charter authority to repair the streets and remove nuisances, remove without compensation or notice the trees of an abutting owner which are within the limits of the highway, the roots of which interfere with the operation of a municipal sewer.

(November 19, 1908.)

Case Note. — Right of municipal corporation to cut or trim trees within limits of highway.

Municipal authorities have the entire control over their highways, streets, and sidewalks, and may remove shade trees whenever they are an obstruction to the use of the highway for public travel, although the fee to the street is in the abutting owner and such trees are his private property. *Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509; *Miller v. Detroit*, Y. & A. A. R. Co. 125 Mich. 171, 51 L.R.A. 955, 84 Am. St. Rep. 569, 84 N. W. 49.

A city, in grading its streets and sidewalks, may remove shade trees if necessary to the grading. *Castleberry v. Atlanta*, 74 Ga. 164. In this case it was held that such trees belong to the city.

If a growing tree is an obstruction to the free use of the street, it is a nuisance, and the city authorities have the right to remove it. *Hildrup v. Windfall City*, 29 Ind. App. 592, 64 N. E. 942.

For earlier cases upon the question of the right of municipal corporations to remove or trim trees within the highway upon the ground that they are nuisances, see subject note to *Hagerstown v. Witmer*, 39 L.R.A. 670.

A city is not liable in damages for removing shade trees where their removal is ordered not oppressively nor unreasonably, but because they would be an obstruction to the proper and uniform construction of a sidewalk according to a general plan. *Scott v. Marshall*, 110 Mo. App. 178, 85 S. W. 98.

Municipal authorities will not be enjoined from cutting down shade trees 2 feet in thickness, standing within the line of a sidewalk ordered to be constructed, where they would constitute permanent obstruc-

APPEAL by defendant from a judgment of the Superior Court for Wayne County in plaintiff's favor in a suit to enjoin interference with trees belonging to plaintiff. Reversed.

Statement by Hoke, J.:

It appeared that the city authorities in charge and control of the matter, having concluded that the roots from certain shade trees along the streets of the city obstructed and threatened the safety of the city sewerage, ordered removal of the trees, and thereupon the plaintiff, owning and occupying a residence abutting on the streets, and which would be injuriously affected by the execution of the order, instituted the present suit to restrain the contemplated removal.

From the facts stated in the pleadings, and admitted by the parties in open court, it appeared:

"This cause coming on to be heard, and the pleadings being read, the defendant thereupon admits that the elm trees described in the complaint are no more obstruction to the free use of the streets and sidewalks for travel than any other trees located on the streets of the city, but reiterates its allegation that the said elms and all other elms of the city are nuisances, in that they

obstruct the sewerage of the said city. The court thereupon, from the pleadings in the case and the admissions in open court, finds the following facts:

"(1) That the defendant is a municipal corporation, duly chartered and organized.

"(2) That the plaintiff is and has been for many years a resident of the said city, and owns and occupies a dwelling house situated on the eastern side of James street, in said city, and fronting about 105 feet on said street; that in front of said residence, and on the western side thereof, extending along the whole front thereof, and just inside the curb line of the sidewalk of said city, there have been for the last twenty years, and now are, seven or eight large, handsome elm trees, planted by the plaintiff and those through whom she claims title to the said lot, which said trees add greatly to the appearance and enjoyment of her said premises, and said trees make no more obstruction to the free use of the said sidewalk and street by the public for passage over it than is made by all other trees in said city.

"(3) That the plaintiff has a property right in said trees.

"(4) That, about twelve years ago, the defendant constructed in said city a general system of sewerage, a portion of which

tions if left standing, and the proposed cutting is not wanton or unreasonable and oppressive. *Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L.R.A. 580, 46 Am. St. Rep. 311, 39 N. E. 584 (upon the ground that shade trees in the public streets are the property of the municipality); *Hildrup v. Windfall City*, supra.

In *Embler v. Wallkill*, 57 Hun. 384, 10 N. Y. Supp. 797 (affirmed without discussing this question in 132 N. Y. 222, 30 N. E. 404), it was held to be inexcusable negligence for the highway commissioners to allow for more than ten years the branches of a tree standing upon the side of the highway to overhang the traveled portion of the road so low as to leave insufficient space for the passage of a load of hay.

In *Murray v. Norfolk County*, 149 Mass. 328, 21 N. E. 757, it was held that, if trees become an obstruction in the street in the opinion of the proper officers of the town, it is for them so to determine and to order their removal; and their decision is conclusive.

But, from most of the following authorities, it appears that such decision is not conclusive, and is subject to review in equity.

In *Paola v. Wentz* (Kan.) 98 Pac. 775, it was held that the determination of the city authorities to remove shade trees from a street must be the result of a fair and reasonable consideration, since the abutting owner has a property interest in such trees, subject only to the superior claims of the public. 20 L.R.A. (N.S.)

In *Kemp v. Des Moines*, 125 Iowa, 640, 101 N. W. 474, it was held that, if a city duly adopts a plan for the improvement of a street by grading or otherwise, and the execution of such plan necessarily requires the destruction of shade trees standing in the street, their removal in the prosecution of such work affords no cause of action to the abutting lot owner; but that the court, recognizing the interest which the abutting owner has in such trees, will require that the city take reasonable care to do the work so ordered, in a manner to avoid unnecessary injury to such trees.

If a municipality arbitrarily, capriciously, or unnecessarily determines and undertakes to remove shade trees which are not a nuisance, it may be enjoined at the instance of the abutting owner, such trees being private property. *Paola v. Wentz*, supra; *Frostburg v. Wineland*, 98 Md. 239, 64 L.R.A. 627, 103 Am. St. Rep. 399, 56 Atl. 811, 1 A. & E. Ann. Cas. 783; *Ellison v. Allen*, 62 N. Y. S. R. 274, 30 N. Y. Supp. 441.

In *Paola v. Wentz*, supra, it was held that the removal, by officers of a city, of shade trees growing in the street, may be enjoined where the only reason offered to justify such removal is insufficient as a matter of law, and no other purpose is disclosed.

In *Kemp v. Des Moines*, supra, it was held that, if shade trees are so located as not to be an obstruction to the proper use of a roadway or sidewalk, the city may not arbitrarily destroy or remove them.

In *Atlanta v. Holliday*, supra, it was held that, where it palpably appeared that no

passed through the middle of the street in front of the premises of the plaintiff, and which is now in use, that roots from some of the elm trees in the said city have penetrated in some portions of said city into the said sewer, and have thereby rendered the same less useful.

"(5) That the said city is the owner of a system of waterworks, supplying water to residents of said city for compensation, and furnishing water to the city for public use, which system of waterworks is used in connection with the said system of sewerage, by both said city and the citizens thereof, both constituting one system for the purpose of furnishing water, and after its use for the purpose of carrying off same.

"(6) That, on the 7th day of January, 1907, the defendant took action to cause the trees of the plaintiff and all other citizens of the town to be cut down and removed from the streets of the city, as appears from the minutes of the meeting of the board of aldermen of said city held on January 7, 1907, which is as follows: 'The street committee was empowered to have all the elm trees along the line of the city sewers removed, and chief of police was instructed to employ a force of hands for that purpose, and to sell wood from said trees to help in defraying the

expense of the removal of the same, having been condemned as injurious to sewers.' That, pursuant to said order, the authorities of the said city have cut and removed from the streets of said city a number of elm trees, and were, at the beginning of this action, threatening to cut down and remove the trees of the plaintiff. That the plaintiff had no other notice of the purpose to cut down her trees than arises from the knowledge of the existence of the said order, and afterwards an appearance by her agent before the board to effect a compromise, which was refused.

"(7) That no proceedings were had or begun to condemn plaintiff's trees, and no compensation was tendered or offered to her for their destruction.

"(8) That § 27 of the charter of the city of Goldsboro provides that, among the powers herein conferred on the board of aldermen, they shall provide water, provide for repairing and draining the streets, . . . regulate, suppress, and remove nuisances.

"(9) That § 38 of the charter provides that the board of aldermen shall have power to lay open the new streets within the corporate limits of the city whenever by them deemed necessary, and have power at

necessity existed for the removal of shade trees growing upon the margin of a sidewalk, the fee to the street being in the abutting owner, and that public convenience would not thereby be subserved, injunction would lie to prevent the city from removing them.

In *Frostburg v. Wineland*, supra, it was held that shade trees which had stood for forty years at the curb between the sidewalk and the street without impeding travel on the highway were not shown to be nuisances because they extended a few inches outside the curb; and equity would review the action of the city in declaring them to be such and ordering their removal.

In *Crismon v. Deck*, 84 Iowa, 344, 51 N. W. 55, it was held that so long as shade trees planted in the highway by an abutting owner and there allowed to remain for over ten years did not obstruct the road nor prevent its necessary improvement, the road supervisor would not be permitted to remove them against the wish of such owner.

In *Sproul v. Stockton*, 73 N. J. L. 158, 62 Atl. 275, it was held that statutory power given a city council to regulate the planting and protection of shade trees in the streets did not authorize the cutting down and removal of such trees.

In *Wheatfield v. Shasley*, 23 Misc. 100, 51 N. Y. Supp. 835, it was held that shade trees planted in a highway by the owner of the fee, under a statute which made it lawful for abutting owners to plant such trees, and which did not actually encroach upon that part of the highway which had

been in use for thirty years, did not constitute an encroachment or obstruction within the meaning of a statute authorizing highway commissioners to remove obstructions or encroachments.

Statutory power to remove all obstructions, encroachments, encumbrances, and nuisances in and upon any street or sidewalk has reference only to such obstructions as are apparent or readily ascertainable without the necessity of any adjudication, and does not authorize the summary removal of growing trees without notice to the owner, since such trees are not necessarily an unlawful encumbrance or encroachment. *Sproul v. Stockton*, supra; *Hitchner v. Richman*, 74 N. J. L. 234, 65 Atl. 856.

And in *Michigan* it is held that municipal authorities may not remove shade trees within the limits of the public highway without notice to the owner and an opportunity given to him to remove them as he may see fit. *Stretch v. Cassapolis*, 125 Mich. 167, 51 L.R.A. 345, 84 Am. St. Rep. 567, 84 N. W. 51; *Miller v. Detroit*, Y. & A. A. R. Co. 125 Mich. 171, 51 L.R.A. 955, 84 Am. St. Rep. 569, 84 N. W. 49.

As to authority of municipal officers to cut or trim tree on private property to facilitate use of street, see case note to *Com. v. Byard*, post, 814.

As to liability of abutting owner for mutilating trees in highway by erecting poles or stringing wires, see case note to *Cartwright v. Liberty Teleph. Co.* 12 L.R.A. (N.S.) 1125.

any time to widen, enlarge, change, or extend or discontinue any street or streets, or any part thereof, within the corporate limits of the city, and shall have full power and authority to condemn, appropriate to use any land or lands necessary for any of the provisions named in this section.

"(10) That section 46 of the charter provides that the board of aldermen shall cause to be kept clean and in good repair the streets, sidewalks, and alleys. They may establish the width, ascertain the location of those already provided, and lay out and open up others, and may reduce or increase the width of all of them."

And it was thereupon considered and adjudged by the court: "That it is not within the power of the defendant to destroy the trees in which the plaintiff has a property right without just compensation to be ascertained upon due notice; and it is further considered and adjudged that the defendant be perpetually enjoined from proceeding to cut down said trees until and unless a proper proceeding is instituted to condemn the same. It is further adjudged that the plaintiff recover the costs of the defendant, to be taxed by the clerk."

Defendant excepted and appealed.

Mr. J. Langhorn Barham, for appellant:

The city had the right to remove the roots without notice or compensation.

Brown v. Asheville Electric Co. 138 N. C. 537, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; *Tate v. Greensboro*, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767; 2 *Lewis, Em. Dom.* § 66; *State v. Jones*, 139 N. C. 616, 2 L.R.A. (N.S.) 313, 52 S. E. 240; 2 *Smith, Mun. Corp.* § 1311; *Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L.R.A. 580, 46 Am. St. Rep. 311, 39 N. E. 584; *Chase v. Oshkosh*, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; *Bunch v. Edenton*, 90 N. C. 431; *White v. Chowan*, 90 N. C. 437, 47 Am. Rep. 534; *Kelley v. Milwaukee*, 18 Wis. 83; *State v. Leaver*, 62 Wis. 387, 22 N. W. 576; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52; *Dill. Mun. Corp.* § 987; *Goodrich v. Chicago*, 20 Ill. 445; *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962; *Cherry v. Keyport*, 52 N. J. L. 544, 20 Atl. 970; *Benson v. Waukesha*, 74 Wis. 31, 41 N. W. 1017; *Elliott. Roads & Streets*, p. 375; 15 Am. & Eng. Enc. Law, p. 1046.

Messrs. I. F. Dortch and Aycock & Daniels, for appellee:

The trees are the property of the plaintiff, and they cannot arbitrarily be removed for the purpose of relieving the sewers.

Tate v. Greensboro, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767; *Brown v. Asheville Electric Co.* 138 N. C. 537, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; *Frostburg v. Wineland*, 98 Md. 239, 64 L.R.A. 627, 103 Am. St. Rep. 399, 56 Atl. 811, 1 A. & E. Ann. Cas. 783.

Hoke, J., delivered the opinion of the court:

The decisions of this state are against the plaintiff's position, and the ruling of the court below upholding it, notably the case of *Tate v. Greensboro*, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767. That was a case involving the right of a city to remove shade trees from the streets and sidewalks, and the court held as follows:

"(1) A city has exactly the same rights in, and is under the same responsibilities for, a street which it controls by dedication only, as in and for one which has been granted or condemned; and the rights of the abutting proprietor are no greater in such street than if it had been granted or condemned.

"(2) The law gives to municipal corporations an almost absolute discretion in the maintenance of their streets, since wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid.

"(3) The charter of the city of Greensboro and the general law of the state (2 Code 1883, chap. 62) give to the municipal authorities of that city wide discretion in the control and improvement of its streets; and, if damage result to an abutting property owner by reason of acts done by it neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria*.

"(4) The courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when and to what extent its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion."

In order to show how far the principle was applied in that decision, it appeared that the city authorities, having concluded that the trees, from their shade and placing tended to prevent the proper maintenance of the streets in reference to the public benefit and convenience, ordered their removal, and, on the hearing, the judge found: "That the trees did not obstruct the passage of persons on the sidewalks; that the public convenience did not require their destruction; that the mudhole in the street, for the removing of which this act seems to have been done, could have been remedied without cutting down the trees." And on the facts, *Burwell, J.*, in his well-considered opinion, thus stated the question presented: "This phase of the case presents for our consideration this ques-

tion: Can the courts review the exercise by the city of Greensboro of its power to repair and improve its streets and remove what it considers obstructions therein, and find and declare that certain trees in the streets of that city which the municipal authorities honestly believe were injurious and obstructive to the public were in fact not so, and upon such findings, there being no allegation of negligence or of any want of good faith on the part of the city, award damages to an abutting proprietor, the comfort of whose home has been lessened by the removal of the trees?" And in reference thereto, among other things, said: "Hence it is that the law gives to all such corporations an almost absolute discretion in the maintenance of their streets, considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility of improper performance is so heavily laid. Illustrative of this is the provision of Code 1883, § 3803, that the commissioners of towns 'shall provide for keeping in proper repair the streets and bridges of the town in the manner and to the extent they may deem best.' We think that, under its charter and under the general law of the state (2 Code 1883, chap. 62), the city of Greensboro was clothed with such discretion in the control and improvement of its streets, and, if damage comes to the plaintiff by reason of acts done by it, neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria*. *Smith v. Washington*, 20 How. 135, 15 L. ed. 858; *Brush v. Carbondale*, 78 Ill. 74; *Pontiac v. Carter*, 32 Mich. 164." The opinion further quotes with approval from the case of *Chase v. Oshkosh*, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560, as follows: "The right of the public to the use of the street for the purposes of travel extends to the portion set apart and used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot owner abuts. As against the lot owner, the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends to the entire width; and whether it will so open and improve it, or whether it should be opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements are committed. With this discretion of the authorities courts cannot ordinarily interfere upon the complaint of the lot owner so long as the easement continues to exist. . . . The public use is the dominant interest, and the public authorities are the exclusive

judges when and to what extent the streets shall be improved. Courts can interfere only in cases of fraud and oppression, constituting manifest abuse of discretion. It necessarily follows that for the performance of this discretionary duty by the city officers in a reasonable and prudent manner no action can be maintained against the city." This doctrine, so clearly and forcibly stated by the learned justice, was apparently qualified to some extent in *State v. Higgs*, 126 N. C. 1014, 48 L.R.A. 446, 35 S. E. 473, but this last decision was itself overruled in the recent case of *Small v. Edenton*, 146 N. C. 527, 60 S. E. 413; and it may now be considered as established with us that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers conferred upon them for the public weal, and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion. This position is, we think, supported by the better reason, and is in accord with the decided weight of authority. *Brodnax v. Groom*, 64 N. C. 244; *Chase v. Oshkosh*, supra; *Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L.R.A. 580, 46 Am. St. Rep. 311, 39 N. E. 584; *Smith, Modern Law of Mun. Corp.* § 1311. True, the doctrine announced in *Tate v. Greensboro* was in reference to the removal of shade trees when considered as an obstruction to travel, but the dominant principle discussed and applied was in reference to the general power of a municipal government over its streets when exercised for the benefit and convenience of the public; and this principle is none the less potent, and its application none the less necessary, because the motive and purpose of exercising the power was for the preservation of the city sewerage. It is well established that the right of user for the last purpose arises to the public by reason of the dedication (*Elliott, Roads & Streets*, § 17); and, in a matter of such supreme and controlling importance, it would lead to most deplorable results if municipal governments could be stopped or hindered in their efforts taken in good faith to preserve the public health, unless their action should come clearly under condemnation within the principle announced as law in that decision.

Nor could any valid objection be made because no notice was given plaintiff. It is true that, when condemnation is required, notice must be provided for or given at some stage of the proceedings, though we have held in *State v. Jones*, 139 N. C. 613, 2 L.R.A.(N.S.) 313, 52 S. E. 240, that such notice is not required when the order of appropriation is made, but is sufficient if provided for when the appraisement is made or the amount of compensation is to be fixed; but that is where some right of the injured

party is wrongfully invaded, making condemnation proceedings necessary. In the present case, as we have endeavored to show, the authorities of the city, being in the exercise of discretionary powers, conferred upon them by the law for the welfare of the public, and, there being no evidence tending to show a want of good faith or oppressive abuse of their discretion, there is no legal right of plaintiff infringed upon. The injury, if any, suffered by her, is *damnum absque injuria*. We again refer to *Tate v. Greensboro*, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767, as authority for the position that no notice was required.

There is nothing here said which conflicts, or is intended to conflict, with the decision of this court in *Brown v. Asheville Electric Co.* 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62, cited, and to a great extent relied upon, by plaintiff. In that valuable opinion, delivered in protection of the just rights of the individual citizen, it was held that a municipal government had no power to confer upon a corporation exercising its privileges for purposes of private gain the right to construct and operate a street railway along the public streets of a city or town, so as to deprive abutting owners of their right to compensation by reason of the additional burden thus placed upon the streets. A perusal of the opinion will show that the decision was placed distinctly on the ground that such action of the city government was clearly not taken for the benefit of the public, or in the exercise of powers conferred for its benefit, and which were contemplated and included in the original act of dedication, but in promotion of a private enterprise. Accordingly it was held in that case: "(3) An abutting owner has property in shade trees standing along the sidewalk which the law will protect, and they may not be removed except where their removal is necessary for the use of the street as a public highway."

There was error in the judgment entered below, and, on the facts stated and admitted, there should be judgment entered that defendant go without day, and it is so ordered.

Reversed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.
WILLIAM H. BYARD.

(200 Mass. 175, 86 N. E. 285.)

Highways — moving building — permit.

1. A permit to move a building along a 20 L.R.A. (N.S.)

street will not justify the moving of a building larger than the one described therein.

Trees — removal — public official.

2. A tree warden has no authority to cut from a tree standing on private property branches extending over the street to aid the moving of a house along the street, under a statute permitting the surveyors and road commissioners to cause parts of trees standing on private property to be removed if they obstruct the way, or endanger, hinder, or incommode persons traveling therein, and providing for the cutting of trees standing in ways.

Same — mutilation — statutory penalty.

3. One is within the operation of a statute providing punishment for wantonly injuring a tree if he does a manifestly injurious act thereto wilfully in reckless disregard to the right of the owner.

Same — liability of tree warden.

4. A tree warden is subject to punishment under a statute prohibiting wanton injury to trees, where he proceeds irreparably to injure trees standing upon private property, which he has no authority to do, without trying to ascertain what his rights and duties are in regard to them.

(November 24, 1908.)

Case Note. — Authority of municipal officers to cut or trim tree on private property to facilitate use of street.

In *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380, it appeared that the tree cut down stood upon the line, partly within the street and partly within plaintiff's lot. It was held that the principle of law which would control the liability of the owner of a private lot for cutting a tree standing on the line between him and an adjoining proprietor was not applicable to a street commissioner, who is required by a reasonable necessity to hew to the line in the construction of a sidewalk and invested by statute with authority "to remove any obstacle which obstructs, or is likely to obstruct, a way, or render its passage dangerous;" that the commissioner was not liable in trespass for cutting the whole of the tree, if, after removing that portion within the street, the remaining portion would be a constant menace to public travel.

In *Gallaher v. Jefferson*, 125 Iowa, 324, 101 N. W. 124, it appeared that the city, under an ordinance which was not inherently unreasonable or otherwise improper, was about to lower the grade of the street 4 or 5 feet in front of plaintiff's property, and that the same would result in the destruction of two rows of shade trees,—one in the street 5 or 6 feet from the lot line, and the other 2 feet inside the lot line; and plaintiff sought to enjoin the same. The court, in denying the relief demanded, said that, when "such trees become a nuisance or an obstruction to public travel, or interfere with proper street improvements, then the power to remove the same cannot be ques-

EXCEPTIONS by defendant to rulings of the Superior Court for Bristol County made during the trial of a prosecution against him for wantonly injuring a tree, which resulted in his conviction. Overruled.

The facts are stated in the opinion.

Mr. Benjamin Cook, Jr., for defendant.

Messrs. James M. Swift and Frank B. Fox, for plaintiff:

The building was being moved for the private purposes of one individual, and not in any public interest, and did not give the tree warden a right wantonly to injure the complainant for the benefit of the owner of the building.

Lynn v. Essex County, 153 Mass. 41, 26 N. E. 409; *National Folding Box & Paper Co. v. Robertson*, 125 Fed. 525; *Werner v. State*, 93 Wis. 266, 67 N. W. 417; 30 Am. & Eng. Enc. Law, pp. 2-4.

Knowlton, Ch. J., delivered the opinion of the court:

The defendant was found guilty upon an indictment framed under Rev. Laws, chap. 208, § 100, as amended by Stat. 1902, chap. 544, p. 485, § 30, alleging that he "wilfully and maliciously and wantonly did injure a tree standing for a useful purpose, of the property of Minnie M. Glendon." This was a large cherry tree standing near the line of the street, within its owner's inclosure, and it had large branches extending over the street. One part of the trunk, about 14 inches in diameter, extended over the line of the street about 9 feet above the ground. One Nickerson obtained from the proper authorities a permit to move a building through the street, around the corner, into another street. Mrs. Glendon's lot at and

tioned." But, from all that can be gathered from the opinion, the court considered only the mutual rights of the city and the lot owner with respect to the trees "set out in the street," and made no allusion to the trees just inside the lot line.

In *Colston v. St. Joseph*, 106 Mo. App. 714, 80 S. W. 590, it was held not error to give the following instruction: "The jury are instructed that plaintiff cannot in this case recover any damages for the trees mentioned in evidence if the trees were wholly or partially in the street, and were not at the curb line, but were so located as to obstruct the travel or use of the street unless they were removed." It appeared in evidence, however, that, although the roots of the trees penetrated plaintiff's land, the trunks of the trees were wholly within the street.

In *Bradley v. Southern New England Teleph. Co.* 66 Conn. 559, 32 L.R.A. 280, 34 Atl. 499, it was held that the selectmen of a town had no power, without the consent of the owner, to cut and trim trees

near the corner abutted on both streets. The building was 5 feet longer and about a foot and a half wider than that described in the permit, and therefore the authority given did not justify the removal of this larger building through the street. Under Rev. Laws, chap. 52, § 13, which applies to cities as well as towns (Rev. Laws, chap. 26, § 2), its removal in that place was unlawful.

Its length and width were such that it was necessary to carry it over a part of Mrs. Glendon's land near the corner of the street, and to cut down a small tree in her yard, and Mrs. Glendon agreed with Nickerson that this might be done. Its width was so great, and houses upon the other side were so located, that it could not be taken through the street without cutting off branches and a part of the trunk of the cherry tree. The owner of the tree refused to permit this to be done, and the defendant, assuming to act under his authority as a tree warden, did it against her protest.

The first question that arises is: What is the authority of a tree warden under Rev. Laws, chap. 51, § 10? Does it include a right to cut down trees, or to cut off parts of trees, standing on private land outside of the boundary lines of the street? We are of opinion that it does not. The surveyors and road commissioners, under the last clause of this section, should cause parts of such trees to be removed if they obstruct the way, or endanger, hinder, or incommode persons traveling thereon. In the early part of the section an exception is made of "public shade trees in towns;" but trees and bushes standing in ways may be trimmed or lopped off, or, in pursuance of a vote of the mayor and aldermen, selectmen, or road commissioners, passed after public notice and a

growing on private property, but overhanging a highway, for the purpose of enabling a telephone company to relocate its line, since whatever power the selectmen possessed to direct where poles and wires of a telephone company should be placed was subject to a general statute which prohibited such companies from injuring trees without the consent of the owner.

In *Unwin v. Hanson* [1891] 2 Q. B. 115, it was held that the term "lop," as used in an act of Parliament authorizing justices of the peace to order "lopped or pruned" trees growing near the highway to its prejudice by excluding the sun and wind therefrom, meant to cut off the branches laterally; and neither under such an order nor at common law had the surveyor of highways any power to cut off the tops of trees growing on private land near the highway.

As to the right of a municipal corporation to cut or trim trees within the limits of the highway, see case note to *Rosenthal v. Goldsboro*, ante, 809.

hearing, may be cut down and removed by the officer who has the care of trees belonging to a city or town. But this part of the section has reference only to trees and bushes "standing in ways." The defendant had no legal right to cut off the branches of the tree, and the ruling on this part of the case was correct.

The defendant's counsel presented seventeen requests for rulings, some of which are covered by what we have said, and many of which relate to the meaning of the word "wantonly," used in the indictment. Under this indictment, it was not necessary to prove that the defendant acted maliciously. Indeed, the commonwealth did not contend that the charge of malicious action was sustained, and the judge instructed the jury that it was not sustained. The case was left to stand upon the allegation that the defendant acted wantonly.

The judge instructed the jury that "an act done heedlessly, without regard to the propriety demanded by the circumstances of the case, and in reckless disregard of the rights of others, with a total absence of care, amounting in this case to gross negligence by the defendant in the discharge of his duties as tree warden, would be an act done wantonly." We are of opinion that a manifestly injurious act, done wilfully in reckless disregard of the rights of others, is done wantonly within the meaning of this statute. *National Folding Box & Paper Co. v. Robertson*, (C. C.) 125 Fed. 525; *Werner v. State*, 93 Wis. 266, 67 N. W. 417; 30 Am. & Eng. Enc. Law, 2d ed, pp. 2-4. The jury were further instructed that, if the defendant, acting as a reasonable man, was justified in believing and honestly believed that he had the authority that he exercised, he was not guilty; but, if they found that if he had taken any proper precaution to learn of his rights and duties as tree warden he would not have acted as he did, and found that he was grossly negligent in the performance of his duties as tree warden, they might find that he acted wantonly. Wilfully to do an irreparably injurious act without trying to ascertain what his rights and duties were, and to go on in gross negligence of his duties, indicated a spirit of wantonness and reckless disregard of right and wrong in his conduct affecting others. We are of opinion that the instructions on this branch of the case were substantially correct, and that the defendant's requests were rightly refused.

We are also of opinion that there was evidence to which the instructions were properly applicable, and which well warranted the finding of the jury. There were a variety of circumstances tending to sustain the contention of the commonwealth. The defendant

admitted in cross-examination that he had not at any time taken any steps to inform himself as to his powers, duties, and authority as tree warden, except that he asked the mayor what he should do and was told to lop off trees in the highway which would obstruct carriages or the apparatus of the fire department; that he had never read any of the statutes or other sources of information concerning it, except that he looked once or twice in a book sent him by the state forester; that he had not seen anything in that concerning his duties in such a case as this; that he took no steps to inform himself as to his powers, duties, or authority after Mr. Nickerson made complaint about this cherry tree; that he did not attempt to ascertain what the permit was, or whether the building was of the dimensions given in the permit; that he made no inquiry of the mayor or the city clerk, and did not consult the city solicitor, although he knew he had a right to ask the city solicitor about it. It also appeared that he began the cutting without saying anything to the owner of the tree, and that, although he saw her husband and talked with him the evening before the cutting after he had viewed the premises and made up his mind to cut the tree, he said nothing to the husband about it. There was also testimony for the consideration of the jury as to the way in which the tree was cut and as to the defendant's having said that he was doing Mr. Nickerson a favor. The bill of exceptions shows no error of law at the trial.

Exceptions overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MINNEAPOLIS GENERAL ELECTRIC COMPANY, Plff. in Err.,

v.

MINNIE CRONON, Admr., etc., of James Edward Cronon, Deceased.

(— C. C. A. —, 166 Fed. 651.)

Electric wiring — control — fire — licensee — injury — liability of company.

1. Where the inside wiring for lighting by electricity of a private house, such as a shop, is done under an independent contract with the owner of the building, and is

Headnotes by PHILIPS, District Judge.

Note. — The duty of an electric light company with respect to wiring or fixtures installed in private property is discussed in a case note to *Fish v. Waverly Electric Light & P. Co.* 13 L.R.A.(N.S.) 226, to the decisions in which may be added the sub-

accepted by him and approved by the city inspector as sufficient, such inside wires become the private property of the proprietor of the building, and are subject to his exclusive control. A third party voluntarily and uninvited entering such shop to ascertain the cause of and to extinguish a fire therein is a mere licensee, to whom the company furnishing the electric current to the house owes no obligation other than not to wantonly or knowingly injure him. And, where such inside wiring becomes imperfectly insulated by the act of the owner of the building without notice thereof to the electric company, resulting in injury to such licensee,—Held, not to give a cause of action for such injury against the company in favor of the legal representative of the deceased licensee.

Trial — instructions — inferences — error.

2. It devolves upon the plaintiff in an action for damages based upon the negligence of the defendant not only to present in his petition a definite theory upon which the negligence is predicated, but to support it by tangible evidence as distinguished from mere conjecture and possibility. Where the evidence leaves the matter uncertain as to which one of several things immediately brought about the injury, for some of which the defendant is answerable and for others he is not, it is error for the court to single out a responsible act, and suggest to the jury that they may infer it, without directing their attention to other inferences, more or equally reasonable, exculpatory of the defendant.

Electricity — defective wiring — injury — liability of company — res ipsa loquitur.

3. The doctrine of *res ipsa loquitur* is at best uncertain, and should not be applied except where it not only supports the conclusion contended for, but also reasonably excludes all others. It is limited to cases of absolute duty, or an obligation practically amounting to that of an insurer. Held, that it cannot be invoked to hold liable an electric company furnishing a current of electricity to a private house, connecting with inside wiring owned by and under the exclusive control of the proprietor of the building, for an injury resulting directly from the imperfect insulation and condition of such inside wiring, merely because the electric company is producing and furnishing the dangerous and subtle element of

electricity under a contract with the owner of the building.

(December 14, 1908.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of her intestate. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Hook, Circuit Judges, and Philips, District Judge.

Messrs. M. B. Koon, Ralph Whelan, and William H. Bennett, for plaintiff in error:

The electric company owed no duty to the deceased, who was upon the premises as a trespasser or bare licensee, to inspect the inside wiring, or to keep it in repair and in a safe condition.

Memphis Consol. Gas & Electric Co. v. Speers, 113 Tenn. 83, 81 S. W. 595; National F. Ins. Co. v. Denver Consol. Electric Co. 16 Colo. App. 86, 63 Pac. 949; Cleveland, C. C. & St. L. R. Co. v. Ballentine, 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. 935; Woodruff v. Bowen, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113; Gibson v. Leonard, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; Hamilton v. Minneapolis Desk Mfg. Co. 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; Trouton v. New Omaha Thomson-Houston Electric Light Co. 77 Neb. 821, 110 N. W. 569; Hector v. Boston Electric Light Co. 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773; Sullivan v. Boston & A. R. Co. 156 Mass. 378, 31 N. E. 128; Keefe v. Narragansett Electric Lighting Co. 21 R. I. 575, 43 Atl. 542; McCaughna v. Owosso & C. Electric Co. 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73; Hargreaves v. Deacon, 25 Mich. 1.

Where an injury has been received from grasping a live electric wire after notice has been brought home to the injured person before injury, his contributory negligence will bar recovery for such injury.

Haynes v. Raleigh Gas Co. 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19

sequently reported case of Union Light, Heat & P. Co. v. Arntson, 157 Fed. 540, which holds that an electric light company owes a duty to prevent a dangerous current of electricity from entering a dwelling, not only to its patron, but to his family, servants, employees, and others who may be rightfully upon his premises; and that such patron's ownership and control of the building presents no such intervening human agency between the negligence of the electric light company and the injury there-

by occasioned as to preclude recovery, it being the current of electricity generated by defendant's dynamo, under its exclusive control and operation, and not the wires and lamps disconnected from the live current, which caused the injury.

See also, as holding in effect that an electric light company is not responsible for an injury, by electric shock, resulting from the condition of a fixture belonging to the person injured. Peters v. Lynchburg Traction Co. 108 Va. 333, 61 S. E. 745.

S. E. 344; *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66; *Henning v. Western U. Teleg. Co.* 41 Fed. 864; *Cumberland v. Lotting*, 95 Md. 42, 51 Atl. 841; *Wood v. Diamond Electric Co.* 185 Pa. 529, 39 Atl. 1111; *Danville Street Car Co. v. Watkins*, 97 Va. 713, 34 S. E. 884; *Frauenthal v. Laclede Gaslight Co.* 67 Mo. App. 7.

There is no liability when there is no control over the wires and no knowledge of the defect which occasioned the injury, by the person charged with negligence.

Memphis Consol. Gas & Electric Co. v. Speers and National F. Ins. Co. v. Denver Consol. Electric Co. supra.

Mr. Clark Hempstead also for plaintiff in error.

Mr. E. L. Sutton, with Mr. Arthur H. Noyes, for defendant in error.

Phillips, District Judge, delivered the opinion of the court:

The writ of error is to have reviewed the judgment of the circuit court in awarding defendant in error \$3,500 damages, resulting from the death of her husband, James E. Cronon.

About 6 o'clock A. M. on May 24, 1906, the deceased discovered smoke coming from the blacksmith shop of one Victor Nordloff, on Central avenue, in the city of Minneapolis, Minnesota. This shop was a small frame building of one room, one story in height, standing about 37 feet from the residence of the deceased. Finding the shop locked, Cronon thrust his hand through a broken pane of glass in the window, and, unfastening the window, entered the shop. He discovered that the wall near the window was afire, against which hung, suspended on a nail, an electric wire. This suspended wire was about 12 feet in length, with an incandescent electric bulb at the end, and was used by the blacksmith in shoeing horses and doing other work at nighttime, or when the day was dark. When not so in use the blacksmith hung this wire on a nail driven into the side wall of the shop. After entering the building through the window the deceased called to his wife to bring a pail of water, which she did and passed to him through said open window. He dashed the water on the fire, but failing to extinguish it called for another vessel of water, which his wife brought and passed to him in the same way, and which he threw on the fire with a like result. He then directed her to bring a larger vessel of water. As she turned to go, she testified, she heard him fall, and looking through the window discovered him lying on his back about 3 feet from said wall, with the end of the electric wire, broken off,

grasped in his right hand, his hand resting on his chest. The man she called to the scene passed in through the window and found Cronon dead. The palm of his hand holding the wire was badly burned, indicating that death thus resulted from the electric current, as there was no other mark upon his body indicating contact with the wire.

The evidence of the wife was that when she returned to the window the last time, again placing her hands on the sill, she felt perceptibly an electric shock. This was confirmed by the man who entered through the window. His testimony was that he was working in the railroad yards hard by, and, as it had been raining during the night he had on a rubber coat, and with him rubber gloves, which gave sufficient insulation to enable him to pass through the window without feeling any electric shock. As no such appearance of electricity was manifested at the window when the deceased passed and when the wife handed the first two buckets of water through the window, it is evident that the presence of sufficient electricity to be felt at the window did not manifest itself until after the suspended wire was separated from the nail on the wall and its broken end was left unprotected.

The inside wiring of the blacksmith shop was done under an independent contract by the plaintiff in error with the owner of the shop some three years prior to the accident in question, and it was inspected by the city authorities when completed, and accepted as sufficient. This inside wiring then became the private property of the owner of the building. The use of the suspended wire was for his own convenience, and the manner of hanging it against the wooden wall on the nail was of his own selection. From long use the insulating covering of this wire became much worn where it rested on said nail. There was no notice given to the electric company of this condition of the wire. When the blacksmith concluded his work the evening preceding the accident, he left the wire suspended on this nail. He closed and locked the shop and went to his home, and had not returned to his work at the time of the accident. The evidence further shows that the deceased frequented said shop, and had at times assisted the blacksmith in his work, and had knowledge of the use and position of said suspended wire.

The actionable negligence imputed by the petition to the company is as follows: "That, on the 24th day of May, A. D. 1906, and for a long time prior thereto, the above-named defendant had maintained said system or set of wires running into said blacksmith shop, a one-story frame building, known as 930 Central avenue, in the city of Minneapolis, Hennepin county, state of

Minnesota, as above described, for lighting purposes, and that such wires had, through the carelessness and negligence of the above-named defendant, become old, defective, and dangerous, the insulation having worn off to a large extent. That the insulation and support of said wires had become, through the carelessness and negligence of the defendant, defective and insufficient, so that they had become crossed and in contact with other wires belonging to said defendant company, or to some other company to this plaintiff unknown, in such a way as to become on the day above set forth highly and dangerously charged with a high and dangerous voltage of electricity, so that early on the morning of the day above set forth, and before the above-named blacksmith, Victor Nordloff, had come to his shop known as 930 Central avenue, said blacksmith shop was set on fire by the defective and improperly insulated wires of said defendant company."

A correct analysis of the foregoing specifications enforces the conclusion that the gravamen of the complaint is that the negligence of the company refers alone to the imperfect condition of the wires inside the building and the resultant injury therefrom. The predicate of the charge is that the company had maintained said system or set of wires running into said blacksmith shop; that such wires, through the carelessness and negligence of the defendant, had become old, defective, and dangerous, the insulation having worn off to a large extent. It further avers "that the insulation and support of said wires had become, through the carelessness and negligence of the defendant, defective and insufficient;" and that, by reason of this fact, they had become crossed and in contact with other wires of the defendant company or some other company, in such a manner as at the time in question to become highly dangerous and charged with a high voltage of electricity. And, to put this construction beyond tolerant debate, it concludes with the statement that "said blacksmith shop was set on fire by the defective and improperly insulated wires of said defendant company." So, throughout the trial, and as indicated by the charge of the court, the company was sought to be held responsible for the condition of the wires inside of the shop, as not being in condition to receive the charge of the current at that time sent into the building. The court refused to admit proof offered by the company that the shop was wired under an independent contract, paid for by the shop owner, and it became his property, and under the agreement was by him to be kept inspected and repaired; the assertion of the court being that it was the responsible duty

of the company furnishing the electricity to see to it that the inside wiring of the building was in safe condition for transmission into it of the electricity.

As if the issue tendered by the petition warranted it, the plaintiff below was indulged to introduce a lot of expert testimony for the purpose of showing that the charge of voltage passing over such wire was too great, and that it might be inferred that the company was guilty of some negligence in not seeing that its transmitters, at some undisclosed point on its system of wires, were out of order, without any other fact or circumstance from which such inference might be drawn, or that the cause thereof, occurring at that time of the morning, could have been known to or discovered by the defendant.

It is true the wiring done in this shop, some three years prior to the accident, was under contract with the company. But there was no pretense, and no foundation for any, that the work as done by the company was improper or imperfect, or that the fire resulted from any such cause. The suspended wire was for the convenience of the blacksmith, to be used in his own way. When not in use, as is frequently and safely done, he could have looped up the suspended wire out of the way, thus leaving it perfectly insulated. Or he could have hung it to one side free from contact with the wall. Instead thereof, or other safe method, he saw fit to hang it on a nail driven into the wall, so that the wire was thus placed in contact with the wall. Not only that, but he hung it over the nail for so long a time that the insulating covering of the wire became so broken and worn as to expose the live wire to the inflammable wooden wall, but for which the fire would not have occurred. This is a demonstrated, indisputable conclusion from the fact that there was another suspended insulated wire in the back part of the building and no danger came therefrom. So there is no reasonable escape from the conclusion that the immediate cause of the fire was the exposed condition of the live wire against the wooden wall of the building. That was the direct fault of the blacksmith, over whose action the company had no right of control.

The only answer made to this is that, as the company was manufacturing and furnishing for the building a highly dangerous and subtle force, under its immediate control in the transmission, it fell short of its duty to the owner and to the public who might chance to enter the building in not seeing that the inside wires were, at the instant, in such condition of repair and insulation as to prevent the impartation of

electricity from the exposed live wire to the building.

The only pertinent case cited in support of this extreme doctrine is that of *Maysville Gas Co. v. Thomas*, 25 Ky. L. Rep. 403, 75 S. W. 1129, and the antecedent case by the same court, cited in the opinion. The gas company furnished electricity to the Maysville Railroad & Transfer Company, a street railroad. The injury resulted from the electric current escaping through the negligence of the railway company. The court held that, on account of the dangerous character of the forces produced by the gas company, the duty was imposed both upon it and the railway company to see that the wires into which the electricity was sent by the gas company were properly insulated; that the danger was the same whether the wires were owned by one or both corporations; that the gas company was compelled to know that the means of its distribution were in such condition that those whose business or pleasure brought them in contact with it might do so with safety; and that both companies were liable. No considerate authority supports this proposition. Its recognition and enforcement by the courts would impose upon the company furnishing electricity under contract with the owner of a building, who had wired it and owned and controlled the wires inside, an intolerable burden. Take such a city as Minneapolis, with perhaps 20,000 dwelling and business houses wired inside, under an independent contract. The contract of the electrical company is to furnish the required amount of electricity to light these buildings. Can the company, unbidden, enter at will the private house of the citizen and pass into its various rooms to inspect these wires every day to see that they are in proper condition for the reception of the electricity it has contracted to sell? If so, it must employ a large retinue of competent men to do this work; and, as absolute insurers under the rule contended for, the necessities of the situation would demand that they should have free access to these buildings at all hours and under all conditions. Such a rule of law would tend to put concerns furnishing electricity to private houses out of business.

This question was passed upon by the court of appeals of Colorado, in *National F. Ins. Co. v. Denver Consol. Electric Co.* 16 Colo. App. 86, 63 Pac. 949. The insurance company undertook to hold the electric company responsible for the destruction of a part of the railroad station in Denver, on the theory that the fire was imparted to the building from the electric wires therein, attributable, as the insurance company claimed, to the negligent and

imperfect construction of this wiring. Although the electric company did not do this work, it was sought to hold it responsible on the grounds (1) that it had notice of the dangerous condition of the wires, which the evidence failed to sustain; and (2) that, under its contract to furnish so subtle and dangerous an element for lighting the building, it was its duty to have seen to it that the inside wires were at all times in a safe condition. That eminent jurist, Bissell, P. J., rejected this contention, and said, in effect, that to charge the electric company with responsibility for the imperfect and un-insulated condition of the wires in the building, of which it had no notice, would impose a burden beyond its contract and undertaking. He further said: "We do not assent to the position . . . that the electric light company had no business to deliver the current without informing the depot company of the danger attending its use, and particularly of the danger attending its use where the wiring was defective or its construction unskilful and negligent. Where parties undertake to wire their own property, and then apply to a light company to deliver a current to light the building, they must be assumed to take all risks resulting from the character of the wire which is put in the building and the method of construction which is adopted in putting it in. We do not believe that the principle contained in some cases to which our attention has been called . . . is at all applicable. . . . It is a matter of common knowledge, and in fact of universal knowledge, that an electric current is dangerous, and must be discreetly and prudently handled in order to avoid danger either to life or to property. We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling house or to a building, they are bound to see that the wires they put in and the connections they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by the individual who owns the property, it seems to us that their responsibility ends when the connection is properly made under proper conditions, and they deliver the current in a manner which will protect both life and property. We do not believe any such responsibility rests on the company as to require them to advise the persons who apply for the connection that they must see to it that the wiring is of a certain class or description, that it is insulated in a particular manner, and that there is no connection between it and the woodwork, and failing in this, that they will be liable for any damages which may

happen because of the negligent or unskilful nature of the construction. When parties wire houses they are supposed to have done it intelligently, and to have hired competent persons for the purpose, to whom alone they must look in case the work is improperly and unskilfully done."

The only difference between that case and this is that here there is no charge that the wiring in this shop was imperfectly or badly done, or that the injury resulted from original bad construction. But the injury is alleged to have resulted from the wires in the building being suffered to become worn and out of order, whereby the current or voltage sent into them escaped and did the injury.

In *Memphis Consol. Gas & Electric Co. v. Speers*, 113 Tenn. 83, 81 S. W. 595, *Speers* sued the company for the value of a horse, killed by electricity communicated from an illuminated sign on a post to which the horse was hitched. In hitching the horse the owner threw a small steel chain around the post, and fastened the two ends of the chain to the bit in the horse's mouth. The chain came in contact with a metal clamp containing the electric wire, improperly insulated, and the electric current was thus conducted to the horse's mouth and killed him. The wiring about the premises of the owner of the sign was done under his order, and was his property under his exclusive control. It was inspected and accepted by the city, just as in the case of the blacksmith shop in question. The only relation the gas and electric company sustained to this matter was that it furnished the electricity therefor, for which the owner paid. This testimony was excluded by the trial court, just as in the case at bar. The court said that, although electricity is a subtle and dangerous agent unless properly controlled, that fact did not place responsibility on the company when it simply furnished the electric current for the wires of the owner of the illuminated sign and post, and that there was no duty of inspection on the part of the company. By way of illustration, the court said that, although the gas used for illuminating purposes, uncontrolled, is also a dangerous agency, it could not be maintained that a company which made and furnished it to the pipes of the customer on his own premises would be liable for his asphyxiation, or one of his guests, or a stranger, caused by a leakage from the pipes. "Or, changing the illustration, should there be so violent an explosion of the gas accumulated from the leak that the house of his neighbor, who has no interest in or control over them, was injured; could it be said the company furnishing the gas was liable to either for his

20 L.R.A. (N.S.)

loss?" The court maintained that the liability of the company for such a defect is dependent upon the interest in or control over the appliance in which the defect exists. It then said: "The Circuit Judge, in excluding the testimony as to the ownership and control of the defective wires by another than the plaintiff in error, as well as in his charge, was controlled by the case of *Maysville Gas Co. v. Thomas*, supra. While the opinions of that court are entitled to the highest respect, yet we are not able to coincide with its reasoning in that case. The sounder view, we think, is that of the court of appeals of Colorado, as expressed in *National F. Ins. Co. v. Denver Consol. Gas & Electric Co.* supra." Then, speaking of the conclusion reached in the Kentucky case, the court said: "Pressed to its legitimate conclusion, we think this argument would make an electric or a gas company an insurer against defects in appliances over which they had no control, and, to avoid liability, would impose upon them the duty of continued inspection of the wires and pipes of every customer supplied with their products. This would be a burden which no such company could bear and live; and it also would be a source of annoyance to its customers, which they would not long submit to."

The circumstances persuasively indicate that the most rational inference to be drawn by the impartial mind is that the deceased voluntarily undertook to disconnect the wire from the wall with his hand. The wire was on the nail when he entered the building; it was there until after the second bucket of water was thrown on the fire. Immediately after his wife turned to go for the third bucket of water she heard him fall, and looking into the window discovered him lying on his back, grasping the end of the wire in his hand. How did the wire get into his hand? Is not the more reasonable answer: Discovering that the water had not extinguished the blaze, he conceived the idea of detaching the wire from contact with the wood, to end the impartation of the electric current, so that when the third bucket of water arrived he could the more certainly extinguish the fire? But the court, to parry the force of this inference, gave license to the jury in its charge to enter the wide field of possible conjecture, by suggesting to them that they might consider the fact that the instinct of self-preservation would dictate to a man of common sense not to take such an obvious live wire in his naked hand; and, therefore, the jury were at liberty to assume that he grabbed the wire in his hand as it fell, to protect himself from contact with it. If his body had shown evidence of

the wire having struck it first, there might be some reasonable basis for the jury to indulge such presumption. But there was no such evidence. Where he stood and fell was about 3 feet from where the wire hung on the wall. If it fell from the nail, would it have struck him where he stood? If so, where is the proof? "It is not permissible to guess at the cause of an injury, and assume it is something for which the defendant is responsible." *Reese v. Clark*, 146 Pa. 465, 23 Atl. 246. The rule, and a sane one, laid down by the Supreme Court, in *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, is that it is not sufficient to show that an accident happened and an injury ensued. The evidence must point out that the negligence of the defendant was the direct cause.

"Where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." This rule was recognized by this court in *Chicago & N. W. R. Co. v. O'Brien*, 67 C. C. A. 421, 425, 132 Fed. 593-597.

When an alleged injury may have been due to one or the other of two causes, either one of which may have been the sole proximate cause, there can be no recovery unless it is shown that, as between the two causes in question, it was the negligence of the defendant which caused the injuries. *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *The Nellie Flagg* (D. C.) 23 Fed. 671; *Hartford County v. Wise*, 75 Md. 38, 23 Atl. 65.

If the deceased took hold of the live wire to disengage it from the wall, it was both a voluntary and reckless act, and the maxim *Volenti non fit injuria* would apply.

A plaintiff is required to develop a theory upon which the actionable negligence of the defendant is claimed, and such theory must be supported by tangible evidence. The jury may not be indulged, against visible facts contradicting it, to guess that it was otherwise. The burden of proof ought not to be shifted after such fashion, to enable the plaintiff to recover. The palpable, undisputed evidence is that, when the deceased voluntarily entered the building, the wire was in its place on the wall. Shortly thereafter he was found dead grasping the wire in his hand; and the indisputable further fact appears that it was the electrical current through this hand that caused his death. Against this obviously reasonable

conclusion, it devolved upon the plaintiff to show that the deceased did not voluntarily so grasp it. It was certainly unequal for the court, in its charge, to throw into the scale the said suggestion to the jury, without also directing their special attention to the counter obvious inference, inculpatory of the action of the deceased.

The doctrine of *res ipsa loquitur*, invoked in argument, has no place under the facts of this case. At best it is uncertain, if not dangerous, in practice, and should not be applied, "except when it not only supports the conclusion contended for, but also reasonably excludes all others." *Peirce v. Kile*, 26 C. C. A. 201, 53 U. S. App. 291, 80 Fed. 865; *Chicago & N. W. R. Co. v. O'Brien*, 67 C. C. A. 421, 132 Fed. 593; *Northern P. R. Co. v. Dixon*, 71 C. C. A. 555, 139 Fed. 737.

The qualification of the doctrine is aptly expressed by the court in *Zahniser v. Pennsylvania Torpedo Co.* 190 Pa. 353, 42 Atl. 708, as follows: "The maxim *res ipsa loquitur* is itself the expression of an exception to the general rule that negligence is not to be inferred but to be affirmatively proved. The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute, and show not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows as that complained of. It is sometimes said that the mere happening of an accident in this class of cases raises a presumption of negligence, but this is hardly accurate. Negligence is never presumed. If it were, it would be the duty of the court, in the absence of exculpatory evidence by the defendant, to direct a verdict for the plaintiff, whereas in these cases the question is for the jury. The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury."

Sufficient answer to its application to this case is that the place where the injury occurred was in the exclusive control of another, and the defect in the wire that occasioned the injury was not the fault of the electric company.

We need have no contention with the line of authorities cited by counsel for defendant in error, holding that where, in consequence of the defective construction of an electric wire or its imperfect insulation, attributable to the electric company, or when a live wire without insulation is suffered

by the company to lie in a position to injure a person rightfully coming in contact with it, responsibility may attach to the company. The following cases illustrate this rule:

Jones v. Union R. Co. 18 App. Div. 267, 46 N. Y. Supp. 321, where the plaintiff was standing at night upon the streets of the city, and a span wire used to support a trolley wire carrying a current of 500 volts broke a few feet beyond the insulator which carried the trolley, and, falling, burned through the plaintiff's hat and destroyed one of his eyes. It was held that the defendant company owed the duty of constructing its plant and maintaining it reasonably safe and secure for the public who might use the street. The liability there ensued from the want of care in construction and repair of wires owned by the company over and above the public highway.

The case of *Griffin v. United Electric Light Co.* 164 Mass. 492, 32 L.R.A. 400, 49 Am. St. Rep. 477, 41 N. E. 675, was where a tinsmith was engaged in placing an iron conductor on a building, upon the side of which an electric wire ran. He received a shock from the wire by reason of a pipe coming in contact with a wire where the insulating material was worn off. The court said: "The plaintiff was not a trespasser or a mere licensee who must take the premises of another as he finds them. He was rightfully on the premises for purposes of business. . . . These were a source of danger unless properly insulated. . . . It [the defendant] was negligent if it failed to use reasonable diligence in seeing that its wires were kept in a state of repair. This duty it owed at least to every person who, for purposes of business, was rightfully upon the premises."

In *Thomas v. Wheeling Electrical Co.* 54 W. Va. 305, 46 S. E. 217, the electric company left its wires with the ends detached, not properly wrapped or covered, and it was worn and dangerous. They remained in such condition for a long time, without inspection. An opera company which leased the building for a time tacked advertising banners on the balcony. At the expiration of the lease a man twenty-one years of age was sent up to gather the banners. He went upon the balcony to untack them, and while engaged in this work in the nighttime came in contact with one of the electric wires, which he grasped with his left hand, and was transfixed by the shock. It was held that the company was guilty of negligence in not properly insulating or protecting the wire, as against a party who had business there to perform.

In *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L.R.A. 637, 64 Am. St. Rep. 592, 37 Atl. 730, electricity escaped from a 20 L.R.A. (N.S.)

street railway and injured a horse driven on a public street. It was held that this was presumptive proof of negligence in the operation of the railway. The doctrine of *res ipsa loquitur* was applied to the situation.

In *Devlin v. Beacon Light Co.* 192 Pa. 188, 43 Atl. 962, the electric light company, in making some alterations in its line, allowed an arc light wire to lie upon the pavement in a much-traveled part of the city, without guard or warning to passers-by. The plaintiff stepped upon it and received a shock. It was held that that was sufficient evidence of negligence on the part of the defendant to require it to explain.

On the other hand, the more pertinent cases are as follows: *Sullivan v. Boston & A. R. Co.* 156 Mass. 378, 379, 31 N. E. 128, presents the case of a boy who went upon the roof of a shed of a railroad company to recover a ball, and he was killed by coming in contact with two naked copper wires attached to the shed, used in the business of the company for conducting electricity. The court said: "If the plaintiff's intestate was not a trespasser, which we do not decide, he was at most a mere licensee, and, so far as he was concerned, the defendant had a right to arrange and use its property in any lawful manner, and owed him no duty with respect to it, except to refrain from setting a trap for him, and from doing him intentional or wanton harm. . . . The live electric wire with which the deceased came in contact was a lawful apparatus, used in the ordinary business of the defendant, and was not designed as a trap."

In *Woodruff v. Bowen*, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113, the defendant had erected a building which, under ordinary circumstances, was reasonably safe. It became unsafe by reason of the storage of a large quantity of goods by a tenant, and by reason of the additional fact that, in an extraordinary emergency by fire, large quantities of water were thrown into the building, causing it to collapse. Firemen, in the discharge of their duty, were killed. It was held that the owner of the building was not responsible in damages for the death of the firemen, who were on the premises under a mere license conferred by law. "The licensor owes to a mere licensee no duty except that of abstaining from any positive wrongful act which may result in injury to the licensee, and the licensee takes all risks."

In *Hamilton v. Minneapolis Desk Mfg. Co.* 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693, it is held that at common law the owner of a building owed no duty to keep it in a reasonably safe condition for members of the public fire department, who, in the exercise of their duty, have occasion to enter the building.

In *Hector v. Boston Electric Light Co.* 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773, a lineman employed by a telephone company, for the purpose of affixing wires of the company to a standard erected on the roof of a building by the electric lighting company, had an implied license to reach the roof by going up through the building. But he used a different way, and, while unnecessarily upon the roof of an adjoining building, was injured by coming in contact with an uninsulated wire charged with electricity belonging to the electric lighting company. It was held that he was not entitled to recover. Field, Ch. J., observed that: "Whatever duty . . . the defendant owed to the plaintiff as servant of the telegraph and telephone company, under its license to that company to use the standard for the support of telegraph or telephone wires, this duty cannot be held to extend over the whole circuit of the defendant's wires; and the defendant was not required, for the protection of the servants of the telegraph and telephone company, to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed, at places where the defendant had no reason to expect that the servants of that company would go in the performance of their duties in using its standard, and where the defendant had neither invited nor licensed them to go."

In *Keefe v. Narragansett Electric Light Co.* 21 R. I. 575, 43 Atl. 542, the testimony showed that the plaintiff, a girl about eleven years of age, climbed out of the window of a house in which she lived onto the jet of the adjoining house. While so walking she came in contact with electric wires owned by the tenant of that building, which were connected with the defendant's wires for transmitting electricity at the houses. The court said: "We do not think that the action can be maintained: First, because the wires by which the plaintiff was injured were not the wires of the defendant; and, secondly, even if they had been, we fail to see that the defendant would have owed any duty to the plaintiff, since it could have had no reason to anticipate the act of the plaintiff in walking along the jet."

In *Augusta R. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203, a lineman for a telephone company, in working for his company, placed a telephone wire above and across a fire-alarm wire, ascending the pole of the fire-alarm system for that purpose. In passing the telephone wire over the fire-alarm wire he received an electric shock. The claim made was that the street railway company was negligent in constructing the feed wire so that it came in contact with the fire-alarm wire and charged it with a dangerous current, and that this negligence caused the injury. The claim was disallowed, on the ground that the street railway company owed him no duty and was not liable for injury that happened to him while, without permission, he was upon the pole of the fire-alarm system.

The authorities bearing upon this feature of the case are collected and reviewed in a very thorough manner in *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89, and in *Trouton v. New Omaha Thomson-Houston Electric Light Co.* 77 Neb. 821, 110 N. W. 539, in which it was held that a fireman who enters upon private premises for the purpose of extinguishing a fire, without the special authority or invitation of the owner, is a bare licensee, made such by public necessity, and takes the risk of the premises as he finds them. The evidence showed that for some unexplained cause a severe shock of electricity came from one of the low-pressure wires which the fireman supposed was harmless. The doctrine of *res ipsa loquitur* was invoked. The court said: "It is only when the defendant is under an absolute duty to prevent the results that their appearance shows negligence." There, as here, although the wire may not have been at the instant properly insulated, the party coming in contact with it did so voluntarily and unnecessarily.

In *Cleveland, C. C. & St. L. R. Co. v. Ballentine*, 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. 935, a train of tank cars, filled with petroleum, took fire, and a boy seventeen and a half years old, out of curiosity, went upon the premises and perhaps rendered some service there. Jenkins, J., quoted the rule that "it is not everyone who suffers loss from another's negligence who may recover therefor. Negligence, to be actionable, must occur in breach of a legal duty arising out of contract or otherwise, owing to the person sustaining the loss;" citing *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Kahl v. Love*, 37 N. J. L. 5. Although the setting fire to the oil tanks resulted from the negligent act or omission of the servant of the railroad company in misplacing the switch, he said: "That negligent act or omission, however, was not in breach of any duty owing to Ballentine, and as to him was innocuous, he being 2 miles away at the time, and unaffected thereby. . . . He went upon the grounds of the railroad company, where he had no right to be, and going there, at best, as a mere licensee, he was bound to take things as he found them, and he assumed the risk of the situation. *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 24 U. S. App. 182, 63 Fed. 942. So it is held that firemen entering

upon premises to extinguish a conflagration and to save property do so, not by permission or invitation of the owner, but under license of the law, and they also must take the risks as they find them. . . . The railway company owed to him no active duty,—only the duty to abstain during his presence on the premises from positive wrongful act which might result in injury to him. It was not bound to remove the burning cars to another part of its yards, either in the discharge of any duty towards him, or, so far as the record discloses, in discharge of duty towards anyone."

The case was tried by the learned trial judge upon a false theory of law, and the request of the defendant below for a directed verdict should have been granted.

It results that the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to grant a new trial.

MISSOURI SUPREME COURT.
(Division No. 2.)

WILLIAM H. DONOVAN et al.

v.

JAMES R. GRIFFITH.

(215 Mo. 149, 114 S. W. 621.)

Curtsey — trust estate.

1. The conveyance to a man of land purchased with funds from the separate estate of his wife, and his holding the legal title at the time of her death, will not prevent his having curtesy in the property.

Same — prior death of child.

2. That the wife's title to real estate is not acquired until after the death of the

only child of the marriage will not deprive the husband of curtesy in the property.

Same — entreties.

3. That an estate purchased by funds from the wife's separate estate is conveyed to husband and wife jointly does not deprive him of his curtesy in the property.

Entreties — trust funds.

4. A conveyance to a man and wife jointly of real estate purchased by him with funds partly his own and partly belonging to his wife's separate estate, without her written authority to do so, does not create an estate by entreties, but equity will protect her interest in favor of her heirs.

Wife — heirs — curtesy — rents.

5. In a proceeding by heirs of a wife for partition of real estate purchased wholly or partly with funds from her separate estate and standing in the name of her husband or in their joint names at the time of her death, he is not chargeable for rents accruing on the property before her death, whether it was occupied by him or rented to others, where the parties were living together and there is nothing to show that both did not enjoy the benefits and products of the land.

(December 15, 1908.)

CROSS APPEALS from a decree of the Circuit Court for Pike County partitioning certain real estate; plaintiffs appealing from so much of the decree as recognized an estate by curtesy in the property, and defendant appealing from so much as granted partition. Modified.

Statement by Fox, P. J.:

This is a proceeding by which it is sought to declare that certain undivided portions of certain lands are held in trust by de-

Case Note. — Effect upon curtesy of death of issue before seisin by wife.

From the days of Littleton till the present time all the authorities, with but a single exception, as will be seen hereafter, have held that, as to the husband's right of curtesy in the lands of his wife, it is immaterial whether the issue was living or dead at the time of the seisin by the wife. Such was the conclusion reached with little or no discussion of the question, in the following authorities: Co. Litt. 29b; 2 Bl. Com. 128; 4 Kent, Com. 28; 1 Greenleaf's Cruise, Real Prop. title 5, chap. 1, §§ 7, 18; 8 Am. & Eng. Enc. Law, p. 515; Hunter v. Whitworth, 9 Ala. 965; McDaniel v. Grace, 15 Ark. 465; Heath v. White, 5 Conn. 228; Zeust v. Staffan, 16 App. D. C. 141; Jackson ex dem. Swartwout v. Johnson, 5 Cow. 102, 15 Am. Dec. 433; Templeton v. Twitty, 88 Tenn. 595, 14 S. W. 435; Paine's Case, 8 Coke, 34a; Menvil's Case, 13 Coke. 19.

The only case opposed to this rule of law is Haywood v. Moore, 2 Humph. 584, in which the court used the following language: 20 L.R.A. (N.S.)

"One requisite to constitute a tenancy by the curtesy is that the wife have issue capable of inheriting her estate. Therefore, if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female cannot inherit the estate in tail male." 2 Bl. Com. 127, 128. Here . . . [the wife] never had issue capable of inheriting this estate, because she became seized of the fee after the death of her son, and after being thus vested with the estate she had no child born."

But in Templeton v. Twitty, supra, the foregoing case was said not to be in conflict with the other authorities upon this question, and to have well decided that the husband had no curtesy. The court distinguished it in that the wife and her only child both took the land as purchasers under the same deed, she a life estate, and the child the remainder, and in that the child could never by any possibility inherit the estate from his mother, for the reason that he must die before she could take it.

defendant for the plaintiffs, and, after the ascertainment of the interests of the parties in this land, to partition the same in accordance with the laws of this state. There are two 40-acre tracts of land, situated in Pike county, Missouri, which are involved in this proceeding, one is known as the "Pritchett 40" and the other as the "Thornton 40," so called from the respective names of the grantors. Leona Griffith was the wife of the defendant James R. Griffith. They were married on January 30, 1895, and on January 4, 1900, a child was born of this marriage. This child died on October 15, 1903. Leona Griffith, the wife of the defendant, and the mother of the deceased child, died April 9, 1904. She died intestate, and left no debts. The only heirs at law surviving Leona Griffith were her husband, James R. Griffith, the defendant herein, William H. Donovan, her brother, and Carrie I. Boyd, her half-sister, both of whom are plaintiffs in this cause. The petition described the land in controversy, and averred that the wife, Leona Griffith, furnished the entire purchase price of each 40 acres out of her own separate money and means. Upon this state of facts the chancellor was asked to declare that the defendant, James R. Griffith, held the legal title to said lands as trustee for the wife, and since her death as trustee for her heirs at law, the plaintiffs in this cause. The interests of the parties in said real estate were alleged in the petition to be as follows; that is to say: William H. Donovan, one third, Carrie I. Boyd, one sixth, and James R. Griffith, one half. From the allegations in the petition it was further sought to charge the interests of James R. Griffith with certain rents arising from said lands which he had received from the date of the acquisition of title, which it is averred belonged to his wife, and was converted by him to his own use. The answer of the defendant, James R. Griffith, admitted that Leona Griffith, the wife of the defendant, died intestate in Pike county, Missouri, on the 9th day of April, 1904. He also admitted that, by and through his deceased wife, Leona Griffith, he received and invested in the lands described in plaintiff's petition the sum of \$925, and no more. Further answering, the defendant says: "That there was born during the marriage of himself and deceased wife, Leona Griffith, one child, named ——— Griffith, and that said child died on the ——— day of ———, 1904; therefore, defendant says that he has a curtesy interest or life estate, in the remaining one half of the land so purchased as aforesaid with the money of his deceased wife, Leona Griffith, and therefore denies the right of plaintiff to partition the lands in question. Further answering, he says that he invested the

money of his wife as her agent and as she directed. Defendant, further answering, denies each and every allegation, statement, and charge made by plaintiffs' petition, not hereinbefore admitted to be true, and, now having fully answered, asks to be discharged with his costs." Plaintiffs' reply was a general denial of the new matter contained in defendant's answer.

Testimony was introduced by both plaintiffs and defendant upon the issues presented, and the court, at the close of the testimony, took the case under advisement, and subsequently made a special finding of facts and entered its decree, which finding of facts and decree were as follows: "Now, at this day, again come the parties to the above-entitled cause, plaintiffs appearing by Hoster & Jones, their attorneys, and the defendant appearing by Ball & Sparrow, his attorneys, and the court having had this cause under advisement since the hearing of the testimony and the submission of the same on a former day of this term of court and after the argument of counsel, and being fully advised in the premises, makes the following written finding of facts and conclusions of law, which are as follows, to wit: Finding in reference to Pritchett 40: Defendant owns $\frac{1}{2}$ in his own right. Defendant owns $\frac{1}{4}$ by inheritance from his wife. Defendant owns curtesy in $\frac{1}{4}$. Defendant owes estate of deceased wife $\frac{1}{2}$ rental value of $\frac{1}{2}$ of wife's share for five years; i. e., $\frac{1}{2}$ of \$276.90, to wit, \$138.45. That, on the date of the death of the Mrs. Griffith, defendant was indebted to her on account of said rental value in the sum of \$276.90. That one half thereof, viz., \$138.45, became the property of defendant by inheritance from his deceased wife. This leaves the sum of \$138.45, for which, as trustee of his wife's interest in said land, the defendant should account, and his marital interest acquired from his wife in said lands should be and is charged with the repayment of said sum of \$138.45. That the plaintiffs William H. Donovan and Carrie I. Boyd, as the sole surviving (collateral) heirs of said Leona Griffith, are entitled to have and receive from defendant before he receives any part of the sum that may be realized from the sale of said Pritchett lands belonging to said Leona Griffith said sum of \$138.45, said Donovan being entitled to two thirds thereof, i. e., \$92.30, and Carrie Boyd to one third thereof, i. e., \$46.15. That the interest of the respective parties in said Pritchett lands is as follows: Defendant is owner in his own right of a $\frac{1}{2}$ interest in said lands. Defendant is the owner, by inheritance from his wife, of a $\frac{1}{4}$ interest in said lands subject to said charge of \$138.45. Said defendant is the owner of a curtesy estate

in $\frac{12}{100}$ interest in said lands. Said Donovan is the owner, subject to defendant's said curtesy estate, of a $\frac{12}{100}$ interest in said lands. Said Carrie Boyd is the owner, subject to said curtesy estate, of a $\frac{12}{100}$ interest in said land. That, in purchasing the Thornton 40-acre tract for \$1,100 defendant invested \$275 of his wife's money in said purchase, and defendant, by reason thereof, held the legal title to one fourth thereof in trust for his wife, Leona. Defendant is the owner in his own right of an undivided three fourths interest in the Thornton 40 acres. Defendant is the owner by inheritance from his wife of an undivided one eighth interest in said land. Decree of partition, order of sale of said land by sheriff at public sale to highest bidder for cash in hand at regular October term, 1904, of this court. Said tracts to be sold separately. In case the full amount of said charge of \$138.45 shall not be realized from the sale of defendant's interest in the Pritchett 40, the remaining balance shall be deducted from the proceeds of defendant's interest inherited from his wife in the Thornton 40 and paid to said Donovan to Carrie Boyd's guardian in the respective proportion aforesaid. The court doth further find that Leona Griffith was the wife of James R. Griffith, and that she died intestate at the county of Pike and state of Missouri on the _____ day of April, 1904, without issue and without any father or mother surviving her and leaving as her sole heirs at law her husband James R. Griffith, defendant herein, and her brother, William H. Donovan, plaintiff herein, and her sister of the half blood, Carrie I. Boyd, also a plaintiff herein.

"The court further finds that during the coverture there was born to said Leona Griffith and her husband, James R. Griffith, a child which lived for some months, but died prior to the death of said Leona Griffith. The court further finds that during the coverture Mary E. Pritchett and S. A. Pritchett, her husband, conveyed to the said James R. Griffith and Leona Griffith, his wife, by proper and suitable deed of conveyance, the title to the following described real estate, situated in Pike county, Missouri, to wit: Beginning at a cornerstone from which a pin oak 20 inches in diameter bears north 36 degrees east, 3.35 chains, the same being the southwest corner of S. A. Pritchett's land; thence south, 13.04 chains, to Mrs. Sallie Porter's land; thence east, with Mrs. Porter's north line, 33.50 chains, to Salt river; thence north, with the meanderings of Salt river, to the southeast corner of S. A. Pritchett's land; thence west, with Pritchett's south line, 27.90 chains, to place of beginning, containing in all 40 acres, more or less, and all being in section 14, township 20 L.R.A. (N.S.)

55 N., range 3 W., said deed of conveyance being recorded in Book 113, at page 567, of the deed records of Pike county, Missouri. The court finds that during said coverture the defendant, James R. Griffith, acquired by a proper deed of conveyance from Ella Thornton and others the legal title to the following described real estate, also situated in Pike county, Missouri, to wit: The N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 14, in township 55, range 3 W., containing 40 acres, more or less.

"The court further finds that in the purchase of the first-named 40 acres, which was acquired from Mary E. Pritchett and husband, the defendant contributed $\frac{12}{100}$ of the purchase money and that $\frac{12}{100}$ was the separate money and means of his wife, Leona Griffith, and that in the purchase of the last-named 40 acres which was acquired from Ella Thornton et al. defendant contributed $\frac{3}{4}$ of the purchase money and the remaining $\frac{1}{4}$ was the separate money and means of his wife, Leona Griffith.

"The court further finds that, upon the acquisition of the title to said Thornton 40 acres, the defendant, James R. Griffith, held the legal title to an undivided one fourth interest therein in trust for his said wife, Leona Griffith, and that, upon the death of said Leona Griffith, he holds the legal title to that portion of the Pritchett 40 acres which was paid for by her separate money and means in trust for the heirs of his said wife subject to his own right of inheritance and the marital interests therein, and that he now holds the legal title to one-fourth interest in the Thornton 40 acres in trust for the heirs of said deceased wife subject to his own interest by inheritance and to his marital interests therein; and it is ordered and decreed by the court that that portion of the title to each of the 40-acre tracts above mentioned now be held in trust by the defendant, James R. Griffith, for the plaintiffs William H. Donovan and Carrie I. Boyd be and the same is hereby vested out of the defendant and vested in the plaintiffs. In accordance with the written findings made by the court and filed in this cause and set out hereinbefore in this decree, it is considered and adjudged by the court that the said lands are not susceptible of division in kind, and the same is hereby ordered sold by the sheriff of Pike county, at public sale, to the highest bidder for cash in hand at the next regular October term, 1904, of this court, in accordance with the statute governing sales of real estate in partition. It is further considered and adjudged by the court that said tract be sold separately, and that, in case the full amount of the said charge \$138.45 shall not be realized from the proceeds of the sale of the said James R. Grif-

fifth's interest in the 4¹/₂ acres acquired from Mary E. Pritchett et al., the remaining balance of such charge shall be deducted from the proceeds of the sale of the defendant's, James R. Griffith's, interest inherited from his wife in the said Thornton 40 acres, and shall be paid to the plaintiffs in the respective portions as hereinbefore found and adjudicated; and it is further ordered by the court that the sheriff make report of his proceedings under this order as soon as the sale had thereunder shall be consummated, and that no distribution be made by said sheriff until further order of this court; and it is further ordered that this cause be and the same is hereby continued." To which action of the court plaintiffs and defendant excepted at the time and saved their exceptions.

There is little or no dispute as to the facts developed upon the trial of this cause, and it is sufficient to say that the testimony introduced furnished ample support to the finding of the trial court, with the exception of that portion of its finding concerning the charge sought to be made upon the interests of the defendant in the land involved as to rents. We do not deem it necessary to set out in detail the testimony of the witnesses in this cause, but will further refer to the general tendency of the testimony during the course of the opinion.

Both plaintiffs and defendant preserved their exceptions to the action of the court in its findings of facts and the decree rendered, and on October 20, 1904, both plaintiffs and defendant filed their motions for a new trial, which were, by the court, overruled, and this appeal was prosecuted by both sides from the finding and decree rendered by the trial court to the supreme court, and the record is now before us for consideration.

Messrs. Hostetter & Jones, for plaintiffs:

Where the separate means of the wife are invested in land by the husband without her written assent, the title is held by him in trust for the wife, and at her death for her legal heirs, to the extent which her separate means contributed to the purchase price.

McLeod v. Venable, 163 Mo. 536, 63 S. W. 847; *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261; *Winn v. Riley*, 151 Mo. 61, 74 Am. St. Rep. 517, 52 S. W. 27; *Hurt v. Cook*, 151 Mo. 431, 52 S. W. 396; *Scrutche-field v. Sauter*, 119 Mo. 615, 24 S. W. 137; *Seay v. Hesse*, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633; *McGregor-Noe Hardware Co. v. Horn*, 146 Mo. 129, 47 S. W. 957; *Johnston v. Johnston*, 173 Mo. 115, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202.

The wife, and her heirs when she is dead, can hold the husband liable for conversion 20 L.R.A. (N.S.)

of her rents, issues, and products arising from her real estate.

Gordon v. Gordon, 183 Mo. 294, 82 S. W. 11; *Miller v. Slupsky*, 158 Mo. 643, 59 S. W. 990; *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001.

Messrs. Ball & Sparrow, for defendant:

The lands are not subject to partition since the defendant inherited one half of his wife's interest in the money invested, and the other he owns as tenant by the curtesy.

Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001; *Tremmel v. Kleiboldt*, 75 Mo. 255; *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463; *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95; *Alexander v. Warrance*, 17 Mo. 228; *O'Brien v. Ash*, 169 Mo. 283, 69 S. W. 8; *Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161; *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137.

The deed was made to Griffith and wife, and therefore was a deed by entirety, and upon the death of the wife the defendant became the absolute owner in fee.

Garner v. Jones, 52 Mo. 68; *Hall v. Steph-ens*, 65 Mo. 670, 27 Am. Rep. 302.

Fox, P. J., delivered the opinion of the court:

The record discloses that the complaint of the plaintiffs is solely directed to the recognition by the trial court of an estate by the curtesy in the defendant, James R. Griffith, in the aliquot parts of the respective tracts designated in the special findings of the court. The errors complained of on the part of the defendant appellant challenge the correctness of practically all the findings of the court and its decree ordering a partition of the land involved in this proceeding. We will first direct our attention to the complaint of the plaintiffs, who are appellants also in this case, respecting the recognition given by the court to the estate of curtesy claimed by the defendant. The testimony as disclosed by the record applicable to this proposition shows that the Thornton 40-acre tract of land was conveyed to James R. Griffith alone on February 20, 1904, which was shortly after the death of their only child.

1. It is insisted that the entire legal title to the Thornton 40 having been conveyed to the husband, James R. Griffith, the defendant in this cause, that the wife, Leona Griffith, was never seised of that 40, and that seisin was always essential to establish curtesy. It is sufficient to say upon that proposition that learned counsel for the plaintiffs overlook the question that the wife was seised of an equitable estate. Certainly that will not be disputed by the plaintiffs, for the reason that the very foundation of

this action, in which it is sought to have the chancellor declare that the legal title to this 40 acres should be held in trust for the wife, and, she being dead, in trust for the plaintiffs to this action, fully recognizes that the wife did have in this 40 acres at the time of her death an equitable estate, otherwise the plaintiffs would have no standing in this court. Their right to successfully maintain this action is predicated upon the theory that the wife at the time of her death was in equity entitled to certain interests in the lands involved in this controversy. The facts developed upon the trial of this cause and the finding of the trial court indicate very clearly that the wife was entitled in equity to certain portions of the lands involved in this controversy, and that it was the equitable separate estate of the wife, and that she died seised of that equitable estate.

In *Woodward v. Woodward*, 148 Mo. loc. cit. 247, 49 S. W. 1001, speaking through Judge Gantt, it was there said: "It is also well-settled law in Missouri that a husband is entitled to curtesy in the equitable separate estate of the wife of which she died seised, although limited to her separate use,"—citing in support of the doctrine *Alexander v. Warrance*, 17 Mo. 228; *Tremmel v. Kleiboldt*, 75 Mo. 255; *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95. In *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137, it was expressly ruled that the married woman's statute (§ 4340, Rev. Stat. 1899 [Anno. Stat. 1906, p. 2382]), which is the same as § 6869, Rev. Stat. 1889, did not further impair the rights of the husband's estate by the curtesy in land held by the wife as her separate equitable estate than to take away from the husband his common-law right to the possession and usufruct of the land during the life of the wife. Applying the doctrine as announced in the cases above indicated, it is clear that the law is well settled in this state that a husband is entitled to curtesy in the equitable separate estate of the wife; and the provisions of § 4340, which is denominated the married woman's statute, has in no way changed the rights of the husband other than to the extent as heretofore indicated.

It is also suggested by counsel for plaintiffs that curtesy at common law could only exist in real estate which lawful issue of the wife born alive was or might be capable of inheriting. If this suggestion is to be taken as a contention on the part of the plaintiffs that the Thornton 40-acre tract was not acquired until after the death of the child of the wife of the defendant, James R. Griffith, therefore there was no issue of the wife born alive after the acquiring of this Thornton

40 acres, and, as to that there could be no estate by the curtesy in the husband, we have no hesitation in saying that we are unwilling to give our assent to such contention. "Curtesy" is defined by the leading authors as "the estate to which by common law a man is entitled on the death of his wife in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they had lawful issue born alive which might have been capable of inheriting the estate." "It is a freehold estate in the husband for his natural life, cast upon him by operation of law immediately upon the happening of the necessary incidents." 12 Cyc. Law & Proc. p. 1002. Lord Coke says of this subject the four essential things necessary to constitute an estate of tenancy by the curtesy are, first, marriage; second, seisin of the wife; third, issue born alive; fourth, death of the wife. He said, however: "But it is not requisite that these should occur together all at one time. And, therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesy. So, if he hath issue which dieth before the descent, as is aforesaid." [1 Co. Litt. 30a.] Chancellor Kent, in his Commentaries, stated the doctrine as applicable to the tenancy by the curtesy in this language. He said: "Tenancy by the curtesy is an estate for life created by the act of the law. When a man marries a woman seised at any time during the coverture of an estate of inheritance in severalty, in coparcenary, or in common, and hath issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the curtesy of England; and it is immaterial whether the issue be living at the time of the seisin, or at the death of the wife, or whether it was born before or after the seisin." 4 Kent, Com. 11th ed. 26. In *Templeton v. Twitty*, 88 Tenn. 595, 14 S. W. 435, the precise question under discussion in the case at bar was passed upon and thoroughly discussed, and all the authorities reviewed. The facts as applicable to that case from which the legal propositions arose were as follows: "During the coverture P. L. and Eveline A. Twitty had two children born unto them,—a boy and a girl,—the former dying July 17, 1857, at the age of about four years, and the latter dying August 4, 1857, at the age of about three years. Both children were born and died before their mother acquired any land; and, for this reason, it is said that their father could not have taken an estate as tenant by the curtesy. In other words, the

contention in behalf of defendants is that, because the wife's seisin did not commence until after the death of her children, there was no right of curtesy in her husband." The Tennessee supreme court, in responding to the contention of the defendant in that case, speaking through Caldwell, J., said: "All the authorities of which we have any knowledge are contrary to this contention. Whether seisin arose before or after the death of the child is an unimportant circumstance. If there was a child which by possibility might have inherited the land from the mother,—a child to whom the land would have descended had it survived the mother,—that is all that is required as to issue, and the father takes an estate for life as tenant by the curtesy." In *1 Greenleaf's Cruise, Real Prop. 147, § 7*, the rule applicable to this subject was thus stated: "The time when the seisin commences, whether before or after issue had, is immaterial; for, if a man marries a woman seised in fee is disseised, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So if he has issue which dies before the descent of the lands on the wife." The distinguished American author, Mr. Washburn, on *Real Property*, 4th ed. pp. 178, 179, § 45, very clearly states the rule as applicable to this proposition: "It is immaterial whether the child is born before or after the wife acquires her estate, if, had it lived, it would have inherited that estate; and it matters not though it die before she acquires the estate, so far as the husband's right to curtesy is concerned." Judge Caldwell, in the Tennessee case, directs attention to the celebrated case of *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. 102, 15 Am. Dec. 433, in which Chief Justice Savage, in treating of this question, says: "It is immaterial at what period during coverture the wife became seised,—whether before issue or after. Nor is it material whether the issue be living at the time of the seisin." In *Heath v. White*, 5 Conn. 228, the subject of tenancy by the curtesy was thoroughly considered and all the authorities exhaustively reviewed, and it was expressly ruled in that case that whether the issue were born before or after the wife's seisin of the lands, or whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband would be tenant by the curtesy, citing 2 Bl. Com. 128; Co. Litt. 29b; *Bush v. Bradley*, 4 Day, 298. We see no necessity for pursuing this subject further. Applying the authorities as heretofore indicated to the proposition now under discussion, there is no escape from the conclusion that the defendant James R. Griffith had a curtesy interest in the Thornton 40-acre tract.

20 L.R.A. (N.S.)

Learned counsel for plaintiffs-appellants insist that as to the Pritchett 40, that being the 40 in which the conveyance was taken to the husband and wife jointly, that as the deed was made to the husband and wife, which ordinarily was an estate by the entirety at common law, it was no such a title as that the husband's curtesy estate would attach, and it is argued at common law such estate was one by entirety, and, if the wife died first, her surviving husband would take not a curtesy consummate, even though all the other requisites should exist, but he would become invested with the entire fee. In other words, the survivor took the entire title. Upon this proposition, it must be again repeated that counsel overlooked the question as to the character of the estate that the facts developed at the trial show this estate to be. In equity the conveyance, if made jointly to husband and wife, would not be held an estate by the entirety. This has been expressly ruled by this court in *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847; *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261. If this estate created by this deed conveying the Pritchett 40 acres to the husband and wife jointly is to be construed for the purpose of defeating the husband of the curtesy as an estate by the entirety, then it is clear that the plaintiffs, as to that 40 acres, would have no standing in this court, for the reason that, under that construction of the deed, the husband would be the absolute owner of the Pritchett 40 by his right of survivorship. Upon that proposition, we have reached the conclusion that the defendant is also entitled to a curtesy interest in the Pritchett 40-acre tract.

2. This leads us to the consideration of the complaints of the defendant appellant James R. Griffith. Learned counsel for defendant appellant insists that the conveyance of the Pritchett 40-acre tract to James R. Griffith and Leona Griffith, his wife, created an estate by entirety, and that, upon the death of the wife, the defendant became the absolute owner in fee of said 40 acres by right of survivorship. It must be conceded that, if nothing else was disclosed by the record in this cause other than the conveyance itself, the contention of counsel for the defendant would be unanswerable. The authorities are all one way on that proposition; but this suit involves a contest as to the nature and character of the estate created by this conveyance, and all the facts were developed concerning the execution and delivery of the deed. That the purchase money for this land was partly furnished by the defendant, James R. Griffith, and partly by money constituting the separate estate of the wife, the testimony shows beyond dispute. We have read in detail the

testimony developed upon the trial, and it fully supports the finding of the court concerning the amount of money belonging to the husband and wife which was applied to the payment for the purchase of the Pritchett 40 as well as the interests of the parties in said lands. Upon the facts disclosed by the record applicable to this case, it comes directly within the rules of law announced in *McLeod v. Venable and Jones v. Elkins*, supra, and the doctrine as announced in those cases is a full and complete answer to the contention of the defendant that the deed to Griffith and wife constituted an estate by entirety. It was expressly ruled in *Jones v. Elkins*, supra, that, where the husband purchases land and pays for it with the separate money of his wife in part without her written assent authorizing him so to do, and in part with his own money, and takes the legal title jointly to himself and wife, a court of equity will protect the wife in the enjoyment of her interest in the property, and declare a trust in her favor. In *McLeod v. Venable*, supra, the case of *Jones v. Elkins*, was unqualifiedly approved, and it was held that, under the rule announced in the *Elkins* Case, as well as under the exceptions to the common-law rule announced distinctly in *Garner v. Jones*, 52 Mo. 68, that, under the facts in that case, the wife had a trust estate in the land in proportion to the amount contributed by her to the full amount of the purchase money, which a court of equity would protect. An examination of those cases will demonstrate that the facts upon which the rules of law are predicated are nearly identical with the facts in the case at bar. Counsel for defendant manifestly rely upon the case of *Garner v. Jones*, supra. That case, it is true, very clearly and correctly announced the rules of law applicable to estates by entirety, and in a clear, painstaking manner sets forth the reasons upon which the doctrines of estates by entirety are predicated. With the doctrine announced upon that subject in *Garner v. Jones* we have no fault to find or criticism to suggest. It is entirely in harmony with the uniform unbroken line of decisions by this court, as well as most of the courts of our sister states where the subject has been in judgment before them. However, it is apparent that defendant overlooked what was said in that case, which is strikingly applicable to the case at bar. The learned judge, after discussing the law applicable to estate by entirety, in conclusion announced this rule in the following language: "It may be conceded that, if a husband invests the separate funds of his wife in real estate and takes a deed to them jointly; a court

of equity would protect her in the enjoyment of the property, and declare a trust in her favor. But no such point arises in this case." The cases to which I have directed attention treating of this proposition cite numerous authorities in support of the conclusions therein reached, and it is sufficient to say that, if the doctrine as announced in the cases applicable to this proposition are longer to be followed, then there can be but one conclusion reached upon this question, and that is that Leona Griffith, the wife of the defendant appellant, had an interest in the lands involved in this proceeding, which a court of equity would protect, and, she being dead, that the plaintiffs were entitled to the interests as designated in the written finding of the court, and the court was warranted, as was done in the case of *McLeod v. Venable*, supra, to decree partition and order the land to be sold and the proceeds distributed in accordance with the interests of the parties.

3. This brings us to the consideration of the final question in this case, as to whether or not, under the testimony as developed at the trial, the chancellor was warranted in charging the interests of the defendant in the land involved with certain rents, which it seems is claimed accrued by reason of the occupancy of a part of the land by the defendant and the renting out by the defendant of a part of it prior to the death of the wife. We take it that the charge of rents was based upon the use of the premises prior to the death of the wife, for subsequent to her death the defendant was a tenant by the curtesy, and therefore was not liable for the payment of rents. We have fully considered the testimony which is sought to be made the basis of that part of the decree which charges the interests of the defendant with rents, and have reached the conclusion that these rents were improperly charged, and should be entirely omitted from the decree. While it is true that there is testimony showing that defendant used this land, it must not be overlooked that he and his wife were living together, both of whom, doubtless, enjoyed the benefits and products of such land. Again, it must not be overlooked that this is not a contest between the wife and the husband as to the control of her separate estate in this land. There is an entire absence from this record of any dispute while they were living together as husband and wife, up to the time of her death, as to the control of the premises, or as to whom the rents should be paid. After the passage of the married woman's act, the unity of husband and wife as to their property rights designated in such act was dis-

solved; hence as to such property rights they had full authority to contract with each other in respect to the same. Manifestly as applicable to this case, if the wife during the time that she and her husband were occupying the premises was denied any right of control of her interest in such premises, or denied the right to collect the rents to which she was entitled, she could have maintained an action in her own name against her husband asserting her rights, thereby recovering a judgment for any rents her husband had deprived her of respecting those premises.

In *Rice S. & Co. v. Sally*, 176 Mo. 107, 75 S. W. 398, it was expressly ruled by this court, after a most exhaustive review of all the authorities, that after the passage of the married woman's act the husband and wife had the right to deal at arm's length with each other; and it was there said, speaking through Judge Gantt, that "the statutes dissolve the unity of husband and wife as to the property rights enumerated in our married woman's act, and make the wife a *feme sole*, and, as the husband could always have contracted with a *feme sole* and granted his property after marriage as before, with the exceptions that he could not receive a deed directly from her, and could not dispose of her inchoate dower, there remains no obstacle to their dealing directly with each other at law as well as in equity. That such was the purpose of these married woman's acts we have no doubt whatever, and we think that releasing the bonds which bound the wife necessarily left the husband free of the disability which rested on him solely and only because the law rendered his wife incompetent, and when she was rendered *sui juris* nothing remained of the common rule as to their incapacity to contract." We repeat that this suit does not involve any contest between the wife and her husband as to the control and collection of rents upon lands in which she had a separate estate. Neither does the record disclose any dispute or controversy while they were living together up to the time of her death about the application of rents. While they were authorized under the law respecting their rights of property to contract concerning such property with each other, there is an entire absence from this record of any disclosures showing any express contract or any reference made as to the accounting for rents by the husband to the wife by reason of his occupancy and control of these premises. The law manifestly would not favor the implication of a contract between parties where the relation of husband and wife existed where they were residing together in harmony with due respect and consideration for such relation. It is significant in 20 L.R.A. (N.S.)

McLeod v. Venable, 163 Mo. 536, 63 S. W. 847, where, as before stated, a similar state of facts to the case at bar were developed, that the conveyance was made to the husband and wife jointly on July 10, 1876, and the title to the land involved in that suit remained in the husband and wife until January 24, 1897, a period of nearly twenty-one years, when the wife died, that no effort was made in that litigation to charge the interest of the husband with any rents, but the decree simply made partition and ordered the sale of the land and the distribution of the proceeds between the husband and her collateral heirs, who were parties to the proceeding. While it is true the record of that cause does not disclose how the lands involved in suit were controlled, yet the conveyance having been made jointly to the husband and wife, together with other facts recited as to the purchase of the land, indicate that the husband managed and controlled the property, the same as was done by the husband in the case at bar.

Our attention has not been directed to any cases directly in point upon the proposition now in hand. There are cases in which the husband has been required to account for the separate estate of the wife, and has been required to pay money which constituted a part of her separate estate, together with the interest upon such money; but in those cases it must not be overlooked that it was a controversy between the husband and wife while living, and not a dispute as between the collateral heirs of the wife after her death and the husband as to whether or not he should be charged with rents for lands jointly owned by both of them, and about which, as to the use, management, and control of the lands, there had never been any reference to a contract, or as to the application of rents, or any dispute whatever concerning the manner in which the property was used.

Our conclusion is that the defendant appellant's interest in the land in this suit should not be charged with the rents as contained in the decree; that, in order to warrant such a charge, the record should clearly disclose that the wife had been denied the control of her interest in the estate, and had also been denied the payment of rents which may have accrued from the premises. We repeat that the husband and wife, under the facts as disclosed in this case, were living together and jointly enjoying the use, benefits, and products of this land in a manner entirely satisfactory to themselves; and we at least are unwilling, upon the facts as disclosed by this record, to hold that the husband should be made to account for the rent upon the lands involved in this controversy.

We have given expression to our views up-

on the legal propositions disclosed by this record, and have pointed out the error of the decree. The judgment and decree of the trial court is affirmed, except that part of it to which we have called attention, in which it seeks to charge the interests of the defendant in the lands sought to be partitioned, with rents. The subject of rents has no place in that decree.

It is therefore ordered that this cause be remanded to the Circuit Court with directions that it modify the decree by omitting entirely from it the subject of rents.

All concur.

TEXAS SUPREME COURT.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY, Plff. in Err.,

v.
IDA MATZDORFF.

(— Tex. —, 112 S. W. 1036.)

Carrier — station — friend of passenger.

A railroad company is not bound to keep its station safe as for invited guests, for a mere friend or acquaintance of an intending passenger who resorts to it to see him begin his journey.

(October 28, 1908.)

Case Note. — Duty of carrier to persons who accompany passengers to, or wait for them at, station.

This note confines itself strictly to the questions indicated in its title and excludes cases on the liability of a carrier to one who goes upon a train to assist a passenger in boarding or alighting. For a consideration of the latter question, see the note to *Hill v. Louisville & N. R. Co.* 3 L.R.A. (N.S.) 432.

Where a person is at a railroad station awaiting the arrival of a relative, and at the place provided by the company for that purpose, he is lawfully at the place so provided; and the company is liable to him for injuries received due to negligence of its employees in placing a baggage truck in the place used for receiving and discharging passengers, so as to render it an instrument of danger. *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606.

In *New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871, where a boy twelve years old, while at the defendant's station for the purpose of meeting his sister, was thrown under the wheels of a moving train and killed as the result of stumbling over some obstruction upon the platform, it was held that it was the duty of the railroad company to keep its station and platform in a reasonably safe condition for the negligent failure to do which it was answerable not only to actual

ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to review a judgment affirming a judgment of the District Court of Bexar County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Baker, Botts, Parker, & Garwood, Newton & Ward, and Teagarden & Teagarden, for plaintiff in error:

If there is no mutuality of interest in the purpose of the visit between the owner of the premises and the visitor, the visitor is a mere licensee, and assumes all risks arising out of want of ordinary care respecting the condition of the premises.

Galveston Oil Co. v. Morton, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 756; *Post v. Texas & P. R. Co.* (Tex. Civ. App.) 23 S. W. 708; *Burbank v. Illinois C. R. Co.* 42 La. Ann. 1158, 11 L.R.A. 720, 8 So. 580; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317; *Woolwine v. Chesapeake & O. R. Co.* (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 374, 89 Am. Dec. 644; *St. Louis,*

passengers, but also to those who came to meet friends or see them safely off.

In *McKone v. Michigan C. R. Co.* 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74, where the plaintiff, while at the defendant's depot to meet his wife, was injured by stepping into a deep hole upon the defendant's grounds, it was held that he was not a trespasser, his presence being not only lawful, but obviously within the license which the company had extended to the public.

In *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317, the plaintiff, while present at a railroad station out of mere curiosity, was injured by the falling of the station platform, and a recovery was denied. In commenting upon the company's liability, the court said: "Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by the authority of defendants as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible."

The established rule is again clearly recognized in *St. Louis, I. M. & S. R. Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347, where the court said, in an action for the death of one who had gone to escort a friend to his coach which was open for passengers, and, on returning, was killed while crossing the track: "Now, if Tomlinson went to the cars not

I. M. & S. R. Co. v. Fairbairn, 48 Ark. 491, 4 S. W. 50; 2 Jaggard, Torts, p. 889; 3 Elliott, Railroads, p. 1948; Patterson, Railway Acci. Law, p. 176, § 184; Ray, Negligence of Imposed Duties, Pass. Carr. pp. 25, 109, 110.

An invitation to visit the premises is not inferred in favor of one who goes on a mission purely personal, and where there is no common, mutual advantage shared with the owner.

Bennett v. Louisville & N. R. Co. 102 U. S. 585, 26 L. ed. 238; Campbell, Neg. § 33.

Mr. John Sehorn, for defendant in error:

Appellee was at the depot by the implied invitation of appellant, and appellant owed her the duty of ordinary care to keep the depot in a reasonably safe condition.

out of mere idle curiosity, but to assist a friend who desired to take passage, and needed assistance to reach and enter the coach, it is evident that he was not a trespasser, and the rules that apply in a case where a trespasser is injured would not be applicable in such a case. An escort of that kind performs a service in the common interest of the carrier and the passenger. His entry upon the premises of the company is upon an implied invitation of the carrier, which should use at least ordinary care to avoid injury to him while there."

In Cherokee Packet Co. v. Hilson, 95 Tenn. 1, 31 S. W. 737, where the plaintiff present at a boat landing for the purpose of bidding good-by to her grandson who was taking passage, was injured by the negligence of the company in unloading freight from its boat, it was held that a common carrier is under the duty to prevent injury from its negligence to those who come upon its premises for the purpose of doing business with it; and, among others, this obligation extends to persons who are on the premises to meet a friend or see him off.

It is the duty of a railroad company to provide safe platforms at its station, and its liability for negligence in failing to do so extends not only to passengers, but also to one at the depot in attendance upon arriving or departing friends. In this case the plaintiff and his wife were present at the defendant's station to accompany and assist two old and decrepit friends. The court said that, if the infirmities of passengers to go on the train required the assistance of friends to see them safely on board, servants or friends attending them for that purpose would clearly be in attendance at the depot under an invitation of the company as direct as that given to the passengers themselves. The injury complained of was suffered by the plaintiff's wife as a result of the company's failure to provide railings about its platform and necessary lights. Hamilton v. Texas & P. R. Co. 64 Tex. 251, 53 Am. Rep. 750. 20 L.R.A. (N.S.)

Hamilton v. Texas & P. R. Co. 64 Tex. 251, 53 Am. Rep. 750; Texas & P. R. Co. v. Best, 66 Tex. 116, 18 S. W. 224; Gulf, C. & S. F. R. Co. v. Williams, 21 Tex. Civ. App. 469, 51 S. W. 653; Missouri, K. & T. R. Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905; Houston & T. C. R. Co. v. Phillio, 96 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994; Izlar v. Manchester & A. R. Co. 57 S. C. 332, 35 S. E. 584; McKone v. Michigan C. R. Co. 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74; Keokuk Packet Co. v. Henry, 50 Ill. 264.

Williams, J., delivered the opinion of the court:

The judgment in this case was recovered against the plaintiff in error by defendant in error, plaintiff below, on account of a fall which she received in entering the wait-

The duty of carriers of passengers to exercise ordinary care to keep their waiting rooms in a reasonably safe condition is held in St. Louis, I. M. & S. R. Co. v. Grimsley (Ark.) 117 S. W. 1064, to extend also to the benefit of those who go to stations for the purpose of meeting and assisting the incoming, or of aiding the outgoing, passengers in such friendly offices as may be reasonably necessary for their convenience, comfort, and safety. Such persons, the court said, were upon the premises upon the implied invitation of the railroad company, and a recovery was allowed the plaintiff, who was injured in attempting to use a defective chair while present in the station to aid his departing daughter-in-law and her children.

Atlantic & B. R. Co. v. Owens, 123 Ga. 393, 51 S. E. 404, recognizes the rule that the railroad company owes a duty to keep its passenger station in a safe condition, not only to those who come there for the purpose of embarking upon trains or those who use the station in alighting from trains, but also to those who may accompany others about to become passengers, or who resort there for the purpose of meeting incoming passengers; and the court holds that the company owes the duty of ordinary care to one who is awaiting in its station the arrival of a friend, and is liable to such a person injured as the result of ordinary neglect on the part of servants of the company in handling baggage upon the portion of the platform where he was waiting.

Upon the point in question, Judge Dennan in Watkins v. Great Western R. Co. 37 L. T. N. S. 193, was of the opinion that a railroad company keeping open a bridge over its tracks at a station for the use of its passengers is bound to keep that bridge reasonably safe; and that if, in practice, the friends are allowed by the company's servants to see passengers off by the train, and to cross the bridge without asking special permission, the duty of the company in that respect cannot be put toward them otherwise

ing room for passengers kept by the railroad company at San Antonio. The fall was caused by a piece of wire projecting from a door mat, which penetrated plaintiff's shoe as she stepped upon it. Plaintiff was not a passenger, and had not gone to the station upon any business with the company or with any passenger. One Mrs. Simpson, intending to take passage for a temporary absence, went to the station accompanied by her husband and children. Mrs. Nicholls and plaintiff went with them; plaintiff going upon the invitation of Mrs. Nicholls to accompany her, and to bid Mrs. Simpson goodbye. Upon these facts, the question is whether or not the plaintiff has a cause of action arising from a failure of the defendant to keep the waiting room and its approaches in safe condition, which is the only theory upon which the judgment is defended. If she

is to be regarded as there upon an implied invitation from the defendant, the question should be answered affirmatively. If she was no more than a mere licensee, it should be resolved in the negative. *Greenville v. Pitts* (Tex.) 14 L.R.A.(N.S.) 979, 107 S. W. 50.

Those who keep premises for the carrying on of business with the public impliedly invite people to come and transact business with them, and from this invitation arises the duty to keep the premises in suitable condition for use by those accepting it. Common carriers of passengers in this way extend invitations to persons desiring transportation as passengers and owe to them the resulting duty. The attendance and assistance of others is often necessary or convenient to passengers, and the invitation to them includes the right to have others with them

than it is towards those whom they accompany. The passenger's friend so permitted to go along the bridge by constant acquiescence is not to be regarded as a person barely licensed, but as being invited to go there to the same extent as the person whom he accompanies.

A person who is present at a railroad station to assist friends in getting to the train and to bid them good-by cannot be considered a trespasser upon the company's premises. The company owes the duty of exercising reasonable and ordinary care towards such a person; and is liable to one so attending her friends, who is injured by the negligent handling of trunks upon the station platform while she remains upon it awaiting the departure of the train to bid her friends a final farewell. *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237.

And so *Izlar v. Manchester & A. R. Co.* 57 S. C. 332, 35 S. E. 583, holds that a person who goes upon the lands of a railroad company in order to reach the station at which his wife or child embarks or disembarks from the passenger train of such railroad is not a trespasser, but is to be regarded as a licensee to whom the railroad company is liable for its failure to use ordinary care in keeping in repair the approaches to its station.

Again, in *Galveston, H. & S. A. R. Co. v. Matzdorf* (Tex. Civ. App.) 107 S. W. 882, the rule is followed without question that a railroad impliedly extends an invitation to persons in general to meet a coming friend or accompany a departing one to its depot, and is bound to the exercise of ordinary care in having its premises in a reasonably safe condition. The plaintiff in this case was injured as she was entering the station, in company with a departing friend, by stumbling over a defective door mat, and her recovery was affirmed on the above theory.

In *Smoak v. Savannah. F. & W. R. Co.* 65 S. C. 299, 43 S. E. 662, where a gentle-

man, while at the defendants' station to meet his daughter, received serious injury in falling from steps improperly constructed and unlighted, while going from the platform to where the car stopped, it was held that, while the company did not owe him the same degree of care that it owed a passenger, nevertheless it did owe him as a licensee ordinary prudence.

A railroad is again held to owe the duty of ordinary care, with regard to the proper maintenance of its station and platform, to one going to the station to meet an arriving relative, in *Gulf, C. & S. F. R. Co. v. Williams*, 21 Tex. Civ. App. 469, 51 S. W. 653. Such a person the court said was not a trespasser, and the company was liable to her for injuries received in falling from the station platform, which was without a railing and unlighted.

In *York v. Canada Atlantic S. S. Co.* 22 Can. S. C. 167, the plaintiff and his wife were at the steamship wharf of the company to meet the wife's mother and assist her home. In an action to recover for the wife's death alleged to have resulted from the company's negligence in not lighting the wharf, the court held that they were lawfully on the wharf, having a right to assume that they were, under the circumstances, invited by the company; that they had a right to expect that the means of approach were safe for anyone using ordinary care; and that the company was under an obligation to see that they were safe.

The following *dictum* from *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72, is of value upon the point under discussion: "All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim the right to enter, save those who have business with the railroad. Under this classification, however, we must include attending friends and protectors, who accompany friends to the train to aid them in getting on, in procuring tickets, and in checking baggage, and

to assist them in attending to the details incident to departure or arrival. Hence such persons are entitled, in right of the passenger, to the use of the carrier's premises. The domestic relation and the ties of kinship and the usages incident thereto make it so customary as to be looked upon as a matter of course for persons sustaining such relations to attend the arrivals and departures of each other upon and from journeys. The existence of such relations, therefore, may often properly be regarded as sufficient to include within the invitation to the traveler those who so naturally are to be expected to attend his going or to await his coming. In the authorities stating the rule the invitation is said to include those who go to "welcome the coming, speed the going, guest." This suggests the existence of the relation of host or entertainer and guest, and is based upon social custom, which exacts the extension of certain courtesies and attentions by

kindred services. The same license is accorded to protecting friends, when the traveler is to leave the train. To persons filling these classes, the railroad corporation owes special obligations of duty, different from those due to the general public."

Persons going on a carrier's premises to greet an arriving passenger, or to take leave of one departing, cannot be deemed passengers, but should be considered as licensees, to whom the carrier owes certain duties. 5 Am. & Eng. Enc. Law, p. 518.

Fetter on Carriers, § 237, cites *Langton v. Board of Land & Works*, 6 Vict. L. R. 316, as holding that railway proprietors owe a duty to friends of a passenger going to a station to receive him to protect them from any dangerous places not only in the way provided for access to the station, but also in any other way of access allowed to be commonly used by persons resorting to the station. One not a friend of an incoming passenger, but accompanying friends going to meet him, is entitled to the same protection.

The rule so generally followed was also recognized in *Texas & P. R. Co. v. Best*, 66 Tex. 116, 18 S. W. 224, where the plaintiff was at the station by appointment with one supposed to be on the defendant's incoming train, the plaintiff intending himself to become a passenger if the appointment was met.

The recent case of *Cogswell v. Atchison, T. & S. F. R. Co.* (Okla.) post, 837, 99 Pac. 923, fully sanctions as a generally recognized doctrine the theory that one who goes to the premises of a railway company to meet an incoming passenger, or to accompany a departing one, goes upon the company's premises under an implied invitation, and is entitled to have the company exercise ordinary care for his safety. In applying the general rule, the court said that the reason for it does not require that it be confined to those persons who are present at stations with

one to the other of those sustaining such a relation. Business relations may exist between passengers and others, which will entitle both to be at the station and upon the premises of the carrier. We believe that these classes will be found to embrace all who have been held, by actual decisions, to be included by implication in that invitation which is extended by the carrier to the traveler himself. It is sometimes said generally that friends who go to stations to see passengers off or to await their arrival are in the invited class; but it will be found, in examining the facts of cases, that such expressions refer to those who sustain some special relation to the passenger, such as attendant, assistant, member of his family, host, or the like.

In the case of *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 457, 54 Am. Rep. 72, the rule is stated thus: "All the property of a railroad company, including its depots and

friends for social pleasure or from promptings of friendship or kinship; and the holding extended the railroad's liability to one who was injured by the company's negligence while at the station for the purpose of consummating a business transaction with one who was a passenger.

Trice v. Navigation Co. L. R. 5 N. S. Wales, 137, is cited by Fetter in his work on Carriers of Passengers, § 237, as holding that one escorting a passenger to a station or to a seat in a train, while not a passenger, is not a trespasser; and that, being on the company's premises by its implied invitation, he is entitled to have the company exercise ordinary care for his safety.

But *Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24, holds that a woman who goes to a railroad depot to see her husband off on a freight train which does not carry passengers, but on which he is carried under a contract by which he ships horses and other freight, is a mere licensee, to whom the company owes no duty to keep lights and railings on the station platform.

Houston & T. C. R. Co. v. Phillio, 96 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994, holds that one who goes to a railroad depot merely to assist his wife in taking a train is there by the implied invitation of the company, and is not a trespasser; but the railroad is under no obligation to protect such a person from assault by others lounging about its station, even though such duty may exist as to the intending passenger.

A few cases have been found where the plaintiff was, as a matter of fact, at a railroad station to meet or see a friend depart; but such decisions, apparently assuming the plaintiff's right to be at the station, have not taken up the question involved in this discussion, and have therefore been omitted as having no practical value on the point.

adjacent yards and grounds, is its private property, on which no one is invited, or can claim the right to enter, save those who have business with the railroad. Under this classification, however, we must include attending friends and protectors, who accompany friends to the train, to aid them in getting on, in procuring tickets, and in checking baggage, and kindred services. The same license is accorded to protecting friends, when the traveler is to leave the train. To persons filling these classes the railroad corporation owes special obligations of duty different from those due to the general public. While the former come by invitation, express or implied, the latter are mere pleasure seekers, or are prompted by curiosity. For the use and comfort of the former class, railway companies are bound to keep in safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go."

We are not disposed to draw narrowly the line defining those entitled to the benefit of the principle; but that line must be drawn somewhere, and we find no authority for the proposition that the invitation extends to those who have no business with the carrier or passenger and sustain no relation to the latter but that of friendship or acquaintanceship. If it includes one merely because he is a friend or acquaintance, it includes all friends and acquaintances, not of one passenger only, but of all. Not only that, but it is held that the invitation to those included in it is not simply to the station houses, waiting rooms, or platforms, but to the trains and any other places where the discharge of the duty of the attendant to the passenger makes it proper for the former to go. The consequences of such an extension of the doctrine may easily be seen. That which is really a mere incident of the relation of the carrier to the passenger would become the principal thing, and, instead of facilitating, would seriously impede, the discharge of the duties of that relation.

In not a few of the cases in which the doctrine has been referred to, the real ground on which the carrier was sought to be held liable was that of active negligent conduct of its employees towards persons at stations or upon trains. It is scarcely necessary to say that we have before us no such case, or that our decision would not affect a right of recovery of that kind. Persons who go to such places upon occasions like that which took plaintiff to defendant's waiting room are not there unlawfully or wrongfully, and 20 L.R.A. (N.S.)

their rights as licensees to complain of active negligence by which they are injured is unquestioned. The question here is whether or not the carrier owes them the affirmative duty of keeping its premises safe for their use as persons invited by it to go there, and we must hold that it does not owe that duty.

Reversed and rendered.

OKLAHOMA SUPREME COURT.

JUD COGSWELL

v.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY.

(— Okla. —, 99 Pac. 923.)

Carrier — persons at station — relation.

1. A railway company is bound to exercise ordinary care for the safety of a person who is upon its premises for the purpose of meeting an incoming passenger, and is liable to such person for injuries sustained on account of the railway company's failure to exercise such care.

Same — defective platform — liability.

2. A person went to the depot of a railway company to meet an incoming passenger with whom he had an engagement to meet him for the purpose of continuing, after he had met him, a business negotiation between them. Held, that the railway company was liable to such person for injuries received by him because of the negligence of the company in permitting its

Headnotes by HAYES, J.

Case Note. — Duty of carrier to person at station for business consultation with individual passenger.

The authorities upon the question presented in *COGSWELL v. ATCHISON, T. & S. F. R. Co.* as to the liability of a carrier for the safety of a person upon its station premises to meet an incoming passenger are reviewed in the note accompanying *Galveston, H. & S. A. R. Co. v. Matzdorff*, ante, 833. The rights of a person present at a station upon the departure or arrival of a passenger, as affected by the fact that he is there purely on business matters with the passenger, seem to have been discussed in but one other case. There, also, the railroad company was held liable for the exercise of ordinary care toward one who was present at its station for the purpose of meeting for business consultation a person who was expected to take a train. *Klugherz v. Chicago, M. & St. P. R. Co.* 90 Minn. 17, 101 Am. St. Rep. 384, 95 N. W. 586.

The question as to a carrier's duty toward one whom it permits to enter its cars upon his own business, and not as a passenger, is treated in a note to *Peterson v. South & W. R. Co.* 8 L.R.A. (N.S.) 1240.

station platform to become in a dangerous condition, on account of which said person fell and was injured.

Judgment — reduction — right of court.

3. Where the verdict in an action for damages is deemed by the court to be excessive, it may impose upon the successful party the alternative of accepting a reduced amount or of submitting to a new trial; but it has no power to render judgment for the smaller sum, where the plaintiff refuses to remit and objects to such action of the court, and such action on the part of the court is error as to both parties.

(February 2, 1909.)

CROSS WRITS OF ERROR to the United States District Court for the Northern District of the Indian Territory to review a judgment rendered in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence; the defendant complaining of the judgment in plaintiff's favor, and the plaintiff complaining of the court's action in reducing the verdict. Reversed.

Statement by Hayes, J.:

This action was brought by Jud Cogswell, plaintiff, against the Atchison, Topeka, & Santa Fé Railway Company, defendant, in the United States district court for the northern district of the Indian territory at Bartlesville, for damages sustained on account of personal injuries by him received at defendant's station platform in the town of Bartlesville, caused by the alleged negligence of the railway company. The negligence alleged by plaintiff on account of which he seeks to recover his damages is as follows: "That, on or about the 28th day of December, A. D. 1906, said defendant, disregarding its duties, negligently and carelessly permitted the said platform at said station or depot house to be in improper and dangerous condition, and to be and remain in an unsafe and dangerous condition; and said station and platform were, by defendant, negligently and carelessly operated, kept, and maintained, in that said defendant suffered, allowed, and permitted a large hole to be in said platform of said station, which was, by defendant, negligently and carelessly covered by a loose and unnailed board; and that on said date the plaintiff, while lawfully, rightfully, and necessarily walking along and over said platform for the purpose of meeting a friend whom he expected on an incoming train, did, between the hours of 8 and 9 o'clock in the evening of said day, step and fall into and through said hole; that, in order for the plaintiff to enter said station, or to meet said train, it was necessary for him to pass over said platform wherein was said defective portion and hole; that the 20 L.R.A. (N.S.)

said platform was not lighted, and on said evening was dark, and that said unsafe and dangerous condition of said platform was well known to said defendant." He alleged that, solely by reason of said negligence of defendant in permitting said hole and loose board to remain as alleged, he was precipitated into and through the hole in the platform, and his leg was seriously and permanently injured. Defendant, in its answer, specifically denies all the allegations of the petition. The case was tried to a jury, who returned a verdict for plaintiff, and assessed his damages at \$1,600. On motion for a new trial the court required the plaintiff to elect to accept a judgment for \$1,000 in lieu of the amount fixed by the jury, which plaintiff declined to do. The court then remitted \$600 upon his own motion from the amount fixed by the jury, and rendered judgment in favor of the plaintiff for \$1,000. From this judgment defendant appealed to the United States court of appeals of the Indian territory, and plaintiff has filed his cross appeal, complaining of the court's action in reducing the judgment. The case is now before this court for final disposition under the provisions of the enabling act (Act June 16, 1906, chap. 3335, 34 Stat. 267).

Messrs. Montgomery & O'Meara and John H. Burford, for plaintiff.

One who is injured while going to the station to meet an incoming passenger, or to escort an outgoing one, may recover for injuries caused by defendant's negligence.

Tobin v. Portland, S. & P. R. Co. 59 Me. 183, 8 Am. Rep. 415; *McKone v. Michigan C. R. Co.* 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74; *Pierce, Railroads*, 175; *Langan v. St. Louis, I. M. & S. R. Co.* 72 Mo. 392; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64, 66 Am. Dec. 406; *Hamilton v. Texas & P. R. Co.* 64 Tex. 251, 53 Am. Rep. 756; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678; *Bishop, Non-Contract Law*, § 1109.

Messrs. J. R. Cottingham, Charles H. Woods, and George M. Green, for defendant.

Plaintiff was at the station on a personal matter, and not to welcome a coming guest.

Post v. Texas & P. R. Co. (Tex. Civ. App.) 23 S. W. 708.

It was the duty of the court to grant the defendant a new trial.

Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696.

Hayes, J., delivered the opinion of the court:

Plaintiff in error has made twenty-seven assignments of error in its petition, but all

may be considered under two propositions. The issues of fact, including the alleged acts of negligence on the part of the railway company, were found by the jury in favor of defendant in error.

The first proposition to be determined is whether the facts found constitute in law negligence in the railway company as against defendant in error. Defendant in error, on the 28th day of December, 1906, went, after night, to defendant's depot in Bartlesville to meet a passenger by the name of Crane, whom defendant in error expected on one of the incoming passenger trains of the railway company, due to arrive at Coffeerville at about the hour plaintiff went to the depot. Crane lived in Bartlesville, and had gone to Coffeerville on the preceding day, and was to return to Coffeerville on the next day thereafter. A deal concerning a barber shop was pending between Crane and defendant in error. Defendant in error had agreed to meet Crane. The night was dark, and, as plaintiff stepped upon defendant's depot platform, which he did just as the train arrived, his foot passed through a hole in the platform, and he fell and fractured one of the bones of his leg and inflicted other injuries. It is conceded that plaintiff had no other business at the depot than to meet the passenger, Crane, and that his purpose in meeting Crane was that he had agreed to meet him, and that they were to continue the negotiations pending between them relative to the barber shop. The railway company contends that plaintiff, under these facts, was at its depot and upon its premises as a licensee, and that it owed him no duty except not to wilfully or wantonly injure him. On the other hand, it is contended by plaintiff that he was at the depot for the purpose of meeting an incoming passenger, and that, although his principal purpose in meeting the passenger, Crane, was to revive the business negotiations pending between them, he was there under the implied invitation of the railway company, and that it owed him ordinary care in the construction and maintenance of its depot and platforms to avoid injuring him. A person who does not go upon the premises of a railway company as a passenger, servant, trespasser, or as one standing in any contractual relation to the corporation, but who is permitted by the company to come upon its premises for his own interest, convenience, or benefit, is upon the premises of such railway company as a licensee, and the railway company is liable only for wilful or wanton injuries which may be done to such licensee by the gross negligence of its agents or employees. *Woolwine v. Chesapeake & O. R. Co.* (Manning v. Chesapeake) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; *Sweeney v. Old Colony & N. R. 20 L.R.A. (N.S.)*

Co. 10 Allen, 368, 87 Am. Dec. 644; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Burbank v. Illinois C. R. Co.* 42 La. Ann. 1156, 11 L.R.A. 720, 8 So. 580; 3 Elliott, Railroads, 2d ed. ¶ 1251. On the other hand, one who goes upon the premises of a railway company to transact business with it or its agents or to transact business in the operation of the road, or who is there by invitation of the company, express or implied, is lawfully there, and the railway company owes him a duty of using ordinary care in the construction and maintenance of its depot and platforms to avoid injuring him. *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235. One who goes with the permission and acquiescence of the owner upon the premises of another solely for his own pleasure and benefit goes as a licensee. *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; 3 Elliott, Railroads, 2d ed. ¶ 1248. But one who goes upon the premises of another in a common interest or to a mutual advantage is there under the implied invitation of the owner.

The test as to whether there is an implied invitation is stated by Mr. Campbell in his treatise on Negligence in the following language: "The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." [2d ed. § 44]. This language is quoted with approval in *Bennett v. Louisville & N. R. Co.* supra; but the court in that case does not, and we do not here, undertake to say that this principle furnishes an invariable test by which it may be determined in every case whether a person is upon the premises of another under an implied invitation. The courts have not, to our knowledge, fixed any general rule by which such tests may be made, and whether an invitation exists in any case must be determined by the circumstances surrounding the case. But, where the facts of any case bring it within the language of the first sentence of the above quotation, an invitation is implied. It now seems to be the doctrine of the various state courts of the Union that one who goes to the premises of a railway company to meet an incoming passenger or to accompany a departing passenger is within this rule, and goes upon the premises of the railway company under an implied invitation of the company. 3 Elliott, Railroads, 2d ed. ¶ 1256; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415; *McKone v. Michigan C. R. Co.* 51 Mich. 601, 47 Am. Rep. 598, 17 N. W. 74; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 21 Am. Rep. 371; *Louisville & N. R. Co. v.*

Berry, 88 Ky. 222, 21 Am. St. Rep. 320, 10 S. W. 472; Denver & R. G. R. Co. v. Spencer, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606; Izlar v. Manchester & A. R. Co. 57 S. C. 332, 35 S. E. 583; Montgomery & E. R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72; Sullivan v. Vicksburg, S. & P. R. Co. 39 La. Ann. 800, 4 Am. St. Rep. 239, 2 So. 586; New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; Hamilton v. Texas & P. R. Co. 64 Tex. 251, 53 Am. Rep. 756; Atlantic & B. R. Co. v. Owens, 123 Ga. 393, 51 S. E. 404.

In the last case cited the court said: "A railroad company owes a duty to keep its passenger station in safe condition, not only to those who come there for the purpose of embarking upon trains, or those who use the station in alighting from trains, but also to those who may accompany others about to become passengers, or who resort there for the purpose of meeting incoming passengers. The company owes to one who goes to its station for the purpose of meeting an incoming passenger the same duty, in regard to the station and the conduct of its employees thereat, as it does to any person going there for the purpose of transacting business with an agent of the company. While such a person is not a passenger, the company owes to him ordinary care for his safety, and will be liable to him if he is injured as a result of ordinary neglect on the part of the agent or servants of the company.

One of the cases most frequently cited by the courts in support of this doctrine is *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317. In that case a multitude of people had gathered upon the platform of the railroad company's depot at Johnstown, Pennsylvania, for the purpose of seeing and hearing President Johnson, who was a passenger upon a special train of said company. The platform, which extended over a canal, gave way under the weight of the multitude gathered upon it, and fell. Many of the persons who were upon the platform were precipitated into the chasm and seriously injured or killed. The court held the railway company was not responsible to the persons injured who came through curiosity or for the purpose of their own pleasure and without business with the road, but, as to the persons who came to meet or part with passengers, the right of recovery existed. Mr. Justice Sharswood, who delivered the opinion of the court, said: "Had it been the hour for the arrival or departure of a train, and he [the plaintiff] had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by the authority of the defendants as much as

if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it. As to all others they were liable only for wanton or intentional injury." The general practice of the members of the public of accompanying departing friends and acquaintances to the stations of railway companies upon whose passenger trains such friends and acquaintances are to depart, and of meeting and receiving at said places friends and acquaintances who are passengers on incoming trains, is one in which the railway company has an interest in common with the members of the public who go to its stations for such purposes. One who travels upon passenger trains must go to the places provided by the railway company for receiving him and for beginning his journey, and he has a right to have someone carry or accompany him to such places; and one who rides upon the passenger trains of a railway company must, in order to reach his ultimate destination, depart from the train and from the premises of the railway company, and such person has a right to have someone meet him and accompany him in his departure therefrom. In many instances, without such right, persons would be unable to travel upon passenger trains or to do so only with great inconvenience. It is true the facts in the case at bar do not make it such a case, but the principle is illustrated by such instances. The right of persons who travel upon passenger trains to have his friends and acquaintances accompany him in departing to the station of the railway company, or to meet and receive him at such place upon his coming, adds to the convenience and pleasure of traveling upon the company's railroad, and tends to lessen its inconveniences and burdens, and thereby tends to encourage travel, in all of which the railway company has an interest. Its interest in having passengers met at its stations by their friends and acquaintances is one in common with the interest of the persons who meet such a passenger, and we do not think that the reason of the rule requires it to be narrowly confined only to those persons who go to meet an incoming passenger purely for social pleasure or from the promptings of friendship or kinship; and the fact that one who meets an incoming passenger, acquaintance, or friend is prompted by the motive of ultimately consummating a business transaction, which may result profitably to him or both to him and the passenger, does not take him without the rule.

In *Tobin v. Portland, S. & P. R. Co.* supra, the person who was injured conveyed a passenger to the railway company's depot and received an injury while aiding the passenger to alight upon the platform of the company. He was there solely in his own business and profit. The court in that case said: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence, and not the other. The hackman is there in the course of his business; but it is a business important to and for the convenience and profit of the defendants." *Klugherz v. Chicago, M. & St. P. R. Co.* 90 Minn. 17, 101 Am. St. Rep. 384, 95 N. W. 586, is a case in which the facts are very similar to the facts in the case at bar. In that case a boy fourteen years of age went to the depot grounds of the company for the purpose of meeting for business consultation a person whom he had reason to believe was to take a train. The court held that there is no reasonable distinction between the right of a person visiting the premises for the purpose of accompanying another to the departing train and the rights of one who goes there for the purpose of talking with a departing passenger on a business matter. The boy had gone to the station about an hour before the time for the train to depart, and had received his injuries while awaiting for the arrival of the expected departing friend and of the train. The court held that whether the time at which he went to the station in advance of the time for the departure of the train was negligence upon his part was a question to be determined by the jury. It is not contended in this case that plaintiff was guilty of contributory negligence. There is no contention that he was upon the company's platform an unnecessary length of time before the arrival of the train, or that he lingered upon the platform for an unnecessary length of time after its arrival. He, in fact, received the injuries just as he was approaching the depot and just as the train arrived. The company owed the plaintiff the duty of exercising ordinary care in the maintenance of depot platforms, to make them reasonably safe for his use. In the discharge of this duty the jury has found the company was negligent, and there is evidence to support the verdict.

In its motion for a new trial, some of the grounds assigned by plaintiff in error were: "Because said verdict is for excessive damages appearing to have been given under the influence of passion and prejudice;" "because the verdict is not sustained by sufficient evidence;" and "because it is con-

trary to the evidence." The court upon hearing the motion required the plaintiff to elect to accept a judgment of \$1,000 in lieu of the amount fixed by the jury, which plaintiff declined to do. The court thereupon remitted \$600 from the amount fixed by the jury, overruled plaintiff in error's motion for a new trial, and rendered judgment for the sum of \$1,000. This act of the court is complained of by plaintiff in error in its petition and by defendant in error in his cross appeal, and was error as to both. The Code in force in the Indian territory at the time of the trial in this case provided that the court may vacate and set aside the verdict of a jury and grant a new trial upon several grounds, among which are the following: "Excessive damages appearing to have been given under the influence of passion or prejudice;" "the verdict or decision is not sustained by sufficient evidence, or is contrary to law." *Mansfield's Dig. (Ark.)* § 5151. As was said by the court in *Kennon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696, under this statute, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, grant or deny a motion for a new trial, or make order that a new trial be granted unless the plaintiff elects to remit the excessive part of the verdict; and, if he does remit, that judgment be entered for the amount of the verdict less the amount remitted. See also *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 500; *Missouri, K. & T. R. Co. v. Turley*, 1 Ind. Terr. 283, 37 S. W. 52; *Blunt v. Little*, 3 Mason, 102, Fed. Cas. No. 1,578. But the trial court is without authority to reduce a verdict and render judgment for the reduced amount without the consent and over the objection of the plaintiff. *Mas-sadillo v. Nashville & K. R. Co.* 89 Tenn. 661, 15 S. W. 445; *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385; *Noel v. Dubuque, B. & M. R. Co.* 44 Iowa, 293; *Young v. Cowden*, 98 Tenn. 577, 40 S. W. 1088. It is therefore apparent that the action of the court in rendering judgment for the reduced amount was error as to the plaintiff, for when he refused to remit the court was only authorized to grant a new trial.

Plaintiff in error was also prejudiced by the action of the court; for, when the court decided that the verdict of the jury was excessive, and should be reduced to the amount specified by him in his order, it was entitled to have a new trial if defendant in error refused to remit the amount required by the court; and, while in one sense, it may be said that this act of the court is in favor

of plaintiff in error in that its result is to reduce the amount of the judgment against it, it is not, however, the order plaintiff in error was entitled to. *Kennon v. Gilmer*, supra, is an action in which the facts are somewhat similar to the facts in this case. That action arose in one of the district courts of the territory of Montana, and resulted in a judgment for damages in the sum of \$20,750 in favor of plaintiff. On appeal to the supreme court of the territory, that court held the judgment to be excessive, and, without giving plaintiff an opportunity to remit, reduced the judgment of the inferior court from \$20,750 to \$10,750. From the judgment of the supreme court of the territory of Montana both plaintiff and defendant appealed to the Supreme Court of the United States, and that court, in passing upon the action of the territorial supreme court, said: "The defendants were prejudiced, because, if the judgment for the lesser sum had been conditional upon a remittitur by the plaintiff, the defendants, if the plaintiff had not remitted, would have had a new trial generally; and if the plaintiff had filed a remittitur, and thereby consented to the judgment, he could not have sued out a writ of error, and the defendants would have been protected from the possibility of being obliged in any event to pay the larger sum. Whereas upon the absolute judgment entered by the court, without any election or consent of the plaintiff, the plaintiff had the right to sue out a writ of error; and he availed himself of that right, and docketed his writ of error in this court before the defendants docketed their writ of error. The defendants were thus put in the position of being obliged to contest the plaintiff's writ of error in order to defend themselves against being held liable for the larger sum, as the plaintiff contended that they must be upon this record." In the case at bar, when the court rendered judgment for the lesser sum, if plaintiff in error had not appealed, defendant in error had the right of appeal, and has availed himself of it by his cross appeal herein, and plaintiff in error would have been compelled to defend against defendant in error's appeal in order to prevent being held for the larger sum on appeal, for which plaintiff now contends in his cross appeal.

We have examined carefully the evidence in this case, and cannot say that the trial court erred in his conclusion that the verdict was excessive. The cause will be reversed and remanded with directions to grant a new trial, and that the costs in this court be taxed equally against the parties.

Kane, Ch. J., and Williams, Turner, and Dunn, JJ., concur.
20 L.R.A. (N.S.)

WISCONSIN SUPREME COURT.

DANIEL DERAGON, Respt.,

v.

NORBERT SERO, Appt.

(— Wis. —, 118 N. W. 839.)

State — jurisdiction — reservation.

1. State laws for the peace and good order of the people within its borders extend over Indian reservations, and apply to the infraction of such laws by persons of Indian blood.

Indian reservation — police regulation — instruction.

2. A direction of an Indian agent to policemen on the reservation to keep people back from car entrances when persons are getting on and off cars does not apply to a person of Indian blood who goes in an orderly manner to meet his wife and children who are arriving on a train.

Assault — policeman — damages.

3. A policeman on an Indian reservation who assaults and imprisons a person of Indian blood who, upon going to a train to meet his wife and children, disregards his directions to keep back from the entrance to the train, is liable therefor in damages.

Indian reservation — police regulation — reasonableness.

4. An Indian agent cannot authorize policemen on a reservation to require persons of Indian blood, going to meet relatives on an incoming train, to keep away from the entrances to the cars.

(December 15, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Ashland County in plaintiff's favor in an action brought to recover damages for assault and battery. Affirmed.

Statement by Marshall, J.:

Civil action for assault and battery.

Both plaintiff and defendant were partly of Indian blood. The occurrence was at Odanah railway station on the Indian reservation in Northern Wisconsin. The defendant justified upon the ground that he was an Indian policeman lawfully acting in the performance of his duties.

There was evidence showing, or tending to show, the following situation: Defendant was a subordinate United States officer on the Indian reservation having authority to enforce observance of the regulations of the Interior Department for the preservation of

Note. — As to the general question of the rights of a person to accompany departing friends and relatives to the train, or to meet them on their return, see note to *Galveston. H. & S. A. R. Co. v. Matzdorff*, ante, 833.

peace and good order and the observance of law thereon. Plaintiff knew, or ought to have known, of that fact. The latter went upon the depot platform to meet his wife and child, whom he expected, presently, to arrive by train. Defendant ordered him back from the front of the platform and persisted in enforcing his demand in that regard after being informed of plaintiff's purpose. The latter persisted in carrying out such purpose after the train arrived and his wife was about to alight therefrom notwithstanding defendant indicated a determination to prevent it by force. The result was that defendant pushed plaintiff back, roughly, and knocked him down with a policeman's club and then incarcerated him in a badly kept jail for two nights and a day and then set him at liberty.

There was evidence on defendant's side tending to show he acted in good faith to enforce, as he supposed, lawful rules made by the Indian agent, his superior officer; that he assaulted plaintiff to prevent being assaulted by him; that he took him into custody because he was, and persisted in being, disorderly; that he kept him the two nights and one day because of the time, the intervening day being Sunday, and that he set him at liberty, without further pursuing the matter, as a favor. There was evidence on the other side tending to show the assault was needless and perpetrated, revengefully, to prevent plaintiff from going to meet his wife and child. There was evidence that the Indian agent had given orders to keep persons away from trains on their arrival who were not desirous of boarding the cars, but there was no rule of the Interior Department on the question, nor any rule of such department which plaintiff violated up to the time the assault occurred. The jury rendered a verdict in plaintiff's favor. The amount allowed thereby was reduced to comply with terms of denying a motion for a new trial, and judgment was rendered accordingly.

Messrs. William G. Wheeler and Henry H. Morgan, for appellant:

The case is one of Federal cognizance only. *United States v. Mullin*, 71 Fed. 682; *Re Neagle* (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Sheriff v. Turner*, 119 Fed. 231; *Anderson v. Elliott*, 41 C. C. A. 521, 101 Fed. 609; *Hirsch v. Rand*, 39 Cal. 315; *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; *Peters v. Malin*, 104 Fed. 849.

Mr. V. T. Pierree, for respondent:

Both parties are citizens of the state and as such are subject to its laws, both civil and criminal.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; *State v. Morrin* (Wis.) 20 L.R.A. (N.S.)

117 N. W. 1006; *State v. Duxtater*, 47 Wis. 283, 2 N. W. 439; *Schriber v. Langlade*, 66 Wis. 627, 29 N. W. 547, 554; *Stacey v. La Belle*, 99 Wis. 522, 41 L.R.A. 419, 67 Am. St. Rep. 879, 75 N. W. 60.

The action was properly brought against the policeman.

Y-ta-tah-wah v. Rebock, 105 Fed. 257; *Freeman v. Robinson*, 7 Ind. 321; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390; *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744; 19 Cyc. Law & Proc. pp. 353, 354.

Marshall, J., delivered the opinion of the court:

Counsel for appellant cover a broad range in their printed argument, bringing to our attention many Federal statutes and decisions and some authorized rules promulgated by the Interior Department. Such brief recognition of counsel's industry in that regard will, in the main, suffice, since it is conceded, and properly too, that, notwithstanding the occurrence took place on the Indian reservation, the trial court had jurisdiction of the subject-matter of the action and the parties, if appellant's act was not performed in the proper execution of a Federal statute or rule authorized by law.

The laws of this state for the peace and good order of people within its boundaries extend over Indian reservations and apply to infractions of such laws whether by persons of Indian blood or others. *State v. Duxtater*, 47 Wis. 278, 2 N. W. 439; *State v. Harris*, 47 Wis. 298, 2 N. W. 543. That does not conflict with the police duties of Federal officers on reservations, rendering them liable to be prosecuted in the state courts for acts lawfully done in the discharge of their duties.

There was an attempt to justify appellant's conduct on the theory that it occurred in the lawful execution of a rule of the Federal government, promulgated by the Interior Department, but no such rule, touching the case in hand, was produced, or is referred to in counsel's brief. Moreover, there was evidence that no such rule existed for keeping persons of Indian blood, or others, off from depot platforms on the reservations and depriving them of the ordinary privilege of going to and from car entrances on business, and that appellant did not pretend to act in execution of any such rule but of a mere verbal declaration of the Indian agent and Indian farmer to keep people back from car entrances when persons were getting on and off cars. The reasonable limits of that direction, we apprehend, are that mere curiosity seekers, loafers, and persons having no business to go to a car entrance at a depot platform are to be kept at a reasonable distance therefrom so as not to interfere with

the proper and safe transaction of business between railroad companies and their patrons in respect to railway travel. Manifestly, it could not reasonably have anything to do with interference with a person going, in an orderly way, to a car entrance to meet and assist his wife and family in alighting from the car and taking care of them and their belongings. Such a person has business of a perfectly legitimate character in respect to railway travel, and any official direction prohibiting reasonable enjoyment of the privilege would need to be in language unmistakable in that regard, before it could be held to go that far, and then its validity might well be challenged, since the right to enjoy such privilege is well established by law. 2 Rorer, Railroads. p. 1130; Thomp. Carr. Pass. p. 49; Dowd v. Chicago, M. & St. P. R. Co. 84 Wis. 105-114, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24; Banderob v. Wisconsin C. R. Co. 133 Wis. 249, 113 N. W. 738; Doss v. Missouri, K. & T. R. Co. 59 Mo. 27, 21 Am. Rep. 371; Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317.

There was evidence, as indicated in the statement, tending to show appellant assaulted respondent to prevent him from enjoying his foregoing stated lawful privilege. There was no justification, as the jury were warranted in finding, for violating respondent's person after the notification of the perfectly legitimate purpose in mind. The act of pushing him back after being so notified and following it up with harsh treatment upon being defied for the unlawful interference, culminating in knocking him down with a club and incarcerating him in the jail, seems to have been without the slightest legal warrant, as the jury may well have found.

The foregoing amply shows that the case was rightfully submitted to the jury and upon the question of punitory as well as actual damages.

A suggestion is made that the court erred in submitting to the jury the question of whether rules promulgated by the Interior Department of the Federal government were reasonable. There was no such submission. Counsel's argument in that field seems to be purely academic. The language of the court's instruction, to which we are referred, must be read in connection with the evidence to which it applies. The only evidence there was of any regulation testified to have been violated was the direction of the Indian agent and Indian farmer to which we have referred. Were that as drastic as to justify the interference the jury found, and were warranted in finding, occurred, then appel-

lant was not prejudiced by the reasonableness thereof being submitted to the jury for it was unreasonable as a matter of law, The judgment is affirmed.

VERMONT SUPREME COURT.

GEORGE CALDBECK

v.

CHARLES SIMANTON.

(— Vt. —, 71 Atl. 881.)

Warranty — tort — scienter.

1. An action in tort for breach of warranty that an article sold was perfect, which may be begun by arresting defendant, will not lie unless *scienter* is alleged.

Pleading — warranty — falsity — knowledge.

2. An allegation in a declaration for breach of warranty, that defendant "falsely and fraudulently warranted the property," is not sufficient to charge knowledge of the falsity on his part.

Debt — arrest — citizen — description.

3. A warrant describing defendant as of a certain municipality in a certain county located within the state is sufficient to determine his residence within the United States, so as to entitle him to the benefit of a statutory exemption from arrest for debt.

(February 13, 1909.)

Case Note. — Arrest under civil process for breach of warranty.

While, as is clearly shown in the foregoing opinion, an action in the form of tort might lie for a breach of warranty, and, indeed, formerly such actions were of that character rather than in assumpsit, yet, the court holds, the actual nature of the action is to be determined by the substance of the claim rather than by the mere form or classification of the action. The court therefore follows the rules asserted by many authorities, that a plaintiff who may proceed either on the contract or in tort cannot, by proceeding in tort, secure an order of arrest of the defendant where he would not be entitled to such an order if he proceeded on the contract.

Although the court makes a very fine distinction between the effect of the phrase "falsely and fraudulently" as applied to "representations" and "pretense" and to a "warranty," yet, having determined that the declaration did not sufficiently allege *scienter*, it was undoubtedly correct, according to the weight of authority upon the general subject of arrest, in holding that the plaintiff could not proceed by arrest. A search of the authorities, however, has failed to disclose any other case in which an arrest was sought in an action for breach of warranty.

EXCEPTIONS by defendant to rulings of the Caledonia County Court overruling a motion to dismiss a case brought to recover for false warranty. Judgment reversed.

The facts are stated in the opinion.

Messrs. Harland B. Howe and Herbert W. Hovey, for defendant:

The declaration is trespass upon the case for breach of warranty, and no *scienter* is alleged which is fatal to the action.

Stuart v. Wilkins, 1 Dougl. K. B. 18; Williamson v. Allison, 2 East, 446; Sprigwell v. Allen, Ayleyn, 91; Denison v. Ralphson, 1 Ventr. 366; Weall v. King, 12 East, 452; Wright v. Geer, 6 Vt. 151, 27 Am. Dec. 538; Bates v. Martin, Brayton (Vt.) 78; Howard v. McKee, 82 Pa. 409; Staines v. Shore, 16 Pa. 200, 55 Am. Dec. 492; Orphans' Ct. use of Groff v. Groff, 12 Serg. & R. 184; McCauley v. Salmon, 14 Phila. 131; Re Stephenson, 32 Mich. 60; Sedgbeer v. Moore, Brightly (Pa.) 197; Jennings v. Rundall, 8 T. R. 335; Green v. Greenbank, 2 Marsh. 485; Campbell v. Stakes, 2 Wend. 137, 19 Am. Dec. 561.

The process in the case at bar was issued and served as a *capias*, and is void.

Pike Bros. v. McMullin, 66 Vt. 121, 28 Atl. 876; Aiken v. Richardson, 15 Vt. 500; Muzzy v. Howard, 42 Vt. 23; French v. Holt, 57 Vt. 187; Adams v. Whitcomb, 46 Vt. 708; Hill v. Whitney, 16 Vt. 461; Ferris v. Ferris, 25 Vt. 100.

Messrs. David E. Porter and Simonds & Searles for plaintiff:

It is an action in tort.

Dean v. Cass, 73 Vt. 314, 50 Atl. 1085; Beeman v. Buck, 3 Vt. 53, 21 Am. Dec. 571; Joy v. Hill, 36 Vt. 335; Kenerson v. Bacon, 41 Vt. 573; Carter v. Glass, 44 Mich. 154, 38 Am. Rep. 240, 6 N. W. 200; Schuchardt v. Allen, 1 Wall. 359, 17 L. ed. 642; Humiston v. Smith, 22 Conn. 19.

A count for false warranty may be joined with other counts in tort.

Humiston v. Smith, *supra*; Shippen v. Bowen, 122 U. S. 576, 30 L. ed. 1173, 7 Sup. Ct. Rep. 1283; Morehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211; Lassiter v. Ward, 33 N. C. (11 Ired. L.) 443.

At common law the plaintiff was entitled to arrest defendant in an action *ex contractu* as well as in tort.

3 Cyc. Law & Proc. 901; Aiken v. Richardson, 15 Vt. 500; Scott v. Curtis, 27 Vt. 763.

The fact that plaintiff might have waived the tort and sued in *assumpsit* does not make the issuance of the writ as a *capias* void, where the action brought is in tort.

Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774; Suydam v. Smith, 7 Hill, 182; Armstrong v. Ayres, 19 Conn. 540; Hopper v. Williams, 2 Clark (Pa.) 448; 20 L.R.A. (N.S.).

Emerson v. Dow, 11 W. N. C. 270; Russel v. Phelps, 73 Vt. 390, 50 Atl. 1101; Barnes v. Tenney, 52 Vt. 558; Elwell v. Martin, 32 Vt. 217.

When all the other essential allegations have been made, the phrase "falsely and fraudulently" imports a knowledge and sufficiently avers *scienter*.

Shepherd v. Worthing, 1 Aik. (Vt.) 189; State v. Smith, 63 Vt. 201, 22 Atl. 604; Mixer v. Herrick, 78 Vt. 349, 62 Atl. 1010; 20 Cyc. Law & Proc. p. 100; Pryor v. McNairy, 1 Stew. (Ala.) 150; Thomas v. Beebe, 25 N. Y. 246; Eibel v. Von Fell, 64 N. J. L. 364, 48 Atl. 1117; 63 N. J. L. 3, 42 Atl. 754; Steip v. Seguire, 66 N. J. L. 370, 49 Atl. 715; Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55; Pursley v. Wickle, 118 Ind. 139, 19 N. E. 478; West v. Wright, 98 Ind. 335.

Munson, J., delivered the opinion of the court:

The plaintiff declares, in substance, that he bargained with the defendant for the purchase of a diamond, and that the defendant sold him the diamond for a certain price by "falsely and fraudulently warranting" it to be a perfect stone, when, in fact, it was not a perfect stone, but defective in certain respects stated, and that the defendant thereby "falsely and fraudulently deceived him." The service was by arrest, and the case stands on a motion to dismiss. The defendant argues that no *scienter* is alleged; that the declaration is in case for a breach of warranty; that there could be no recovery without proving the warranty; and that this conclusively determines that the action is founded on contract. No point is made distinguishing between the counts.

In 2 Chitty's Pleading, 279, there is a form for declaring in *assumpsit* on a warranty, and at page 679 there is one for declaring in tort on a warranty. The latter form is the one used here. The two forms were joined in one declaration in Dean v. Cass, 73 Vt. 314, 50 Atl. 1085, and the second was held to be in tort and improperly joined with the first. So the declaration before us may be classed, without special examination, as in form a declaration in tort. In pursuing the inquiry further, it will be well to have in mind the nature of a warranty, and the history and characteristics of the remedies permitted for a breach of it. The ordinary warranty relates to the condition of the property at the time of the sale. Such a warranty, if broken at all, is broken when made. The breach consists in the fact that the property is not as it is stated to be. The warranty may be made merely as an assumption of a contract obli-

gation, or it may be deceitfully made with a knowledge of its falsity. In either case it is made to induce the purchase. Personal actions are either for breaches of contract or for wrongs unconnected with contract; assumpsit being in the first class, and case in the second. Chitty, 97. The original action on the case, permitted in suits for which the established forms were not adapted, was not similar to the present action of assumpsit, but resembled rather the present form of a declaration in case for a tort. Chitty, 99. It was at first difficult to distinguish assumpsit from case; and the early decisions in actions on warranties were made before the boundary between the two remedies was well defined. Note to Chandelor v. Lopus, 1 Smith, Lead. Cas. 178. The practice of declaring in tort for warranty broken originated in this early period; and the remedy then adopted continued in almost exclusive use until the middle of the eighteenth century. As late as 1778, Lord Mansfield considered an action of assumpsit for a breach of warranty so peculiar that he reserved the question of its sufficiency; and this method of declaring was then authoritatively sanctioned. Stuart v. Wilkins, 1 Dougl. K. B. 18. Since then assumpsit and case have been recognized as concurrent remedies for breach of warranty. Williamson v. Allison, 2 East, 446; Beeman v. Buck, 3 Vt. 53, 21 Am. Dec. 571; 19 Enc. Pl. & Pr. p. 82, and cases cited.

Closely connected with the subject of warranty is that of deceit by fraudulent representations. The two grounds of liability are entirely distinct, but both may be developed by one affirmation. The evidence may make the affirmation either a deceit or a warranty, or both. The allegations of a declaration charging deceit by means of a false warranty, and of one charging a deceit independent of warranty, are in other respects substantially the same, as is indicated by the first counts of the forms in 2 Chitty, Pl. 687, 688. If the allegation of knowledge in a declaration following the first count of the first of these forms be treated as surplusage, the case becomes an action of tort for a breach of warranty. This treatment of a declaration so framed was sanctioned in Williamson v. Allison, before cited, and that case has since been generally followed. The recognition of assumpsit and case as concurrent remedies for breach of warranty, and the decision in Williamson v. Allison regarding the *scienter*, have led to the adoption of forms confessedly designed to enable the plaintiff to recover for a breach of warranty or for deceit, as the case might develop. A short declaration, framed in this double aspect, was used in Beeman v. Buck, *supra*; 20 L.R.A. (N.S.)

Vail v. Strong, 10 Vt. 457; West v. Emery, 17 Vt. 583, 44 Am. Dec. 356; Goode-nough v. Snow, 27 Vt. 720; Pinney v. Andrus, 41 Vt. 631. This declaration, given in full in the case first cited, avers that the defendant deceitfully sold the property by warranting it to be as described, "well knowing" it to be otherwise. The first count of the form in 2 Chitty, Pl. 687, before referred to, is a more formal declaration of the same character. This form was followed in Harlow v. Green, 34 Vt. 379, and was apparently the basis of the declaration in Whitton v. Goddard, 36 Vt. 730. The direct allegation of knowledge contained in the phrase "well knowing" or its equivalent is ordinarily employed in declarations which claim a recovery on the ground of deceit, and its absence from the declaration used here is the basis of the defendant's claim.

The plaintiff claims that a sufficient averment of knowledge is contained in the form used. The inclusion of this form under the general marginal heading of "deceit" is of little consequence, especially in view of the early history of the subject. It is not probable that Mr. Chitty considered the allegations sufficient to show knowledge; for in subsequent forms for deceitfully selling property by falsely and fraudulently warranting it the usual *scienter* is employed. The concluding averment that the defendant thereby falsely and fraudulently deceived the plaintiff cannot enlarge the effect of the matters previously alleged. If the declaration contains a *scienter*, it must be—where the plaintiff claims it to be,—in the allegation that the defendant "falsely and fraudulently warranted" the property. Words similar to those contained in this declaration are found in the form at page 279, which is unquestionably a declaration in assumpsit. It is there alleged that the defendant, "contriving and fraudulently intending to injure the said plaintiff, did not perform or regard his said promise and undertaking, . . . but thereby craftily and subtly deceived and defrauded the said plaintiff, in this:" That the property was not as warranted. But it will be noticed that the words in the two forms are used in different connections. In the assumpsit declaration the words quoted are applied to the breach of the defendant's promise, and not to the promise itself. In the declaration in tort the words "falsely and fraudulently" are applied directly to the act of warranting. This difference, however, is minimized by the fact that the undertaking is broken when assumed, so that in the first form the fraudulent intent is really laid at the time of the sale. The assumpsit form was considered in Shepherd v. Worth-

ing, 1 Aik. (Vt.) 188, and was held to contain no substantial allegation of fraud; but it was suggested that an averment that the defendant falsely and fraudulently warranted the property might be equivalent to the required *scienter*. In *State v. Smith*, 63 Vt. 201, 22 Atl. 604, the court examined an indictment for perjury in which the usual words "as he then and there well knew" were omitted, and it was held that the averment that the respondent testified to the matter "wilfully and corruptly" sufficiently alleged that the statement was false to his knowledge. The averment that the defendant "falsely and fraudulently" warranted the property, given its natural construction, might seem to import more than a warranty false in fact. It may be urged with some force that "fraudulently" characterizes the defendant's act, and implies a knowledge of the falsity of his statement. But the construction long given to the form, in connection with the construction of other forms pertaining to the same subject, is not to be ignored in passing upon the question.

The case of *Eibel v. Von Fell*, 63 N. J. L. 3, 42 Atl. 754, should be considered in this connection. There the declaration alleged that the defendants sold certain premises to the plaintiff by "falsely and fraudulently representing" that the house was new, when, in fact, it was old. The court held that this disclosed a cause of action, not for a false warranty as was claimed by the plaintiff, but for deceit, and said: "A good cause of action for deceit may be set out without a charge that the representation alleged to be false was known by defendant to be so, provided it is charged that the false representation was fraudulently made." It will be noticed that in the second of the two forms for charging deceit before referred to (2 Chitty, Pl. 688), the first count contains an allegation that the defendant knew that the representation was false, while the second count does not contain this, but stands on the allegation that the defendant, "contriving and intending to deceive and defraud the said plaintiff in that behalf, then and there falsely and deceitfully pretended to the said plaintiff," etc. It would seem from these authorities that the words "falsely and fraudulently" as applied to a "pretense" or even to a "representation" are given an effect to which they are not entitled when applied to a warranty.

But the precise question has been adjudged in this state, although without special consideration. In *Foster v. Caldwell*, 18 Vt. 176, the declaration alleged, in substance, that the deceased sold the plaintiff a number of sheep by falsely and fraudu-

lently warranting them to be sound when in fact they were diseased, and that the deceased deceived the plaintiff in the sale; but there was no allegation that the deceased knew the sheep were unsound. The verdict taken was in tort, and the court allowed it to be amended, after the panel was dismissed, by striking out the words "is guilty" and inserting the words "did assume and promise." In sustaining this action, it was said: "There is no allegation of a *scienter* in the declaration, and consequently there can be no recovery . . . for a deceit, notwithstanding the declaration is, in form, in case for a false warranty."

But the plaintiff contends, further, that no *scienter* is necessary, that the declaration is in tort, and that the question whether the process issues on a contract is to be determined, not by the origin of the claim, but by the form of the action. We have seen that the declaration is tort in form, and incapable of being joined with *assumpsit*. But it may nevertheless be process issuing on a contract within the meaning of the statutory provision. The plaintiff's argument to the contrary is based largely upon what was said by the courts soon after the recognition of *assumpsit* as a proper remedy placed them in the position of sustaining *assumpsit* and case as concurrent remedies for the breach of a purely contract obligation. It was said by Lord Ellenborough in *Williamson v. Allison*, 2 East, 446, that the warranty is the thing which deceives the buyer who relies on it, and that it is sufficient to prove the warranty broken to establish the deceit. It has sometimes been said in following this authority that the law implies deceit from the breach of the warranty. This view is clearly untenable,—even when the undertaking of warranty is treated as a representation. "No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it." 2 Pom. Eq. Jur. § 884. The law raises no presumption of knowledge of falsity from the mere fact that the representation was false. *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881. The phraseology of our standard forms reflects the indefiniteness of distinction which prevailed in the formative period of the common law, and this is true to some extent of the language of commentators comparatively modern. Blackstone, writing about 1758, after speaking of the beating of another and the taking of another's goods as trespasses, proceeds: "So, also, nonperformance of prom-

ises or undertakings is a trespass upon which an action of trespass on the case in assumpsit is grounded." The subject may be briefly reviewed and further elucidated in the words of the note to *Chandelor v. Lopus*, 2 Smith's Lead. Cas. 187 (Am. ed. 1847), where it is said in connection with a consideration of *Williamson v. Allison* and kindred cases: "Originally actions upon breaches of warranty, as well as of all other promises, were substantially, as well as nominally, actions on the case, which went upon the ground of deceit, and set forth the undertaking of the defendant, and the consideration by which it was supported, for the purpose of establishing a fraud on his part, and a consequent legal injury to the plaintiff. But in modern times the distinction between assumpsit and case has become as well established as that between trespass and covenant, and it is not easy to see why it should be disregarded in the single instance of actions such as those we have just been considering." It may also be said that there is no plainer distinction in the law than that between breach of warranty and deceit; and the law no more implies deceit from a breach of warranty than it does from a breach of covenant for title or from the non-performance of a contract of suretyship.

The difference between assumpsit and case as remedies for wrongs of this character was comparatively of little importance when our earliest cases upon the subject was decided. The subsequent abolishment of imprisonment for debt has introduced an element which cannot be ignored in reviewing the subject at this date. It is not necessary to consider further the construction, technicalities, and classification of the different forms employed, nor to anticipate the questions of practice that may arise in connection with their use. It is enough to say that, if a plaintiff wishes to proceed by arrest, he must allege a case that entitles him to arrest. That right cannot be given by mere form or classification. The test must be the nature of the action as determined by its substance. It is said in *Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571, that assumpsit is supported by proof of the sale, a warranty, and the breach of it, and that nothing more is required in tort. If the declaration in tort requires the same and only the same proof as the one in assumpsit, it is manifestly a declaration in tort only in name. The declaration before us is so framed that nothing more is required. It discloses a warranty false in fact, but not false to the knowledge of the warrantor. If the plaintiff recovers upon this declaration, it will be solely by force of the contract. Proof of fraud was not pertinent to the issue presented.

20 L.R.A. (N.S.)

Commencement by trustee process is authorized, and arrest or imprisonment is prohibited, in actions founded on contract. It is held in regard to trustee process that the form of the action governs (*Elwell v. Martin*, 32 Vt. 217), and it is argued that this holding is decisive here. It is true that we have substantially the same expression in both statutes, but it is used with reference to different subjects, and the nature of those subjects may justify, and even require, different constructions. It is the general scheme of our law that a man's property shall be held for the satisfaction of all his obligations, but that his body shall be held only for the satisfaction of obligations of a certain class. The trustee process is a method provided for reaching property held in certain forms, and whatever the scope given it by construction its operation will be in line with the general purpose of the law. The right of arrest pertains only to a limited class of obligations, and the right to exercise it in a given case must be determined by the line which separates that class from others. Any test or construction which carries the right beyond that line will be at variance with both the purpose and the letter of the law.

It is said that it does not appear that the defendant is a resident of any of the United States, and so within the exemption. But the writ sets up the defendant as of St. Johnsbury, in the county of Caledonia, and this is a sufficient determination of residence for the purposes of defendant's motion.

Judgment reversed, motion to dismiss sustained, and writ dismissed.

ALABAMA SUPREME COURT.

SOUTHERN STEEL COMPANY, Appt.,

v.

WILEY HOPKINS, Adm., etc., of Sam Birchfield, Deceased, et al.

(— Ala. —, 47 So. 274.)

Corporation — consolidation — rights.

1. A corporation formed by consolidation of others may assert the rights, equities and defenses of one of the constituent companies when sued on a liability existing against it prior to the consolidation.

Parties — defect — effect.

2. A motion to dismiss an action against

Case Note. — *Power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single tort.*

SOUTHERN STEEL Co. v. HOPKINS is one of a very few cases that has had presented to it for consideration the foregoing proposition. The case reopens a controversy that

a consolidated corporation for a liability which arose against one of the constituent companies before the consolidation cannot prevail because the name of the original defendant was necessary and not used in the cause, since the defect might have been cured by amendment.

Injunction — multiplicity of suits.

3. A corporation having a perfect defense applicable alike to more than one hundred cases brought against it by employees injured by an accident in its works may, to avoid a multiplicity of suits, maintain a bill to enjoin prosecutions of the actions at law until the defense can be established.

Same — jury trial.

4. The right of trial by jury is not infringed by entertaining a bill in equity in favor of one sued by numerous persons

against whose actions he has a common defense, to enjoin prosecution of the actions to enable him to establish his defense so as to avoid a multiplicity of suits.

(February 13, 1908.)

APPEAL by complainant from a decree of the Chancery Court for Jefferson County dismissing a bill filed to enjoin prosecution of numerous suits at law. Reversed.

The facts are stated in the opinion.

Messrs. Campbell & Johnston, for appellant:

The equitable jurisdiction to enjoin numerous actions at law may and should be exercised on behalf of a single party against

has been going on for some time between the courts and Mr. Pomeroy in reference to the soundness of one of the four grounds mentioned by him for equitable interposition in ordinary actions at law on the ground of preventing a multiplicity of suits. The one referred to is number 3, which reads: "Where a number of persons have separate claims . . . against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter can be settled in a single suit." 1 Pom. Eq. Jur. 3d ed. § 245.

This broad statement of Mr. Pomeroy, is, however, limited by him to a certain extent in § 251½. The proposition in the abstract, as is laid down in Pomeroy, if given the scope often claimed for it, would violate the rule of equity pleading relating to multifariousness. Is it not the purpose of this note, however, to engage in this controversy.

SOUTHERN STEEL CO. v. HOPKINS is the only case that a careful search reveals which holds that an alleged tortfeasor, who has been sued in actions at law for personal injuries by a number of persons injured by the alleged tort, may, because of the number of suits, invoke the aid of equity to settle the controversies in one suit, on the ground that the complainant has a common defense to all of such actions.

The cases cited therein as sustaining the position taken by the court in exercising jurisdiction, do not go to the extent that SOUTHERN STEEL CO. v. HOPKINS does. Moreover, those cases presented some well-settled ground of equitable jurisdiction. Thus, *York v. Pilkington*, 1 Atk. 282, was a bill of peace by one in possession to settle a right of fishery against several claimants.

The most reliance seems to be placed upon *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8. It is very evident that the court misconstrued this case, as it apparently treated it as being a bill in equity to restrain several actions for damages by a great many defendants injured by an inundation caused by the bursting of a reservoir, on the ground that a multiplicity of suits would thereby be prevented. As a matter 20 L.R.A. (N.S.)

of fact, the case did not present that question, and it was not passed upon by the court. Indeed, in so far as the question here under consideration is concerned, the case, if it is an authority either way, sustains a proposition contrary to SOUTHERN STEEL CO. v. HOPKINS, since the entire proceeding is based upon a tacit recognition of the right of injured persons to have the question of their injury settled by proceedings at law.

It appears that upwards of 7,000 people were either killed or injured by this inundation, and, by a special act, called "The Sheffield waterworks act," commissioners were appointed who were to inquire into the damages occasioned by the inundation, and any person claiming damages under the act was directed to lodge a statement of his claim at the office of the commissioners. Where, on any claims, damages were assented to by the county or assessed by the commissioners, the costs of the claimants were to be borne and paid by the county, and the commissioners were to certify accordingly. Most of the claimants for compensation under this act were poor and ignorant, and employed improper persons to represent them. The commissioners therefore made a regulation that no certificate should be issued except to the claimant in person. A difference of opinion arose among the commissioners as to the validity of 1,500 of such certificates, as it was questionable whether the power of the commissioners had not expired prior to their issuance. These certificates, however, were delivered to the defendant in the case, who was the town clerk. According to the act in question, these certificates, unless paid as therein provided, had the effect, as against the company, of a judgment. While the certificates were still in the hands of the town clerk, the water company, by a bill in equity, sought to restrain the clerk from delivering the certificates to the persons entitled thereto, on the ground that they were invalid for the reasons already stated, and that, if issued, the holders thereof would have them taxed according to the terms of the act, and have judgment rendered thereon, and that such proceedings would seriously prej-

a numerous body, although there is no "common title" nor "community of right" or of "interest in the subject-matter" among these individuals, where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained against each individual member of the numerous body.

Turner v. Mobile, 135 Ala. 126, 33 S. W. 132; Cleveland v. Insurance Co. of N. A. 151 Ala. 191, 44 So. 37; Jones v. Hardy, 127 Ala. 221, 226, 28 So. 564; Morgan v. Morgan, 3 Stew. (Ala.) 386, 21 Am. Dec. 638; York v. Pilkington, 1 Atk. 282; Kennedy v. Kennedy, 2 Ala. 571; Dallas County v. Timberlake, 54 Ala. 403; 15 Enc. Pl.

& Pr. pp. 675 et seq.; 1 Pom. Eq. Jur. 3d ed. §§ 269, 274; 16 Am. & Eng. Enc. Law, pp. 64, 65; Sheffield Waterworks v. Yeomans, L. R. 2 Ch. 8; Hale v. Allinson, 188 U. S. 77, 47 L. ed. 392, 23 Sup. Ct. Rep. 244; Bispham. Eq. 7th ed. § 417, p. 576; Wyman v. Bowman, 62 C. C. A. 189, 127 Fed. 263; Milwaukee Electric R. & Light Co. v. Bradley, 108 Wis. 467, 84 N. W. 870; Southern P. R. Co. v. Robinson, 132 Cal. 408, 12 L.R.A.(N.S.) 497, 64 Pac. 572; Lehigh Valley R. Co. v. McFarlan, 31 N. J. Eq. 730; 3 Current Law. p. 1216; American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. 400; Kerr, Inj. 135; Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contr. Co. 57 Fed. 45; Osborne v. Wisconsin C. R. Co. 43 Fed. 824; De-

duce the complainants by compelling them to defend themselves on numerous improper taxations. It was also alleged that the question whether these certificates were valid or invalid was the same as to all of them. The relief sought was that the clerk be restrained from delivering the certificates except as the court should direct; also for a decree declaring their invalidity.

From the foregoing statement it is obvious that the question presented to the court of equity was not the question of the validity of the claim of the defendants for damages arising from the tort in question, but simply a question of law as to the validity of certificates issued by commissioners authorized in that regard, but under such circumstances, as claimed, as to be without the scope of their authority, and therefore invalid.

In considering the question of relief after holding, on demurrer to the bill, that it presented proper grounds for equitable jurisdiction, the vice chancellor said that the other question, whether the documents ought to be delivered up and canceled, or whether the parties ought to be allowed to have them and pursue their legal remedy, depended upon whether these were proper certificates, and that again depended on all the details and facts as to what was done by the commissioners and their clerk by their direction.

In affirming the judgment of the vice chancellor, Lord Chelmsford, L. C., said that, strictly speaking, perhaps the bill was not a bill of peace, as the rights of the claimants under the alleged certificates were not identical. Continuing, he said: "The rights of the numerous claimants for costs all depend upon the same question,—the validity of certificates sealed under the circumstances stated in the bill. Each of the 1,500 persons, if he obtained the certificate from Mr. Yeomans [the town clerk], might produce it to a master of one of the superior courts of common law, and obtain, as a matter of course, a taxation of the costs. He might then enter up judgment and sue out execution, and no application could be made in any of the common-law courts to stop the proceedings, although it may turn out 20 L.R.A. (N.S.)

in the result of this suit that the certificates are wholly invalid. It is true that, if the certificates have no validity, a motion might be made in the court where judgment was entered up, and from which the execution issued, to set aside that execution, but not until considerable expense had been incurred, and possibly after the same course of proceeding to judgment and execution had been taken by many of the claimants. It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned, and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend."

The criticism in SOUTHERN STEEL CO. v. HOPKINS, of Tribette v. Illinois C. R. Co. infra and the citing of Pomeroy to the contrary, is also apparently based upon a misconception of the position taken by that able writer. In his 3d edition, § 264, pp. 428, 429, he considers the Tribette Case, and concedes that a defense by the complainant that the defendants were guilty of contributory negligence, would be a common defense as against all of the several actions for the injury but would require a separate issue as to each of them, which could not be avoided by removing the cases to a court of equity. He, however, asserts that, if the case presented the single question of the denial of complainant's negligence, it would then be within ground number 3.

While, as stated, it is not the purpose of this note to engage in this controversy, yet a search fails to reveal any case which, on the facts, sustains the proposition if applied to actions for breach of contract or the commission of a tort; and Pomeroy cites no such case.

Much the same question as that considered by the court in SOUTHERN STEEL CO. v. HOPKINS was presented and passed upon in the case of Tribette v. Illinois C. R. Co. 70 Miss. 182, 19 L.R.A. 600, 35 Am. Rep. 642, 12 So. 32, which is cited and disapproved of in that case. In this case it was sought to restrain actions for damages by several persons for injuries by fires, caused from

Forest v. Thompson, 40 Fed. 378; Carlton v. Newman, 77 Me. 408, 1 Atl. 194; 14 Harvard Law Rev. pp. 611, 612; Kellogg v. Siple, 11 App. Div. 458, 42 N. Y. Supp. 379; Guess v. Stone Mountain Granite & R. Co. 67 Ga. 215; 16 Cyc. Law & Proc. p. 66, article "Equity;" Bailey v. Tillingham, 40 C. C. A. 93, 99 Fed. 807; New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592; Boyd v. Schneider, 65 C. C. A. 209, 131 Fed. 223; Virginia-Carolina Chemical Co. v. Home Ins. Co. 51 C. C. A. 21, 113 Fed. 1; Crawford v. Mobile, J. & K. C. R. Co. 83 Miss. 708, 102 Am. St. Rep. 476, 36 So. 82; Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082; Pom. Eq. 4th ed. § 261, note; Tisdale v. Three Ins. Cos. 84 Miss. 709, 36 So. 568; Illinois C. R. Co. v. Garrison, 81

Miss. 257, 95 Am. St. Rep. 469, 32 So. 996; Henderson v. Hall, 134 Ala. 455, 63 L.R.A. 673, 32 So. 840; Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50.

The jurisdiction for the prevention of a multiplicity of vexatious actions at law is a part of the chancery jurisprudence, and the exercise thereof does not deprive plaintiffs at law of any right to trial by jury.

York v. Pilkington, supra; Morgan v. Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; Cleveland v. Insurance Co. of N. A. supra.

Messrs. Frank S. White & Sons and John C. Carmichael, for appellees:

There being no privy or common interest between the defendants in the action at law, and the negligence alleged being a several and separate wrong as to each

sparks emitted by an engine of the complainant. The case contains a very able presentation of the grounds on which equity will take jurisdiction to avoid a multiplicity of suits, and, after considering the authorities on the subject, it is held that the existence of numerous suits for damages for a tort or breach of contract, where each depends upon the same questions of fact and law, does not present a sufficient ground for the interposition of equity. The doctrine of that case was recognized in Illinois C. R. Co. v. Garrison, 81 Miss. 257, 95 Am. St. Rep. 469, 32 So. 996, but was distinguished from a case involving actions of trespass when the liability in each case depended upon the same facts, and the act of which complaint was made in each of the suits was a constantly recurring one. In later decisions, however, the case seems to have been practically overruled, and, from the conservative position taken by the court in that case, that court seems to have gone to the opposite extreme.

Thus, in Blumer v. Ulmer (Miss.) 44 So. 161, it was held that equity would take jurisdiction in behalf of different depositors of an insolvent bank to recover from the directors damages for deceit, on the sole ground that a multiplicity of suits was thereby avoided.

And in Whitlock v. Yazoo & M. Valley R. Co. 91 Miss. 779, 45 So. 861, it was held that the fact that a number of suits were pending against a railroad company by passengers on the same train to recover damages because of being unreasonably delayed in transit presented sufficient ground for equitable jurisdiction to dispose of such actions in one suit; and the several actions at law were accordingly restrained.

Ducktown Sulphur, Copper, & I. Co. v. Fain, 109 Tenn. 56, 70 S. W. 813, involves a principle very similar to that in the Tribette Case. In this case the court of equity refused to assume jurisdiction and restrain actions at law by different property owners for damages for a nuisance, and to dispose of the matters involved in such suits in a single action in equity, on the ground of

preventing a multiplicity of suits. The court, in so holding, cited the Tribette Case with approval.

A case directly in point is that of Vandalia Coal Co. v. Lawson (Ind.) 87 N. E. 47, wherein, after giving the matter very able consideration, the Tribette Case is sustained and the doctrine of SOUTHERN STEEL CO. v. HOPKINS criticized and disapproved. So far as the facts are concerned, the cases are very similar, many people being injured in a mine by the alleged negligent action of the mine owners or operators. The aid of equity was sought by the company to restrain the bringing of suits by the injured persons, or their representatives, for damages sustained by them, and seeking to have the entire matter disposed of by a single action in a court of equity, on the ground that the company was in no wise liable to the defendants for any of their alleged injuries; that the claim of each was based on the same explosion, and that, upon the trial of the cause, the company would clearly prove a state of facts which would be a common defense to all the actions. In refusing to take jurisdiction for this purpose, it is said that the exercise of the power to issue an injunction to prevent a multiplicity of suits is not to be absolutely controlled by the discretion or caprice of the various courts. "Such arbitrary power would be as unreasonable as that possessed by a monarch. The discretion used should be the result of legal reasoning and consideration, wherein all the facts and circumstances are considered with regard to whether the assumption of jurisdiction by equity would 'make for justice.' . . . Many of the later cases show that the number of cases in which equity will assume jurisdiction is increasing; but in allowing this condensation of litigation courts must look well to the facts and see that a consolidation will not confuse the issues, will not bring so many questions or varied interests into a case that they cannot be as well decided as if the cases were tried separately. will not work a practical denial of that grand constitutional guaranty, trial by jury. Every man has the right to try his case

party injured, equity has no jurisdiction to enjoin their actions to avoid a multiplicity of suits.

Turner v. Mobile, 135 Ala. 124, 33 So. 132; Tribette v. Illinois C. R. Co. 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; Illinois C. R. Co. v. Garrison, 81 Miss. 263, 95 Am. St. Rep. 469, 32 So. 996; Marselis v. Morris Canal & Bkg. Co. 1 N. J. Eq. 31; Adams, Eq. p. 200; Randolph v. Kinney, 3 Rand. (Va.) 394; Dodd v. Hartford, 25 Conn. 232; Thomas v. Council Bluffs Canning Co. 34 C. C. A. 428, 92 Fed. 422; Schulenberg-Boeckeler Lumber Co.

v. Hayward, 20 Fed. 422; Scofield v. Lansing, 17 Mich. 437; Youngblood v. Sexton, 32 Mich. 410, 20 Am. Rep. 654; Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; O'Brien v. Fitzgerald, 6 App. Div. 509, 39 N. Y. Supp. 709; Rayner v. Julian, 2 Dick. 677; Brookes v. Whitworth, 1 Madd. Ch. 86; Sheffield Waterworks v. Yeomans, supra; Brinkerhoff v. Bostwick, 105 N. Y. 567, 12 N. E. 58; National Tube Co. v. Smith, 57 W. Va. 210, 1 L.R.A.(N.S.) 195, 110 Am. St. Rep. 771, 50 S. E. 717; Deepwater R. Co. v. Motter, 60 W. Va. 55, 116 Am. St. Rep.

with its issues clear and well defined. If a consolidation can be had without interfering with this right, it should be granted in a proper case; if it cannot be so had, it should be denied. Should the court take jurisdiction of this case in equity and the issues tried out therein, it would be necessary to submit the questions of fact—the amount of damages done the several injured persons, etc.—to a jury. The possibility that the jury might confuse the evidence relating to so many separate parties is strong. Great difficulty might arise in adjusting the rights of all parties in one decree, and justice would be more likely obtained by separate trials. . . . Given countenance by such eminent authority as Professor Pomeroy, it is not strange that courts have been found willing to carry the doctrine of injunctive relief to prevent a multiplicity of action to such an extent as to seriously impair the right of trial by jury; and it is certain that other courts, in time, with the added warrant of precedent given by the first cases, will be found willing to still further undermine that right."

In referring to *SOUTHERN STEEL Co. v. HOPKINS*, it is said the effect of that decision is to prevent single suits brought by competent parties in competent courts, where the issues, separate and distinct, "could be determined in accordance with constitutional and regular methods, and where it, equally with the administrator of the dead employee, could have a fair trial. The right of a single employee separately injured to have his case thus tried has not yet been denied. But by the case under review it is substantially held that the cost of an explosion which kills 110 men must not be made greater than it would have been had only one man been killed." Continuing, the court says: "The inability of appellees to pay judgments or costs which might be rendered against them cannot be considered as a reason for invoking equity jurisdiction. The law does not limit a man's privilege to establish his rights by his financial standing, and justice in due and orderly course is as much the right of the poor as it is of the rich."

It is doubtful if one of the reasons stated for equity not assuming jurisdiction, to the effect that it would be necessary to ascer-

tain the amount of damages occasioned to the injured people, would generally be recognized, as it is a question whether, if equity found that the alleged common defense was not a valid defense to the several actions, it would retain jurisdiction to assess the damages of the defendants. Under such circumstances, it would be quite as apt to dismiss the bill and allow the prosecution at law of the various suits. Conceding that this course would be indulged in rather than the one suggested by the court, it would seem to present an additional reason why, under such circumstances, equity ought not to take jurisdiction. If the only purpose of taking jurisdiction is to decide a question of law, based upon disputed facts which it must determine, and which, ordinarily, the defendants would be entitled to have submitted to a jury, then it would seem clear that not only one, but two, valid reasons are presented for refusing to take jurisdiction. One reason—a deprivation of the right to trial by jury—has already been considered; the other rests upon the equitable principle that "equality is equity." That "equity abhors inequality." The determination of this question of law, or common defense, as it is called, based upon a disputed state of facts, should the determination result in favor of the defendants, would result simply in a dismissal of the bill, leaving the defendants in a position no better than before their actions were restrained, while, in the meantime, the long delay incident to the ordinary chancery case would undoubtedly result in greatly injuring and impairing their chances of recovery by the removal or death of witnesses, and loss of memory incident to the delay. The defendants would not even have the advantage of claiming that the decision of the court of equity was *res judicata* upon either the law or the facts, as the company would be entitled in each case to contest the facts and have the same submitted to the jury on variant theories, which might, and undoubtedly would, raise questions of law not presented in the equity case. If it be conceded that a favorable decision to the company would be *res judicata* as to the defendants, and it undoubtedly would, as it would result in the actions at law being permanently restrained, then the added reason for refusing equitable jurisdiction is presented

875, 53 S. E. 705; Freer v. Davis, 52 W. Va. 1, 59 L.R.A. 556, 94 Am. St. Rep. 895, 43 S. E. 164; Story, Eq. §§ 72, 73; Sadlier v. New York, 185 N. Y. 408, 78 N. E. 272; Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; Winslow v. Jenness, 64 Mich. 84, 30 N. W. 905; Dilly v. Doig, 2 Ves. Jr. 486; Ward v. Northumberland, 2 Anstr. 469; Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 531; Hinchman v. Paterson Horse R. Co. 17 N. J. Eq. 75, 86 Am. Dec. 252; Murphy v. Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 355; Ritchie v. Dorland, 6 Cal. 40; Scottish Un-

ion etc. Ins. Co. v. J. H. Mohlman Co. 73 Fed. 68; Swift v. Larrabee, 31 Conn. 239; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 468; Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445; Storrs v. Pensacola & A. R. Co. 29 Fla. 617, 11 So. 229; Boonville Nat. Bank v. Blakey, 166 Ind. 427, 76 N. E. 534; School Dist. No. 25 v. Rice, 11 Idaho, 99, 81 Pac. 155; Scott v. Erie R. Co. 34 N. J. Eq. 355; Scott v. McFarland, 70 Fed. 281; Merrill v. Lake, 16 Ohio, 373, 47 Am. Dec. 380; Hardin v. Swoope, 47 Ala. 276; Zanhizer v. Hefner, 47 W. Va. 418, 35 S. E. 4; Tompkins v. Craig, 93 Fed. 885; Scott v.

in that in assuming jurisdiction no possible advantage could result to one of the parties to the suit, and no possible injury to the other. If the company wins, it has ended the matter; if it loses, its rights would still be practically intact with the added gain arising from the delay.

The Tribette Case, was also cited and quoted from with approval by the Alabama court in *Turner v. Mobile*, 135 Ala. 73, 33 So. 132, which case is analyzed and quoted from in a note to *Illinois Steel Co. v. Schroeder*, 14 L.R.A.(N.S.) 239. In the *Turner Case*, in considering the third proposition of Mr. Pomeroy, it is said: "The authorities which take a different view of the doctrine under discussion hold, as we have seen, that to authorize numerous persons to unite in one bill for the prevention of a multiplicity of suits, they must have a common title to, or a common interest in, the subject-matter involved; and that a mere common interest in a question of law involved in pending or threatened suits will not suffice. This position is nowhere better or more fully stated than by Campbell, Ch. J., in *Tribette v. Illinois C. R. Co.* 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; and, as the opinion treats fully of Mr. Pomeroy's position, and demonstrates its fallacy, we quote it in part."

The doctrine of the Tribette Case also finds support in *Bliss on Code Pleading*, § 76, wherein, as illustrating the necessity of community of interest, in order that actions for damages may be united, the learned writer mentions as a case where there is no such community of interest, one where a common carrier carelessly destroyed property belonging to different persons, or the lives of different passengers.

This question also receives a very exhaustive discussion in *Beach on Injunctions*, § 543, and the doctrine of the Tribette Case is therein approved.

This case is also cited with approval as authority to sustain this doctrine in *High on Injunctions*, § 65-a.

The trend of modern authorities on the question of equitable jurisdiction to avoid a multiplicity of suits is to exercise a certain degree of discretion as to when jurisdiction will be taken on that ground. This discretion is not arbitrary, but depends to a great extent upon the question of con-

venience to each party, and also on the question of injury to either party by assuming jurisdiction or refusing jurisdiction. To a great extent this discretion is controlled by the question whether the exercise of it will deprive any of the parties of their constitutional right of trial by jury. This right is generally placed by the courts beyond and above any question of convenience or pecuniary loss. In determining whether in a given case the discretion vested in the court should be exercised by assuming jurisdiction or extending jurisdiction to meet a new state of facts, or a new condition, the rule that one is not deprived of his constitutional rights to jury trial by a court of chancery taking jurisdiction of and disposing of a case presenting ordinary equitable features is not applicable. In determining whether or not the discretion in the court should be exercised to save a multitude of suits, it is not the question of its right that the court considers, but the question what it ought, under the circumstances presented, to do. The following cases, while not within the scope of this note, illustrate this tendency of the courts: *American Smelting & Ref. Co. v. Godfrey*, 158 Fed. 225; *United States v. Bitter Root Development Co.* 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318; *Southern P. Co. v. Robinson*, 132 Cal. 408, 12 L.R.A.(N.S.) 497, 64 Pac. 572; *Chicago v. Collins*, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423; *Livingston County Bldg. & L. Assn. v. Keach*, 219 Ill. 9, 76 N. E. 72; *Adams v. Oberndorf*, 121 Ill. App. 497; *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; *Jordan v. Western U. Teleg. Co.* 69 Kan. 140, 76 Pac. 396; *Daab v. New York C. & H. R. R. Co.* 70 N. J. Eq. 489, 62 Atl. 449; *Christian Feigenspan v. Nizolek*, 71 N. J. Eq. 382, 65 Atl. 703; *Miller v. Willett*, 71 N. J. Eq. 741, 65 Atl. 981; *Tudor Boiler Mfg. Co. v. I. & E. Greenwald Co.* 5 Ohio C. C. N. S. 37; *Columbian University v. Taylor*, 25 App. D. C. 124; *National Tube Co. v. Smith*, 57 W. Va. 210, 1 L.R.A.(N.S.) 195, 110 Am. St. Rep. 771, 50 S. E. 717 (citing *Tribette v. Illinois C. R. Co. supra*). See also *Illinois Steel Co. v. Schroeder, supra*.

Neely, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Northern P. R. Co. v. Amacker*, 1 C. C. A. 345, 7 U. S. App. 33, 49 Fed. 629, S. C. 46 Fed. 233; *Manchester F. Assur. Co. v. Stockton Combined Harvester & Agri. Works*, 38 Fed. 378; *Dodge v. Briggs*, 27 Fed. 160; *Hughes v. Hannah*, 39 Fla. 365, 22 So. 613; *Rowbotham v. Jones*, 47 N. J. Eq. 337, 19 L.R.A. 663, 20 Atl. 731; *Richardson v. Davidson*, 2 Silv. Sup. Ct. 194, 5 N. Y. Supp. 617; *Mt. Zion v. Gillman*, 9 Biss. 479, 14 Fed. 123.

Messrs. Caldwell & Carmichael, Bowman, Harsh, & Beddow, Stallings & Drennen, Robert M. Bell, B. M. Allen, George P. Bondurant, W. K. Terry, D. B. Anderson, Sam Will John, John S. Kennedy, H. K. White, and Smith & Smith also for appellees.

Tyson, Ch. J., delivered the opinion of the court:

Two questions only are involved in this appeal: One, whether the appellant was a party who could file the bill; second, whether the court has jurisdiction of the case made. The lower court dismissed the bill for want of equity, deciding both points against the appellant.

The appellant is the resultant or successor and assign by consolidation of two corporations—one the Alabama Steel & Wire Company, and the other the Underwood Coal & Iron Company—in December, 1905. The Alabama Steel & Wire Company having been sued at law on a liability existing prior to the consolidation, the first question is: Can the appellant, the new company, assert the rights, equities, and defenses of the wire company, as set up in the bill in this case. We think there ought to be no doubt about this right. The appellant is the successor in law of the merged companies. It succeeds to all their respective rights, privileges, powers, and franchises, and becomes liable for all their debts, liabilities, and duties, and thus plainly has the right to defend and prosecute suits at law and in equity for the protection of its rights, the same as the original companies could do. The original company in this case in all prosecutions and defenses in its name would necessarily act for and under the control of the new company. The policy of the law and the character of the change affected by the consolidation of the corporations are shown by § 1151 of the Code, and by Gen. Acts 1903, pp. 331, 332, § 40. See *Johnson v. State*, 88 Ala. 176, 7 So. 253. If the name of the original corporation was essential in this proceeding on special objection urging and showing such necessity, the defect could 20 L.R.A. (N.S.)

easily have been cured by amendment, and therefore was not available on motion to dismiss.

The second question is whether the bill is properly filed as one to avoid a multiplicity of suits. An explosion occurred in a mine owned by the wire company, by which 110 persons lost their lives, and 110 separate suits were brought by their representatives to recover damages for alleged negligence by the owner of the mine, by which the accident occurred. The appellant, alleging that the wire company (and it, as its successor) has a perfect defense applicable alike to all these suits, filed the bill in this case to enjoin actions at law until this defense could be determined. The question abstractly is whether the court has jurisdiction of any case of this kind; for, if it has, this case must come within the rule, since the allegations show that, though the defense be perfectly good, it would be impossible for the appellant to properly present the same at law, because many of the cases would be on trial in different courts at the same time, and further show that the expenses and costs of the litigation at law would be ruinous, though successful against every plaintiff.

It is objected by the appellees that, the negligence alleged being a several and separate wrong as to each party injured, and there being no privity or common interest between the defendants in the actions at law, the court of chancery has no jurisdiction to enjoin their suits to avoid a multiplicity of suits. The principle upon which this jurisdiction is established is that it is the duty of the government to furnish a full, adequate, and complete remedy for the assertion and protection of all property rights of its citizens; and this bill is filed upon the idea that it is the peculiar function of the chancery jurisdiction to supplement the law courts and to give such remedy when it does not exist at law in a way "as practical and efficient to the ends of justice as the remedy in equity," and that there is no plain, adequate, complete, and practical remedy for appellants' protection in the courts of law. *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Oelrichs v. Spain* (*Oelrichs v. Williams*) 15 Wall. 211–228, 21 L. ed. 43, 45; *Allen v. Hanks*, 136 U. S. 311, 34 L. ed. 418, 10 Sup. Ct. Rep. 961.

The right of defense, and of a form of defense as efficient and practical as the nature of the transaction will reasonably admit of, are rights as sacred as the corresponding rights of prosecution for the assertion of property rights. There can be no distinction, nor is there any, between the right to an efficient remedy for defense

and one for the reclamation of property, as protection in the acquisition and in the defense of property is only the application of the same principle of security in different forms. *Brown v. New Jersey*, 175 U. S. 175, 44 L. ed. 120, 20 Sup. Ct. Rep. 77; *West v. Louisiana*, 194 U. S. 258-263, 48 L. ed. 965-970, 24 Sup. Ct. Rep. 650.

Independent of special grounds for proceeding in equity, the court at an early date assumed a jurisdiction to prevent a multiplicity of suits by settling in a single case a right or transaction which at law involved the trial of numerous cases, entailing loss of time and perhaps ruin in costs. 1 *Spence*, Eq. Jur. 657; *Tenham v. Herbert*, 2 Atk. 483; *Hanson v. Gardiner*, 7 Ves. Jr. 309, 310. Lord Hardwicke, in the Case of *Tenham*, supra, expressed the rule as to when a bill of this kind could be filed and when the right must first be established at law. Not quoting the authorities cited in 26 English Reports, Reprint, 692, sustaining his position, he said: "Undoubtedly there are some cases in which a man may, by a bill of this kind, come into this court first; and there are others where he ought first to establish his right at law. It is certain, where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court first, which is called a bill of peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant. . . . As to the case of *York v. Pilkington*, 1 Atk. 282, the plaintiffs there were in possession of the right of fishing upon the River Ouse for 9 miles together, and had constantly exercised that right, and, as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at law. But, where a question about a right of fishery is only between two lords of manors, neither of them can come into this court till the right is first tried at law."

This we consider as expressing the rule of law; the principle dictating the rule being the duty and necessity of affording a practical and efficient form of remedy for protection to persons and property founded in the very conception of government. 6 Am. & Eng. Enc. Law, 2d ed. p. 972. If this case falls within the rule, 20 L.R.A. (N.S.)

the allowance of the proceeding is no infringement of the constitutional right of trial by jury, for that guaranty refers to, and is coextensive only with, the common-law right then existing, and it was always a principle of the common law that the trial by jury must give way to an appeal to equity, when from the nature of the situation, the transaction to be investigated, and the relation of the parties to that transaction the ordinary proceeding at law would not answer sufficiently the purpose of administering justice. *Boring v. Williams*, 17 Ala. 510; *Oelrichs v. Spain*, supra; *Cook v. Schmidt*, 100 Ala. 582, 13 So. 686; 6 Am. & Eng. Enc. Law, 2d ed. pp. 972-974. It is the duty of affording an efficient and speedy and economical administration of justice which evoked and established the principle of jurisprudence under which a court of equity interferes to avoid a multiplicity of suits. This principle, then, is established by the application of reason to the circumstances of the particular case, and, of course, it can have no other limit than that of reason. The classification by the text writers and courts of the instances in which a particular jurisdiction founded on a general principle has been exercised may be a guaranty of safety in following in their footsteps; but it is only a recognition of the controlling principle, and does not by any means restrict the principle itself.

The question here, then, is, What is the principle upon which equity interferes to avoid a multiplicity of suits? In determining this, it may be borne in mind that the jurisdiction is not to be invoked when the remedy at law is plain, adequate, and complete, and that no court has the right to infringe upon the wholesome doctrine of multifariousness which prevents a mingling in one suit of entirely distinct and separate causes of action between different parties. Subject to these restrictions, the principle and rule is that, where numerous parties are jointly and severally claiming against one, or where one is claiming against many liable jointly or severally, and the same title or right of defense will be called in question, and will be determinative of the issue for or against all, a case for the interposition of equity to avoid a multiplicity of suits is made without the aid of any independent equity. The fact that this unity of claim or defense frequently or generally arises from privity or joint action by or between the many affords an obvious instance of the application of the rule, and it has induced some to suppose that the junction and unity of interest calling for the application of the rule is limited to such cases. But the association and unity of in-

terest in the many as to the other party, may be brought about just as well by the nature of the transaction or the situation and relation of the parties, independent of all privity or joint action. And therefore privity, or joint right, or liability, although good examples for the application of the principle, afford no test for the propriety of its application.

The case made by the bill in this case is this: An explosion in a coal mine killed 110 persons. The several administrators of these persons have brought several suits against the appellant as the owner and operator for damages, insisting that its negligence was the proximate cause of the accident. The appellant in effect says, if these actions are allowed to proceed at law it will be ruined in costs and expenses, though it be successful in every suit; that the plaintiffs are all insolvent, and thus could not pay the taxed costs against them, should they be unsuccessful; that the suits are pending in different courts, and will be called for trial in different courts at the same time; that, by reason of this, and the necessity of having the same witnesses in each trial, it is impossible for the defendants to present a proper defense to these multitude of claims. The appellant says, moreover, that it has one and the same and a perfect defense or defenses to all these suits, which will be put forward in each case, and which will be determinative of all alike; and, on this ground, it is insisted that this is a plain case for the application of the jurisdiction of a court of equity to avoid a multiplicity of suits. We agree with this contention on principle.

The first thing to obliterate from the mind in considering the question is that it is immaterial how the unity of title, claim, or defense is brought about. It is the *factum* of a single title against many, or a common defense against many, which is the foundation of the jurisdiction. A vested right of property and a vested cause of defense for protection against liability stand precisely on the same basis; and whence and how such right originated is wholly immaterial. 8 Cyc. Law & Proc. p. 911; Pritchard v. Norton, 106 U. S. 124, 132, 27 L. ed. 104, 107, 1 Sup. Ct. Rep. 102. If the unfortunate persons who lost their lives by the explosion had jointly leased the mine, and their administrators had instituted several actions as in this case against the owner, it is conceded that the privity between the plaintiffs established by the contract would justify a bill to have the question of liability determined in one suit. But why? Only because a single and common defense would, if successful, determine all the suits. Suppose, however, the owner

leased to a third party, instead of the operators and the same accident happened, and a thousand suits were brought or threatened by solvent, or especially by insolvent, parties, what reason is there for, or could there be for, denying the jurisdiction to enforce in a single suit the common cause of defense against all? Ingenuity, we think, cannot discover a substantial distinction between the two cases under which the owner in one instance may take shelter in a court of equity against the wrongful and vexatious suits, while in the other he must submit to financial ruin in defending a thousand vexatious actions at law.

We now examine the precedents to show that the great legal minds who have administered the principles of equity in the past do not disagree with this conclusion. In the Case of Tenham, 2 Atk. 484, the master builder of equity jurisprudence, whose words we have quoted above, lays it down as clear and certain that, when a general right is set up, and is disputed by many, the party may come into equity in the first instance against the many, and have that right determined in one suit; for if this could not be done there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant. Suppose the case was reversed, and the many had already instituted their separate suits; would not the principle announced entitle the party having a common defense against all, through a "general right," to claim the aid of the court for a settlement of liability *vel non* in a single suit? Clearly so. It is the general vested right in property, or common cause of defense for the protection of property, which opens the field for the operation of the principle. In the case of York v. Pilkington, 1 Atk. 282, the same great judge laid down the rule in language which covers this case. There the suit was to establish a right of fishing against a number of defendants not connected by title or privity. At first a demurrer was sustained by the chancellor, but on reargument he said he had changed his mind, saying that it matters not about privity of any sort, nor about a general right on the part of the defendants; that the question as to such bills "is whether the plaintiffs have a general right to the sole fishing, which extends to all the defendants." This case has been followed and approved in England to the present day. One of the most interesting applications is in the case of Sheffield Waterworks v. Yeomans, L. R. 2 Ch. 8, decided in 1866. In that case a reservoir of the water company had burst, and 7,315 persons

lost their lives or had their property injured, and many were prosecuting claims against the company. The bill was filed to test the liability in a single suit, and was sustained. The vice chancellor defined the case for a bill of peace as being one in which "there were a number of persons claiming as against one, or one person against a number, and where all were claiming alike." On appeal the court sustained the lower court, saying: "It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be occasioned, and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend."

The same view of the law is entertained by the Supreme Court of the United States and many of the states. In *Hale v. Allinson*, 188 U. S. 77, 47 L. ed. 392, 23 Sup. Ct. Rep. 244, though the court declined to exercise the jurisdiction, it stated with accuracy the rule itself, stating that it did not require a common title, nor community of right or interest in the subject-matter, among the defendants, but only a common interest in the questions of law or fact in controversy. And the statement of law in this case has been approved by the same court at the present term (1907) in the case of *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91. The following, amongst many other, cases strongly support the rule that, when all the cases may be determined on a single question or defense common to all, the jurisdiction will be exercised. *Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 263; *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870; *Southern P. Co. v. Robinson*, 132 Cal. 408, 12 L.R.A. (N.S.) 497, 64 Pac. 572; *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 730; *American Cent. Ins. Co. v. Landau*, 56 N. J. Eq. 513, 39 Atl. 400; *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contr. Co.* (C. C.) 57 Fed. 45; *Osborne v. Wisconsin C. R. Co.* (C. C.) 43 Fed. 824; *DeForest v. Thompson* (C. C.) 40 Fed. 375; 1 Pom. Eq. §§ 269-274.

We are committed to the same principle in Alabama. In the early case of *Morgan v. Morgan*, 3 Stew. (Ala.) 383, 21 Am. Dec. 638, it is said: "It is not conceived to be necessary, in bills of peace, that there should appear to be any privity or connection between the defendants. There are cases where bills of peace have been brought, though there has been a general right claimed by the plaintiffs, and yet no privity between the plaintiffs and defendants, nor 20 L.R.A. (N.S.)

any general right on the part of the defendants." And in the case of *Cleveland v. Insurance Co. of N. A.* 151 Ala. 191, 44 So. 37, decided in 1907, we used the following language comprehending the rule of Lord Hardwicke: "The jurisdiction of the court of equity will be exercised in suits by a single party against a number of persons to restrain the prosecution of simultaneous actions at law brought against him by each defendant, and to procure a decision of the whole in one proceeding, where all of the actions depend upon the same law and facts."

It is insisted that the case of *Turner v. Mobile*, 135 Ala. 77, 33 So. 132, is opposed to the view above expressed. That there are expressions in the opinion to that effect is not to be doubted, but there are other expressions which approve and define with accuracy the very basis of our conclusion in this case. Judge McClellan, in that case, says: "So, where one party is subjected to or threatened with numerous and vexatious actions at law, or is the victim of numerous, repeated, and continuing wrongs, so that a multitude of suits would be necessary for his redress at law, he may come into chancery, because the necessity for numerous suits or defenses to numerous suits at law is in itself such a wrong and vexation to him as vests him with an equity." This case is founded on this declaration of the law, which is clearly and precisely and accurately stated. In reference to other expressions in the opinion it is sufficient to say that every decision must be read in the light of the exact case before the court, and which it was intended to decide. *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Gaines v. Hennen*, 24 How. 553, 16 L. ed. 770; *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 430, 11 So. 262. The point and principle here at issue was not in the least involved in the *Turner Case*. Judge McClellan in the opening of his opinion so declares. He says: "There is no pretense that this case falls within the first, second, or fourth classes" pointed out by Mr. Pomeroy, in which equitable jurisdiction on account of multiplicity of suits is allowed. And then he shows that the bill was not sufficient under the third class. So that the question in this case, which comes directly within the fourth class, as defined by Mr. Pomeroy and Judge McClellan, was not before the court in the *Turner Case*, and was not and could not have been decided.

The case, however, of *Tribette v. Illinois C. R. Co.* 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32, is directly opposed to our views. That case we consider as overruled by the subsequent one in the

same court of *Crawford v. Mobile, J. & K. C. R. Co.* 83 Miss. 708, 102 Am. St. Rep. 476, 36 So. 83, in which the court expressly approves the view repudiated in the *Tribette Case*. It is said in the *Hightower Case*: "We think the doctrine announced by *Pomeroy* is sound and clearly established by the best considered modern cases." After this repudiation of the *Tribette Case* by the supreme court of Mississippi, we will not follow the reasoning of the opinion in that case to point out its defection from and opposition, in our opinion, to the ancient as well as modern view of the extent of the jurisdiction of courts of equity in reference to multiplicity of suits. That jurisdiction is too well established and too beneficent, when wisely exercised, to be any longer called in question.

It would be a strange *casus* in juridical evolution to meet the needs of society if there was no remedy against a party being vexatiously prosecuted at the same time by over 7,000 separate invalid claims held by insolvent plaintiffs, as in the *Sheffield Waterworks Case*, *supra*, when each case is founded upon the same facts, and when it is alleged and admitted, by the objection to the jurisdiction, that there is a defense common to all the claims. It is to avoid the monstrosity of such a result that the court of chancery extends its plenary jurisdiction to stay the proceedings at law until the question of liability can be determined in one suit, and therefore we hold that the bill in the case was well filed.

The bill in this case was dismissed on motion. The demurrers, therefore, are not before us; nor have we to do more than to say that the bill on its statements has equity on the single ground of preventing the multiplicity of suits unaided by the other matters averred. The decree of the lower court is reversed, and one will be here rendered overruling the motion.

Haralson, Anderson, and Denson, JJ.,
concur.

Petition for rehearing denied July 3, 1908.

ALABAMA SUPREME COURT.

PINK CARTER et al., Appts.,
v.
WILLIAM COUCH.

(— Ala. —, 47 So. 1006.)

Devise — debased fee.

1. A debased fee, and not a life estate, is created by a devise to one to have and to hold to her and to the heirs of her body. 20 L.R.A. (N.S.)

(which fee tail is by statute raised to a fee), and, should she die without issue surviving, the property to go to her heirs at law; and, upon the happening of the contingency, the fee vests in the heirs at law.

Curtsey — determinable fee.

2. A surviving husband is entitled to curtesy out of a determinable fee owned by his wife with issue born alive, notwithstanding the contingency upon which the fee is to terminate exists at the time of her death.

(December 15, 1908.)

Case Note. — Right of curtesy in determinable fee.

The rule as to a husband's right of curtesy in the conditional and limited estates of his wife is said in 4 Kent, Com. 33, and in 1 Washb. Real Prop. 6th ed. §§ 322-326, to be that, if the wife's estate is determined by a condition expressly annexed thereto requiring the entry of the grantor and his heirs in order to defeat it for a breach of the condition, such entry would destroy the wife's estate and all intermediate rights, including curtesy; but, if limited either by way of a springing use or executory devise, which takes effect at the wife's decease, thereby determining the original estate before its natural expiration and substituting a new one in its place, by which the estate is merely shifted from one person to another, the wife's seisin is left undisturbed, and the husband's curtesy is preserved.

And in *Northcut v. Whipp*, 12 B. Mon. 65, though the case is not exactly in point in this note, being an action for dower, it was said that dower, being an estate growing out of that of the husband or incident to it, could not, from its nature, exist after the estate to which it was attached had ceased; and, therefore, if the fee were ~~devoted~~ by title paramount, or were determined by entry of the donor for condition broken, dower and curtesy necessarily ceased. To quote from the opinion: "So, in a case of a qualified or base fee, dower and curtesy cease when the estate is determined; and it is said (1 Cruise, Dig. title, 'Dower,' chap. 3, § 27) that, where an estate in fee is made determinable on some particular event, if that event happens, dower and curtesy cease with the estate. On the other hand, it is well settled in the English common law, that, in the case of an estate tail, dower and curtesy continue after the estate is determined; as, where land is given to a man or a woman, and the heirs of his or her body, and the donee marries and dies, leaving no heirs to the body, the surviving wife is entitled to dower, or the husband, if there had been issue born alive, to curtesy, though the estate tail is determined, according to its own limitation, and the interest of the donor or remainderman becomes immediate."—citing *Paine's Case*, *infra*.

Leaving out of consideration estates limited by condition, and confining the discussion to determinable fees, such as presented by *CARTER v. COUCH*, it may be laid down as

APPEAL by plaintiffs from a judgment of the Circuit Court for Marshall County in defendant's favor in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. J. A. Lusk, for appellants:

The only right of the wife in the property was to a life estate.

Findley v. Hill, 133 Ala. 229, 32 So. 497; Ballentine v. Foster, 128 Ala. 638, 30 So. 481.

An estate by curtesy cannot exist, as the wife was not seised of an estate of inheritance.

3 Tiedeman, Real Prop. §§ 75, 84; 1 Tiffany, Real Prop. pp. 486, 491.

Messrs. Street & Isbell, for appellee:

The wife took an absolute fee under the will.

4 Kent, Com. § 506; 3 Washb. Real Prop.

a general rule of law, supported by almost all the authorities, that if the other requisites are present, a husband is entitled to curtesy out of his wife's determinable estate, notwithstanding the contingency upon which the fee is to terminate exists at the time of her death.

Thus, it is said in 1 Co. Litt. 30a: "If a woman tenant in taile generall taketh a husband, and hath issue, which issue dyeth, and the wife dieth without any other issue, yet the husband shall be tenant by the curtesie, albeit the estate in taile be determined, because he was intitled to be tenant *per legem Angliæ* before the estate in taile was spent, and for that the land remaineth."

And in Paine's Case, 8 Coke, 34, it was held "by the whole court that, at the common law, if lands had been given to a woman, and the heirs of her body, and she had taken a husband and had issue, and the issue died, and the wife also without issue, whereby the inheritance of the land did revert to the donor, in that case the estate of the wife is determined, and yet the husband shall be tenant by the curtesy, for that is *facit* implied in the gift."

And in Buckworth v. Thirkell, 4 Dougl. K. B. 323, Lord Mansfield held that a husband was entitled to curtesy in land which had been devised to trustees and their heirs to receive the rents and profits, and apply them for the maintenance of the *cestui que trust*, till she arrived at the age of twenty-one years, or till she married, and, on her arriving at such age or marrying, to the use of the *cestui que trust* and her heirs and assigns; but, if she should die before the age of twenty-one years, and without issue, remainder over, where it appeared that she married and had a child, and the child and the *cestui que trust* died before she arrived at the age of twenty-one years.

And in Sweetapple v. Bindon, 2 Vern. 536, in which it appeared that a testator devised money to be laid out in land and settled to the use of her daughter and her children, 20 L.R.A. (N.S.)

pp. 414, 699; Holt v. Pickett, 111 Ala. 362, 20 So. 432; Mason v. Pate, 34 Ala. 390; Wilson v. Alaton, 122 Ala. 635, 25 So. 225; Smith v. Greer, 88 Ala. 414, 6 So. 911; Slayton v. Blount, 93 Ala. 575, 9 So. 241; 30 Am. & Eng. Enc. Law, p. 699, and notes.

If not an absolute fee, the grant to Mrs. Couch was a base or qualified fee subject to be defeated upon the happening of the contingency that she leaves no issue surviving her, with an executory devise over in that event to the persons happening to be her heirs at law.

30 Am. & Eng. Enc. Law, pp. 751, 753, and notes; 24 Am. & Eng. Enc. Law, p. 431.

In such an estate the husband is entitled to an estate by curtesy.

8 Am. & Eng. Enc. Law, p. 519, and notes; Webb v. First Baptist Church, 90

and, if the daughter died without issue, to go over; and the daughter married and had a child; and both she and the child died; and the money was not laid out as directed,—it was held that the money was to be considered as land, and the husband entitled to curtesy therein.

And in Sammes's Case, 1 Leon. 167, in which it appeared that the mother of two daughters covenanted to stand seised of certain lands to the use of her elder daughter in tail, upon condition that the latter should pay to her sister within a certain specified time a certain sum, and, if she should fail in payment or should die without issue before such payment, then to the use of her sister in tail; and the mother died and the elder sister married and had issue, and died without issue before the day of payment,—it was held that her husband was entitled to curtesy.

So, in Webb v. First Baptist Church, 90 Ky. 117, 13 S. W. 362, it was held that, where the wife owned an estate in fee subject to be defeated in the event of her death without issue, the surviving husband was entitled to curtesy if the other requisites thereof were present, although there was no issue alive at the time of the wife's death.

And in the following cases it was held that curtesy attached to an estate in fee though it was to be determined if the wife died without issue surviving: Hatfield v. Sneden, 54 N. Y. 280, reversing 42 Barb. 615, disapproving Weller v. Weller, 28 Barb. 588, (a case of dower in which the rule there laid down would apply as well to curtesy); Buchannan v. Sheffer, 2 Yeates. 374; Thornton v. Krepps, 37 Pa. 391; Crumley v. Deake, 8 Baxt. 361; Taliaferro v. Burwell, 4 Call (Va.) 321.

So, in Hay v. Mayer, 8 Watts. 203, 34 Am. Dec. 453, and in Holden v. Wells, 18 R. I. 802, 31 Atl. 265, a husband was held to be entitled to curtesy in an estate tail of his wife, though she died without issue surviving.

Ky. 117, 13 S. W. 362; 8 Cyc. Law & Proc. p. 1012, and notes; 11 Am. & Eng. Enc. Law, p. 374.

McClellan, J., delivered the opinion of the court:

Charles Carter's will contains this clause, called "clause B" hereinafter, omitting the description of the lands described: "I hereby will and bequeath to my daughter Elizabeth Couch, . . . to have and to hold to her and to the heirs of her body, but should she die without issue surviving, the said tract of land shall go to the heirs at law of the said Elizabeth H. Couch." The legal effect of the devise by clause B to Mrs. Couch and to the heirs of her body was to create a fee tail, which, under our statute (Code 1896, § 1021), was raised to an absolute fee. The devise was clearly the paramount intent of the testator, as expressed in clause B. The succeeding limitation, based upon her death without issue surviving, is pendent upon the superior estate created in Mrs. Couch, and debased it upon the defined contingency happening. The result was the creation of a determinate fee in the land, which, upon the happening of a definite event, *viz.*, her death without issue surviving, invested that fee in the heirs at law of Mrs. Couch. 24 Am. & Eng. Enc. Law, pp. 431, 432, and authorities in notes; 16 Cyc. Law & Proc. pp. 602, 603, and notes; 30 Am. & Eng. Enc. Law, pp. 751 et seq., and notes.

The theory of counsel for appellant, that a life estate was the estate devised to

Mrs. Couch, cannot be approved, because, and if so, the plainest expression of the creation of a fee tail estate, enhanced by statute into an absolute fee, would be thereby wholly ignored, without anything in the instrument to justify such an interpretation. The limitation that in default of issue surviving the heirs at law of Mrs. Couch should take is not only not inconsistent with the view that a debased fee was created by the terms of the whole clause, but is repugnant to an interpretation that would distort a clear creation of an estate in fee tail into a mere life estate. The argument for a construction of clause B creative of a life estate is necessarily predicated upon the provision therein with respect to the death of Mrs. Couch. The provision is referable only to a description of an event, not, abstractly speaking, a limitation of an estate, upon which the existence *vel non* of the defined contingency shall be ascertained, and upon the ascertainment of the happening of which the heirs at law shall take.

Mrs. Couch died without issue surviving her, but issue was born alive to her. Her husband, William Couch, appellee, continued in the possession of the premises; and the heirs at law instituted this action of ejectment, which he defends upon the idea that, under the doctrine of curtesy, he is entitled to the possession and enjoyment of the lands during his life. The status being as we have defined it, *viz.*, that Mrs. Couch took a determinate fee in the lands in controversy, the second question then is: Is the

And in the following cases from South Carolina, in which jurisdiction there were (at the time of the decisions, at least) no estates tail because of the fact that the statute *de donis* had never been in force there, it was held that a grant to a woman and the heirs of her body created a conditional fee in which the husband had a right of curtesy, though the wife died without issue surviving: Wright v. Herron, 5 Rich. Eq. 441, affirmed in 6 Rich. Eq. 406; Withers v. Jenkins, 14 S. C. 597; Odom v. Beverly, 32 S. C. 107, 10 S. E. 835.

These rules of law find support, also, in the following authorities: Martin v. Renaker, 10 Ky. L. Rep. 469, 9 S. W. 419; Grout v. Townsend, 2 Hill, 554; Evans v. Evans, 9 Pa. 190; Moody v. King, 2 Bing. 447; 8 Am. & Eng. Enc. Law, p. 579; 1 Greenleaf's Cruise, Real Prop. title 5, chap. 2, § 8; 1 Roper, Husb. & W. 38; while in Butler's note to 2 Co. Litt. 241a, and in Park, Dower, 163, will be found discussions which seem to question the principle.

The only case that throws any doubt upon this rule of law is McMasters v. Negley, 152 Pa. 303, 25 Atl. 641, in which curtesy was denied in land devised to a daughter by a will which further provided that, if she died

before the age of twenty-five without leaving children, her share should revert to, and become part of, the testator's residuary estate. The court said that this case came within the rule laid down by Washburn that, if the estate of the wife was an estate of inheritance determined by a limitation which operated to defeat her estate at common law, the right of curtesy was gone, thus treating it as a conditional estate, and not as a determinable one, distinguishing on this ground Thornton v. Krepps and Evans v. Evans, *supra*. The idea of the court here seems to be that, if a testator devises his fee-simple estate to his daughter with a devise over to another if the daughter dies without issue, this will make the daughter's estate a determinable fee in which her husband will have curtesy; but if, as in the present case, upon the failure of issue, it is to revert to the testator's estate, it will be a conditional fee. The court, however, itself admits, that the distinction is "exceedingly refined." It might be well to add that in any event the husband in this case would not, at common law, have been entitled to curtesy, as there was never any issue of the marriage, that requisite to an estate by curtesy having been abolished by statute in Pennsylvania.

surviving husband entitled to curtesy out of such estate? The question has been often answered in the affirmative, and never in the negative so far as we are now advised, and it will suffice to set down some only of the numerous authorities so holding: *Webb v. First Baptist Church*, 90 Ky. 117, 13 S. W. 362; *Hatfield v. Sneden*, 54 N. Y. 280; *McMasters v. Negley*, 152 Pa. 303, 25 Atl. 641; *Taliaferro v. Burwell*, 4 Call (Va.) 321; 2 Co. Litt. p. 241a, note; 12 Cyc. Law & Proc. p. 1012; *Withers v. Jenkins*, 14 S. C. 597.

The court below, therefore, correctly gave the affirmative charge for and at the request of the defendant; and its judgment is affirmed.

Tyson, Ch. J., and Dowdell and Anderson, JJ., concur.

ALABAMA SUPREME COURT.

J. M. MILLER et al., Appts.,
v.
STATE OF ALABAMA, Resp't.

(— Ala. —, 48 So. 360.)

Bail — discharge — new liability.

After conviction of an accused, for whose enlargement bail had been given, when he was present in court and his passing into custody of the sheriff, the court cannot, without the knowledge of the sureties, upon granting him a new trial, permit him to go at large under the former bond.

(January 14, 1909.)

Case Note. — Effect of granting new trial after a conviction, to extend the liability of accused's bond.

There is but little direct authority upon this question, and there appears to be no other case which presents the same condition as is presented in *MILLER v. STATE*, viz., the effect of granting a new trial to extend the liability of accused's bail after the bondsmen have surrendered the accused into the hands of the sheriff. There are, however, a few cases which involve the liability of the accused's bail after a new trial has been granted in which the accused had not been surrendered by the bondsmen.

Thus, in *Wells v. State*, 21 Tex. App. 594, 2 S. W. 806, it was held that, when a judgment of conviction is reversed, the recognizance given on appeal has served its purpose and is *functus officio*, the bail bond or original recognizance of the defendant still has full force and effect, and it is upon such obligation, and not upon his recognizance on appeal, that he is bound. To the same effect was the decision in *Ex parte Guffee*, 8 Tex. App. 409, where the court said: "The question seems to be fully settled in favor of 20 L.R.A. (N.S.)

APPEAL by defendants from a judgment of the Circuit Court for Walker County in favor of the State in a proceeding by *scire facias* to enforce a forfeited recognizance. Reversed.

The facts are stated in the opinion.

Mr. J. D. Acuff, for appellants:

The sureties' liability on the bond ended when the defendant was convicted and taken in custody.

Hawk v. State, 84 Ala. 466, 4 So. 690; *Ex parte Williams*, 114 Ala. 29, 22 So. 446.

Mr. Alexander M. Garber, Attorney General for the State.

Denson, J., delivered the opinion of the court:

This is a proceeding by *scire facias* against bail on a forfeited recognizance. The defendants, in answer to the *scire facias*, showed that their principal, at the term of the court previous to the one at which the judgment nisi was entered, was tried and convicted of the offense against which, for his enlargement, the bond was given. The principal was present in court when the verdict of guilty was returned and the judgment of conviction thereupon was entered, and at that time he was taken into custody by the sheriff and placed in jail under said conviction. At a subsequent day during that term, and while he was so in custody, the court, on the defendant's motion, set aside the verdict and judgment of guilt, and granted defendant a new trial, at the same time ordering that defendant be held under his former bond (the one here in question) until discharged by due process

the applicant by those provisions of our Codes which prescribe that, where the court of appeals awards a new trial to the defendant, the cause shall stand as it would have stood in case the new trial had been granted by the court below; and the effect of granting a new trial in the court below is to place the cause in the same position in which it was before any trial had taken place. In cases of mistrial, new trial, or reversal, the defendant is remanded by the law to the custody of his sureties, and their surrender of his person for purposes of trial does not operate, in either case, as a discharge of their liability upon the recognizance or bond."

And in *Jenkins v. State*, 45 Tex. Crim. Rep. 253, 76 S. W. 464, it was held that, upon the reversal of a judgment of conviction in the second trial, the defendant was entitled to his liberty under the original bond, which was executed upon the jury's disagreeing in the first trial.

Under an earlier statute, it was held that the recognizance given by the defendant on appeal could be forfeited in the trial court after the judgment of conviction had been reversed and the cause remanded by the ap

of law. The sureties on the bond knew nothing of the order of the court, and took no part in procuring it. The court held that these facts presented no sufficient reason for setting aside the judgment nisi, and made it absolute. The sureties appeal, and assign this ruling as one of the grounds of error.

In *Ex parte Williams*, 114 Ala. 29, 22 So. 446, it was held that, upon the reversal of a judgment of conviction, the defendant, who at the time of his conviction and sentence was out on bond, was not entitled to release from custody by virtue of that bond; and a petition for habeas corpus to be released on the bond was refused. In the course of the opinion in that case the court said: "Whenever a party is convicted and sentenced, he is no longer in the custody of his bail, but is in the custody of the proper officer of the law, and the bail are thereby discharged by the operation of law without a formal order to that effect." Upon the word "sentenced," or upon the fact that the court pronounced sentence on the defendant, it is sought by the attorney general to differentiate that case from the one in judgment. The court, further on in that opinion, said: "The mere appearance of the defendant at court for trial, or his presence during trial, or a mistrial, will not operate to discharge the bail. The obligation of a proper bail bond binds the sureties, at least, until after the verdict of the jury; but, when the sentence of the law is pronounced, the officer of the law is charged with its due execution. The bail have no further control over the custody of their principal, and cannot be longer held responsible." It was also said: "The bail bond became *functus* by the trial and sentence."

Hawk v. State, 84 Ala. 466, 4 So. 690,

peNate court. Weaver v. State, 43 Tex. 386; *Riviere v. State*, 7 Tex. App. 55.

In *State v. Heed*, 62 Mo. 561, it was held that it was the duty of the defendant, upon his appeal being sustained and the cause remanded for a new trial, to appear in court and submit himself to trial; and a failure so to do was a breach of his recognizance on appeal.

In *Ex parte Williams*, 114 Ala. 29, 22 So. 446, a defendant who had previously been released upon bail was tried and sentenced to imprisonment. Upon a reversal of the judgment and the granting of a new trial, he attempted by means of habeas corpus to secure his release upon his former bail; but it was held that that bail bond had become *functus officio* by the trial and sentence. This decision necessarily implies, of course, that the bondsmen would not be liable if the court, for any reason, had granted the accused his liberty, and he failed to present himself for a new trial.
20 L.R.A. (N.S.)

was one where the defendant in a criminal case, on bond, absconded during the progress of the trial and before the jury returned a verdict. It was there said that the statute "declares that the undertaking of bail binds them for the appearance of the defendant 'until he is discharged by law.' This discharge can take place after the trial is begun, in the absence of a surrender by the sureties, only by an order of discharge based on a *nolle prosequi* of the indictment, a verdict of acquittal, or a verdict of conviction, followed by the sheriff's taking custody of the defendant by the implied or express order of the court, which includes any necessary custody taken to prevent his escape. The obligation, therefore, ordinarily binds the sureties for the continued appearance of the defendant during every stage of the trial, from the time it is entered on at least until the rendition of the verdict of the jury." *Ibid.* In *Cook v. State*, 91 Ala. 53, 8 So. 686, the defendant appeared and continued his presence in court until the jury retired to consider their verdict in his case, whereupon he absconded; and it was sought by his bail to avoid a judgment absolute. The court said of the pleas setting up these facts: "The pleas were fatally defective. Disclosing that the trial had been entered upon, they should have disclosed, further, that the defendant had remained in attendance to respond to the judgment that should result therefrom, or that the sureties were discharged by reason of the defendant being taken in custody." By these authorities it seems to be established, beyond cavil, that, when the principal is taken into custody by the proper officer, he is no longer in the custody of the bail, and the bail are discharged.

In this case the principal was convicted of a felony. He was present at the rendi-

A few cases may be noticed which, although not involving the effect of a new trial, do present a somewhat analogous condition.

Thus, in *State use of Independence County v. Glenn*, 40 Ark. 332, it was held that, when bail has once been exonerated by a judgment in favor of defendant, reversal for error does not revive the liability.

And in *People v. McReynolds*, 102 Cal. 308, 36 Pac. 590, a defendant who had been at liberty on bail was, at the beginning of the trial, ordered into the custody of the sheriff. This was held to be an exoneration of the bail, and a vacation of the order did not, by operation of law, restore the defendant to the custody of the bondsmen.

Where a demurrer to an indictment was sustained, and the defendant permitted to go without bail, it was held, in *State v. Murphy*, 10 Gill & J. 365, that a reversal of the judgment on the demurrer would not revive the liability on the bond.

tion of the verdict and judgment of the court on the verdict; and, this being true, it was the duty of the sheriff to take him into custody. While there was no express order of the court that he should do so, there is, under such circumstances, always an implied order that the sheriff shall take custody of the defendant; and the defendant was as legally in the custody of the sheriff as if the bail had delivered him, under the statute (Code 1907, § 6351), into such custody. It is the surrendering of the defendant into the custody of the sheriff that exonerates bail under the statute; and if, under a judgment of conviction of the offense charged, the sheriff rightfully secures custody of the defendant, it must follow that the defendant is as rightfully withdrawn from the custody of his bail, so far as that offense is concerned, as if they had surrendered him. *Ex parte Chandler*, 114 Ala. 8, 22 So. 285. From these considerations it is manifestly true that, if the defendant, after his conviction and before granting of the new trial, had escaped from the jail or the custody of the sheriff, no liability would have attached to the sureties on the bond.

The defendant having been legally withdrawn from the custody of his bail, the question then is: Did the granting of a new trial and the making of the order by the court that he be held under the bond revive the sureties' liability? We can see no difference in principle between the status of sureties on a bail bond after the judgment of conviction against their principal has been reversed, and that after the judgment has been annulled on motion for a new trial. The judgment in either case is set aside and held for naught. *State v. Glenn*, 40 Ark. 332; *State v. Murphy*, 10 Gill & J. 365. It was the taking of the prisoner from the custody of the bail, and transferring him to that of the sheriff, that released the sureties (*State v. Murmann*, 124 Mo. 502, 28 S. W. 2); and, being released, the court could not, without their consent, revive their liability by simply ordering that "the defendant be held under his present bond." That would be the making of a contract, for the sureties and without their consent, by the court.

There is, under the facts of this case, no liability against the sureties on the bond, and the circuit court erred in not so holding. The judgment of the circuit court is reversed, and judgment will be here rendered for the defendants.

Reversed and rendered.

Haralson, Simpson, and Anderson, JJ., concur.

Petition for rehearing denied February 5, 1909.
20 L.R.A. (N.S.)

CONNECTICUT SUPREME COURT OF ERRORS.

JOHN R. BOOTH, Trustee, etc., of George W. Humphry, Appt.,
v.

RALPH PRETE.

(81 Conn. 636, 71 Atl. 938.)

Bankruptcy — deposit account — set off.

The set-off by a bank against a depositor's account of a note which it bona fide holds against him is not a transfer or preference within the provisions of the bankruptcy act; and it will therefore be upheld in favor of both the bank and the indorser from whom the note was received, although made within four months of the time the depositor becomes bankrupt.

(February 16, 1909.)

Case Note. — Set-off by bank against bankrupt's deposit as a preference within the bankruptcy law.

The doctrine of *BOOTH v. PRETE*, that it is not an unlawful preference within the bankruptcy law for a bank to charge past-due notes bona fide held by it to the account of the maker, is in harmony with the other cases on the question, both as to a preference which could be avoided by a trustee and a preference which, unless surrendered, would bar the preferred creditor from filing a claim.

The foregoing doctrine was authoritatively settled in *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199, which held that it did not amount to an unlawful preference which would prevent a bank from filing its claim against the bankrupt's estate without first surrendering a deposit which it had credited to a past-due note of the depositors, with knowledge of the insolvency, even though substantially all of the deposits, although made in the usual course of business, were made a few days prior to bankruptcy, and when the makers were hopelessly insolvent. The court reasoned that a deposit of money to one's credit in a bank did not operate to diminish the estate of a depositor, for when he parted with the money he created at the same time on the part of the bank an obligation to pay the amount of the deposit as soon as the depositor saw fit to draw a check against it, and hence it was not a transfer of property as a payment, pledge, mortgage, gift, or security. It was, however, said: "It is true that it creates a debt which, if the creditor may set it off under § 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of § 68a. If this argument were to prevail, it would, in cases of insolvency, defeat the

APPEAL by complainant as trustee in a bankruptcy from a judgment of the Court of Common Pleas for New Haven County in defendant's favor in an action brought to recover from the defendant the amount paid him on a certain promissory note. Affirmed.

The facts are stated in the opinion.

Mr. J. Birney Tuttle, for appellant:

Payments by bankrupts within four months prior to the filing of petition in bankruptcy upon his indorsed notes, which the indorsers would have paid if he had not, constitute a preference.

Swartz v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 1.

Courts of equity will not allow a set-off of a joint debt against a separate debt, or

of a separate debt against a joint debt. Scammon v. Kimball, 92 U. S. 367, 23 L. ed. 485.

The payment by the bank was a voidable preference.

Re George M. Hill Co. 66 L.R.A. 68, 64 C. C. A. 561, 130 Fed. 318; Bartholow v. Bean, 18 Wall. 635, 21 L. ed. 866; Re Lyon, 58 C. C. A. 143, 121 Fed. 725; Re W. W. Mills Co. 162 Fed. 56; Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538; Western Tie & Timber Co. v. Brown, 196 U. S. 509, 49 L. ed. 574, 25 Sup. Ct. Rep. 339; Wilson v. City Bank, 17 Wall. 473, 21 L. ed. 723.

Messrs. Matthew A. Reynolds and J. F. Donovan, for appellee:

A bank has the right to set off a deposit

right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that, to the extent of the set-off, he is paid in full."

But where, on the day a bank suspended and went into bankruptcy, the manager of a clearing house, of which it was a member, deposited money to its credit in another bank in which it carried an account, which was at the time overdrawn, and the money was deposited and received with knowledge of the insolvency of the depositor, and for the purpose of covering the overdraft, it amounts to a fraudulent preference. Rector v. Commercial Nat. Bank, 200 U. S. 420, 50 L. ed. 533, 26 Sup. Ct. Rep. 294.

Following the doctrine of the Massey Case, Tomlinson v. Bank of Lexington, 76 C. C. A. 400, 145 Fed. 824, held that the charging by a bank of an overdraft to the debtor's deposit, made in the usual course of business, did not amount to a preference which would require the bank to surrender the deposit as a condition of filing its claim against the bankrupt's estate for the balance due. To the same effect as to the right to charge past-due notes to a depositor's account, are Re Scherzer, 130 Fed. 631, and Re George M. Hill Co. 66 L.R.A. 68, 64 C. C. A. 561, 130 Fed. 315.

On the authority of the Massey Case, Irish v. Citizens' Trust Co. 163 Fed. 880, held that, although checks on an account in a bank, payable to the bank, to apply on demand notes bona fide held by the bank, were drawn by the debtor to prefer the bank as a creditor, and had that effect, yet the debtor's trustee in bankruptcy could not recover the deposit for the benefit of the estate, although the deposits were made with the intention on the part of the debtors to prefer the bank, the bank not having reasonable cause to believe that the debtor was insolvent and intended to prefer it, either by making the deposit or drawing the checks. In reaching this conclusion, the court reasoned that, as the deposits were actually ap-

plied by the depositor and received by the bank on notes then due and payable, the voluntary action of the debtor in turning the deposit over should not place the bank in a worse position than it would have been in had it exercised its right to charge the notes to the debtor's account; that the mere fact that it did not do this because the deposit was turned over voluntarily, did not forfeit the bank's right of set-off. It will be noted that this was an action by the trustee to recover the deposit on the theory that payment in this manner was a preference, and it was therefore necessary for him to prove notice to the bank, or reasonable cause on its part to believe that the debtor intended to prefer it.

The Massey Case was also followed as authority in Steinhardt v. National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23, which held that a bank was not liable to a trustee for his bankrupt's deposit account, which, after insolvency, had been applied on the bankrupt's demand notes due to the bank, which in amount exceeded the deposit, although such indebtedness was secured by collateral exceeding in value the amount of the indebtedness. This conclusion was reached on the theory that the amount owing by the bank for moneys on deposit is deemed in law to have been applied upon the indebtedness of the bankrupt. To the same effect is Hooks v. Gila Valley Bank & T. Co. (Ariz.) 100 Pac. 806.

West v. Bank of Lahoma, 16 Okla. 328, 85 Pac. 469, holds that it does not amount to a preference which a trustee in bankruptcy may avoid, for a bank which loaned money to the bankrupt prior to his bankruptcy, taking his note, secured by chattel mortgage, therefor, to charge the note at its maturity to the bankrupt's deposit account, which consisted of the balance of the loan not checked out, since this mutual transaction brought about the exact condition mentioned in § 68a, a case of mutual debts and mutual credits between the estate of the bankrupt and the creditor. The court reasoned that, after the adjudication the bank would have been entitled to have set off the

to the credit of a bankrupt against the indebtedness of the bankrupt to the bank.

25 Am. & Eng. Enc. Law, 2d ed. p. 519; Re Myers, 99 Fed. 691; Loveland, Bankr. 3d ed. 373; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 190; Re George M. Hill Co. 66 L.R.A. 68, 64 C. C. A. 561, 130 Fed. 315; Re Scherzer, 130 Fed. 631; Re Philip Semmer Glass Co. 67 C. C. A. 551, 135 Fed. 77.

Thayer, J., delivered the opinion of the court:

The plaintiff, as the trustee of the bankrupt estate of George W. Humphry, brings this action to recover from the defendant \$464.61, the amount of a deposit which the bankrupt had in the Merchants' National

amount of the bankrupt's deposit against the amount due on his note to the bank, and to have the balance allowed against his estate; and that, this being the right of the bank in the event of the depositor's bankruptcy, it had not put itself in any worse position by making the transfer of the deposit in payment of its debt by the adjudication in bankruptcy.

Also following the Massey Case, Habegger v. First Nat. Bank, 94 Minn. 445, 110 Am. St. Rep. 379, 103 N. W. 216, held that a bank could apply on a past-due note a deposit standing to the credit of the maker, although at the time it knew that the maker was insolvent, where the deposit was made in the due course of business, and not with any intent to prefer the bank as a creditor. The court said that, upon this state of facts, the application of the deposit upon the note did not amount to an unlawful preference under the terms of the bankruptcy act, which would authorize a trustee of the bankrupt to recover the deposit on the theory that it was a preference.

This doctrine was also applied by the courts before the question was settled by the Massey Case. Thus, in Re Myers, 99 Fed. 691, the doctrine was enunciated that a deposit in a bank upon the bankruptcy of a depositor became a security for and payment *pro tanto* of his liability to the bank by the operation of the law of mutual credits. Hence, the bank was entitled to retain the amount on deposit to the credit of the bankrupts, and apply it on the indebtedness of the bankrupts to the bank. Applying this doctrine, the court allowed the bank to amend its proof of claim so as to deduct therefrom the amount on deposit with it to the credit of the bankrupt at the time of his adjudication.

If the right to offset accrues prior to insolvency, it may be exercised after adjudication, when a demand is made on the bankrupt's estate for the balance after crediting the bankrupt's deposit, or it may be exercised when a demand is made by the trustee of the bankrupt for the deposit as the property of the bankrupt. In either case the exercise of the right does not amount to an un-

Bank of New Haven on March 17, 1908, and which was on that day applied by the bank in part payment of a note of the bankrupt payable on that day at the bank to the order of the defendant, and by him indorsed and discounted there. This application of the deposit was within four months of the filing of the petition in bankruptcy, and it is claimed that the action of the bank in making it worked a preference in favor of the defendant voidable by the trustee under § 60b of the United States bankruptcy law (Act July 1, 1898, chap. 541, 30 Stat. at L. 562 [U. S. Comp. Stat. 1901, p. 3445]), as amended by Act Feb. 5, 1903, chap. 487, 32 Stat. at L. 799 (U. S. Comp. Stat. Supp. 1907, p. 1031). If this claim is correct, the plaintiff was entitled to recover.

lawful preference which must be surrendered as a condition to filing a claim against the bankrupt's estate for the balance. Re Elsasser, 7 Am. Bankr. Rep. 215.

Re Little, 110 Fed. 621, also held that it did not amount to an unlawful preference which would require a bank to surrender a deposit as a condition of filing its claim against the bankrupt's estate, for it to have credited on its indebtedness a deposit in favor of the bankrupt, made in the usual course of business.

A contrary conclusion was, however, reached in Re Kellar, 110 Fed. 348, as to the right of a bank, without notice of the insolvency of the depositor, to apply deposits made in the usual course of business to an overdraft of the depositor. It was held that such application amounted to an unlawful preference, which the bank must surrender as a condition to filing its claim against the bankrupt's estate. The doctrine of this case is undoubtedly overruled by the Massey Case.

A bank cannot charge to a debtor's account, or receive a check on his account in payment of a note held by it not yet due, without it amounting to a preference within the bankruptcy law, which the trustee may avoid. Irish v. Citizens' Trust Co. supra.

Ridge Ave. Bank v. Studheim, 76 C. C. A. 362, 145 Fed. 798, although in harmony with the Irish Case in holding that the payment to a bank of a note not yet due by a depositor giving a check on his account was a preference and could be avoided by the trustee, did not, however, base the decision on that fact, but rather upon the proposition that the doctrine of set-off would not apply to a voluntary payment of a deposit. On this point the reasoning of the court is apparently opposed to that followed in the Irish Case. In distinguishing a voluntary turning over of a deposit from a set-off, the court said: "This is not the case of a deposit remaining to the credit of a bankrupt's estate at the time of the filing of the petition in bankruptcy, and which, under certain circumstances, and in the absence of collusion, might be the subject of set-off, but is rather that of a transfer to a bank of

The bank at the time of the application of the deposit was the owner of the note, having discounted it for the defendant, and was therefore a creditor of the bankrupt. It was also his debtor to the amount of his deposit. They were mutual debts, and subject to be set off against each other under § 68 of the bankruptcy act. *New York County Nat. Bank v. Massey*, 192 U. S. 138, 146, 48 L. ed. 380, 383, 24 Sup. Ct. Rep. 199; *Re Scherzer* (D. C.) 130 Fed. 631, 632; *Re Philip Semmer Glass Co.* 67 C. C. A. 551, 135 Fed. 77; *Lowell v. International Trust Co.* 86 C. C. A. 137, 158 Fed. 781, 784. Such set-off is not a transfer of property by the bankrupt within § 1, subdiv. 25, of the act, and does not give a preference within § 60a of the act. *New York County Nat. Bank v. Massey*, supra. The case last referred to distinguishes between cases like *Pirie v. Chicago Title & T. Co.* 182 U. S. 444, 45 L. ed. 1176, 21 Sup. Ct. Rep. 906, and other cases cited by the plaintiff, where there was a payment by the bankrupt of his notes due at the bank, and cases like the present, where a bank, having a general

deposit of the bankrupt, sets it off against his notes of which it is the owner. The payment of the note in the former case is a preference voidable against both the bank and the indorser who may have negotiated it. It changes the relations existing between the bank and the bankrupt. But in equity and under the statutes of this and other states, where there are mutual debts, the difference between them after one has been set off against the other is deemed to be the only sum really due. Section 68 of the bankruptcy law recognizes this and permits the set-off. The fact that the set-off in the present case was made by the bank prior to the filing of the bankruptcy petition does not affect the question because it did only what the law would have done had the bank waited until the petition was filed. *Re Scherzer*, supra.

We are assuming that the transaction was bona fide. If the giving of the note and the application of it in disposing of the bankrupt's deposit was, as claimed by the plaintiff, a trick devised to appropriate the bankrupt's deposit to the defendant's bene-

a portion of the bankrupt's estate by the bankrupt's own act prior to the bankruptcy, and which was accepted by the bank in partial payment of an unmatured claim, and concerning which transaction a jury has said that the bank had reasonable cause to believe at the time the payment was made that it was accepting a preference."

The doctrine that charging a past-due indebtedness by a bank to the debtor's deposit account does not amount to an unlawful preference, even though the depositor was bankrupt at the time, was also applied under the bankruptcy law of 1867. Thus, in *Robinson v. Wisconsin M. & F. Ins. Co. Bank*, 9 Bias. 117, Fed. Cas. No. 11,969, it was held that it was not an unlawful preference, which could be avoided by an assignee in bankruptcy, for a bank, with knowledge of the insolvency of the debtor, to accept a check upon his deposit account to cover his indebtedness. As to the effect of the fact that payment was voluntary, the court said: "There can be no doubt that, if the transaction as stated had not occurred between the parties, and the matter had been, subsequent to the adjudication in bankruptcy, brought to the court for adjustment, it would have directed an account between the parties to be stated, and would have ordered, as authorized by § 5073, one debt set off against the other. Disregarding matters of form which I deem immaterial, the question is whether the transaction between the parties was not in fact an exercise of the right of set-off within the meaning of the statute; and, if this be so, whether the court can declare it illegal, because the adjustment was thus made by the parties before the adjudication, instead of by the court after adjudication. Here was a plain case of mutual debts between the parties. Hard-

ly a clearer case for application of the statute could arise."

To the same effect is *Hough v. First Nat. Bank*, 4 Biss. 349, Fed. Cas. No. 6,721.

To the same effect, also, is *Re Petrie*, 7 Nat. Bankr. Reg. 332, Fed. Cas. No. 11,040, as to the right of a bank to charge an unpaid draft to the acceptor's account, where the acceptor at the time was insolvent, which fact, however, was unknown to the bank.

In *Winslow v. Bliss*, 3 Lans. 220, it was held not to be a preference for a bank to charge a past-due note to the maker's deposit account, and deliver the note to the maker, who at the time was insolvent.

But in *Re Warner*, Fed. Cas. No. 17,177, in holding that a bankrupt was not entitled to his discharge in bankruptcy because he had transferred his deposit in a bank to it to apply on a note owned by the bank and not yet due, the court expressed the opinion that, while such a transaction was valid as between the parties, yet, that as between them on the one hand, and the other creditors on the other hand, it might constitute an unlawful preference under the bankruptcy law, and for that reason be void.

The conclusion of the court in *First Nat. Bank v. Gish*, 72 Pa. 13, seems also to be opposed to the doctrine that it does not amount to a preference for a bank to apply, either with or without the consent of the depositor, his deposit account on his bona fide indebtedness to it, as it was held that a trustee in bankruptcy, under the bankruptcy law of 1867, could recover a bankrupt depositor's deposit from the bank, although at the time he was owing it. The reason for the decision does not appear, the matter being disposed of in a word or two.

fit, it would not stand. But the finding does not warrant the claim. We must treat it, as the trial court has done, as a bona fide transaction. So treated, the set-off did not work a preference in favor of either the bank or the defendant.

There is no error.

The other Judges concur.

GEORGIA SUPREME COURT.

OCEAN STEAMSHIP COMPANY OF SAVANNAH, Plff. in Err.,
v.
SAVANNAH LOCOMOTIVE WORKS & SUPPLY COMPANY.

(— Ga. —, 63 S. E. 577.)

Sea carrier — duty — discrimination.

1. The common-law obligation of a carrier by sea is to receive goods which it is able and accustomed to carry, in the order of their tender, without preference to any shipper.

Same — extent.

2. At common law a carrier's duty to carry was limited to its facilities for transportation. A navigation company, whose charter confers no power of eminent domain, nor imposes any public duties, is not to be classed as a public or quasi public institution, and is not bound to provide sufficient facilities to carry all goods which may be offered to it. It may decline to receive goods for transportation in excess of its carriage capacity.

Same — rights and duties — when not public.

3. A carrier, not a public institution, may select the character of the goods it proposes to carry, or discontinue to carry a particular commodity.

Same — duty — discrimination.

4. A common carrier by sea cannot lawfully reject some goods which it professes to carry, and afterwards receive and transport other goods, where at the time of the tender there is room in the vessel for the

rejected goods, and the safety of the vessel will in no wise be imperiled.

Same — advance bookings — discrimination.

5. The carrier's common-law obligation of indifferently serving the public in the receipt and transportation of goods does not inhibit a carrier by sea from making "bookings" of freight; that is, from making specific arrangements for the transportation of goods by a particular vessel, in advance of its sailing day, provided this privilege is indifferently extended to all patrons, or if the grant of this privilege to shippers of one commodity does not interfere with the carrier's discharge of duty to the shippers of other commodities with respect to the receipt and transportation of their goods. The same rules which govern a carrier by sea in the reception of goods for transportation apply to the carrier's engagements to transport by a particular vessel, or within a specified limit of time.

Same — discrimination — injunctive relief.

6. There was evidence authorizing a finding that the defendant discriminated against the plaintiff in the reception and transportation of lumber tendered for shipment, and the court did not abuse his discretion in granting an *ad interim* injunction.

(January 15, 1909.)

ERROR to the Superior Court for Chatham County to review a judgment in plaintiff's favor in an action brought to enjoin defendant as a common carrier from practising certain alleged discriminations. Affirmed.

Statement by Evans, P. J.:

The Ocean Steamship Company is a common carrier operating three vessels between the ports of Savannah, Georgia, and Boston, Massachusetts, and six vessels between the ports of Savannah and New York. The Savannah Locomotive Works & Supply Company is a corporation engaged in buying and selling lumber to persons living in Boston and other eastern points. In September and October, 1907, there occurred at the port of Savannah a congestion of cotton and lumber shipments destined from Savannah to Boston. The plaintiff brought suit against the carrier to enjoin certain discriminations against it, alleged to be as follows: (1) The carrier received and transported, in preference to the lumber offered it by the plaintiff, the lumber of other shippers of later tender, where the same was offered it under through bills of lading issued by railroads at points in the interior. (2) It received and transported, in preference to the plaintiff's lumber, cotton and naval stores of later tender offered by other shippers. (3) It contracted with persons deal-

Headnotes by EVANS, P. J.

Note. — Research has failed to disclose any decision as to the right of a carrier by water to refuse transportation of goods tendered, other than those which hold that it is the duty of such a carrier, where holding itself out to the public as a common carrier, to serve the public indifferently. The distinction taken in the case reported between such a carrier and a carrier by rail, with respect to the duty of providing sufficient facilities to carry all goods which may be offered, seems to be well taken, the duty thus imposed upon railroads being beyond that imposed upon common carriers generally by the common law.
20 L.R.A. (N.S.)

ing in cotton in advance of the sailing day of a vessel that it would carry the cotton thus agreed to be transported on a particular steamer, but declined to make in advance of the sailing of a vessel a similar contract with the plaintiff or other lumber merchants to carry lumber on a particular steamer, and the carrier transported the cotton of other patrons in compliance with its contract, and refused to receive and transport the plaintiff's lumber of prior tender. The steamship company denied that it discriminated against the plaintiff in favor of other shippers. It denied that it discriminated against lumber in favor of cotton and other articles of commerce in the facilities afforded for transportation. It admitted that it made with shippers of cotton specific engagements in advance for the shipment of cotton on particular vessels, where such cotton was intended for foreign shipment by way of New York, and that it refused to "book" ahead lumber, because it was unable, in the course of its business as a common carrier, to contract reservations for future shipments of lumber by its vessels for the reasons set out in the answer. On the interlocutory hearing the defendant was enjoined from "booking" future shipments of cotton and other articles of commerce for persons dealing in the same until it places plaintiff upon a substantially similar basis for booking lumber for future shipment, wherever the storage capacity and safety of the ships permit such equality of basis of booking; from receiving or carrying any lumber or other articles of commerce of similar character and similarly circumstanced to defendant for shipment until it receives and carries lumber of the plaintiff tendered to defendant at a prior date, the storage capacity and safety of defendant's ship permitting; and from receiving or carrying any articles of commerce similarly circumstanced for any other person until it carries for plaintiff lumber tendered to it for shipment prior to the date of the tender of said articles of commerce for shipment, the storage capacity and safety of defendant's ships permitting, and from refusing to receive and carry the lumber of plaintiff in the order in which it is tendered for shipment, provided the storage capacity and safety of the ship permits such reception and carriage."

Messrs. Lawton & Cunningham, with Messrs. H. C. Cunningham and H. W. Johnson, for plaintiff in error:

A common carrier by water is not bound to provide transportation for all traffic offered.

1 Hutchinson, Carr. § 60; State ex rel. McComb v. Chicago, B. & Q. R. Co. 71 20 L.R.A. (N.S.)

Neb. 593, 99 N. W. 309; 2 Hutchinson, Carr. § 495.

Discrimination as between different commodities is lawful; only undue and unjust discrimination is unlawful.

Central R. Co. v. Augusta Brokerage Co. 122 Ga. 646, 69 L.R.A. 119, 50 S. E. 473; 5 Am. & Eng. Enc. Law, p. 179; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 684, 28 L. ed. 297, 4 Sup. Ct. Rep. 185; 2 Hutchinson, Carr. § 495; Choctaw, O. & G. R. Co. v. State, 73 Ark. 373, 84 S. W. 503; Interstate Commerce Commission v. Alabama Midland R. Co. 5 Inters. Com. Rep. 685, 21 C. C. A. 51, 41 U. S. App. 453, 74 Fed. 723; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 33 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844, 3 Inters. Com. Rep. 192, 43 Fed. 37; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 198, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; State ex rel. McComb v. Chicago, B. & Q. R. Co. supra; United States ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co. 154 Fed. 108; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169, 61 C. C. A. 405, 125 Fed. 445; Chicago, St. L. & P. R. Co. v. Wolcott, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451; Little Rock & Ft. S. R. Co. v. Oppenheimer, 64 Ark. 271, 44 L.R.A. 353, 43 S. W. 150; E. L. Rogers & Co. v. Philadelphia & R. R. Co. 12 Inters. Com. Rep. 309; Wright v. Baltimore & O. R. Co. 32 Pa. Super. Ct. 5.

No discrimination arose from the refusal to book lumber.

Van Zile, Bailments & Carriers, § 550; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 537, 50 L. ed. 586, 26 Sup. Ct. Rep. 330; Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 109, 32 N. E. 311; Central R. Co. v. Augusta Brokerage Co. 122 Ga. 650, 69 L.R.A. 119, 50 S. E. 473; Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 173; Fred G. Clark Co. v. Lake Shore & M. S. R. Co. 11 Inters. Com. Rep. 576; Miner v. New York, N. H. & H. R. Co. 11 Inters. Com. Rep. 427.

Messrs. Osborne & Lawrence and Hitch & Denmark, for defendant in error:

All common carriers are bound to serve the public indifferently, and to receive and carry all freight tendered and in the order of its tender.

Hilton Lumber Co. v. Atlantic Coast Line R. Co. 141 N. C. 171, 6 L.R.A. (N.S.) 232, 53 S. E. 823; 5 Am. & Eng. Enc. Law, 2d ed. p. 177; Beale & W. Railroad Rate

Regulation, § 175; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; *Ballentine v. North Missouri R. Co.* 40 Mo. 491, 93 Am. Dec. 315; 6 Cyc. Law & Proc. p. 372; *Hutchinson, Carr.* § 511; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 644, 46 L.R.A. 431, 34 S. E. 372; *New England Exp. Co. v. Maine, C. R. Co.* 57 Me. 188, 2 Am. Rep. 32; *Union P. R. Co. v. Goodridge*, 149 U. S. 690, 37 L. ed. 902, 13 Sup. Ct. Rep. 970; *Atlanta & C. Air-Line R. Co. v. Holcombe*, 76 Ga. 590; *St. Louis, I. M. & S. R. Co. v. State*, 84 Ark. 150, 104 S. W. 1106; *Welton v. Missouri*, 91 U. S. 279, 23 L. ed. 349.

Evans, P. J., delivered the opinion of the court:

1. It was admitted in the answer of the defendant that it was a common carrier by sea, operating a certain number of vessels between the port of Savannah, Georgia, and the ports of Boston, Massachusetts, and New York City, and accustomed to carry the particular commodity offered it by the plaintiff, and against which it is alleged to have discriminated. From the earliest times it has been considered that a common carrier exercises a public employment, with public duties to perform. He cannot, like a merchant, receive or reject a customer at pleasure. He is bound to serve the public indifferently, and this duty with respect to the commonness of service was regarded by Judge Nisbet as the distinguishing trait of a common carrier. *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393. In the case just cited it was said that "a common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying." If the carrier be under obligation to accept goods which he proposes to carry, and there is room for them in his vehicle, the time for acceptance is when the goods are tendered. It therefore follows that all applying have an equal right to have their goods transported in the order of their tender. Indeed, the proposition is too well established at this late day to require citation of authorities. 6 Cyc. Law & Proc. p. 372; 5 Am. & Eng. Enc. Law, 2d ed. p. 1772; *Hutchinson, Carr.* § 512.

Counsel for the plaintiff in error contend that at common law a carrier has the right to discriminate in the facilities offered to shippers of different commodities so long as shippers of the same commodities are all treated alike, and that this right of discrimination justifies a preference given to shippers of cotton over the shippers of lumber 20 L.R.A. (N.S.)

in the order of acceptance of these commodities for transportation. We have examined the cases cited to support this contention, as well as many others on the same general subject; and we find in all of them which concede to a carrier the right of discrimination among shippers a recognition of the principle that the right to discriminate only arises when the carrier has fulfilled his obligations to the shipper affected by the alleged discriminatory conduct. We do not think any case which has come under our notice goes further than to hold that, when a carrier extends a favor to one shipper, such favor is not to be regarded as an unjust discrimination so long as the carrier, by granting the favor, does not deny to other shippers any right which they may demand under the law, and the favored shipper is not given any material advantage in competition in business with them. A brief reference will be made to some typical cases to illustrate the accuracy of our analysis. There are a considerable number of decisions which hold that at common law the carrier was under no duty to charge every patron the same rate of carriage; that his duty was to charge a reasonable rate, and, if the rate charged was reasonable, one shipper could not lawfully complain that other shippers were charged a less rate. *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684. Some courts hold that, inasmuch as a carrier has the right to demand of all shippers the prepayment of his freight charge, it was not undue discrimination to exact of one shipper payment of the carriage charge in advance of carrying the freight, and collect it from other shippers at the end of the transportation. *Randall v. Richmond & D. R. Co.* 108 N. C. 612, 13 S. E. 137. The Supreme Court of the United States has decided that railroad companies may transport the traffic of one express company and refuse to transport the traffic of another express company over their lines because they "are not obliged either by the common law or by usage to do more as express carriers than to provide the public at large with reasonable express accommodation; and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains." *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628. In these cases the complaining shippers were accorded by the carriers every legal right which they could lawfully exact, and their complaint was not that the carriers were remiss in any duties to them, but that they were entitled to share in the favors extended to other ship-

pers. In the case in hand the complaint is that the carrier denies the plaintiff a substantial legal right, that the carrier owes it a duty to accept its lumber in the order of its tender, and that the carrier refuses to perform this duty and is prevented from performing it by giving a preference to the shippers of cotton. The gist of the complaint is not so much that favors are shown the shippers of cotton, as it is that the bestowal of these favors interferes with the steamship company in discharging its duty to the plaintiff by accepting its commodity in the order of its tender. We are also cited to the case of *Central R. Co. v. Augusta Brokerage Co.* 122 Ga. 646, 69 L.R.A. 119, 50 S. E. 473, as sustaining the contention that a carrier may discriminate in the facilities offered to shippers of different commodities so long as shippers of the same commodity are treated alike. In that case the shipper claimed that the railroad company delivered to his competitor in the same commodity cars for unloading at his competitor's private warehouse, and refused to deliver to the plaintiff at his private warehouse cars to be forwarded over the railroad of another company; and the refusal of the railroad company in this respect was alleged to be a breach of a certain rule of the railroad commission. It was held that the rule of the commission did not apply to discrimination in commodities. In the discussion of the points involved, it clearly appeared that the alleged discrimination did not consist in the denial of any right to the plaintiff which the carrier was under duty to grant, but that the cause of action in this particular hinged upon the refusal of the carrier to deliver its cars at the plaintiff's warehouse for shipment over the railroad of another company solely because it switched cars for unloading to the private warehouse of a competitor.

Much stress is put upon an adjudication of the supreme court of Arkansas in the case of *Little Rock & Ft. S. R. Co. v. Oppenheimer*, 64 Ark. 271, 44 L.R.A. 353, 43 S. W. 150. This was a suit for a penalty under an Arkansas statute prohibiting discrimination by railroads. It appeared that the plaintiffs were merchants at a non-competitive station on the carrier's line, and that the carrier failed to furnish sufficient cars to move the cotton from that station, while sufficient cars were furnished a competitive point. The supreme court reversed the judgment of the trial court on the merits of the case, and it was said that "the complaint of unjust discrimination grew out of the unusually large cotton crop of 1891. Sufficient transportation was not furnished them because applicants had not anticipated it." The complaint was 20 L.R.A. (N.S.)

not that the railroad company refused to accept the plaintiff's cotton, but that it failed to provide sufficient cars for its prompt transportation. Besides, that case is controlled by the principle that a railroad company as a public institution is bound to provide only such facilities for the transportation of freight which might ordinarily be anticipated, and, as the same number of cars were furnished in 1891 as had been furnished in previous years, which were sufficient to move the freight at plaintiff's station, the railroad had discharged its duty, and in the regulation of its business it could devote its other cars to meeting the demands of its business at competitive points. From an examination of the authorities we conclude that by the common law a common carrier, not only is obliged to receive and carry such goods as he is able to carry and customarily does carry, but he is required to carry for all patrons alike, all applying have an equal right to have their goods transported in the order of their application. *Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

2-4. At common law a carrier's duty to receive goods was limited to his facilities for transportation. The owner of a single ship may hold himself out to the public to carry certain goods for hire. As to the goods he proposes to carry, he is a public carrier; but he is under no obligation to provide other ships because his vessel is inadequate to transport all goods which may be offered him. Such a carrier does not owe to the public all the duties imposed by the law on railroad companies and similar public institutions to furnish adequate transportation facilities for all goods which may be tendered. Railroad companies are public institutions, and are granted certain exclusive franchises and rights which naturally impose correlative duties. They are invested with the power of condemnation, by the exercise of which sovereign right they acquire an exclusive privilege to carry on their business over the highway constructed by them. They are endowed with special and unusual powers, with an express view to their rendering to the public adequate service. The conferment of these unusual powers raises an obligation, not only to serve the public impartially, but to serve the public efficiently. Upon them the law imposes the obligation to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage; and they are bound to provide sufficient cars for transporting, without unreasonable delay, the usual and ordinary quantity of freight offered to them, or which might reasonably and ordinarily be expected. 5 Am. & Eng. Enc. Law,

2d ed. p. 167. A navigation company like the defendant, which receives no franchise from the state to use the open sea, and which enjoys no monopoly or right of eminent domain, owes no duty to the public to furnish adequate facilities to transport all of the traffic of the ports of its termini. It is under no obligation to buy other ships because it does not undertake to carry any more goods than its vessels will safely accommodate. If there is a demand for more ships, the commercial necessities will regulate the deficiency in transportation service, either by voluntary enlargement of the facilities of existing ship lines or the establishment of new ones. A carrier, not a public or quasi public institution may select the class of goods which he proposes to carry. Whether the right of selection may include the right to limit the quantity of any commodity he proposes to carry, provided he gives public notice of the limitation, is not before us.

57 The principal complaint of the complaining lumber dealer is against the system of booking cotton for a particular vessel in advance of its sailing day. It is said that this practice results in accumulating large quantities of lumber and cotton at the port of Savannah beyond the immediate carrying capacity of the steamship company's vessels, and that "booked" cotton is transported in preference to lumber tendered subsequent to the booking, but prior to the arrival and receipt of the "booked" cotton, and that the steamship company refuses to accord to lumber dealers the privilege of booking their commodity. The system of "booking," as explained in the record, is the practice of the steamship company to make specific engagements with shippers of cotton for a reservation of space for cotton to be shipped on a particular vessel in advance of its sailing day. If the steamship company indifferently extended this privilege to all its patrons and to all commodities, we do not think it would violate any duty which it owed the public. The basal principle of the requirement of the common law that a common carrier must convey the goods of all persons offering to pay his hire, unless his carriage be already full, is that there should be no unjust preference given one member of the public over another. The practice of making specific engagements in advance of the shipment, if the privilege is indifferently extended to all, is but another form of acceptance of goods tendered in the order of their application. The same impartiality of service is rendered when public notice is given by the carrier that he will "book" the freight of all patrons, and reserves space for the goods engaged to be transported as

if he had received the goods of the shipper in the order of their tender. But, when a carrier reserves space in his carriage for a favored patron or a favored commodity, not perishable in its nature, and refuses to reserve space for another patron or commodity, he fails to afford that commonness of service which the law annexes as an incident to his business. The steamship company may discontinue to carry any particular commodity it desires, or it may voluntarily cease to do business as a common carrier and engage in the business of a special carrier; but, so long as it pursues the business of a common carrier, it is bound to render to the public the service which the law exacts of a common carrier.

6. The requirement of the common law that a common carrier must receive goods offered for transportation in the order of their tender cannot on principle be affected either by the place where the shipment originates or by the ultimate destination of the goods. There is no reason why the steamship company should prefer freight tendered in a car from one forwarding agency, and deny freight similarly tendered by another forwarding agency or shipper. If the steamship company desires an inland carrier to issue through bills of lading, it may do so subject to its obligations to receive and carry freight in the order of its tender. The mere fact that a particular commodity is destined to a foreign port cannot justify a carrier in giving a preference to it over the same or another commodity because the latter may be a domestic shipment. It is urged that in apportioning its space to the various commodities, according to the volume of freight at the port, no discrimination was shown by the steamship company against lumber shipments in favor of cotton or other articles of commerce. Some of the reasons advanced are that the steamships are built with a view to the packet trade, that lumber is bulky, and cannot be as expeditiously handled as cotton; that the vessels are advertised to sail on particular days, and to require a greater percentage of lumber to be carried than was carried would not enable the vessels to observe their sailing dates; that there is a congestion of freight and a larger percentage of lumber than of cotton is carried; that cotton moves only within three or four months of the year, whereas lumber moves evenly throughout the year; that the price of cotton is liable to fluctuation, while that of lumber is more constant; that cotton is the great staple crop of the state of Georgia, and that a larger number of the public is served by the prompt transportation of cotton to the preference of lumber. With respect to the contention that,

if the steamship company accepted all the lumber which was tendered to it, its vessels could not sail at the advertised times, the evidence was in conflict. As previously indicated, the steamship company is under no duty to carry all the freight of the port of Savannah; so that the main question on the facts is whether cotton possesses such inherent qualities as to permit a preference to be given to that commodity over all other articles which the steamship company customarily carries. We fully appreciate the value of the South's great staple product, and are aware that for years the slogan has been that "cotton is king." But the great value of the cotton crop and the importance of its prompt transportation gives to that staple no imperial rights over the other products of this state. It is not perishable in its nature, and it will not be contended that its fluctuation in price is so violent that a delay in transportation would substantially destroy its value. On the whole, after a careful consideration, we think that, under the legal principles applicable to the facts of the case, there was no abuse of discretion in the grant of an *ad interim* injunction. The terms of the injunction did not extend to matters outside of pleadings, nor are they indefinite and uncertain.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., absent on account of sickness.

Petition for rehearing denied February 10 1909.

IDAHO SUPREME COURT.

GEORGE STELTZ

v.

ARMORY COMPANY, Limited.

(15 Idaho, 551, 99 Pac. 98.)

Building contract. — acceptance — defects — waiver.

1. As a general rule, where the owner of a building accepts the same and takes possession thereof, and at the time of doing so the building is incomplete and contains patent and obvious defects, the acceptance will be deemed a waiver, and the contractor will be entitled to recover the amount earned on the contract.

Same — latent defects.

2. An acceptance of a building or structure that has been completed, or which contains latent defects either in the class or character of its workmanship or the quality of material used, will not be deemed a waiver of such latent defects; but, on the

contrary, the owner may maintain his action against the contractor for breach of the contract at such time as he discovers the extent of the defects or after he has had reasonable time and opportunity, by due diligence, to have discovered the same.

Mechanics' lien — foreclosure — set-off — breach of contract.

3. Where a building has been completed, and the owner thereof has entered into possession of the same on the theory that the building is a completed structure, and he later discovers that the building was defectively constructed and not properly tied to the adjoining wall, and the front falls out, the owner may recover the damages thus incurred on account of breach of the contract as an offset against the contractor, who is seeking to foreclose his mechanics' lien for the construction of the building.

Building contract — acceptance — defect — knowledge — waiver.

4. The fact that the owner of a building went into possession thereof with knowledge that the building contained latent defects in its construction and inferior material will not prevent his claiming damages for such defects as an offset against the contractor's action to recover the contract price therefor, unless an express waiver is shown, or such other facts and circumstances as would amount to a waiver of damages.

Mechanics' lien — amount due.

5. Under the provisions of § 6 of the lien laws of this state (Sess. Laws 1899, p. 148), every person performing labor or furnishing material for a building or structure is entitled to a lien therefor; and the amount to be recovered under such lien is always measured by the amount found to be due him under his contract.

Same — set-off — necessity of pleading.

6. Where a building contract provides for a forfeiture of \$5 per day for each day the owner is kept out of possession thereof after the day fixed by the contract for the completion of the building, such damages cannot be recovered by the owner in an action by the contractor to foreclose his lien, unless the same is affirmatively pleaded by way of defense or cross complaint.

(December 16, 1908.)

Case Note. — Taking possession of building with knowledge of defects as waiver thereof, as against contractor.

The reason which underlies the doctrine that the owner's taking possession of a building, though with knowledge of defects therein, will not prevent his claiming damages for such defects against the building contractor, is the same which governs the closely related question of the effect of the use of a building by the owner as an acceptance of work of construction or repair, which has heretofore been discussed in a case note to *Pope v. King*, 16 L.R.A. (N.S.) 489.

As is said in *United States v. Walsh*, 52 C. C. A. 419, 115 Fed. 697: "The owner of

CROSS APPEALS from a judgment of the District Court for Latah County enforcing a mechanics' lien; defendant appealing from so much of the judgment as enforced the lien, and plaintiff appealing from so much as allowed defendant a set-off for damages alleged to have been sustained by reason of defective construction. Affirmed.

The facts are stated in the opinion.

Mr. Stewart S. Denning for plaintiff.

Mr. I. N. Smith for defendant.

Allshie, Ch. J., delivered the opinion of the court:

This action was instituted by the plaintiff for the foreclosure of a mechanics' lien. Plaintiff entered into a contract with the defendant corporation to furnish the material and construct an armory building in the city of Genesee. Plans and specifications were adopted, the price and terms of payment were agreed upon, and the building was erected. The company went into possession of the building and continued to use it for some six weeks, at which time an unusual windstorm occurred and blew down the front of the building. The company declined to pay the contractor, whereupon he filed his lien and prosecuted this action to foreclose the same. The defendant company answered, admitting the contract,

but denying that the building was ever completed "in a good, substantial, and workmanlike manner." It also alleged that, as an affirmative defense, the building was defectively constructed, in that the front wall was not properly tied to the adjoining building, and other defects were charged, whereby the defendant alleged damages in the sum of \$200. The trial resulted in a judgment in favor of the plaintiff for a balance due of \$700 on the contract and \$28.50 for extras. The court found in favor of the defendant on its allegation of damages in the sum of \$140, which sum was offset against the total balance due on the contract. Both parties appealed from the judgment, and, since each party is both appellant and respondent in this court, we shall refer to them in this opinion as plaintiff and defendant.

Findings 4, 5, 6, and 7 are as follows: "(4) The court finds that the defendant tendered into court the sum of \$610, and is shown to have tendered the same amount to the plaintiff at a period long prior to the time of the case. (5) The court also finds that the defendant corporation has been in possession of the building ever since the date shortly after its construction, and that they went into possession of the said building with full knowledge of the defect alleged to have been the cause of the falling

real property, who has employed another to erect a structure on his land, does not, by taking possession and appropriating the structure to the uses for which it was built, preclude himself from insisting that the builder has not properly performed his contract. The results cannot be separated from the necessary consequences of ownership; and, as he cannot, without prejudice to himself, reject them or refuse to retain them, the law does not imply any promise from his acceptance of them. This being so, it matters not whether, at the time, he is or is not aware of the defects."

In *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734, it is held that where, after the expiration of the time within which the contractor stipulated to complete the building, the owner entered into possession of the premises, as it was his right to do, he cannot be held to have waived all defects of which he knew or could have known by the exercise of ordinary care.

In *Ludlow Lumber Co. v. Kuhling*, 119 Ky. 251, 115 Am. St. Rep. 254, 83 S. W. 634, it is said that, even if there had been a defect in the construction of the house, and the owners had knowledge of it before moving in, that fact would not prevent them from recovering for the breach of the contract.

In *Stewart v. Fulton*, 31 Mo. 59, an instruction that, if the plaintiff accepted the building in question and received the same, he would be debarred from claiming dam-

ages for any noncompliance with the contract of construction, unless the fact should appear that the defect in the work could not be, or was not, ascertained at the time of the acceptance of the building, was held erroneous; the court saying that the fact that the house had been used is a matter to be weighed by the jury with all the other circumstances in the case, which may strengthen the force of it or dispel it altogether.

In *Mohney v. Reed*, 40 Mo. App. 99, it was held that, in building contracts, where the house is built upon the property of him who has it built, acceptance and use of the work, knowing it is not done in accordance with the contract, is not a waiver, the owner being powerless to do anything else, unless he should tear the house down.

So, also, in *Franklin v. Schultz*, 23 Mont. 165, 57 Pac. 1037, it was held that the owner of a house, upon taking possession thereof, did not waive any further compliance on the part of the builder with the terms of the contract,—the defects claimed to have been waived being failure to plaster a portion of the basement and omission to build a flue.

In *New York v. Dexter*, 59 Misc. 157, 110 N. Y. Supp. 360, damages were allowed to a person for whom a gangway to his bath house had been constructed, where, after knowledge of the defect complained of, he continued to use the gangway.

of the wall. (6) The court finds that the north wall of the building was defectively constructed, and that it was not properly tied to the building, and that on an occasion, shortly after the defendant had taken possession of the same, the wall was blown down by a high wind, and the court finds that all of the aforesaid facts are substantiated by the evidence. (7) The court further finds that it would take the sum of \$140 to replace the said wall, and that the defendant has been damaged to that extent, and the court finds that the defendant is entitled to deduct from the amount of the contract the sum of \$140."

Defendant contends that the fifth finding, to the effect that the company went into possession of the building with full knowledge of the defect alleged to have been the cause of the falling of the wall, is unsupported by the evidence, while the plaintiff contends that findings 6 and 7, to the effect that the north wall of the building was defectively constructed to the defendant's damage in the sum of \$140, is not supported by the evidence. We may dispose of these contentions on the part of both plaintiff and defendant by saying that there is a substantial conflict in the evidence on all these points, and that there is sufficient evidence in the record to support each of the findings. We would not disturb them on that ground. The contract provided that the plaintiff should construct this building "in a good, substantial, and workmanlike." Evidence was produced tending to show that the defendant complied with this provision of the contract. There was also a great deal of evidence produced by defendant to the effect that he had not complied with this part of the contract. There is also evidence both ways on the question as to whether defendant had knowledge in a general way of this defect at the time it entered into possession of the building. It must be admitted, we think, that the defect in not tying the wall to the adjoining building with spikes or ties was not an obvious or patent defect, but was rather a latent defect. Had it been a patent and obvious defect or a failure to complete the building, the defendant would, under ordinary circumstances, be held to have waived the same by taking possession of the building without doing so conditionally, or protesting against its conditions, or demanding its completion. It may often happen that a building or structure contains a latent defect that the owner cannot reasonably discover at the time he takes possession. For instance, the material of which it is constructed may be of an inferior quality, or the work may have been so imperfectly done as to render the build-

ing or structure of little use or slight value, or so that it may fall, and thereby cause great damage to the owner. In such case the owner, although having paid for the building, would be entitled to recover damages for breach of the contract. *Barker v. Nichols*, 3 Colo. App. 25, 31 Pac. 1024.

Counsel for the defendant contends that these defects actually existed as proven and found by the court, and that for such reason the plaintiff had failed to "faithfully perform and fully comply with the contract on his part," and was consequently not entitled to recover and particularly not entitled to a lien, under § 7 of the Lien Laws (Sess. Laws 1899, p. 148). In support of this contention, plaintiff cites the cases of *Justus v. Myers*, 68 Minn. 481, 71 N. W. 667, and *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657, and 27 Cyc. Law & Proc. pp. 402, 403. The *Justus* Case involved a contract for putting in a heating plant. The contract contained a warranty to the effect that the radiation should be sufficient to heat the rooms to 75 degrees on the coldest winter weather, and that the plant might be tested by the owner before accepting, and that, if not entirely satisfactory, it should be made so by the contractor without any additional expense. The defendant alleged that she had never accepted, but, on the contrary, had notified the plaintiff that it was not up to the requirements, and that she would not accept it. The court held that there was no substantial compliance with the contract, and that they could not maintain their action. In *Boots v. Steinberg* the contract provided for the erection of a house, and, among other stipulations, provided that it should be to the satisfaction of the owner, who should have the right to act as superintendent of the work, or appoint someone to act in that capacity, and the last payment was not due until "ten days from the completion of said work to the satisfaction of said Julius Steinberg." It appeared from the evidence that a number of things required to be done by the contract were never in fact completed in any manner, and others were imperfectly completed. The court held that the contract was not substantially complied with and refused plaintiff any relief. The facts of that case are somewhat different from the facts of the present case. Here, so far as outside appearances were concerned, and as a matter of fact, the building was a completed structure, although defectively constructed. The company accepted it, and one of the defendant's officers went far enough on the night it was opened for use to publicly state that they had a better building than they had expected to

get for the money, and that they thanked the contractor for the work he had done. The trouble was, however, that, in the matter of construction itself, the building, although a completed structure, was so defectively and imperfectly erected as to entail damage to the defendant by reason of the front blowing out when the storm came.

Taking possession of the building with knowledge of the latent defect it contained is sufficient to prevent the owner from denying the completion of the building in an action by the contractor to foreclose his lien. Section 6, Lien Laws (Sess. Laws 1899, p. 148); Boisot, *Mechanics' Liens*, § 1; *Bell v. Teague*, 85 Ala. 211, 3 So. 861. On the other hand, the mere fact of entering into possession with knowledge of this defect is not sufficient to defeat the owner's right of action for breach of the contract as to the quality of material used, of the class and character of workmanship put on the building, unless an express waiver is shown, or such other facts as would amount to a waiver. The owner always has the general possession of the property, and the contractor's possession is only a special and limited possession for the purpose of doing the work for which he has contracted. It often becomes necessary and essential for the owner to take possession of a building or structure, although not completed or imperfectly and defectively constructed, in order to protect himself from still further and greater damages. The fact of such possession should not be a bar to his right of recovery for breach of the contract. *Barker v. Nichols*, *supra*; *Hanley v. Walker*, 79 Mich. 607, 8 L.R.A. 207, 45 N. W. 57; *Boots v. Steinberg*, *supra*; *United States v. Walsh*, 52 C. C. A. 419, 115 Fed. 697. Knowledge in a general way of a latent defect, of which the owner had no means of knowing its extent and latent dangers, will not amount to a waiver of the right of action for a breach of the contract, in the absence of other facts tending to disclose an intent to waive the right of action.

Under § 6 of the Lien Laws (Sess. Laws 1899, p. 148), every original contractor claiming the benefit thereof must within ninety days, and every other person within sixty days, after the completion of a building, improvement, or structure, or in case he, for any cause, ceases to labor thereon before the completion thereof, file for record with the county recorder his notice of lien, etc. Section 1 of the act provides that every person performing labor or furnishing material for a building or structure is entitled to a lien. This statute seems to be drawn upon the theory that any person who contributes labor or material for

the construction, alteration, or repair of a building or structure on another's real estate is entitled to a lien therefor. Of course, the extent of the lien when he comes to foreclose it must be measured by the amount found due him on his contract at the time of filing his lien. If there is nothing due him under his contract, he is not entitled to any lien; but, if anything is found to be due him, he is entitled to a lien therefor. This statute is evidently based on the theory that whoever contributes labor or material whereby the real property of another is enhanced in value shall be entitled to a lien upon the whole property in the sum due. The affirmative answer and defense of defendant in this case is drawn apparently on the theory that the building, although at one time a completed structure and accepted by the defendant, contained latent defects and faults which resulted in damage to the defendant, and that defendant was entitled to recover the amount of damage sustained by reason thereof and have the same set off against the contract price of the building. The court's findings and judgment seem to follow that theory of the case. We think it was proper, and in harmony with the law, for the court to find the amount of damage sustained by defendant on account of the defective workmanship and construction, and to offset the same against the balance due on the contract price.

Appellant also insists that the court erred in not awarding it damages at the rate of \$5 per day for each day it was kept out of possession of the building, from the 1st day of September until the date it entered into possession. The contract contained a provision that the building should be completed on the 1st day of September, and that the contractor should pay the owner the sum of \$5 per day for each day thereafter until the building should be completed. The court made no finding on this question. In fact, there was no issue tendered on that subject. The defendant did not plead damages on account of plaintiff's failure to complete the building within the time specified in the contract. There is no mention of this either in the answer or affirmative defense. It would be manifestly erroneous to allow a party to recover such an item of damages for breach of a contract without tendering any issue whatever on the subject. *Stevens v. Home Sav. & L. Asso.* 5 Idaho, 741, 51 Pac. 779, 986; *Murphy v. Russell*, 8 Idaho, 151, 67 Pac. 427.

We find no error in the record, and the judgment will therefore be affirmed. Each party having appealed in this case, the

whole cost of the two appeals will be equally divided between the parties to the action.

Sullivan and Stewart, JJ., concur.

Petition for rehearing denied.

ILLINOIS SUPREME COURT.

RUSSELL STRAFFORD, by Next Friend,
v.
REPUBLIC IRON & STEEL COMPANY,
Appt.

(238 Ill. 371, 87 N. E. 358.)

Master — minor — contributory negligence.

1. The contributory negligence of a child employed in violation of the terms of a statute is no defense to an action against the master for personal injuries received by

Case Note. — May one employing child under statutory age rely on contributory negligence or assumption of risk to defeat liability for personal injury sustained by the latter.

The earlier cases upon the subject are collected and discussed in a case note to *Lenahan v. Pittston Coal Min. Co.* 12 L.R.A. (N.S.) 461, and this note is confined to the more recent cases, which are quite numerous.

In the earlier note there was no decision which expressly held that neither assumption of risk nor contributory negligence was available as a defense to an action for personal injuries to a minor employed in violation of the statute, but a few of the more recent decisions do so hold.

It was so held in *Marquette Third Vein Coal Co. v. Dielie*, 110 Ill. App. 684, affirmed in 208 Ill. 116, 70 N. E. 17. As to contributory negligence the court said: "But, if plaintiff was injured while absent from the post of duty, or while violating his orders, or if it was carelessness or negligence for him to run between the sides of the moving cars and the mine wall, still, in our judgment, those facts would not prevent a recovery under the second count. The statute absolutely forbids the employment of a child of that age in a mine. One reason, no doubt, is that immature children are liable not to understand the significance and importance of the regulations prescribed for the mine and the employees therein; they may thoughtlessly disobey orders, or expose themselves to peril, or do acts which would be careless in an adult. The company which violates this statute ought not to be allowed to screen itself from liability because the child has been injured by reason of those childish traits which give rise to the statute."

And in *Frorer v. Baker*, 137 Ill. App. 588, it was held that the defendant was liable for injuries to a minor employed in vio-

lation of the statute notwithstanding the fact that he may have been guilty of contributory negligence. The decision follows the *Armentraut Case*, which is set out at length in the previous note and also in *STRAFFORD v. REPUBLIC IRON & STEEL CO.*

Same — statutory liability.

2. A master is not relieved from liability for injury to a child employed in violation of the terms of a statute because the statute does not in express terms provide for such liability.

(February 19, 1909.)

A PPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Rock Island County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed. The facts are stated in the opinion.

So, in *Swift & Co. v. Miller*, 139 Ill. App. 192, it was held that the doctrine of assumed risk has no application where a minor is employed in violation of the express provisions of the statute. The question of contributory negligence did not arise in this case, but the rule in Illinois is apparently well settled.

And in *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116, the court followed *Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A. (N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642, which held that it was within the power of the legislature to fix an age limit below which children should not be employed in dangerous kinds of work, and that an employer who violated the law by engaging a child under the statutory age did so at his own risk; and, in an action of trespass for personal injuries sustained in such employment, the master cannot set up as a defense either the assumption of risk or the contributory negligence of the child servant. And to the same effect was the decision in *Sullivan v. Hanover Cordage Co.* 222 Pa. 40, 70 Atl. 909.

So, in *Inland Steel Co. v. Yedinak* (Ind.) 87 N. E. 229, in violation of a statute a boy thirteen years of age was required to work at night twelve hours a day; on one occasion, becoming exhausted and having no immediate duty to perform, he sat down in a dangerous place, fell asleep, and while in this condition was injured. In holding that neither assumption of risk nor contributory negligence was available as a defense under the circumstances of the case, the court said: "The doing of a thing prohibited, or the failure to do an act commanded, by

Messrs. Richard Jones, Jr., William A. Meese, and Peck & Dietz, for appellant:

In case an employee is hired in violation of statute, and is injured, the unlawful employment must be the direct and proximate cause of the injury to warrant recovery for such injury.

Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Goodwillie v. London & Guarantee & Acci. Co. 108 Wis. 207, 84 N. W. 164; Evans v. American Iron & Tube Co. 42 Fed. 519; Belles v. Jackson, 4 Pa. Dist. R. 194; Kutchera v. Goodwillie, 93 Wis. 448, 67 N. W. 729.

Where, at the time of an injury, an employee hired in violation of statute has disregarded the scope of his authority and the direction of his employer, and is engaged at a task which he was not directed or which he was expressly forbidden to perform, his contributory negligence is a necessary ele-

statute, constitutes negligence *per se*, the natural consequence of which the master cannot escape on the ground that the employee knew of such disobedience and assumed the risk of injury. . . . The employer of a child in violation of a specific statute cannot screen itself from liability for an injury sustained by the child in its service because the injury was occasioned through such negligence, imprudence, or childish traits as gave rise to the statute."

When a defendant violated the law in putting a minor at work at a forbidden employment, it was held in Nairn v. National Biscuit Co. 120 Mo. App. 144, 96 S. W. 679, that the master assumed all the risks of danger to the latter, and, where there was nothing to show that the plaintiff knowingly placed his person in danger, there could be no question of contributory negligence.

In Sterling v. Union Carbide Co. 142 Mich. 284, 105 N. W. 755, it was held that a minor child did not assume the risk of injury where he was employed in violation of the statute; but whether or not his acts constituted contributory negligence was, in view of his immaturity, held to be a question for the jury.

And the Sterling Case was cited with approval in Syneszewski v. Schmidt, 153 Mich. 438, 116 N. W. 1107, where it was held that a minor employed in violation of the statute did not assume the risk of injury from the negligent act of a fellow servant.

A number of cases, in which there was no question as to assumption of risk, have held that the question of the injured child's contributory negligence was for the jury, or have directly held that contributory negligence is a complete defense to an action for personal injuries.

Thus, in Woolf v. Nauman Co. 128 Iowa, 261, 103 N. W. 785, it was held that the question of contributory negligence was for the jury. Upon the question whether the statute operates to create a conclusive pre-

ment to be considered in determining his right to recover for such injury.

American Car & Foundry Co. v. Armendraut, 214 Ill. 509, 73 N. E. 766; Evans v. American Iron & Tube Co. supra; Lee v. Sterling Silk Mfg. Co. 115 App. Div. 589, 101 N. Y. Supp. 78; Yeung v. Eugene Dietzgen Co. 72 App. Div. 618, 76 N. Y. Supp. 123, affirmed in 176 N. Y. 590, 68 N. E. 1126; Belles v. Jackson, supra; Marino v. Lehmaier, 173 N. Y. 531, 61 L.R.A. 811, 66 N. E. 572.

Mr. W. R. Moore, for appellee:

In an action for injuries to a child employed in violation of a statute prohibiting the employment, in manufacturing establishments, of children under the age of fourteen years, it is no defense to the employer that the child's own negligence contributed to his injuries.

American Car & Foundry Co. v. Armen-

sumption that a child under sixteen years of age is too immature to be permitted to assume a risk of the prohibited kind, the court declined to pass as it was not presented, and the theory upon which the trial court proceeded was favorable to the appellant-defendant.

So, in Smith v. National Coal & I. Co. (Ky.) 117 S. W. 280, it was held that the question of contributory negligence was one for the jury.

And in Braasch v. Michigan Stove Co. 153 Mich. 652, 118 N. W. 366, although the court did not squarely pass upon the question, there is an implication to the effect that the question of contributory negligence is one for the jury.

So, in Peters v. Gille, 133 Mo. App. 412, 113 S. W. 706, the question of the plaintiff's contributory negligence was passed upon by the jury.

And in Evans v. American Iron & Tube Co. 42 Fed. 519, the judge, in his charge to the jury, said that the mere employment of the injured child below the prohibited age would not entitle him to recover if the question of contributory negligence was involved.

So, in Fortune v. Hall, 122 App. Div. 250, 106 N. Y. Supp. 787, a boy was employed under the statutory age, but the injury occurred after he had passed such age; the court held that the statute was not applicable to the case, and, further, disregarding that question, there could be no recovery as the injuries appeared to have been caused by his own carelessness.

A master is not liable for injury to a boy employed in violation of the statute where the injuries were received while the boy was subjecting himself to an obvious risk the danger of which he was capable of appreciating. Darsam v. Kohlmann (La.) post, 881, 48 So. 781.

Both contributory negligence and assumption of risk have in some cases been held to be questions for the jury.

traut, 214 Ill. 509, 73 N. E. 766; *Jefferson Theatre Program Co. v. Crejczyk*, 125 Ill. App. 1; *Marquette Third Vein Coal Co. v. Dielle*, 208 Ill. 116, 70 N. E. 17; *Helm-bacher Forge & Rolling Mills Co. v. Garrett*, 119 Ill. App. 166; *Morris v. Stanfield*, 81 Ill. App. 264; *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20; *Marino v. Lehmaier*, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; *Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642; *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662; *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335; *Springfield Coal Min. Co. v. Gedutis*, 227 Ill. 9, 81 N. E. 9, affirming 127 Ill. App. 327; *Spring Valley Coal Co. v. Pating*, 210 Ill. 342, 71 N. E. 371, affirming 112 Ill. App. 4; *Willis Coal & Min. Co. v. Grizzell*, 100 Ill. App. 480; *La Porte Carriage Co. v. Sullender* (Ind. App.) 71 N. E. 922; *Brower v. Locke*, 31 Ind. App. 353, 67 N. E. 1015; *Monteith v. Kokomo Wood Enameling Co.* 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610; *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479, 63 N. E. 239; *Leathers v. Blackwell Durham Tobacco Co.* 144 N. C. 330, 9 L.R.A. (N.S.) 349, 57 S. E. 11; *Ornamental Iron & Wire Co. v. Green*, 108 Tenn. 161, 65 S. W. 399; *Bromberg v. Evans Laundry Co.* 134 Iowa, 38, 111 N. W. 417; *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137.

Farmer, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court in favor of appellee for \$10,000 for personal injuries. Appellee is a minor, and was employed by appellant to work in its steel mill or manufacturing establishment about the middle of May, 1906. On the 25th day of October, 1906, while feeding angle irons into the "straight-

ening machine," he received injuries that resulted in the loss of his left arm and one finger of the right hand. At the time of said injury appellee was thirteen years, eleven months, and eight days old. The first two counts of the declaration are based on § 1 of the act of 1897 (Laws 1897, p. 90; *Hurd's Rev. Stat.* 1908, p. 1038), which provides "that no child under the age of fourteen years shall be employed, permitted, or suffered to work for wages at any gainful occupation hereinafter mentioned." The occupations thereafter mentioned in the act embrace manufacturing establishments, factories, and workshops. The third count is based on § 6 of said act, which provides that "no child under the age of sixteen years shall be employed, or permitted, or suffered to work by any person, firm or corporation in this state at such extra-hazardous employment whereby its life or limb is in danger, or its health is likely to be injured, or its morals may be depraved." Each count of the declaration charged that the employment of appellee by appellant was unlawful and was the proximate cause of his injuries. Appellant pleaded the general issue, and a trial by jury resulted in a verdict in favor of appellee for \$10,000, upon which the circuit court, after overruling a motion for a new trial, rendered judgment, and the appellate court for the second district has affirmed that judgment.

It was a controverted question of fact on the trial whether appellee was set at the work he was performing when injured by appellant's foreman, or whether he had been set to do other work which he quit without orders to do so, and, without any directions from the foreman, but against his orders, began the work of feeding angle irons into the machine, which he was engaged in doing when injured. The proof offered by appellee tended to show he was set at the work he was engaged at when injured by the foreman, while the proof offered by appellant tended to show he was set at other

Thus, in *Bromberg v. Evans Laundry Co.* 134 Iowa, 38, 111 N. W. 417, it was held that assumption of risk and contributory negligence were for the jury. In speaking of the rule applicable to cases of this character, the court said: "It leaves open to the employer to show affirmatively, if he can, that the injured person, notwithstanding he or she was within the protected age, was yet in fact of sufficient capacity, strength, and judgment to recognize and appreciate the risks attendant upon that kind of labor, or arising from the known negligence of the employer, or that, by a failure to exercise the degree of care which a person of his or her age, experience, and capacity ought to exercise, he or she contributed to the injury of which complaint is made." 20 L.R.A. (N.S.)

And in *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137, the court sustained the charge of the trial judge that the employment of a child in violation of statute is prima facie evidence of negligence, which might be overcome by proof that the machine which injured the child was properly guarded, or that the plaintiff himself was guilty of contributory negligence.

The questions of contributory negligence and assumption of risk of a boy employed under the statutory age were held, in *Rahn v. Standard Optical Co.* 110 App. Div. 501, 96 N. Y. Supp. 1080, to be for the jury. And to the same effect was the decision in *Regling v. Lehmaier*, 50 Misc. 331, 98 N. Y. Supp. 642.

work and ordered not to work at the straightening machine. Appellant's contention is that it was incumbent upon appellee to prove his injury was the direct and proximate result of the unlawful employment, and that if he had of his own accord left the work he was employed for, and directed to do and attempted to do a different character of work which he was forbidden to do, and was injured while so engaged, and his own negligence contributed to the injury, then there can be no recovery.

The second instruction given on motion of appellee is, as follows: "The jury are instructed that in this case the law is that no child under the age of fourteen years shall be employed, permitted, or suffered to work at any gainful occupation in any mercantile institution, store, office, laundry, manufacturing establishment, factory, or workshop within this state; and in this case it does not make any difference whether the plaintiff was or was not told by the foreman to work on the straightening machine, if you believe from the evidence the plaintiff was under the age of fourteen years at the time he was injured and was at that time working for defendant in its manufacturing establishment for a compensation to him, to be paid by defendant." The court refused instructions asked by appellant to the effect that it was incumbent upon appellee to prove that he was in the exercise of due care, and that he could not recover if at the time of the accident he was doing work which he was not authorized to perform or which he had been forbidden to do. The correctness of the court's rulings in giving appellee's instruction No. 2 and refusing those asked by the appellant are the only questions presented for our consideration.

In *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766, it was held that one of the purposes of the statute was to protect children from their own immaturity, inexperience, and heedlessness; and that, where a child under fourteen years of age, employed in violation of the statute, was injured while engaged in the performance of the work he was directed to do, the negligence of the child, though it may have contributed to the injury, was no defense to the liability of the employer. In that case the child was injured while engaged in doing the work it was directed to do by the employer. After stating the rule announced in the opinion that contributory negligence was not a defense where the injury resulted while the child was performing the work he was directed to do, the court said: "If the child left the task which he had been directed to perform, and, while not engaged in doing work which he

had been directed to do by his master, was injured through an accident to which his own negligence contributed while he was still in or upon the premises of the master, a different question would present itself." This language, appellant insists, indicates the view of the court was that in such cases contributory negligence would constitute a defense. We do not think it means any more than it said,—i. e., that the court had no such question as that before it for consideration,—and is not to be accepted as an expression of the court's view of the law if such question had been presented. The statute in express and positive language forbade the employment of appellee in the business appellant was engaged in, in any capacity, and in the *Armentraut* Case it was said such construction should be given the act as to effectuate its purpose, if it can be done without violence to the letter of the statute. The validity of such statutes has been sustained as an exercise of the police power of the state upon the ground that the state is interested in the protection of children, and to that end may pass laws preventing their employment at a tender age, when they should be in school, in occupations that expose them to danger of being crippled and maimed for life, and thereby rendered less capable of taking care of themselves and discharging the duties of citizenship on arriving at maturity. The wisdom and humanity of the statute cannot be questioned, and in the *Armentraut* Case we held that an employer must know, at his peril, that children employed by him are of an age that he may lawfully employ them. It is a matter of common knowledge and experience that boys under fourteen years of age are less cautious and careful than persons of more mature age, and cannot be expected to observe and follow directions and instructions given for their protection, like older persons. This lack of appreciation of danger and regard for authority are matters which, no doubt, had an influence on the legislature in the adoption of so sweeping an act. There may be, and doubtless are, positions in the industries in which children under fourteen years of age are forbidden by the statute to be employed, where there would be little or no hazard to life or limb if the child confined himself exclusively to the duties of such position, but the childish inclination to experiment and do something he has seen others do is so well known as to make it dangerous to permit his employment in establishments, especially where machinery is used, and the legislature has therefore seen fit to prohibit his employment in any capacity in such establishments; and we are of opinion that to hold that a child who is

employed in violation of the statute and directed to perform a certain line of work, but who temporarily abandons it and attempts to do something else in the master's business, whereby he is injured, is precluded from recovering if his negligence contributed to his injury, would seriously affect the purposes sought to be accomplished by the statute. Nor in such case can it reasonably be said that there is no causal connection between the employment and the injury.

Appellant, assuming the fact to be as contended by it, that appellee had of his own accord left the work he was employed and directed to do and engaged in work he was forbidden to perform when injured, argues that there is no more reason for saying his injury resulted from his employment than there would be if he had, while in appellant's employment, been struck by lightning. It is true liability does not depend alone upon the employment, but the injury must be a consequence of such employment. The mere fact that a child employed in violation of law receives an injury in nowise resulting from the employment would not create a liability. But such is not the case here. The vital and distinguishing fact here is that appellee was employed by appellant to labor in its manufacturing establishment, and, while engaged in performing services for it in said establishment, he was injured. He was in appellant's plant by virtue of his employment to work for it, and the fact that he may have temporarily abandoned the work he was employed and directed to do, and engaged in a forbidden line, we think does not destroy the causal relation between the employment and the injury; and, if it does not, contributory negligence of appellee would constitute no defense, and the court did not err in refusing to submit that question to the jury. It is imposing no harsh burden on appellant to hold that, having unlawfully employed the appellee to labor in its plant, it is liable to him for any injury received by him resulting from the performance of services for it, whether those services were in the line he was directed to perform or not. The law forbids, and was enacted for the purpose of preventing, the employment of children in any capacity in such establishment as appellant's; and it is contrary to the spirit of the law to say that the consequences of its wilful violation may be avoided by showing that the child left the work given it to perform and negligently undertook to do something else, which resulted in the injury. If appellant thought it had set appellee to perform work he could safely perform, and had forbidden him to perform other work thought to be dangerous to him, it was bound, at its 20 L.R.A. (N.S.)

peril, to see to it that appellee did not attempt to engage in a forbidden line. Appellant was bound to know that, on account of appellee's tender years, he was not capable of a proper appreciation of danger, and was also bound to know that, on account of his immaturity, he was incapable of a proper comprehension of the necessity for obedience to orders of those in authority, and, under such circumstances, if it chose to violate the law by employing him, it assumed the burden of protecting him against his own negligence while engaged in such employment. The fact that the statute under consideration does not in express terms provide a liability in damages for its violation, as is done by certain statutes relating to mines and miners, can make no difference under the construction given the statute in *American Car & Foundry Co. v. Armentraut*, supra. The statute was enacted for the protection of the health and safety of children, and a liability for damages resulting from its violation is created whether it is expressly so declared in the statute or not.

Appellant cites cases from other jurisdictions which tend to support its contention that the court should have submitted the question of appellee's contributory negligence to the jury, notably *Evans v. American Iron & Tube Co.* (C. C.) 42 Fed. 519, which squarely decides the question as contended for by the appellant. The reasoning of other cases cited, while not so precisely in point, tends to support that view. Some of them are in conflict with our decision in the *Armentraut* Case, and the reasoning in none of them appeals to us with such force as that we would feel justified in following them. *Ornamental Iron & Wire Co. v. Green*, 108 Tenn. 161, 65 S. W. 399, we think in point in support of our view. The Code of Tennessee prohibited the employment of any child under twelve years of age in any workshop, mill, factory, or mine, and provided a penalty for its violation. A boy under the prohibited age, employed by the iron and wire company, was injured by some panels of iron fence which had been stacked up falling upon him. The contention of the plaintiff was that he was passing the stack of iron fence on his way to deliver a message to another employee of defendant, under the directions of his superior, when he accidentally stumbled against the panels of fence and the pile toppled over on him. The defendant's contention was that the plaintiff went to the place where he was hurt without orders and not on any matters connected with his employment, and was playing with the stack of fence panels, when he lost his balance, fell backwards, and drew them down upon him. On the

trial the defendant requested the court to instruct the jury that if the injury occurred to plaintiff while not engaged in and about any work for defendant, but while playing with the panels of fence, he could not recover. The court held that this request was properly denied, and that, even upon defendant's theory, it was liable for the reason that the employment was a violation of the statute, and that every injury resulting from such employment is actionable. The court said: "In the case presented by the plaintiff below, as well as in that adduced by the defendant company, the connection between the employment and the injury is that of cause and effect, and brings the complaint within the operation of the statute." Appellant has endeavored to explain this case as not being in conflict with its position, but we do not so understand it. Instruction No. 2, given at the request of appellee, did not take from the jury the question whether his injury was the result of his employment by appellant, but instructed them that whether appellee was or was not told by appellant's foreman to work on the straightening machine could make no difference as to the liability, if the evidence showed that he was under fourteen years of age and was at the time of his injury working for appellant in its manufacturing establishment for compensation to be paid him by appellant.

We are of opinion there was no error committed by the court in giving and refusing instructions, and the judgment of the Appellate Court is affirmed.

LOUISIANA SUPREME COURT.

FRANK DARSAM AND WIFE, Apts.,
v.
LOUIS KOHLMANN.

(— La. —, 48 So. 781.)

Master — injury to servant — statute — contributory negligence.

1. Whilst the violation by the master of the provisions of a statute regulating the employment of his servants is negligence *per se*, and actionable, if injuries are sustained by the servants in consequence thereof, such provisions are not to be so construed as to abrogate the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless the latter is so worded as to leave no doubt that such defense is to be excluded.

Headnotes by MONROE, J.

Note. — See case note to *Strafford v. Republic Iron & Steel Co.* ante, 876. 20 L.R.A. (N.S.)

Servant — minor — statute — contributory negligence.

2. Where the foreman of a factory employs a boy, in his twelfth year, and assigns him to work in a perfectly safe position, instructing him to stay there, and not to go near or meddle with any of the machinery, the owner of the factory will not be liable in damages, notwithstanding that the employment of boys of that age in factories is prohibited, under penalty of fine and imprisonment, for injuries received by the boy whilst, unnecessarily and in violation of his instructions, subjecting himself to an obvious risk, the danger of which he was capable of appreciating. And, *a fortiori*, is this true where the boy was employed in the belief, superinduced by his own representations and his appearance, and by the acquiescence of his family, that he was over the age prescribed by the statute.

(February 15, 1909.)

APPEAL by plaintiffs from a judgment of the Civil District Court for the Parish of Orleans in defendant's favor in an action brought to recover damages for personal injuries to plaintiffs' minor son alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Armand Romain, for appellants:

The hiring of the child in violation of statute constituted negligence *per se*.

Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 812, 66 N. E. 572; Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Lee v. Sterling Silk Mfg. Co. 47 Misc. 182, 93 N. Y. Supp. 560; Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51; Sioux City & P. R. Co. v. Stout, 17 Wall. 659, 21 L. ed. 745; McCloughry v. Finney, 37 La. Ann. 27; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; 1 Thomp. Neg. §§ 344, 345; 4 Thomp. Neg. § 3827; 1 Kinkead, Torts, § 324.

Mr. George Montgomery also for appellants.

Mr. Charles Rosen, for appellee:

The rules of contributory negligence, which is a defense, are not abrogated by the statute.

Hilliard v. Henry Rose Mercantile Mfg. Co. 120 La. 364, 45 So. 278; Brown v. J. A. Adams & Sons Co. 120 La. 119, 44 So. 1005; Daly v. H. Haller Mfg. Co. 48 La. Ann. 214, 19 So. 116; 1 Kinkead, Torts. 325; 1 Labatt, Mast. & S. § 348, p. 890; 7 Am. & Eng. Enc. Law, pp. 408, 407, 409; 20 Am. & Eng. Enc. Law, 2d ed. p. 151; Hailey v. Texas & P. R. Co. 113 La. 533, 37 So. 131; Lopes v. Sahuque, 114 La. 1004, 38 So.

810; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51; 4 *Thomp. Neg.* 2d ed. § 3827, p. 103; *Belles v. Jackson*, 4 Pa. Dist. R. 194; *Evans v. American Iron & Tube Co.* 42 Fed. 519; *Kutchera v. Goodwillie*, 93 Wis. 448, 67 N. W. 729; *White v. Witteman, Lithographic Co.* 58 Hun, 381, 34 N. Y. S. R. 895, 12 N. Y. Supp. 188, affirmed in 131 N. Y. 631, 30 N. E. 236.

Monroe, J., delivered the opinion of the court:

Plaintiffs seek to recover damages for the use of their minor son, and on their own account, resulting from an injury sustained by the minor whilst in the defendant's employ, and, as they allege, through defendant's negligence and disregard of the law. Defendant, after excepting on several grounds, denies the averments of the petition, and alleges that the injury sustained by the minor was due to his own negligent act. It appears from the evidence that at the time of the accident that caused the injury complained of (August 15, 1907) the minor was about eleven years and one month old, but large for his age, wearing the clothing usually worn by boys of fifteen, and fairly intelligent. He lives, with his parents, on Clouet street, between Chartres and Royal, and on the opposite side of the street defendant operated, and for a number of years has operated, a moss factory, in which the minor's two elder brothers (one of them a major) were, or had been, employed. The minor, Clarence, was enjoying a vacation from school during the month of August, and being, as we infer from the testimony, an active lad, made repeated requests of the foreman of the moss factory to give him work, stating on one occasion, in the presence of his brother George, that he was fifteen years of age, and, on being corrected by George, asserting, without further correction, that he was fourteen, which latter statement he made on another occasion in the presence of a number of the employees of the factory. Defendant appears to have known the law upon the subject of the employment of minors, and had a further interest in the matter, in that he was insured against accidents to his employees by a policy which did not cover an accident to a minor under twelve years of age, and he had specifically instructed his foreman to employ no small boys. He had another business, however, and spent very little time at the moss factory, the operatives in which were employed and discharged by the foreman, and he knew nothing of the employment or age of Clarence Darsam. The foreman apparently thought that the age limit with regard to the employment of minors in factories was 20 L.R.A. (N.S.)

fourteen years, and the evidence satisfies us that, if he had not believed that plaintiff's son had attained that age, he would not have employed him. As it was, the boy was persistent and seemed anxious to earn something, and on two successive Saturdays the foreman employed him in moving dust in the yard with a wheelbarrow. On one of these occasions the father, in passing, inquired what he was doing, and, being told, said he did not think he could stand the dust. He says that he told the foreman that he did not want the boy to work about the factory, but the foreman denies it, and testifies, without contradiction, that the boy's lunch was sent to him from home,—referring as we understand, to the subsequent period of employment, between August 10th and August 15th,—and we hardly think that would have happened without the knowledge of his parents, nor do we find any sufficient reason for believing that the foreman would have employed him against his father's expressed wish. When he applied, on August 10th, he was assigned to about as light and as safe work as is done in the factory. The moss, it appears, is brought into the upper story of the building upon an automatic carrier, consisting of what may be called a belt of slats, which passes up an inclined place, over and around a wheel raised some 5 feet above the floor, and, in so doing, deposits the moss on the floor in front of the wheel. The incline up which the carrier moves is built alongside of and about 16 inches from the wall of the building, and the power which drives the apparatus is communicated to the carrier wheel through a driving wheel and two cogwheels, geared together in the space between the end of the carrier wheel and the wall, the driving wheel getting its power from a steam engine, through a rope, and having a grooved or hollowed periphery in which the rope works. The driving wheel, which is nearest the wall, is 26 inches in diameter, and on the same axle is a cogwheel, 4½ inches in diameter, on which is geared (on the further side from the front of the carrier wheel) the other cogwheel, 30 inches in diameter. In order to prevent the moss and dirt brought up on the carrier from falling into the cogs, and possibly by way of precaution against accidents, defendant caused to be built a wooden partition separating the driving wheel and cogwheels from the carrier and from the end of the carrier wheel, and projecting to the front edgewise, so that a person standing immediately before the carrier wheel would be safe from contact with the others. And it was to that position that Clarence Darsam was assigned: it being his duty to take up with a pitchfork the moss as the carrier brought it over the wheel

and dropped it on the floor, and to distribute it among a number of girls and women who were standing within a few feet of him, and whose function it was to take the moss in their hands and shake it apart.

Being asked by plaintiff's counsel: Clarence, how did you get hurt on that day? How did you come to get hurt?" he replied: "Well, I was standing this way, and when I wanted to throw the moss, it all happened so quick that I didn't know what had hold of me, and when I hollered, Mr. Monroe [the foreman] came there with a crowbar and stopped the machine, and took my hand out and threw the wheel up. . . ."

Q. What was it that caught your hand?

A. Well, I don't know exactly what it was, whether it was the flywheel or the cogwheel.

Q. And when Mr. Monroe came and took your hand out, where was your hand?

A. It was in the cogwheels. . . .

Q. Clarence, what made your hand get caught between the cogwheels?

A. It was my sleeve.

Q. Did you have your coat on at the time?

A. No, sir, no coat.

Q. Well, what did you have on?

A. I had on a red shirt, and the sleeve was a big sleeve, and it caught.

On his cross-examination, his attention was called to the fact that the cogs lie back some 15¼ inches, in the narrow space between the driving wheel and the end of the carrier wheel, and that the rope on the driving wheel lies imbedded in its grooved periphery, and he could give no explanation further than to say that he had a button on his shirt sleeve, and that it might have been caught between the driving wheel and the rope, as the latter was loose. Being asked whether he knew that the button was caught, he replied that he did not; the sum and substance of his testimony being that he knew nothing about the accident, save that he found his hand between the cogwheels, where (it may be here stated) it was very badly mangled, necessitating the loss of the thumb, with the first and second fingers and part of the palm. He was taken to the hospital, and two of the young women who were working with him at the time called on him, about a week later, and they testify as follows:

Miss Louise Macke: "I asked him how did he get his hand hurt, and he said he put his hand there, and he never thought he was going to get his hand hurt."

Mrs. Louise Schlusser: "I asked him how he did that, and he said he put his hand behind there."

Q. That he put his hand in where?

A. In the cogwheels.

Q. That is what Clarence told you?

A. Yes, sir.

Being questioned in regard to the statements thus attributed to him, the minor admitted that the witnesses called on him and that he had a conversation with them, but, being asked, "Did you have any conversation at all with those young ladies as to how this accident happened?" he replied, "No, sir."

That the accident could not have happened as the boy says it did, or in any other way save by his deliberately meddling with the driving wheel or cogwheels, if the partition to which we have referred was in position, is made manifest by all the testimony, and the story told by the boy rests upon the premise that the partition was not in position. The carpenter who built the partition (in 1904) testified that, whilst he could not absolutely identify the boards, they appeared to be the same that he had used. Fourteen other witnesses testified, positively, that the partition was there on the day of the accident, and had been there, just as it was on that day, from the time it was built, or for a year or two years, as they happened to know the fact.

Plaintiff seems to have conceived the idea that three new planks of white pine were put in after the accident, and the photographer employed by him was probably impressed with his view of the matter, as he testified that, when he took his photographs (shortly after those for defendant had been taken), the three planks looked to him like pieces of dry-goods cases. Defendant, however, called several witnesses who testified that the planks are of yellow pine, and, as it would have been easy matter to have shown that they were wrong, if such had been the case, we assume that plaintiffs, who made no attempt to disprove their statements, concluded that they were right. Apart from that, the testimony adduced on behalf of plaintiffs to show that the partition was not in its place at the time of the accident is conflicting, and withal insufficient, both in volume and character, to overcome that adduced by defendant. We therefore conclude, as a matter of fact, that the partition was in its place when the accident occurred.

There was a verdict and judgment in favor of defendant, and plaintiffs have appealed.

Having found, as facts, that the minor, whilst engaged in the discharge of the duty to which he was assigned, could not have come in contact with the driving wheel or cogwheels, and hence could not have been injured by them, if the partition, represented in the photographs offered in evidence, was in position, and that the partition was in position at the time of and prior to the

accident, we are now to inquire whether defendant should be held liable upon any other basis than that of its alleged negligence in failing to provide one of its employees with a safe place in which to do his work.

Counsel for plaintiffs refers the court to the provisions of act No. 34, p. 50, of 1906, which, so far as they are pertinent to the issue to be determined, read:

"Sec. 1. . . . That no boy, under the age of twelve years, and no girl, under the age of fourteen years, shall be employed in any factory, mill," etc.

"Sec. 7. . . . That any person who shall violate any of the provisions of this act shall be deemed guilty of an offense for each violation thereof, and, upon conviction of the same, shall be punished by a fine, . . . or by an imprisonment," etc.

From this law he argues that, by the mere fact of his employing the minor, Clarence Darsam, in his factory, defendant was guilty of negligence which renders him civilly liable for any injury which the minor may have sustained whilst so employed, and this whether there was any proximate causal connection between the employment and the injury or not; and he cites, among others, the following authority, to wit: "Status of Children Employed in Violation of Statute.—Upon this subject, one idea is that the hiring of a boy under twelve years of age, in violation of a statute declaring it to be a misdemeanor, constitutes negligence *per se*, such as will render the employer liable for all injuries suffered in consequence of and in course of the employment. Another view is that to employ a child, in violation of such a statute, to operate a dangerous machine, is evidence of negligence in case the child is injured in so working, because the statute indicates that such children are unfit, by reason of their immaturity and indiscretion, to be so employed."

The remaining portion of the section thus quoted (as supplied by defendant's counsel) reads: "By the view which more nearly comports with judicial analogies is that such unlawful employment of a child does not, *per se*, constitute negligence which will render the employer liable for injuries to the child, where such employment is not the direct or proximate cause of the injury." 4 Thomp. Neg. 2d ed. § 3827.

And the view of the learned author, as thus expressed, is sustained by a consensus of opinion. Thus: "When it appears that the violation . . . of a statute, ordinance, or municipal regulation was a contributing cause to produce the injury complained of, then such statute . . . is competent evidence tending to charge the defendant with negligence. But such evidence is incompetent, as being immaterial, if the violation of the 20 L.R.A. (N.S.)

statute . . . did not contribute to produce the injury." Buswell, *Personal Injuries*, 2d ed. p. 185, citing *Wakefield v. Connecticut & P. Rivers R. Co.* 37 Vt. 330, 86 Am. Dec. 711; *Steves v. Oswego & S. R. Co.* 18 N. Y. 422; *Brooks v. Buffalo & N. F. R. Co.* 25 Barb. 600; *Dascamb v. Buffalo & State Line R. Co.* 27 Barb. 221; *Evans v. American Iron & Tube Co.* (C. C.) 42 Fed. 519. "The fact that defendant's failure of duty consists in the violation of a statute will not relieve the plaintiff from the obligation of showing that he was in the exercise of due care,"—citing *Taylor v. Carew Mfg. Co.* 143 Mass. 470, 10 N. E. 308; *Nosler v. Chicago B. & Q. R. Co.* 73 Iowa, 268, 34 N. W. 850; *Ryall v. Central P. R. Co.* 76 Cal. 474, 18 Pac. 430; *Hudson v. Wabash Western R. Co.* 101 Mo. 13, 14 S. W. 15. "Thus the violation, by the employer, of a statute requiring cogs in factories to be properly guarded, does not render the employer liable for the injury to an employee by coming in contact with unguarded cogs, when the danger was obvious and the employee assumed the risk of it,"—citing *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Buswell, Personal Injuries*, 2d ed. pp. 187, 188. "In many jurisdictions statutes have been enacted which impose upon masters certain duties in relation to their servants. While it is well settled that the violation of these provisions is negligence *per se*, and actionable, if injuries are sustained by the servants in consequence thereof, they are nevertheless not so construed as to abrogate the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statutes, unless they are so worded as to leave no doubt that this defense is to be excluded." 20 Am. & Eng. Enc. Law, 2d ed. p. 151. See also 26 Cyc. Law & Proc. p. 1091.

The doctrine thus stated has been recognized by this court in *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51; *Hailey v. Texas & P. R. Co.* 113 La. 533, 37 So. 131, and *Lopes v. Sahuque*, 114 La. 1004, 38 So. 910. In *McCloughry v. Finney*, 37 La. Ann. 31 (relied on by plaintiff), defendant, a dealer in Western produce, had piled a lot of grain in sacks on the banquette, in violation of a city ordinance, and this court having, in the original opinion, used some language which suggested the idea that he thereby became liable for an injury sustained by a boy by reason of the falling of the sacks, and without reference to any contributory negligence of which the boy might have been guilty, a rehearing was applied for, in refusing which, Manning, Ch. J., said: "A re-examination of the record confirms us in the opinion, expressed before, that there

is no proof of contributory negligence, and, therefore, there is no need to say what effect proof of contributory negligence would have."

In the cases of *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460, and *Marino v. Lehmaier*, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, the boys on whose account the damages were claimed were both injured whilst in the actual discharge of the duties for which they were employed in violation of prohibitory statutes, and hence sustained their injuries by reason of such employment. In the instant case, considered without reference to his status as a minor, the employment of Clarence Darsam had no more causal connection with the injury sustained by him than it would have had if, employed to devote an hour a day to the copying or addressing of letters in the office, he had of his own motion undertaken to investigate some curious machine in a remote part of the building, and had been injured in so doing.

Moreover, it will be noted that we have found as a fact that defendant's foreman employed the boy in the belief, superinduced by the boy's own representations, his appearance, and the apparent acquiescence of his family, that he was at least fourteen years of age, a circumstance which will be borne in mind in the consideration of the remaining question: Was the danger that, being in the factory, he might curiously put his fingers between cogwheels which were not connected with his employment and with which he had no concern, a danger unsuitable to or beyond his apparent capacity? The generally accepted view in regard to the relation between minors and their employers is, as we think, correctly stated as follows: "Persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and experience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer to so instruct such employees concerning the dangers connected with their employment which, from their youth and inexperience, they may not or are presumed not to appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom. Yet the mere fact that the servant is a minor does not of itself affect the liability of the principal or master as to obvious—
20 L.R.A. (N.S.)

facts and dangers, unless the minor was a child of unsuitable age to be exposed to unsuitable risks in a hazardous business. If a minor engages to work, the risks of the business are incident to the work, so far as he is competent to comprehend and appreciate them. And it can make no difference in the application of the rule whether such employment was with or without the consent of the parent." *Bailey, Master's Liability for Injuries to Servants*, pp. 114, 115. See also 1 *Kinhead, Torts*, p. 325; 1 *Labatt, Mast. & S.* § 348, p. 890; 7 *Am. & Eng. Enc. Law*, 2d ed. pp. 406, 407, 409.

Defendant's foreman says, in his testimony, that he told the minor, Clarence, "to stay there" (in a perfectly safe place) "and to throw that moss over there" (a safe occupation) "and keep away from the end, from the machine, from everything else. . . . I ran him away when he came around the gin, one time, not only once or twice, but I told him to go and stand behind the carrier wheel, in his own position. . . . at the place where he was working."

It is true that the boy denies that he received such instructions, but we think the foreman is corroborated, in that the other employees who were working about the carrier, girls and women, unite in testifying that they all received such instructions, and it is improbable that the foreman would have made an exception in the case of the boy. Beyond that, it seems to us that an intelligent boy, in his twelfth year, who has attended school sufficiently to have acquired the rudiments of a common-school education, who has lived across the street from a factory in which his older brothers were employed, and about which he has played and worked, may be assumed to have sufficient capacity to appreciate a danger so obvious as that involved in coming in contact with plainly exposed revolving cogwheels. In fact, he himself admits that he knew the danger. Upon the whole, we find no error in the verdict and judgment appealed from, and they are, accordingly, affirmed, at the cost of the appellant.

Petition for rehearing denied March 15, 1909.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

GULF, COLORADO, & SANTA FE RAILWAY COMPANY, Plff. in Err.,

v.

NANNIE T. MOSELEY.

(88 C. C. A. 236, 161 Fed. 72.)

Limitation of actions — changing current of stream. Digitized by Google
The limitation period for injury to land

on the opposite shore by deflection of the current of a river by the construction of a permanent dike to protect one shore begins to run from the completion of the structure, although the injury occurs by the washing away of the shore during periods of high water in successive years thereafter, a process as certain to continue as the annual rains and the flow of the water of a large river.

(April 20, 1908.)

ERROR to the United States Court of Appeals in the Indian Territory to review a judgment affirming a judgment of the United States Court for the Southern District of the Indian Territory in plaintiff's favor in an action brought to recover dam-

ages for injuries to plaintiff's land through defendant's alleged wrongful act. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Adams, Circuit Judges, and Phillips, District Judge.

Mr. S. T. Bledsoe for plaintiff in error.

Messrs. A. Eddleman and J. F. Sharp for defendant in error.

Phillips, District Judge, delivered the opinion of the court:

The defendant in error (hereinafter designated the "plaintiff") in the United States court for the southern district of the Indian territory recovered judgment against the plaintiff in error (hereinafter designated the "defendant") for damages to her land in the sum of \$1,980, with interest at 6

Case Note. — *When does statute of limitations begin to run against action for damages to land on account of obstructing stream or surface water.*

This note is intended to include all cases passing on the question, when the statute of limitations begins to run against an action for damages occasioned by the placing of a structure, other than a milldam, in such manner as to obstruct the flowing of water and thereby injure adjoining real property by overflowing the same. Cases in which the act complained of was the diverting of the water and the consequent injury to the lower proprietor because of the loss of use of such water have been expressly excluded. For cases dealing with the application of the statute of limitations to actions for injuries caused by a milldam, see case note to *Priebe v. Ames*, 17 L.R.A. (N.S.) 206. Cases in which the damages are the result of the digging of a ditch or drain, or because of water passing through a culvert, are covered in the note to *Turner v. Overton*, post, 894.

A majority of the cases hold, in accordance with the holding of *GULF, C. & S. F. R. Co. v. MOSELEY*, and as indicated by the cases gathered in the note to *Priebe v. Ames*, that whenever a dam or embankment obstructing a stream is of a permanent character, and its construction and continuance are necessarily an injury, the damage is considered original, and may be recovered in one action, and in such case the statute of limitations begins to run upon the construction of the dam or embankment or at least from the time of the first injury; and the one damaged cannot rely upon the theory that every continuance of a nuisance is a fresh nuisance.

Thus, in *Parker v. Atchison*, 58 Kan. 29, 48 Pac. 631, it was held that, where a permanent improvement is made by a city on the bank of a water course in such a way as to narrow the channel and wash and injure private property on the opposite bank, an action therefor can be brought only within two years after the erection of such improvement. Other cases holding to the 20 L.R.A. (N.S.)

same effect are *St. Louis, I. M. & S. R. Co. v. Morris*, 35 Ark. 622 (embankment and trestle causing stream to overflow); *St. Louis, I. M. & S. R. Co. v. Anderson*, 62 Ark. 360, 35 S. W. 791 (filling up of ditch used for drainage); *Heard v. Middlesex Canal*, 5 Met. 81 (permanent dam in river for raising head of water for canal); *Bunten v. Chicago, R. I. & P. R. Co.* 50 Mo. App. 414 (placing permanent embankment across stream); *Missouri, K. & T. R. Co. v. Graham*, 12 Tex. Civ. App. 55, 33 S. W. 576 (dam built across creek to prevent water from injuring roadbed); *Brown v. Texas C. R. Co.* 42 Tex. Civ. App. 392, 94 S. W. 134 (embankment with insufficient culvert); *Patterson v. Great Western R. Co.* 8 U. C. C. P. 89 (digging of ditch, resulting in immediate injury).

A number of authorities hold that, in case of a permanent structure in a stream with its necessarily consequent injuries, the statute of limitations does not necessarily begin to run at the time of the erection of the structure, but at the time of the first injury.

Thus, in *King v. United States*, 59 Fed. 9, where water was thrown back by a government dam on its completion, so as to flow a plantation, but the full effect in rendering the land unfit for cultivation was not ascertained until three years later, it was held that an action brought five years after such injury was within the statutory period of limitations.

So, in *Van Orsdol v. Burlington, C. R. & N. R. Co.* 56 Iowa, 470, 9 N. W. 379, where a railroad embankment dammed up a slough and thereby caused permanent injury to a landowner several years thereafter, it was held that the statute of limitations began to run from the time of the injury, and not from the date of the erection of the embankment.

Other cases which apparently have followed this rule are *Stodghill v. Chicago, B. & Q. R. Co.* 53 Iowa, 341, 5 N. W. 495 (diverting of water by railroad embankment); *Bird v. Hannibal & St. J. R. Co.* 30 Mo. App. 365 (flooding of land caused by in-

per cent from July 4, 1895, which judgment was affirmed by the court of appeals of the territory, to reverse which this writ of error is prosecuted.

In 1893 the plaintiff, under the homestead law, owned a tract of land of 137 acres, bordering on the east bank of the Canadian river, in Cleveland county, Oklahoma territory. The defendant railroad company, prior to 1893, had constructed its roadbed along the opposite west bank of said river on its right of way. The Canadian river, of varying width, at the point in question was perhaps $\frac{1}{2}$ mile wide under high stage of water. The stream was somewhat treacherous in its flow, subject annually to high floods, which rendered its current, when veering to the bank, destructive to

adjacent lands. The bank along the plaintiff's land, owing to the sandy soil formation, was quite susceptible to disintegration from the wash of the current; and, owing to the low surface of the body of the land, this condition existed throughout the tract, so that the caving in of large areas of the land was an apparent inevitable result when the current was sent against the east bank of the river. Prior to 1893 the normal flow of the current was toward and along the west shore line, opposite the plaintiff's land, with the result that it was constantly making inroads on the right of way of the defendant company, endangering it roadbed and tracks, until, as the defendant claims and the testimony tends to establish, it became necessary for the pres-

sufficient culvert); *Stack v. Seaboard Air Line R. Co.* 139 N. C. 366, 51 S. E. 1024 (insufficient culvert ponding water in lot); *Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L.R.A. 708, 24 S. E. 730 (failure to make sufficient passageway for water through railroad embankment).

This seems, also, to have been recognized in *Erwin v. Erie R. Co.* 98 App. Div. 402, 90 N. Y. Supp. 315, affirmed without opinion in 186 N. Y. 550, 79 N. E. 1104, where, because of the absence of a culvert in a depression, not, however, a water course, land was flooded.

In *Buntin v. Chicago, R. I. & P. R. Co.* 41 Fed. 744, where land was overflowed because of the construction of a bridge which was shown to be a permanent structure and not liable to change, it was said: "As such, the statute of limitation would begin to run against the cause of action from the time of the first overflow occasioning any damage to the plaintiff, for which the plaintiff had a cause of action, in which he could have recovered as for a permanent injury to the freehold, because it was then made apparent that the property was liable to perpetual injury." The court, however, took occasion to say further: "But, waiving this proposition, and treating the wrong done as not involving the entire destruction of the estate or its beneficial use, and conceding that it may be apportioned from time to time, so that separate actions may be brought to recover for each overflow, still the right of entry or action for such overflow would be barred after the lapse of ten years from the time the plaintiff's cause of action first originated. . . . More than eleven years transpired after his first injury before this amended petition was filed, claiming any damage resulting from the construction of said bridge. The whole history of this case shows that the claim of injury resulting from the improper construction of the bridge or the accumulation of debris thereat, appears for the first time in this amended petition, although this controversy and litigation between the railroad company and

the adjacent landowners has been in progress for years."

In *Culver v. Chicago, R. I. & P. R. Co.* 38 Mo. App. 130, it was held that the statute of limitations did not begin to run against an action for obstructing the flow of a stream until damage resulted to plaintiff from such obstruction, although the obstruction was of gradual formation, and was finished for some time before the injury occurred.

In *Haisch v. Keokuk & D. M. R. Co.* 71 Iowa, 606, 33 N. W. 126, where an opening into a railroad embankment was originally designed for a cattle way, and was never designed as an outlet for water, and was not adapted to that purpose, it was held, in an action for injury to the land caused by the insufficient outlet, that the statute of limitations commenced to run from the time of the building of the road, and the injury which at that time resulted.

So, in *New York, C. & St. L. R. Co. v. Hamlet Hay Co.* 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269, it was held, without passing on the question whether successive actions might be maintained for damages resulting from the obstruction of a stream by bridge embankments, that an action brought within the statutory period after the first injury was not barred.

To the same effect is *Sullens v. Chicago, R. I. & P. R. Co.* 74 Iowa, 659, 7 Am. St. Rep. 473, 38 N. W. 545, where it was held that an action for damages the result of an insufficient culvert in an embankment, which, however, could not have been foreseen with any degree of accuracy, but depended in part upon the seasons, was not barred, having been brought within the statutory period of limitations after the first injury.

And see *Howard County v. Chicago & A. R. Co.* 130 Mo. 652, 32 S. W. 651, *infra*.

It will be noticed that in all of the above cases it is held that, in case the obstruction is a permanent one, the person injured must recover all his damages in one action, and that action accrues at the time of the erection of the obstruction or at the time of the first injury. Opposed to this class of cases,

ervation of its roadbed to construct at the point in question a line of powerful dikes, with the view of throwing the current back to its wonted place as at the time of the construction of the road. The effect of these dikes, the plaintiff claims, was to so deflect the natural current of the river as to drive it forcibly against the opposite shore line, undermining and disintegrating the natural barrier of the bank protecting her land.

The petition avers that in September, 1893, about one month after the completion of the dikes, the current of the river so diverted washed away of the plaintiff's land about 5 acres, in 1894 about 10 acres, in 1895 about 75 acres, and in 1897 about 5 acres. This action was originally insti-

tuted on the 11th day of December, 1897, covering the damages sustained up to that time. On the 23d day of November, 1899, an amended petition was filed, claiming damages for the destruction of 5 acres of the land in 1898 and for damages to the remaining portion of the land. A demurrer to the petition having been overruled, the defendant answered, pleading, *inter alia*, the statute of limitations. The trial court denied the applicability of this defense. If in fact and law this plea was good, the discussion of other assignments of error is unnecessary. The statute of the state of Arkansas, (§ 4478, Mansfield's Dig. [Ind. Terr. Anno. Stat. 1899, § 2945]), applicable to the Indian territory, declares that an action for trespass upon lands shall be brought

it would seem there are a few cases which have proceeded upon the theory that, where the dam or embankment constitutes a permanent structure, from the building and continuance of which an injury will necessarily result, the person guilty of maintaining the nuisance is liable, at least within the period of prescription, for successive suits, each continuance being a new nuisance, and the injured party is entitled to recover all the damages accruing within the statutory period of limitations. Among these cases are *Delaware & R. Canal Co. v. Lee*, 22 N. J. L. 243 (damming back of stream because of insufficient culvert); *Arnold v. Hudson R. Co.* 55 N. Y. 661 (interference by railroad of trunk used for manufacturing power); *Reed v. State*, 108 N. Y. 407, 15 N. E. 735 (construction of dam for purposes of providing feeder for canal); *Prime v. Yonkers*, 115 N. Y. Supp. 305 (old abutment causing stream to injure adjoining property); *Valley R. Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88 (diverting stream by means of dam and new channel, and thus injuring land because of water thrown across old channel); *Stout v. Kindt*, 24 Pa. 449 (building dam across water course); *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557 (dam across ditch or drain, flooding land); *Devery v. Grand Canal Co. Ir.* L. R. 9 C. L. 194 (embankment over stream with insufficient culvert, causing damage for first time several years after it was built).

There is another class of cases, although not necessarily opposed to the doctrine that when the obstruction is a permanent one, and the damages therefrom directly and necessarily following, the statute of limitations begins to run against the right of action to recover damages for injuries from the time the dam is built or the damages first sustained, yet, finally attain the same results as those cases immediately preceding, in which it is held that the one damaged can rely upon the theory that every continuance of a nuisance is a new nuisance. In some of these cases a distinction is made between a nuisance of a permanent character, 20 L.R.A. (N.S.)

with an injury resulting necessarily from its construction and continuance, and a structure which, although of a permanent character, is not necessarily injurious; others base their decision upon the ground that the injury is the result of the negligence or want of skill of the one maintaining the obstruction, and that, when the latter's attention is called to it, he will take steps to improve the conditions. However, in any event, whatever the basis of the decision, it is held in these cases that, if the structure is of such a character that it may or may not do injury, the cause of action for damages from an injury arises only when an injury is done, and, as is said, or directly so implied, in most of these cases, a new cause of action arises with every injury.

It should be noted, however, that although, in the following cases, the statute of limitations is held to begin to run from the time of the injury, and generally imply that for each injury a new cause of action arises, it is practically impossible in many instances to state whether the court based its decision upon the theory that the facts constituted an exception to the rule that the statute of limitations begins to run from the erection of the obstruction, or whether they based their decision upon the theory that in the case of a permanent obstruction the statute begins to run from each successive injury, or even following the rule laid down in many of the Iowa cases, that the statute of limitations begins to run from the first injury. In some of the cases, however, the decision is clearly referred to an exception to the general rule that the statute commences to run from the time of the original obstruction or injury.

Thus, in *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240, 6 L.R.A. 804, 20 Am. St. Rep. 174, 12 S. W. 331, it was said: "Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. . . . But, when such structure is permanent in its character, and

within three years after cause of action accrues. As construed by the supreme court of Arkansas, the three-year period applies to an action for damages of this character. *St. Louis, I. M. & S. R. Co. v. Morris*, 35 Ark. 622.

The defendant's contention is that the dikes were permanent in construction, and, under the allegations of the petition and the proofs, the injuries to the plaintiff's freehold were obviously consequential, and therefore the entire damages could have been recovered in one action, the cause for which arose as early as September, 1893, more than four years prior to the institution of suit, which was more than three years after the damage was done in 1894. The contention of the plaintiff is that the

structure did not immediately involve the entire destruction of her estate, or its beneficial use, but the damages were apportionable from time to time, and therefore separate actions might be brought to recover damages for each successive injury as it occurred. That the structure of the dikes was permanent in character, and intended by the defendant to be so, hardly admits of debate. The evidence shows that the piles, at the large end, were from 14 inches to 2 feet in diameter, and were driven down into the earth from 5 to 7 feet, and were about 7 feet apart, with caps of heavy boards along the tops. These rows of dikes were boarded up with planks from 2 to 3 inches in thickness, and were filled in with smaller stones at the bottom, and on the

its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of."

So, in *Willitts v. Chicago, B. & K. C. R. Co.* 88 Iowa, 281, 21 L.R.A. 608, 55 N. W. 313, it was held that an action for obstruction of surface water by a railroad embankment, which is in reality based upon failure to keep open a ditch along the side of the embankment, is not for a single permanent injury which accrues with the making of the embankment, but an action accrues with each injury from failure to keep the ditch open.

And in *International & G. N. R. Co. v. Kyle* (Tex. Civ. App.) 101 S. W. 272, it was held that, where the building of a railway embankment is not of itself a nuisance, but becomes so only at intervals by diverting water from rainfalls from its usual flow upon plaintiff's land, the cause of action arises upon receipt of each injury, and successive actions may be brought for each injury as it occurs, and an action for such injury would not be barred by limitations for two years thereafter.

To the same effect is *Chicago & A. R. Co. v. Willi*, 53 Ill. App. 603, where an insufficient culvert caused land to overflow. The court in this case, after recognizing that each overflow upon the land of an adjoining owner caused by negligent construction of the road creates a new cause of action, and that then the twenty years' limitation had no application, said: "In addition to this view, it may be said that such a limitation only applies to damages of a permanent character, apparent at the time of the creation of the nuisance causing them, and that go to the entire destruction of the estate affected thereby."

In *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529, it was said: "Each overflow upon the land of an adjoining owner, caused by the negligence

or want of skill of a railroad company in its mode of constructing or maintaining a bridge or embankment over a running water course, creates a new cause of action against the company for injury thereby occasioned to the crops upon such land."

In *Indiana, I. & I. R. Co. v. Patchette*, 59 Ill. App. 251, it was said that damages to a landowner from overflow caused by the improper and negligent construction of a railroad embankment are called continuing damages, originating from a cause not permanent in its character, but may have existed many years, and back of the statute of limitations; and, while the statute of limitations may be pleaded to the damages occurring beyond five years from the commencement of the suit, yet suit may be brought for continuing damages as long as the original obstruction may remain, causing such damage.

In *Lawton v. Seaboard Air Line R. Co.* 75 S. C. 82, 55 S. E. 128, it was held that the negligent construction and maintenance of an embankment across a natural stream by which lands of another are flooded is continuous in its nature, and, although the embankment was built beyond the period of the statute of limitations, damages might be awarded for such period immediately preceding the commencement of the action.

In *Finley v. Williamsburg*, 24 Ky. L. Rep. 1336, 71 S. W. 502, it was held that a city is liable for each overflow of property caused by its diverting surface water into a stream without providing a sufficiently large culvert for its escape, as for a separate trespass; and the statute of limitations begins to run at the time of each trespass, and not at the time of the act of the city in diverting the water.

In *Chicago, R. I. & P. R. Co. v. McCutchen*, 80 Ark. 235, 96 S. W. 1054, where a railway company constructed its embankment so near a ditch which drained plaintiff's land that the dirt from the embankment would slide off into the ditch and cause the land to overflow, it was held that the obstruction or injury was not a permanent one, and the landowner's right of action for each successive injury accrued at the time of the

top with stones so large that only three of them could be loaded onto a car, which was run out along the side of the dike, and the stones were lifted in place by derricks.

It may be true, in the abstract, that nothing constructed by the hand of man is indestructible. The rasure of time and the process of erosion of the waters may wear away this structure. But in its relation to the practical affairs of human action, with which the law deals, this formidable, substantial work must be regarded as possessing in a high degree the quality of a permanent structure. The petition itself avers: "That the natural and probable consequence of the erection of said dikes was to change the current and channel of said river, by turning the current over and against the

east or left bank of said river and cutting and washing said bank away, and that they were built and maintained by the defendant for this purpose. . . . That the effect of said dikes was to, and they did, change the current of said river, and throw the same over and against the left or east bank of the same, and cut and washed the same away, and destroyed plaintiff's land, and changed the channel of said river, making the same much farther east than it ever was before the wrongful building of said dikes. That after and on account of the said building and maintaining of said dikes, at each successive rise in said river, the current was thrown over and upon plaintiff's land, and washed a portion of the same away, and destroyed it."

injury, and was not barred by a former judgment in an action for a prior injury.

In *Crabtree Coal Min. Co. v. Hamby*, 28 Ky. L. Rep. 687, 90 N. W. 226, it was held that for the obstructing of a stream by refuse from a coal company, and its consequent poisoning of the water which is thus thrown over the adjoining land, a fresh cause of action accrues for the damage done by each overflow, so that any damage within five years before the bringing of the action may be recovered.

In *Cameron v. Ontario, S. & H. R. Union Co.* 14 U. C. Q. B. 612, it was held that an action against a railroad company for preventing the drainage of surface water from land by the construction of its roadbed is not limited to be commenced within six months, as it is a continuing injury, and therefore is in time so far as regards any damage sustained within six months of the commencement of the action.

In *Drake v. Chicago, R. I. & P. R. Co.* 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215, where a railroad, by its unlawful obstruction of surface water, caused damage to a landowner for more than five years prior to his bringing action therefor, it was held that the action was properly brought for the injuries sustained during the five years immediately preceding, and was not barred by the fact that a cause of action had arisen out of the same wrong more than five years before. The court in this case, in distinguishing a case in which the whole injury was regarded as being received at one time, said that, while the remedy applied in that case could not be done by the guilty party, the remedy in the case at bar was to be applied on the railroad's premises, and that, too, in the discharge of a subsisting obligation.

In *Omaha & R. Valley R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183, it was held that a bridge which, because of its negligent construction, prevents the free passage of ice and water, is a nuisance for which no action accrues to a landowner until he sustains an actual injury caused by such unlawful obstruction, and for every continuance of which, when damages have been sustained, 20 L.R.A. (N.S.)

an action will lie for the recovery of such damages as accrued before the action was brought; and one action is not a bar to a second action brought for damages thereafter sustained. This case was followed and approved in *Omaha & R. Valley R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39 (bridge insufficient to permit ice and driftwood to pass); and *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610, 88 N. W. 673 (embankment holding back surface water). Other cases holding to the same effect are *St. Louis, I. M. & S. R. Co. v. Yarrowborough*, 56 Ark. 612, 20 S. W. 515 (embankment with insufficient culverts, causing water during an overflow to destroy growing crop); *St. Louis, I. M. & S. R. Co. v. Stephens*, 72 Ark. 127, 78 S. W. 766 (obstruction of creek and drain by railroad embankment with insufficient culvert); *St. Louis, I. M. & S. R. Co. v. Hoshall*, 82 Ark. 387, 102 S. W. 207 (obstruction of stream by failure to remove debris not result of construction of trestle); *Savannah, A. & M. R. Co. v. Buford*, 106 Ala. 303, 17 So. 395 (stopping of ditch and channels draining surface water by railroad embankment); *Daneri v. Southern California R. Co.* 122 Cal. 507, 55 Pac. 243 (levee deflecting current of river, causing it to make new channel and injure owner of land 6 miles away); *Ohio & M. R. Co. v. Wachter*, 23 Ill. App. 415, affirmed in 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279 (embankment over stream with insufficient culvert); *Ohio & M. R. Co. v. Elliott*, 34 Ill. App. 589 (negligent construction of railroad embankment over stream); *Sherlock v. Louisville, N. A. & C. R. Co.* 115 Ind. 22, 17 N. E. 171 (overflow caused by the negligent construction of a railroad bridge); *Kelly v. Pittsburgh, C. C. & St. L. R. Co.* 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233 (insufficient culvert to carry away accumulations of waters in times of heavy rains); *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540 (embankment holding back flood waters); *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456, 87 N. W. 167 (negligent construction of culvert in embankment, the latter being an old

As if to aid this defense, the plaintiff's evidence was full and strong to the point that within the month succeeding the construction of the dikes the effect was to send the current of the river directly across to the east shore, where it began rapidly to eat away the bank, destroying 5 acres of the land, and in the following year 10 acres. and 1895, 75 acres more. In the very nature of the situation, this deflection of the current to the east shore was constant,—more destructive at intermittent periods of high water than at others. This characteristic of the river, its history shows, was as certain of manifestation as the coming of the seasons. The quality of the soil composing the ever-receding bank and the lay of the land rendered it so probable that

this process of disintegration and work of destruction would proceed, unless arrested by human agency, as to have permitted a tangible estimation of the whole damage, within the admissibility of the law, in a single action as early as September, 1893. Indeed, the plaintiff ought not to be heard to say that this ascertainment was too remote and speculative, for the reason that in this suit the trial court, under the evidence introduced by the plaintiff, permitted her to recover, not only damages for all the land hitherto destroyed by the alleged nuisance within the three years next preceding the institution of suit, but for the prospective damages to the remainder of her land yet left intact. Some of her witnesses testified that the residue of the land was rendered

treble work filled up); *Delaware & H. Canal Co. v. Wright*, 21 N. J. L. 469 (damming back of stream because of insufficient culvert); *Henry v. Ohio River R. Co.* 40 W. Va. 234, 21 S. E. 863 (embankment closing culvert in street and thus flooding adjoining property); *Eells v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479 (maintenance of railroad bridge deflecting stream and injuring adjoining property); *Bonner v. Wirth*, 5 Tex. Civ. App. 560, 24 S. W. 306 (embankment causing diversion of flow of surface water); *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061 (insufficient culvert); *St. Louis Southwestern R. Co. v. Beck* (Tex. Civ. App.) 80 S. W. 538 (embankment across creek with insufficient culvert); *Gulf, C. & S. F. R. Co. v. Caldwell* (Tex. Civ. App.) 102 S. W. 461 (insufficient culvert in embankment, resulting in occasional overflows); *Texas & P. R. Co. v. Ford* (Tex. Civ. App.) 117 S. W. 201 (the same); *Hill v. Empire, State-Idaho Min. & Developing Co.* 158 Fed. 881 (refuse of ore-reduction works thrown in creek, causing it to fill up and during high water to overflow); *Moison v. Great Western R. Co.* 14 U. C. Q. B. 109 (bridge over stream with insufficient culvert); *McGillivray v. Great Western R. Co.* 25 U. C. Q. B. 69 (railroad embankment with insufficient culvert not showing its injurious effects immediately); *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (negligent construction of drains whereby water is thrown upon adjoining premises); *Carrou v. Great Western R. Co.* 14 U. C. Q. B. 192 (embankment with insufficient culvert). And see, in connection with these cases, *Buntin v. Chicago, R. I. & P. R. Co.* 41 Fed. 744.

In *Howard County v. Chicago & A. R. Co.* 130 Mo. 652, 32 S. W. 651, where, because of the throwing of large quantities of rock into a creek, several years thereafter a county bridge was materially injured, it was held an action brought within five years from such injury was not barred by the statute of limitations. In this case the court evidently took pains to show that no actual or material injury was done to the pier until within a period of five years next before 20 L.R.A. (N.S.)

the suit was brought, thus seemingly bringing the case within that class wherein it is held that all the damages must be recovered in one action, and that within the period of limitations from the first injury. The court, however, took occasion to say, further: "While there is some conflict between the American cases on this subject, the rule sustained by the great weight of authority seems to be that when, by wrongful acts, a permanent nuisance is created, and the injury therefrom is direct, immediate, and complete, so that the damages can be immediately measured in a single action, the statute will begin to run from the erection of the nuisance. On the other hand, when the injury, as in this case, is not complete so that the damages can be measured at the time of the creation of the nuisance in one action, but depends upon its continuance and the uncertain operation of the seasons, or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom."

In *McClure v. Broken Bow* (Neb.) 115 N. W. 1081, it seems to have been recognized that, where a city fills with earth the channel of a creek, and fails to provide a sufficient outlet for the flood waters that would naturally find passage down said water course, so that at widely separated dates the flood waters are backed up and cast against and over plaintiff's lots and into his mill, plaintiff's cause of action will accrue at the date of the injury to his property, and not at the time of defendant's negligent acts.

In *Heath v. Texas & P. R. Co.* 37 La. Ann. 728, where land was flooded because of the building of a railroad, it was said that prescription runs, not from the building of the roadbed, but from the time the damage is caused by that act.

In a few cases the question depended somewhat upon whether the person injured complained of the erection of the obstruction, or whether the gravamen of the action was the resulting damages.

Thus, in *King v. Danville*, 32 Ky. L. Rep. 1188, 107 S. W. 1189, where an action was brought for damages resulting from the wrongful diversion and unlawful use of the

almost worthless, and that they would not pay the taxes thereon for its value.

It is to be conceded that there is much conflict in the decisions of courts touching the application of the statute of limitations to nuisances of this character. This conflict has arisen especially in reference to the erection of railroad embankments across creeks and swales, draining large areas of adjacent land without sufficient ditches or culverts to carry off the waters on occasions of freshets, whereby the land becomes

flooded by overflows, damaging annual crops, and the like. In such case there is not infrequently present elements of uncertainty, such as the insufficiency of the openings in the embankments, which, the presumption may be indulged, the railroad might at any time in the future sufficiently enlarge, rather than submit in the first action to the recovery of all the consequential damages. In the second place, where the damage is to crops, it may depend entirely upon the possibility of the nonrecurrence of

water in a stream, and not from the construction of a dam, it was held that the injured party might recover for such damages as resulted from the diversion of the water during five years next preceding the commencement of the action, without reference to the time of the construction of the dam.

In *Dallas v. Young* (Tex. Civ. App.) 28 S. W. 1036, where a recovery was sought for damages occasioned to property as the result of water and filthy sewer matter being forced upon such property "during rains" by reason of the erection of certain embankments, it was held that the cause of action accrued at the time of the injury, and not at the time the embankments were built.

To the same effect are *Gloss-Sheffield Steel & Iron Co. v. Dorman* (Ala.) 49 So. 242, when the gravamen of the action was the filling and clogging up of a waterway and culvert, and not the negligence in their construction; and *Savannah, A. & M. R. Co. v. Buford*, 106 Ala. 303, 17 So. 395, where the gravamen of the action was that the road-bed and embankment, at a particular time after their construction, caused the surface water to flow upon the lands of the plaintiff.

In *Barnett v. St. Francis Levee Dist.* 125 Mo. App. 61, 102 S. W. 583, where the owner of land was damaged by an overflow of his premises caused by the negligent construction of a levee, it was held that his cause of action accrued, so as to set in motion the statute of limitations, when the injury was inflicted, and not when the dam was built. The court in this case evidently based its decision upon the fact that the gravamen of the case was negligent and unskilful construction of the levee, resulting in damage to the landowner, and the further fact that, although the levee was a solid and permanent structure, yet it would not necessarily cause the overflow of the land so that the injury could have been anticipated from the first.

In *Union Trust Co. v. Cuppy*, 26 Kan. 754, it was held that an action for damages caused by the flooding of lands occasioned by the building of an insufficient culvert in a railroad embankment accrued at the time of the injury, and not at the time of the building of the culvert, the court placing especial emphasis on the fact that the foundation of the action was the obstruction of a natural water course, causing damage to the plaintiff, and not the building of the

culvert. To the same effect, *Delaware & R. Canal Co. v. Lee*, 22 N. J. L. 243 (damming back of stream because of insufficient culvert).

So, when a change is made in the obstruction, and damages result therefrom, the statute of limitations begins to run from the time of the change, and not from the original erection of the structure.

Thus, in *Little Rock & Ft. S. R. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280, where an embankment was built which obstructed the natural flow of surface water, which embankment, however, was later abandoned, and, without objection of the railroad company, cut through to permit proper drainage, it was held, upon the company building another embankment, having no different effect from the former, that the statute of limitations commenced to run against the action for damages from the time of the construction of the second embankment, and not from the construction of the first.

In *Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108, reversed on other points in 143 Ill. 46, 32 N. E. 529, it was held that the raising of a railroad embankment from time to time within five years of the bringing of suit was sufficient to permit a landowner to maintain an action for damages caused by floods, although the embankment itself was erected more than five years before the institution of the suit.

In *Thiessen v. Clausen*, 135 Iowa, 187, 112 N. W. 545, it was held that, where a landowner, claiming the right to repel surface water coming from an adjacent tract, erects a barrier on the partition line, and maintains the same with the knowledge, or express or implied consent, of the owner of the adjacent tract for ten years or more, the right of the latter to an injunction against the maintenance of the obstruction is barred.

It is probably well to note that, although those cases bearing upon the right to bring an action where a change of ownership intervenes between the original cause and the effect are closely related to the subject here annotated, unless they expressly pass on the question of the statute of limitations they are not intended to be included in this note.

On the general question when right of action for injury to real estate accrues, when cause not immediately effective, see case note to *Mast v. Sapp*, 5 L.R.A. (N.S.) 379.

the overrunning flood in any given year, or the contingency of no crop being planted thereon, or being cultivated in a product subject to little damage from a temporary overflow. Such are not the conditions of the nuisance in question. The very purpose to be subserved by the defendant's permanent structure does not admit of any rearrangement to obviate sending the force of the current of the river against the plaintiff's shore line. Neither did the situation admit of the probability of the removal of the dikes in the future, as the burden of the defendant's proof was that they are indispensably necessary to prevent the destruction of its right of way, roadbed, and tracks. Moreover, the injury to the plaintiff did not consist in now and then flooding her land with water, damaging possible crops; but it was the destruction of the freehold by the constant eating away of the protecting bank,—a process as certain to continue as the annual rainfalls and the flow of water in a large river, and a result reduced to a demonstration more than three years before this suit was instituted.

Gould, in his work on *Waters* (§ 416), speaking of permanent injury, says: "In such cases the rule is altered for the sake of convenience, and but one action is allowed. The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant's act. Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, and bridges, permanent dams, and permanent pollutions of water, fall in this class."

Farnham, in his work on *Waters & Water Courses* (vol. 2, § 586), discussing this question, says: "The rule that every continuance of a nuisance is a fresh nuisance should have no application in case of permanent nuisances of this class, any more than it should be contended that a trespass upon the land and erection of a structure there should constitute a fresh trespass every moment it was continued, for the purpose of extending the time within which the action could be brought. And there are cases which have applied the true rule that, in case the dam is a permanent one, the limitation period will begin to run against the right of action to recover damages for the injuries from the time the dam was built. The rule that the statute of limitations is not available to defeat an action for damages for the flooding of land until the right to flood it has been acquired by prescription, since every continuance of the injury is a fresh nuisance, is a mere arbitrary rule, invented by the courts to

meet the necessities of an apparently hard case. The difficulty seems to be that the courts have confounded two distinct rights of action. As was seen in a preceding section, it was held that ejectment will not lie to destroy an inchoate flowage easement. To avoid the effect of that ruling, the courts which apply the successive-injury doctrine, in order to prevent the acquisition of an easement in real estate in less than the prescriptive period, hold that the nuisance is a continuing one, and that the action may be brought at any time until the right to maintain it has been acquired by prescription. The latter holding seems illogical. If a permanent obstruction is erected, so that it casts water across the boundary line onto the land of the upper owner, the injury is complete at the time the obstruction is erected and the injury done, and there is no ground for holding that a right of action for damages may be carried along for a period of twenty years, when the statute of limitations says that it shall be barred in six years."

This position is reinforced by Judge Brewer in *Central Branch Union P. R. Co. v. Twine*, 23 Kan. 586, 33 Am. Rep. 203.

As applied to the instance where the permanent structure is such as to injure the land itself of the adjacent proprietor, the supreme judicial court of Massachusetts maintains that the whole injury, present and prospective, is recoverable in one action, maintainable immediately when the effect of the nuisance was first manifested. In *Fowle v. New Haven & N. Co.* 107 Mass. 352, the plaintiff sued to recover damages for injury to the freehold resulting from the construction of the defendant's railroad along the bank of Mill river and across the bed thereof. The construction was of earth and stone, so as to obstruct and deflect the flow and current of the river, driving it against the embankment of the plaintiff's land, whereby it was undermined, and large portions thereof were destroyed, whereby the value of the residue of the land was diminished. The defendant pleaded a former recovery for the first damage resulting from the destruction of the land, which occurred beyond the statutory period of limitations. Gray, J., said: "The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the par-

ties for subsequent injuries from the same cause. *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; *Warner v. Bacon*, 8 Gray, 397, 402, 405, 69 Am. Dec. 253. This case is not like one of illegally flowing land by means of a milldam, where the damage is not caused by the mere existence of the dam itself, but by the height at which the water is retained by it, according to the manner of its use from time to time, as in *Staple v. Spring*, 10 Mass. 72, and *Hodges v. Hodges*, 5 Met. 205. Nor is it the case of an action against a grantee who, after notice to remove it, maintains a nuisance erected by his grantor as in *McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72, and *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132."

When the case went back for retrial, the plaintiff again sought to recover by some additional evidence. After advertng to the fact that in the first action for damages there were probably included in the recovery prospective damages, Judge Colt said: "The case at bar is not to be treated strictly in this respect as an action for abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law; and, if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury." [112 Mass. 334, 17 Am. Rep. 106.]

This doctrine is supported by the following cases: *Chicago & A. R. Co. v. Maher*, 91 Ill. 312; *Van Schoick v. Delaware & R. Canal Co.* 20 N. J. L. 249; *Van Orsdol v. Burlington, C. R. & N. R. Co.* 56 Iowa, 470, 9 N. W. 379; *Henderson v. New York C. R. Co.* 78 N. Y. 423; *Rockland Water Co. v. Tillson*, 69 Me. 255; *Powers v. Council Bluffs*, 45 Iowa, 654, 24 Am. Rep. 792; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 214, 59 Am. Rep. 341, 8 N. E. 460.

The supreme court of Arkansas has applied the rule, under the statute of limitations, to the instance of permanent railroad embankments, whereby the natural waterflow is diverted so as to deluge, in time of freshets, adjacent lands. The pertinent decisions of that court are reviewed in *St. Louis, I. M. & S. R. Co. v. Anderson*, 62 Ark. 360, 35 S. W. 791. The plaintiff had constructed a drainage ditch on his lands. The defendant railroad company built a permanent embankment across it, and obstructed the outflow of water, whereby in 20 L.R.A. (N.S.)

times of freshets the plaintiff's lands were flooded and the value diminished. The court affirmed the proposition that, "whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance." Further on the court said: "In this case the obstruction of the ditch was permanent; that is, it will continue without change from any cause, except human labor. The effect of it was to restore the land drained to the condition in which it was before the ditch was dug. Its present and future effect upon the land could be ascertained with reasonable certainty. The damage was original, and susceptible of immediate estimation. 'no lapse of time was necessary to develop it'. . . . As the law does not favor the multiplicity of suits, and all damages which will be sustained as the necessary result of the filling of the ditch in question and are recoverable could have been estimated at the time of such obstruction from the effect of it upon the value of the land, only one action should be brought therefor, and that within three years after the ditch was closed up."

The trial court, as in effect requested by the defendant, should have instructed the jury that the action is barred by the statute of limitations. It results that the judgment of the Court of Appeals and of the United States Court for the Southern District of the Indian Territory must be reversed, and the cause remanded, with direction to grant a new trial, and for further proceeding in conformity with this opinion.

ARKANSAS SUPREME COURT.

W. V. TURNER, Appt.,

v.

J. H. OVERTON et al.

(86 Ark. 406, 111 S. W. 270.)

Limitation of action — change of water course.

The statute of limitations begins to run upon a right of action against a railroad

Case Note. — When does statute of limitations commence to run against action for damages for the flooding of land caused by the digging of a ditch or drain.

The question as to when the statute of limitations commences to run against an action for damages for the flooding of land caused by the digging of a ditch or drain is

company which, without authority, straightens the bed of a stream so as to accelerate the flow in such manner that its future injurious effect on the riparian land is certain from the time of the completion of the work, although the actual injury is done only by gradual erosion and the overflow of the property in times of freshet.

(June 1, 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Clay County in defendants' favor in an action brought to recover damages for injuries to plaintiff's land through the alleged wrongful act of defendants in changing the bed of a stream. Affirmed.

Statement by Hart, J.:

Appellant, W. V. Turner, was, and had been for several years prior to the institu-

determined by the same test applied in the cases gathered in the note to Gulf, C. & S. F. R. Co. v. Moseley, ante, 885, which deals with the question as to when the statute of limitations begins to run against an action for damages to land on account of obstructing the flow of a stream or surface water. As was said there in regard to dams and embankments, so here it may be said in regard to the construction of ditches or drains, that whenever a ditch or drain causing the flooding of adjoining property is considered of a permanent character, and its construction and continuance necessarily causes injury, the damage is, by the majority of the cases, considered original, and may be recovered in one action, and in such case the statute of limitations begins to run from the construction of the ditch, or in some jurisdictions from the first injury; and the one damaged cannot rely upon the theory that every continuance of a nuisance is a new nuisance, although, as was also true of the other note, there are many cases cited in this note which apply an exception to that general rule because of the fact that the ditch was not necessarily a nuisance or would not necessarily continue to injure the property, and a few cases apparently deny the rule altogether.

In *Powers v. St. Louis*, I. M. & S. R. Co. 158 Mo. 87, 57 S. W. 1090, where the channel of a stream was changed by means of the digging of a canal, and the injuries resulting therefrom become apparent at once and inevitably continuous, it was held that the statute of limitations began to run at the time of the construction of the canal, although the injury gradually increased and did not become complete until some time afterwards.

In *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. 692, where an action was brought against the city for damages alleged to have been sustained from the grading of certain streets and the construction of certain sewers, by reason of which a large body of water was

thrown upon an adjoining lot, it was held that, since the whole damage could have been assessed in one action within the statutory period of limitations after that work was completed by the city, this action, having been brought more than four years thereafter, was barred.

In *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, it was held that the statute of limitations begins to run against an action to recover damages for the insufficient construction of a ditch in such manner that the flow cuts the earth away backward up the stream by an adjoining owner, as soon as it reaches such adjoining owner's land and it becomes apparent that such will be the result of the action of the water; and thus in this case, the cause of action having accrued more than five years prior to the commencement of the suit, it was barred by the statute of limitations.

In *Miller v. Keokuk & D. M. R. Co.* 63 Iowa, 680, 16 N. W. 567, where, because of the digging of a ditch, land was overflowed several years thereafter, it was held that an action for damages, brought within the statutory period after the first injury, was not barred by the statute of limitations.

To the same effect is *McCormick v. Winters*, 94 Iowa, 82, 62 N. W. 655 (increased flow of water on adjoining property because of construction of tile drain).

This was also recognized in *Peden v. Chicago, R. I. & P. R. Co.* 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424, where water was caused to overflow adjoining land because of the construction of a culvert under a railroad embankment.

However, in *Spilman v. Roanoke Nav. Co.* 74 N. C. 675, it was held that successive actions for damages lie for the continuous flooding and sobbing of land caused by the leaking of a canal; and the right of action is not barred for later acts because the statute of limitations has run against the earlier acts.

In *Wells v. New Haven & N. Co.* 151

straight, its current was much swifter. There were about twelve overflows during the year 1905. The creek overflowed its banks on appellant's land, and the action of the water washed the soil from some of his land and cut deep gullies across other portions of it. The worst part of the overflow and the swiftest current was on that part of appellant's land nearest the outlet of the ditch. Appellant testified that overflows never occurred on that part of his land prior to 1905, and that the land overflowed there when the creek was only half bank full. Appellant brought this suit to recover damages, alleging that the overflow was caused by the construction of the ditch accelerating the flow of the water in the creek. Appellees answered, making a general denial, and pleading the statute of limitations of three years. There was a

jury trial and verdict for the appellees. The case is here on appeal.

Messrs. L. Hunter, Huddleston, & Taylor, and Johnson & Burr, for appellant:

Where a nuisance is not necessarily injurious, but may or may not be so, and, if it proves to be injurious, the injury continues for awhile, inflicts damage, and then entirely ceases, the statute of limitations begins to run from the time the damage is done, and not before; and there may be as many successive recoveries as there are successive injuries, and the statute of limitation runs from the time each of such injuries occurs.

St. Louis Southwestern R. Co. v. Morris, 76 Ark. 548, 89 S. W. 846; St. Louis, I. M. & S. R. Co. v. Biggs, 52 Ark. 240, 6 L.R.A. 804, 20 Am. St. Rep. 174, 12 S. W. 331;

Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724, where a railroad unnecessarily brought together several natural streams of water, and discharged them through a culvert upon adjoining land at a place different from the original course of any of them, it was held that the structure constituted a continuous nuisance for which an action for damages would lie at any time, and the action would not be barred by the lapse of six years from the erection of the structure. The court in this case said: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful, as against the plaintiff, unless by release or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner. That which was a nuisance at first does not lose its character as such by being continued for six years, whatever effect the lapse of time might have upon equitable remedies for its removal; and the maintenance of a structure which will continue to cause a wrongful diversion of water upon the plaintiff's land, in quantities varying with the seasons, is a continuing nuisance, and an invasion of the plaintiff's right from day to day, and he may select his own time for bringing an action therefor, and he is not barred by the lapse of six years from the erection of the structure. The case falls within the ordinary rule applicable to continuing nuisances and continuing trespasses."

To the same effect seems to be Wright v. Syracuse, B. & N. Y. R. Co. 49 Hun, 445, 3 N. Y. Supp. 480, affirmed without opinion in 124 N. Y. 668, 27 N. E. 854, where, because of the changing of a stream by means of digging a new channel, a large amount of debris was thrown upon adjoining land.

Presenting the same difficulties as to classification as pointed out in the note to Gulf, C. & S. F. R. Co. v. Moseley, ante, 885, there is a large class of cases in which it is held 20 L.R.A. (N.S.)

that, whenever the ditch or drain is of such a character, because of either its lack of permanency, or negligent construction, variance in seasons, or many other reasons that might be ascribed, that an injury does not necessarily follow from its construction and continuance, a cause of action does not accrue to the injured party until the happening of the injury and, as pointed out in the majority of instances, for every occurrence of which he has a new cause of action, and against which the statute of limitations begins to run only from the time of each injury or overflow.

Thus, in Austin & N. W. R. Co. v. Anderson, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484, where the mere construction of an embankment and culverts by a railroad did not constitute a nuisance as to an adjoining landowner, but subsequently became so at intervals by diverting water from its usual flow upon the adjoining land to the injury of the land and crops, it was held that successive actions for recovery of damages might be brought against the company for causing the overflows, and the statute of limitations would begin to run from each overflow. The court said: "We conclude from the authorities that, where a nuisance is permanent and continuing, the damages resulting from it should all be estimated in one suit; but, where it is not permanent, but depends on accidents and contingencies, so that it is of a transient character, successive actions may be brought for injury as it occurs; and that an action for such injury would not be barred by the statute of limitation unless the full period of the statute had run against the special injury before suit. The building of the embankment and the culverts as alleged was not of itself a nuisance; it was no invasion of plaintiff's rights,—they were not put on his land. They became a nuisance only at intervals by diverting water from rainfalls from its usual flow upon plaintiff's land. The embankment and the culverts were permanent, but the nuisance was not; there was no constant

St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 612, 20 S. W. 515; Kansas City, Ft. S. & M. R. Co. v. Cook, 57 Ark. 387, 21 S. W. 1066; St. Louis, I. M. & S. R. Co. v. Stephens, 72 Ark. 127, 78 S. W. 786; Chicago, R. I. & P. R. Co. v. McCutchen, 80 Ark. 235, 96 S. W. 1054; St. Louis, I. M. & S. R. Co. v. Hoshall, 82 Ark. 387, 102 S. W. 207.

Messrs. Moore, Spence, & Dudley and Lamb & Caraway for appellees.

Hart, J., delivered the opinion of the court:

The appellees have pleaded the statute of limitations of three years in bar of this action. The suit was commenced on the 23d day of December, 1905, and the undisputed testimony shows that the ditch complained of was constructed during the spring

and continuing injury. It may be that, where land is destroyed, and its value before destruction is recovered as damages, there can be but one recovery. The soil and improvements might be renewed, however, in which case other suits might lie for damage to its renewed state. But suppose the land is only injured or the crops occasionally destroyed by rains, the just and rational rule as adopted in this state is that successive actions may be brought for the injuries as they occur."

In *Reid v. Atlanta*, 73 Ga. 523, it was held that it was a nuisance, for which continuous actions for damages lay, to keep up a sewer, which, when it rained, threw upon one's lot excrement, disagreeable in smell and hurtful to health; and an action therefor could be maintained although the sewer was built more than four years before bringing the suit.

In *Louisville & N. R. Co. v. Cornelius*, 111 Ky. 752, 64 S. W. 732, it was held that injuries to land and crops resulting from overflows of surface water collected by a railroad embankment and flowing through an improperly and negligently constructed culvert are not of a permanent, but recurrent, nature; and the statute of limitations runs on each overflow only from the time of its occurrence, and not from the time of the construction of the culvert.

In *Danielly v. Cheeves*, 94 Ga. 263, 21 S. E. 524, it was held that successive actions for damages to land by diminished or suspended fertility thereof for the production of crops, caused by the digging of a ditch and saturating adjoining land, might be maintained from year to year until such time as it is shown that the effect of the nuisance has been wholly and permanently to destroy the fertility of the land so that, if the nuisance were abated, it would not restore the land and render it again fertile and fit for cultivation.

In *Hunt v. Iowa C. R. Co.* 86 Iowa, 15, 41 Am. St. Rep. 473, 52 N. W. 668, where a ditch upon a railroad right of

of 1902. In the case of *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240, 6 L.R.A. 804, 20 Am. St. Rep. 174, 12 S. W. 331, the rule is stated as follows: "Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance.

. . . But, when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained

way caused intermittent overflows, some being slight and beneficial to the land, while others were very injurious, it was held that the first injurious overflow would not furnish a safe basis from which future damages could be calculated; and therefore an action for damages would not be barred because not brought within the statutory period from the first injurious overflow. In this case the court took occasion to say: "Again, it is clear that the plaintiff herein could not have maintained an action until some actual injury was caused to her by the diversion of the water by the defendant. There is here no claim of any such injury until 1888,—less than two years prior to the commencement of this action. True, the evidence shows various overflows of the plaintiff's land prior to that, but, if they caused any injury, no damage is claimed for it."

In *Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. 582, it was held that damages to land, inflicted long subsequent to the lawful and proper construction thereof of an irrigation ditch, from percolation and seepage from the ditch, which could not be foreseen or the extent of the injury determined when the ditch was constructed, are continuing damages for which recovery may be had for the full period of the statute of limitations.

Cases of a similar nature and holding to the same effect are *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984 (digging of ditch by city resulting in overflow of adjoining property); *Smith v. Atlanta*, 75 Ga. 110 (overflowing of sewer during heavy rains and foul deposits left on lot); *Chicago & A. R. Co. v. Connors*, 25 Ill. App. 561, and *Chicago & A. R. Co. v. Riley*, 25 Ill. App. 569 (digging of ditch along railroad embankment, diverting water and throwing it upon adjoining land); *Baker v. Leka*, 48 Ill. App. 353 (throwing of water on adjoining land by construction of ditch which was abatable as a nuisance and thus not permanent in

of." This rule has been repeatedly followed by the court, being applied according to the facts in each individual case. *St. Louis, I. M. & S. R. Co. v. Yarbrough*, 56 Ark. 612, 20 S. W. 515; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066; *St. Louis, I. M. & S. R. Co. v. Anderson*, 62 Ark. 360, 35 S. W. 791; *St. Louis, I. M. & S. R. Co. v. Stephens*, 72 Ark. 127, 78 S. W. 766; *St. Louis Southwestern R. Co. v. Morris*, 76 Ark. 542, 89 S. W. 846; *Chicago, R. I. & P. R. Co. v. McCutchen*, 80 Ark. 235, 96 S. W. 1054; *St. Louis, I. M. & S. R. Co. v. Hoshall*, 82 Ark. 387, 102 S. W. 207.

Counsel for appellant in their brief contend that appellees were wrongdoers *ab initio*, and that they are chargeable with knowledge that the straightened channel of the creek, made so by the construction of the ditch, would so accelerate the flow of the water as to materially injure the land of appellant. Conceding this to be true, the damage was original and susceptible of immediate estimation. In other words,

they claim that the injury to the land resulted from the construction of the ditch. Therefore it necessarily follows that the cause of action was barred at the institution of the suit. The physical facts bear out this view. The evident object of digging the ditch was for the purpose of straightening the channel of the creek across the lands through which it runs, and thereby draining the lands. It was obvious that water would flow faster through a straight than through a crooked channel. That the velocity of the water in the channel of the ditch was greater than that in the old channel of the creek must have been perceptible from the first. That the swifter current would cause the banks of the ditch to be worn away, and thus make it deeper and wider, was also apparent. The present and future effect upon the land could have been ascertained with reasonable certainty, and the injury complained of was permanent in its character.

Therefore, we are of the opinion that the action is barred by the statute of lim-

law); *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093 (failure to provide suitable flood gates for sewer, on account of which during freshets water and sewage were backed up on plaintiff's premises); *Kansas City v. Frohwerk*, 10 Kan. App. 120, 62 Pac. 432 (grading and guttering of street, in consequence of which water was thrown on adjoining property); *Louisville v. Norris*, 111 Ky. 903, 98 Am. St. Rep. 437, 64 S. W. 958 (overflow from defective sewer); *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451 (construction of ditch, overflowing adjoining property); *Mangold v. St. Louis, I. M. & S. R. Co.* 24 Mo. App. 52 (digging of ditch by railroad into which creek overflowed during high water, and thence upon adjoining property); *Fremont, E. & M. Valley R. Co. v. Harlin*, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263 (negligent construction of ditches along railroad, whereby surface water was gathered and thrown onto adjoining property); *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144 (construction of ditch along railroad embankment, resulting in overflow of adjoining property and its consequent destruction of crops); *Morse v. Chicago, B. & Q. R. Co.* (Neb.) 116 N. W. 859; *Hocutt v. Wilmington & W. R. Co.* 124 N. C. 214, 32 S. E. 681 (cutting of ditches along right of way of railroad, and thereby causing increased flow in adjoining small stream); *Houston v. Houston, E. & W. T. R. Co.* 26 Tex. Civ. App. 228, 63 S. W. 1056 (change of sewers and drainage ditches by cities, resulting, during heavy rains, in overflow of adjoining property); *Houston v. Parr* (Tex. Civ. App.) 47 S. W. 393 (construction of ditch by city, resulting in overflow of property from year to year); *St. Louis Southwestern R. Co. v. Clayton* (Tex. Civ. App.) 118 S. W. 248 (negligent con-

struction of ditches by which land was overflowed and crops destroyed).

This seems, also, to have been recognized in *Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287, where the city permitted the end of a sewer to stop up and thus overflow adjoining property; and *Gulf, W. T. & P. R. Co. v. Goldman*, 8 Tex. Civ. App. 257, 28 S. W. 267, where the digging of a ditch without a sufficient outlet caused stagnant water to stand therein to the injury of the value of an adjoining farm and the health of near-by inhabitants.

In *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844, it was held that an action for injury to land from overflow caused by the overtaxing of a main drain constructed by a municipal corporation as an outlet for surface waters, by the subsequent construction of lateral drains and the grade of streets, is not barred by the statute of limitations, where it does not appear that the lateral drains and other improvements were constructed six years prior to the commencement of the action, although a longer time has elapsed since the construction of the main ditch.

In *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470, it was held no defense to an action for damages to land from the overflowing thereof by backwater caused by the accumulation of sand washing into the stream from a ditch constructed by the defendant, that such ditch was constructed and has been used by him for the period necessary for the requirement of a prescriptive right, when the lands have been overflowed for less than such period; as there was no infringement of any right of the plaintiff until the ditch had caused the formation of an obstruction, and consequently the computation of the period of prescription could not commence until that time.

itations. Having held that the action is barred by the statute of limitations, it is not necessary to determine the other questions presented by the appeal.

Judgment affirmed.

MINNESOTA SUPREME COURT.

NORMAN L. NEWHALL, Respt.,

v.

JOURNAL PRINTING COMPANY, Appt.

(105 Minn. 44, 117 N. W. 228.)

Master — contract of employment — mutuality.

1. A contract for employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period.

Agency — termination.

2. A contract of agency, which leaves the agent free to terminate his relations with the principal on reasonable or specified notice, must be construed to confer the same

Headnotes by JAGGARD, J.

Case Note. — Mutuality of contract of employment which, by its terms, is binding upon only one of the parties for the time designated.

The question as to the right to specific performance of a contract of employment as affected by lack of mutuality is not included in this note, as the denial of specific performance on that ground does not necessarily imply that the contract is invalid.

It would seem to be the rule, in the absence of an independent consideration, that, where a contract of employment does not bind one of the parties for either a definite or indefinite time, but, by its terms, does bind the other; or, in other words, where the termination of the contract depends upon the will or actions of one of the parties, — such a contract is not considered a mutual obligation, and is therefore not binding upon either, unless the element of mutuality is otherwise supplied.

This seems to have been recognized in *East Line & R. River R. Co. v. Scott*, 72 Tex. 70, 13 Am. St. Rep. 758, 10 S. W. 99, *infra*, where the court said: "Reciprocal promises, made at the same time and in relation to an agreement, furnish the one for the other a consideration to support a contract; and, if the appellee was relying on such a consideration to sustain the contract, he would fail, for there is no pretense that he promised to render any services whatever for the appellant." This, however, was *dictum* as there was an independent consideration in this case.

So, in *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862, *infra*, it was recognized that, unless such an agreement was supported by some other consideration, the employer might

right upon the principal, unless provisions to the contrary are stipulated.

Corporation extension — presumption — damages.

3. Damages for the breach of such an agency contract by improper termination by the principal, if a corporation, do not necessarily extend beyond the period for which it was organized. There is no presumption of law that such a corporation will prolong its artificial existence by availing itself of statutory provisions for renewal of its franchise.

Damages — contract — breach — profits.

4. It is here held that defendant newspaper was not, as a matter of law, justified in terminating a contract with a carrier; that its breach of that contract did not entitle the plaintiff to recover damages for prospective profits for a longer time than during the remainder of the period for which the company was incorporated; that plaintiff was not entitled, under his complaint for a breach of a contract for daily delivery "(Sundays excepted)," to recover damages for breach of a contract to sell and deliver the Sunday edition subsequently issued.

(July 3, 1908.)

revoke it before the other party had acted upon it. In this case also there was an independent consideration.

A case closely related to the above is *Vogel v. Pekoc*, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386, where it was held that a contract whereby the first party agrees to employ the second party to perform such work as he may assign to him from time to time imposes no obligation on the first party; and a provision therein for the forfeiture of a specified sum by the servant in case he shall leave the employment without a specified notice constitutes no defense to an action by the latter for his wages, as the contract is void for want of mutuality. And see *Bowers v. Detroit Southern R. Co.* 26 Ohio C. C. 518, *infra*.

In *St. Louis, I. M. & S. R. Co. v. Matthews*, 64 Ark. 398, 39 L.R.R. 467, 42 S. W. 902 it was held that want of mutuality in the contract will permit the discharge at any time of a railroad engineer employed under a contract by which the employer agrees to pay him according to specified rates for his services, not to discharge him without just cause, to promote him according to specified grades of service, and, when discharges of engineers are made, to discharge in the order of juniority in service, where there is no agreement on his part to serve for any specified time.

A similar case so holding is *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181.

An interesting case on this question, though possibly not strictly in point here, is *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139. Here a tailoring firm agreed to employ a cutter for

A PPEAL by defendant from a judgment of the District Court for Hennepin County in plaintiff's favor in an action brought to recover damages for breach of contract. Reversed.

The facts are stated in the opinion.

Messrs. Cohen, Atwater, & Shaw, for appellant:

The contract, being silent as to its duration, was terminable at any time, either with or without cause, on thirty days' notice.

Willcox & G. Sewing Mach. Co. v. Ewing, 141 U. S. 627, 35 L. ed. 882, 12 Sup. Ct. Rep. 94; *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862; *St. Louis, I. M. & S. R. Co. v.*

Matthews, 64 Ark. 398, 39 L.R.A. 467, 42 S. W. 902.

It was error to permit the jury to assess damages for plaintiff's loss of profits during the possible renewal of the term of the corporation.

McMullan v. Dickinson Co. 63 Minn. 405, 65 N. W. 661, 663; *Kronsnabel-Smith Co. v. Kronsnabel*, 87 Minn. 230, 91 N. W. 892.

Mr. Norton M. Cross for respondent.

Jaggard, J., delivered the opinion of the court:

Plaintiff sought to recover damages for the breach of a contract made by the defendant

three years, in consideration of the latter working for them for that length of time, the contract being signed by the employers only. It appeared that, after the cutter had worked for some time, he was discharged, and thereupon he brought an action in assumpsit; the court, in holding that the action could not be maintained, said: "The consideration consisted of mutual promises of the parties, not to be performed within a year from the making thereof. The defendants' promise was in writing, and signed by them; but the plaintiff's promise does not appear in the writing signed by the defendants, nor was any note or memorandum made and signed by him, promising to labor for defendants three years or any length of time. Plaintiff was never bound by the agreement. There never was, then, any consideration to support defendants' promises. The agreement was void for want of mutuality. The plaintiff was under no legal obligation to work for defendants a moment longer than he chose, and the defendants were under none to keep him in their employment."

However, in *Gulf, C. & S. F. R. Co. v. Jackson*, 29 Tex. Civ. App. 342, 69 S. W. 89, it was held competent for parties to make a contract binding upon one of them for a certain length of time, but which the other might terminate whenever he saw fit. And see *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536, *infra*.

In *Woodward v. Smith*, 109 Wis. 607, 85 N. W. 424, it was held that a contract with well drillers by which they were to drill until a flowing well was obtained or they were ordered to stop, at fixed prices per foot depending on the distance drilled, is not void for want of mutuality.

The court, in *NEWHALL v. JOURNAL PRINTING CO.*, declares that a contract for employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period; but it will be noted that in *Carnig v. Carr*, 167 Mass. 544, 35 L.R.A. 512, 57 Am. St. Rep. 488, 46 N. E. 117, cited in support of that proposition, as well as in the *NEWHALL CASE* itself, there was an independent executed consideration moving from the employee.

20 L.R.A. (N.S.)

In two cases the element of mutuality seems to have been considered as supplied by the employee's signature to the contract.

Thus, in *Nounenbocker v. Hooper*, 4 E. D. Smith, 401, a contract signed by both parties, whereby an employer promised to give an employee steady employment for the term of one year on certain terms, was held not void for want of mutuality, although in form at least there was no covenant on the latter's part.

In *Walton v. Mather*, 16 Misc. 546, 38 N. Y. Supp. 782, a memorandum signed by both parties, reciting an employer's engagement of an actor's services for the season at a specified salary, was held not unilateral, the latter's signature being an assent to the engagement specified.

So, the element of mutuality may be supplied by the party not bound commencing working under it.

In *Raphael v. Hartman*, 87 Ill. App. 634, it was held that a contract by the terms of which an agent undertakes to devote his time for the period of one year to the sale of goods in consideration for the principal's agreement to pay him his salary and traveling expenses was held not void for want of mutuality, although the agent did not sign the contract, but in fact did accept its terms by commencing work under it.

So, in *Morris v. Taliaferro*, 75 Ill. App. 182, it was held that an undertaking of one person to employ another for one year, when accepted and acted upon by the employee until he is discharged, possesses the mutuality essential to a contract, and is binding on the employer.

In *Sagalowitz v. Pellman*, 32 Misc. 508, 66 N. Y. Supp. 433, it was held that a contract for services until a specified date, assumed, for the purpose of the case, to be lacking mutuality in that the employee failed at the time of making the contract to promise the employer that he would render services during that term, may be remedied as to the want of mutuality by the subsequent conduct of the parties, or by subsequent admissions of the employer that the contract is still in existence.

In *Butterick Pub. Co. v. Whitcomb*, 225 Ill. 605, 8 L.R.A. (N.S.) 1004, 80 N. E. 247, the stipulation in regard to the term of

with plaintiff's assignor for the delivery of newspapers and for collection of the price thereof. The contract in question set forth that for a consideration of \$135, paid by plaintiff's assignor to the defendant, the defendant gave to such assignor, and therefore to plaintiff, the exclusive right to sell defendant's publication within certain specified territory under the terms and conditions stated in the contract. The specification of the time of the duration of the contract was as follows: "Either party to this contract may at any time terminate said contract upon thirty days' written notice to the other party, and upon the expiration of the thirty days from the date of the service of said

notice all the rights of said second party under said contract shall cease, except the right of reimbursement as hereinafter provided; provided, however, that said first party shall not terminate this contract, except for the dishonesty, incompetence, negligence, inattention, or irresponsibility of said second party." The jury returned a verdict of \$928.40. A motion for a new trial was granted unless plaintiff would remit all of the verdict above \$728, in which event the court ordered that the verdict should stand in all respects as if originally rendered for \$728. Plaintiff duly remitted in accordance with the order. This appeal was taken from that order.

service was considered binding upon both parties; and it was therefore held that a contract of employment signed by the employer only is not void for want of mutuality upon the ground that it was not binding on the employee, where it recites that he is to begin service at a specified date, that it is mutually understood that it is to continue for five years, and that his willingness to perform his duties is a part of the essentials of the agreement.

The question of mutuality of contract has often arisen in those cases where, in consideration of the release from liability for injuries received, an employer agrees to give his injured employee steady and permanent employment, or for a definite period, without exacting from the employee the corresponding promise to remain for such designated period. It has, however, been universally held in these cases that such contracts are mutual and therefore binding upon the employer. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685; *Sax v. Detroit*, G. H. & M. R. Co. 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; *Smith v. St. Paul & D. R. Co.* 60 Minn. 330, 62 N. W. 392; *Lake Erie & W. R. Co. v. Tierney*, 29 Ohio C. C. 83, affirmed in 75 Ohio St. 565, 80 N. E. 1128; *East Line & R. River R. Co. v. Scott*, 72 Tex. 70, 13 Am. St. Rep. 758, 10 S. W. 99; *Stearns v. Lake Shore & M. S. R. Co.* 112 Mich. 651, 71 N. W. 148; *Kelly v. Peter & B. Stone Co.* (Ky.) 113 S. W. 486.

A similar case, and holding to the same effect, is *Carter White Lead Co. v. Kinlin*, supra, the court saying that a contract does not lack mutuality merely because every obligation of the one party is not met by an equivalent counter obligation of the other.

In *Bowers v. Detroit Southern R. Co.* 26 Ohio C. C. 518, although the court recognized that a contract of employment in no stipulated capacity, for no stated period, except such as may be satisfactory to the employer, and for no designated wages, does not imply mutuality, it was held that an answer of a railroad company, based upon a contract of re-employment of a former em-

ployee, which avers that, in consideration of his re-employment, plaintiff released it from all claims that he had against it arising out of any injuries sustained by the accident set forth in the petition; and that thereupon, in consideration of said release, defendant re-employed plaintiff and continued to retain him in its employ until such time as plaintiff voluntarily left its employ, —is not demurrable for want of consideration or mutuality of contract.

In *McMullan v. Dickinson Co.* 63 Minn. 405, 65 N. W. 661, 663, it was held that an agreement by a corporation to employ a person at a stated salary as long as its business continues, provided he discharges his duties efficiently and continues to hold in his own name a specified amount of the capital stock, is supported by mutual consideration on both sides.

In *Carnig v. Carr*, supra, where a person, in consideration of giving up his own business, made an agreement with another for permanent employment, the contract was held mutual, although the employee did not bind himself to continue in such employment.

In *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862, although the period of service was left expressly and entirely to the employee's election, the contract was considered mutual, there being in this case also sufficient consideration for such a contract.

In *Hobbs v. Brush Electric Light Co.* 75 Mich. 550, 42 N. W. 965, it was recognized that an agreement on the part of an employer to give an employee steady employment upon the latter's releasing a cause of action for damages against the former was a legal and binding contract.

There are possibly many other cases which have upheld the validity of such a contract, but have not, in terms, at least, discussed its mutuality. No effort has been made to exhaust these cases.

For cases on mutuality of contract giving a real-estate broker exclusive authority to sell, or promising him commissions in case of sale by anyone else: but which does not in terms impose any obligation upon him,—see case note to *Schoenmann v. Whitt*, 19 L.R.A. (N.S.) 599.

One of the essential questions in this case is whether the contract was terminable by defendant, with or without cause, on thirty days' notice. Defendant contends that, where a contract for the employment of a person in a particular business as long as the latter may elect to serve has been broken by the employer, the employee, having never fixed by his election the period of service, cannot recover substantial damages for the breach, inasmuch as the obligation violated is too uncertain. *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862; *Cf. McMullan v. Dickinson Co.* 63 Minn. 405, 65 N. W. 661, 663. And see *St. Louis, I. M. & S. R. Co. v. Matthews*, 64 Ark. 398, 39 L.R.A. 467, 42 S. W. 902. It is, however, well settled that a contract for employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for an definite period (*Carnig v. Carr*, 35 L.R.A. 512, and note, [167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117]), and that a contract for agency, which leaves the agent free to terminate his relations with the principal on reasonable or specified notice, must be construed to confer the same right upon the principal unless provisions to the contrary are stipulated. *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627, 35 L. ed. 882, 12 Sup. Ct. Rep. 94; *Smith v. St. Paul & D. R. Co.* 60 Minn. 330, 62 N. W. 392. And see *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802. There is no doubt that, by the present contract, the parties intended, and clearly expressed their intention, that the defendant should not terminate that contract "except for dishonesty, incompetence, negligence, inattention, or irresponsibility" of the other party thereto, who, for present purposes, is the plaintiff. The conclusion follows that the plaintiff was entitled to recover in some amount unless the evidence showed that he was discharged for cause. An examination of the record has satisfied us that the defendants were not, as a matter of law, justified in terminating the contract for cause, and that the verdict of the jury on this point is sustained by the evidence.

With respect to the extent of the recovery of damages, the trial court construed the contract as continuing through any renewal of the primary term of the corporate existence, and permitted the plaintiff to assess damages for plaintiff's loss of profits during the possible renewal. No period was fixed by the contract itself at which it must be terminated. The defendant's charter, un- 20 L.R.A. (N.S.)

der the laws of this state, expired in about five years. No evidence was offered to show that in fact the defendant intended to renew its artificial existence for any further time in pursuance of statutory provisions. Plaintiff thinks, indeed, that no such proof would have been admissible or obtainable. The award of damages to the extent allowed by the trial court must have rested entirely upon the presumption of law that the corporation would extend its franchise. Why this should be presumed, although it could not be proved, has not been made to appear. The reasoning is analogous. Artificial presumption is made to stand as a substitute for proof said to be impossible. By parity of reasoning that presumption would not be subject to rebuttal. Thus the law, independent of facts, has finally adjudged that the corporation will renew its existence; for it is to be observed that the court did not submit to the jury whether, as a matter of fact, the corporation would prolong its own life. It is by no means certain that, under all conditions, proof of probable renewal of corporate existence would not be obtainable and admissible; but it is clear that upon this record the charge of the trial court as to the period for which plaintiff's damages could be assessed was erroneous.

The final question is whether a new trial should be granted or the verdict reduced to the reasonable profits from the date of the breach by the corporation to the end of the artificial existence of the defendant. Plaintiff was entitled to a return of his deposit and to the fair estimate of his profits for the remaining five years, more or less. The present yearly profits were estimated at \$120. Of this, however, about one half was derived from the sale and delivery of the *Sunday Journal*. At the time the contract was signed the defendant did not issue a *Sunday* edition. The contract expressly provided that the defendant should sell and deliver to the carrier "as soon as practicable after publication each day (Sundays excepted) as many copies of said newspaper" as the carrier shall order. Subsequently a *Sunday* edition was issued, and was in fact sold and distributed by the carrier. For the services so rendered, recovery could be had, but not under the original contract. Whether or not what was said or done by the parties amounted to a new contract, or to a modification of the original contract, we need not inquire. Nothing to that effect is alleged in the complaint. A reduction of the verdict is accordingly not feasible.

Reversed, and new trial granted.

MISSOURI SUPREME COURT.
(Division No. 1.)

PATRICK KELLY et al., Appts.,
v.
HENRY BENAS et al., Respts.

(— Mo. —, 116 S. W. 557.)

Negligence — unsafe premises — attractive nuisance.

1. A landowner is not liable for injury to a trespassing child by the fall of a pile of lumber on which he was playing, on the theory that it was an attractive nuisance.

Same — children — invitation.

2. No invitation to children to play in one's lumber yard can be implied from the fact that he does not always drive them away when they enter it.

(February 25, 1909.)

A PPEAL by plaintiffs from an order of the Circuit Court for the City of St. Louis overruling a motion to set aside a nonsuit in an action brought to recover statutory damages for the alleged negligent killing of plaintiffs' minor son. Affirmed.

Statement by Lamm, P. J.:

Plaintiffs (father and mother of Michael Kelly) sued for the death of Michael, an infant of tender years, laying their damages at \$5,000, and grounding their action on negligence. Proof went in pro and con. At the close of the evidence the court instructed the jury that, under the pleadings and evidence, their verdict must be for defendants. Thereupon plaintiffs took a nonsuit with leave. Failing to get it set aside, they appeal.

The Pleadings.

The petition charges the intermarriage of plaintiffs; that their son, Michael, was the rise of nine years old on the 18th of June,

Note.—The doctrine of attractive nuisance, upon which the above case turns, will be found fully discussed in a note to Cahill v. E. B. & A. L. Stone & Co. 19 L.R.A. (N.S.) 1094. Since the publication of that note it has been held in Snare & T. Co. v. Friedman, 169 Fed. 1, that one who piles in a public highway iron beams which to his knowledge are attractive to children of tender years is bound, on that account, to use due care to prevent such material from becoming so unstable as to fall upon them while at play thereon. This is just the opposite conclusion from that reached in Friedman v. Snare & T. Co. 71 N. J. L. 605. 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497, a case in the state court between the same parties on the same facts, which will be found cited in the note above referred to. 20 L.R.A. (N.S.)

1905; that defendants were the owners, occupants, and proprietors of certain premises on South Second street, in the city of St. Louis, and the lumber and lumber yard thereon; that said premises opened on said street and on a public alley, were unfenced and unguarded, and that children in large numbers played on the premises, all of which defendants well knew; that such open lumber yard was an attraction for children to play on said premises at and about where the lumber was piled, as defendants well knew; that children in large numbers were attracted to play at and about the piles of lumber upon said premises, and were endangered if such lumber be negligently piled, all of which defendants well knew before Michael was killed; that defendants negligently piled lumber in their yard so loosely, insecurely, and without any fastenings that said lumber fell upon Michael and injured him so that he died; that on said date defendants had piled and were maintaining a pile of lumber in said yard in such manner that long pieces of lumber and timber were laid on top of shorter pieces, to a great height; that thereby said pile was made top-heavy and liable to fall; that the pile was built without braces or cleats to secure it from falling, and was without fastenings of any kind to prevent its falling; that a pile so piled was dangerous to persons near the lumber, because liable to fall and injure them; that it was especially dangerous to children attracted by said premises to be and play near said pile, as defendants well knew at all said times, notwithstanding which defendants so negligently piled and maintained said lumber pile in such dangerous and defective condition that on said date Michael was attracted to said premises to be and play thereon near said dangerous pile of lumber, when, by reason of its defective condition, it gave way, and the lumber, falling upon Michael, fractured his skull, and otherwise so broke his bones and crushed him that he died two days later.

The answer was a general denial, and a plea of the negligence of Michael, in that he with some companions wrongfully trespassed upon the premises, and carelessly and negligently caused lumber to fall upon him; and, moreover, that the injuries of Michael were caused, or directly contributed to, by the carelessness and negligence of plaintiffs in permitting their said son wrongfully to trespass upon said premises and the lumber piles.

The reply was a general denial.

The Facts.

It is agreed on all sides that defendants for many years maintained a box factory

across the street from the *locus*; that they owned a lumber yard maintained on the north half of a certain lot, and that they rented the premises from month to month; that at the time in hand they had several piles of lumber on this half lot; that said half lot never had been fenced in front or rear, but wagons drove through the yard directly from Second street to the alley. That plaintiffs lived in an upper apartment in a house next door to the lumber yard.

Plaintiffs put in proof tending to show that they did not allow Michael to play in the lumber yard, and that, whenever they found him there in disobedience to their instructions, they admonished him and brought him away; that the yard is located in a populous part of the city of St. Louis, and many children lived in that region; that the pile killing the boy had been there several months, and was twelve feet and upwards high, was some distance from the alley, and some distance from Second street; that it had no cleats or "stick binders," and no bracing of any kind, and that, while short pieces were on the bottom, longer pieces were on top. They also put in evidence tending to show that children played in the yard frequently, mostly afternoons after school hours, and Sundays; that the right way to pile lumber safely was to pile it with cross-binding sticks or cleats to brace the pile. Patrick Kelly testified that defendant George Benas told him in the presence of one Carraher and his own foreman, the next day after the accident, that he (Benas) knew boys played there, and that the pile was not in good condition. Carraher also testified that he heard Benas say that the lumber was not piled right. Plaintiffs' evidence further tended to show that at about 7 o'clock Sunday evening, on said 18th of June, Michael's father was eating his supper when the boy left the room and went downstairs. In about fifteen minutes the crash of falling lumber was heard, and Michael was found, under some boards that had fallen off said pile, mortally hurt. The boards were about 16 feet long, 2 inches thick, and 12 inches wide. Their evidence further tends to show that, at the time the upper part of the pile fell off, nobody was on it, and that Michael was standing 4 or 5 feet from it watching another boy fly a kite, when all at once the lumber gave way and crushed him. There was evidence of a negative character put in by plaintiffs to the effect that neither the defendants nor their watchman had been seen by the witnesses testifying or heard to chase or warn boys away from the yard; that on some occasions the watchman was seen looking at boys playing there, and did or said nothing. 20 L.R.A. (N.S.)

Defendants, on their part, put in proof to the effect that the lumber was carefully piled; that they employed a watchman on Sundays and evenings, who guarded the yard and lumber against trespassers and warned children away; that children did not play there with the consent of defendants, but, to the contrary, were constantly warned and driven away by them and their employees and by policemen; that the pile was not rickety or top-heavy; that there was a shed used by a junk dealer joining the lumber yard, about a foot from the pile, which was a little higher than the pile; that at the time of the accident there had been some boys on the roof of this shed flying a kite,—Michael, one of them; that they were warned off by the wife of the owner of the shed, and, in jumping from the shed to the lumber pile, Michael was the last to go, and the lumber fell just as he jumped. Other evidence tended to show that, in flying a kite, the boys went on a lumber pile instead of the roof of the junk dealer's shed; that Michael had been on the roof shortly before, but got down to the ground, and, in climbing back on the lumber pile, the upper part fell on him. Evidence was put in contradicting the admissions testified to by Patrick Kelly and Carraher to the effect that Benas knew the lumber was not piled properly.

Such, in brief, is the case on the facts.

Messrs. A. R. Taylor and Howard Taylor, for appellants:

The lumber pile was an attractive nuisance for which the landowner is responsible.

Hydraulic Works Co. v. Orr, 83 Pa. 336; Fink v. Missouri Furnace Co. 10 Mo. App. 61; Sioux City & P. R. Co. v. Strout, 17 Wall. 657, 21 L. ed. 745; Townsend v. Wathen, 9 East, 277; Crafton v. Hannibal & St. J. R. Co. 55 Mo. 580; Morgan v. Wabash R. Co. 159 Mo. 275, 60 S. W. 195; Klockenbrink v. St. Louis & M. River R. Co. 172 Mo. 687, 72 S. W. 900; Scullin v. Wabash R. Co. 184 Mo. 707, 83 S. W. 760; Reyburn v. Missouri P. R. Co. 187 Mo. 574, 86 S. W. 174; Sites v. Knott, 197 Mo. 711, 96 S. W. 206; Wise v. St. Louis Transit Co. 198 Mo. 558, 95 S. W. 898; Goff v. St. Louis Transit Co. 199 Mo. 709, 9 L.R.A. (N.S.) 244, 98 S. W. 49; McQuade v. St. Louis & S. R. Co. 200 Mo. 158, 98 S. W. 552.

Messrs. Lyon & Swarts and Dwight D. Currie, for respondents:

The defendants were under no duty to guard the lumber pile although it was attractive to children.

Smith v. Jacob Dold Packing Co. 82 Mo. App. 9; Barney v. Hannibal & St. J. R. Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069;

Arnold v. St. Louis, 152 Mo. 173, 48 L.R.A. 291, 75 Am. St. Rep. 447, 63 S. W. 900; Moran v. Pullman Palace Car Co. 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659; Overholt v. Vieths, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Rodgers v. Lees, 140 Pa. 484, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399; Thompson v. Baltimore & O. R. Co. 218 Pa. 444, 19 L.R.A. (N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 A. & E. Ann. Cas. 894; Butz v. Cavanaugh, 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; Hargreaves v. Deacon, 25 Mich. 1; Klix v. Nieman, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965; Benson v. Baltimore Traction Co. 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; Vanderbeck v. Hendry, 34 N. J. L. 467; Shea v. Gurney, 163 Mass. 184, 47 Am. St. Rep. 446, 39 N. E. 996; Williams v. Kansas City, S. & M. R. Co. 96 Mo. 275, 9 S. W. 573; Straub v. Soderer, 53 Mo. 43; Barry v. Calvary Cemetery Asso. 106 Mo. App. 358, 80 S. W. 709; Johnson v. Paducah Laundry Co. 122 Ky. 369, 5 L.R.A. (N.S.) 733, 92 S. W. 330; Friedman v. Snare & T. Co. 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497; Smith v. Hopkins, 57 C. C. A. 193, 120 Fed. 921; Mathews v. Bense, 51 N. J. L. 30, 16 Atl. 195; Missouri, K. & T. R. Co. v. Edwards, 90 Tex. 65, 32 L.R.A. 825, 36 S. W. 430; Clark v. Richmond, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369; Williamson v. Gulf, C. & S. F. R. Co. 40 Tex. Civ. App. 18, 88 S. W. 279.

At the time plaintiffs' son was killed he was a trespasser upon defendant's property, and defendants owed him no duty except to refrain from wilfully injuring him.

Barney v. Hannibal & St. J. R. Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069; Moran v. Pullman Palace Car Co.; Williams v. Kansas City, S. & M. R. Co.; Smith v. Jacob Dold Packing Co.; Gillespie v. McGowan; Rodgers v. Lees; Thompson v. Baltimore & O. R. Co.; and Williamson v. Gulf, C. & S. F. R. Co.,—*supra*.

Lamm, P. J., delivered the opinion of the court:

On such record we are of opinion plaintiffs cannot recover. This, because:

One applicable general rule of law is that there must be a duty raised by the law and breached by defendant before an action for negligence lies. Another is that the landowner or occupant owes no duty to trespassers or volunteers, going upon his 20 L.R.A. (N.S.)

land for their own purpose, to maintain it in any particular condition for their benefit. Sweeney v. Old Colony & N. R. Co. 10 Allen, loc. cit. 372, 87 Am. Dec. 644; Straub v. Soderer, 53 Mo. 38. Volunteers, bare licensees, and trespassers take the premises for better or for worse, as they find them, assuming the risk of injury from their condition, the owner being liable only for concealed spring guns, or other hidden traps intentionally put out to injure them, or any form of wilful, illegal force used towards them. To invitees, however, he owes the active duty to exercise reasonable care for their safety.

There was always a main modification allowed to the foregoing general nonliability to persons entering without the owner's permission, and that arose where he made such changes in his land so hard by a public highway as to put a traveler in danger who mistook the course of the highway, and, without fault on his part, inadvertently strayed from it into the danger. Wheeling & L. E. R. Co. v. Harvey, 77 Ohio St., loc. cit. 240, 19 L.R.A. (N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 A. & E. Ann. Cas. 981. Says Campbell, J. (Hargreaves v. Deacon, 25 Mich. loc. cit. 5): "We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant. . . . A person incurs no duties towards persons by not warning or driving them from his premises, and they go there, if mere volunteers and without invitation, at their own risk." In the same case that jurist says (referring to the application of the foregoing principles to children): "There is some danger, in dealing with these questions, of confounding legal obligations with those sentiments which are independent of the law, and rest merely on grounds of feeling or moral considerations. We feel, usually, more indignation at wrongs done to children than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers towards them, resting entirely on the fact that they are children. Those who have any special dealings with them, as parents, teachers, and employers, incur obligations appropriate to their relations, and differing from those incurred towards others in proportion to the necessity of care and protection and the risk of injury. But those who have no such relations with them are not liable for negligence in carrying on their own business, beyond what would be

their liability to others, as well as children, who are equally free from blame." In the Hargreaves Case care was taken to express no opinion concerning cases where the nature of the business is such as to present peculiar attraction to children, beyond other kinds of occupation, nor was the writer dealing with the subject-matter of contributory negligence relating to children, which is to be gauged with reference to infantile capacity. With these modifying suggestions, we give approval to Judge Campbell's remarks.

There is another main exception grafted on the general rule of nonliability to trespassers, volunteers, or bare licensees, and on that exception appellants lean as on a staff. It is known in the law as the doctrine of the Turntable Cases,—a doctrine of this court (Berry v. St. Louis, M. & S. E. R. Co. 214 Mo. 593, 114 S. W. 27; Koons v. St. Louis & I. M. R. Co. 65 Mo. 592; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418) and of many other courts of last resort. The doctrine of those cases is, in substance, that a railroad turntable is a dangerous machine created by the act of its owner, peculiarly attractive to the childish instincts of little ones as a merry-go-round, and, if left unlocked when not in use (when it might be easily locked), and when exposed in a public place where children resort to it with the knowledge and tacit acquiescence of its owner to play on it, becomes an attractive nuisance and operates as an inducement, an implied invitation to them, and therefore when injured thereon, they are not treated strictly as voluntary trespassers, but as toled into a hidden pitfall or trap.

There has been marked judicial eloquence and astuteness in stating the legal grounds of liability in the Turntable Cases, and no little difficulty is found in formulating sound and settled legal principles for it to rest on; but it is established in our law, and doubtless on principle ought to be applied (in those jurisdictions asserting the doctrine) to other cases coming strictly within the limits of the doctrine and presenting every earmarking element upon which liability is predicated in the principal case. While this is so, the manifest distress and injustice flowing from unnecessarily extending the doctrine, or loosely applying it to many conceivable cases, has caused those courts accepting it to restrict its application to the narrowest bounds. For instance: In this court, in Overholt v. Vieths, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74, we refused to apply it in a case where a child was drowned in a pond of water in a rock quarry. In Schmidt v. Kansas City Distilling Co. 90 Mo. 284, 59

Am. Rep. 16, 1 S. W. 865, 2 S. W. 417, we applied it to a little pool of hot water on the private premises of defendant, made by blowing off hot water, *débris*, and steam through an escape pipe from defendant's distillery, in which pool a child was fatally scalded. But in Barney v. Hannibal & St. J. R. Co. 128 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069, we doubted and refused to follow the Schmidt Case, and held that moving railroad cars were not within the purview of the Turntable Cases as dangerous and attractive machinery. In that case a child six years old got into a railway yard where children much frequented, and, catching hold of the stirrup in the foot of the ladder on a car and putting his feet against the trucks to steal a ride, he slipped off and was mangled. In Witte v. Stifel, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891, a little boy went to a building under way, 3 feet from the street line, and tried to draw himself up by taking hold of a loose stone placed across the top of a cellar window frame. The stone fell and killed him. It was held there could be no recovery. In Moran v. Pullman Palace Car Co. 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659, the owner of a lot was held not liable for failing to fence it. In that case there was a pond on the lot, and a child was drowned while bathing in it. In Butz v. Cavanaugh, 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104, the owner of land was held not liable for injuries to a child who voluntarily went on his private premises against the admonition of his own father, and, in trying to get a piece of wire in an old quarry, used as a dumping ground, burned his feet in a smoldering fire. And in Arnold v. St. Louis, 152 Mo. 173, 48 L.R.A. 291, 75 Am. St. Rep. 447, 53 S. W. 900, a pond, lightly frozen over in the neighborhood of a public school, attractive to children of tender years for skating purposes, and where children were known by defendants to resort, was allowed to exist. Two children were drowned there while skating without the permission or invitation of the owner of the lot, and recovery was denied. In Carey v. Kansas City, 187 Mo. 715, 70 L.R.A. 65, 86 S. W. 438, a child lost its life by drowning. While pursuing a frog, he got through a fence inclosing a public reservoir. This reservoir was located in a public park or pleasure ground of the city, and the parents were cast on the theory that when the boy fell into the reservoir he was trespassing.

In other jurisdictions applying the turntable doctrine, there is the same tendency to limit it within strict bounds, as pointed

out by Summers, J., in *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St., loc. cit. 245, 19 L.R.A.(N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 A. & E. Ann. Cas. 981. The prying mind of the student in jurisprudence may see cases in point there collated from Minnesota, Georgia, Nebraska, California, Kansas, Texas, Tennessee, and Washington, to that effect. See also authorities cited by diligent counsel in their briefs.

If the old channel of the law is to be quite changed by the application of the new doctrine automatically and without discrimination, of sentimental considerations (however elevated and tender) are to usurp the place of cold and calm reason as the foundation for rules of law, then the flood gate now damming back liability will be raised, letting in strange and deep waters for the landowner to struggle with. Not only will he be liable for boys drowned while swimming in his stock pond (the idea of swimming being alluring to a boy), for those who fall into uncovered wells, cisterns, and cellars (the notion of playing on the brink of such being a boyish one), for children who are suffocated while playing in piles of sand accumulated for building purposes or in sliding down stacks of straw unscientifically piled and exposed, but he may be mulcted in damages for injuries to his neighbor's children, who, romping in his haymow, without his invitation, break their bones by sliding down his hay chute, or those who, playing in his rock quarry, are hurt. Shall he fence against adventurous, trespassing boys? Almost as well suggest "that he build a wall against birds." If he is held to liability for injury to the children of Jones because of the way he piles his lumber, by the same token, as to Brown, liability would be fastened on him for the way he piles his stones, his bricks, his corn in pens, his hayricks, and his cordwood on his private grounds; in fact, as has been pointedly said, every landowner will be liable for injuries to his neighbor's children under the new doctrine except the neighbor himself. We cannot well write the law that way.

Michael was a trespasser. Defendants did not intentionally injure him. They set no trap for him. Their lumber piles were not an attractive nuisance as defined in the Turntable Cases. Their yard was not used by children by their invitation, express or implied, as a playground, even though their watchman did not always drive children away, and though, on this Sunday evening, he was off duty for a spell. We think the court ruled correctly.

Therefore, the judgment is affirmed.

All concur.
20 L.R.A.(N.S.)

NEBRASKA SUPREME COURT.

JOSEPH MORRIS .

v.

ARCHIE MILLER, Appt.

(— Neb. —, 119 N. W. 458.)

Assault — trial — instructions.

1. In an action for damages for an assault and battery, wherein it was claimed by each of the parties that the other was the aggressor, and by the defendant that what he did was in self-defense, it was not error for the court to instruct the jury, among other things, that the right of self-defense did not imply the right to attack, or to voluntarily enter into an affray, nor to use more force than was necessary for his defense; and that the question as to who provoked the difficulty or made the first assault was for the jury to decide under the evidence.

Trial — instructions — construction.

2. In construing instructions upon any given proposition, all instructions bearing upon the same should be construed together as a whole.

Assault — voluntary combat — right of action — defense.

3. Where two persons engage voluntarily in a fight, either can maintain an action against the other to recover the actual dam-

Headnotes by REESE, Ch. J.

Case Note. — Effect of fact that combat was by agreement or mutual consent of parties upon civil liability for assault.

The overwhelming weight of authority is in accord with the conclusion reached in the above case that, where two parties fight voluntarily, either party may recover from the other the actual damages suffered; and the consent of the plaintiff to engage in the combat will not bar his suit to recover.

Thus, in *Lizana v. Lang*, 90 Miss. 469, 43 So. 477, it was held that the acceptance of a challenge to fight, and the voluntarily engaging in a fight by one party with another because of the challenge so to do, could not be set up as a defense in a civil suit for assault and battery.

So, in *Stout v. Wren*, 8 N. C. (1 Hawks) 420, 9 Am. Dec. 653, it was held that the rule that a man should not recover recompense for an injury received by his own consent must necessarily be qualified to the extent that the act from whence the injury came must be lawful, and that "in those manly sports and exercises which are thought to qualify men for the use of arms, and to give them strength and activity, if two played by consent at cudgels and one hurt the other, no action would lie. But where, in an action for assault and battery, the defendant offered to give in evidence that the plaintiff and he boxed by consent, from whence the injury proceeded, it was held to be no bar to the action; for, as the act of

age for the injuries he may receive; and the fact that the combat was by agreement or mutual consent of the parties to it is no defense.

Same — evidence — admissibility.

4. Immediately after an encounter between plaintiff and defendant, the plaintiff's hat was picked up near where he fell, and was introduced in evidence upon the trial, showing a break or rent at a place which, when worn, would be over or near the point of injury upon plaintiff's head. The identity, condition, and possession of the hat were shown by evidence preliminary to its introduction. Held, that the admission of the hat in evidence was not erroneous.

Appeal — exhibit in jury room — harmless error.

5. After the conclusion of the instructions by the court to the jury, and upon the jury retiring from the court room to deliberate upon their verdict, one of the jurors, by mistake and inadvertence, picked up the hat which had been introduced in evidence and carried it into the jury room, where it

remained until the next day, when it was removed by a bailiff and returned to the court room. The evidence adduced upon the motion for a new trial showed: That the hat was taken by mistake, and that little, if any, attention was paid to it by the jurors; that it was upon the table around which the jurors assembled and used as a ballot box a part of the time; and that it was not used in any way for the purpose of influencing the minds of the jurors, and did not influence them. Held, that the taking of the hat to the jury room under the circumstances was an irregularity, but without prejudice to the defendant.

(January 23, 1909.)

A PPEAL by defendant from a judgment of the District Court for Buffalo County in plaintiff's favor in an action brought to recover damages for assault and battery. Affirmed.

The facts are stated in the opinion.

boxing is unlawful, the consent of the parties to fight could not excuse the injury."

And this proposition that the consent of the plaintiff cannot be pleaded as a defense in an action for assault and battery is asserted to be the law in the following authorities also: *Matthew v. Ollerton*, Comb. 218; *Boulter v. Clark*, Bull. N. P. 16; *Christopherson v. Bare*, 11 Q. B. 473; *McNeil v. Mullin*, 70 Kan. 639, 79 Pac. 168; *Jones v. Gale*, 22 Mo. App. 637; *Bell v. Hansley*, 48 N. C. (3 Jones, L.) 131; *Willey v. Carpenter*, 64 Vt. 212, 15 L.R.A. 853, 23 Atl. 630; 1 *Cooley*, Torts, 3d ed. 282, 284.

Such, also, was the conclusion reached in the following cases, which also support the rule enunciated in *Barholt v. Wright*, 45 Ohio St. 179, 4 Am. St. Rep. 535, 12 N. E. 185, and in *Grotton v. Glidden*, 84 Me. 589, 30 Am. St. Rep. 413, 24 Atl. 1008 (both of which are reviewed at length in *MORRIS v. MILLER*), that it might be shown in mitigation of damages that the assault and battery complained of was committed by the defendant in the course of a fight with the plaintiff, entered into by mutual consent: *Logan v. Austin*, 1 Stew. (Ala.) 476; *Thomas v. Riley*, 114 Ill. App. 520; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333; *Schutter v. Williams*, 1 Ohio Dec. Reprint. 47; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538, 18 N. W. 473.

Indeed, the only cases which question this proposition are the following Michigan decisions, which are also cited in *MORRIS v. MILLER*.

In *Galbraith v. Fleming*, 60 Mich. 403, 27 N. W. 581, it was held that an instruction was as favorable to the plaintiff as the law would admit which stated that, if the plaintiff voluntarily engaged in the fight in the first instance for the sake of fighting, and not as a means of self-defense, he could

not recover unless the defendant beat him excessively or unreasonably. To quote from the opinion: "The law does not put a premium upon fighting; and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he come out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law."

This position of the Michigan court would seem to find support in the other case from the same jurisdiction. *Smith v. Simon*, 69 Mich. 481, 37 N. W. 548, in which it appeared that the trial judge charged the jury that, if the plaintiff's arm was broken in a fight entered into by mutual agreement, the plaintiff could not recover unless the injury was the result of unnecessary and excessive beating and harshness on the part of the defendant, and the defendant intended seriously to injure him; but that, if the arm was broken with no intent to break it on the part of the defendant, the plaintiff could not recover. A judgment for the plaintiff was reversed because there was an entire absence of testimony tending to show that the defendant was guilty of unnecessary beating and harshness, or intended to do the plaintiff the injury complained of.

Of course, if the injury complained of in an action for assault and battery resulted from a friendly scuffle, there can be no recovery for the plaintiff unless it is shown that the defendant used greater force than was justifiable under the circumstances, or was reckless or negligent. *Nicholls v. Colwell*, 113 Ill. App. 219; *Fitzgerald v. Cavin*, 110 Mass. 153; *Gibeline v. Smith*, 106 Mo. App. 545, 80 S. W. 961.

Messrs. H. M. Sinclair and W. D. Oldham, for appellant:

One who voluntarily enters into a quarrel cannot recover compensation for injuries received by him as a result of the combat.

Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581; Smith v. Simon, 69 Mich. 481, 37 N. W. 548.

Proper foundation was not made for the introduction of the hat in evidence, as it was not shown that it had not been tampered with after the combat.

State v. Hossack, 116 Iowa, 194, 89 N. W. 1077; State v. Goddard, 146 Mo. 177, 48 S. W. 82; People v. Hill, 123 Cal. 571, 56 Pac. 443; State v. Phillips, 118 Iowa, 660, 92 N. W. 876; State v. Cook, 17 Kan. 394.

The unwarranted taking of the hat to the jury room, which had a material bearing on an important issue in the case, constituted prejudicial error.

Harris v. State, 24 Neb. 803, 40 N. W. 317; Rainforth v. State, 61 Ill. 365; Hairgrove v. Millington, 8 Kan. 480; Welch v. Franklin Ins. Co. 23 W. Va. 289; Shields v. Guffey, 9 Iowa, 322; Hendel v. Berks, 16 Serg. & R. 92; Howell v. Hartford F. Ins. Co. 6 Biss. 163, Fed. Cas. No. 6,779; Chance v. Indianapolis & W. Gravel R. Co. 32 Ind. 472; Re Foster, 34 Mich. 21; Sanderson v. Bowen, 4 Thomp. & C. 675; Alger v. Thompson, 1 Allen, 453; Koehler v. Cleary, 23 Minn. 325; La Bonty v. Lundgren, 41 Neb. 312, 59 N. W. 904; Cheek v. State, 35 Ind. 492; Lotz v. Briggs, 50 Ind. 346; State v. Hartmann, 46 Wis. 248, 50 N. W. 193; United States v. McKee, 91 U. S. 442, 23 L. ed. 326.

Messrs. C. A. Robinson, John A. Sheehan, and H. D. Rhea, for appellee:

The presence or absence of "provocation" may greatly affect the question of self-defense, as that doctrine cannot be invoked where the defendant was the aggressor, since to do so would be to allow him to take advantage of his own wrong.

Jones v. Gale, 22 Mo. App. 637; Kees v. State, 44 Tex. App. 543, 72 S. W. 855; Watrous v. Steel, 4 Vt. 629, 24 Am. Dec. 648; Thomason v. Gray, 82 Ala. 291, 3 So. 38; Collock v. State, 148 Ala. 669, 41 So. 727; Lizana v. Lang, 90 Miss. 469, 43 So. 477; Morris Hotel Co. v. Henley, 145 Ala. 678, 40 So. 52; 3 Cyc. Law. & Proc. pp. 1047, 1072, 1074; Wells v. Englehart, 118 Ill. App. 217.

If two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive.

Grotton v. Glidden, 84 Me. 589, 30 Am. St. Rep. 413, 24 Atl. 1008; Willey v. Carpenter, 64 Vt. 212, 15 L.R.A. 853, 23 Atl. 630; Shay v. Thompson, 59 Wis. 540, 48 20 L.R.A. (N.S.)

Am. Rep. 538, 18 N. W. 473; McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168; 3 Cyc. Law. & Proc. p. 1070; 2 Am. & Eng. Enc. Law, p. 987.

The taking of the hat to the jury room did not, under the circumstances, constitute prejudicial error.

Bell v. State, 32 Tex. Crim. Rep. 436, 24 S. W. 419; Spencer v. State, 34 Tex. Crim. Rep. 238, 30 S. W. 46, 32 S. W. 690; Hendricks v. State, 28 Tex. App. 416, 13 S. W. 672; Kennon v. Territory, 5 Okla. 686, 50 Pac. 172; Trafton v. Pitts, 73 Me. 408; People v. Tipton, 73 Cal. 405, 14 Pac. 894; Jack v. Territory, 2 Wash. Terr. 101, 3 Pac. 832; State v. Webster, 21 Wash. 63, 57 Pac. 361; Adams v. State, 93 Ga. 166, 18 S. E. 553; Spencer v. State, 34 Tex. Crim. Rep. 238, 30 S. W. 46, 32 S. W. 690; People v. Mahoney, 77 Cal. 529, 20 Pac. 73; Blazinski v. Perkins, 77 Wis. 9, 45 N. W. 947; Louisville & N. R. Co. v. Berry, 96 Ky. 604, 29 S. W. 449.

Reese, Ch. J., delivered the opinion of the court:

This action was instituted in the district court of Buffalo county by plaintiff, Morris, and against defendant, Miller, for damages resulting from an assault and battery alleged to have been made and inflicted by defendant upon plaintiff. A jury trial was had, which resulted in a verdict in plaintiff's favor, upon which, after an adverse ruling upon a motion for a new trial, judgment was rendered, and from which defendant has appealed. The motion for a new trial and the assignments of error in this court consist of a number of alleged grounds, but none of them are urged in the briefs, except that there was error in the instructions given by the court to the jury, errors in the admission of evidence, and misconduct of the jury while deliberating upon their verdict. These contentions will be noticed in the order in which they are presented.

1. There is no contention that there was not an encounter between the parties at the time and place named in the petition, and there would seem to be no reasonable ground to contend that plaintiff was not seriously injured in the conflict. It is claimed by defendant, both in his answer and upon the witness stand, that whatever injury plaintiff sustained was inflicted by defendant in the legal and reasonable defense of his person from an attack made by plaintiff. In support of this, it is urged that the injury suffered by plaintiff was the result of a fall by him against a hitching post in front of a business house in the village of Elm Creek, and through which post was a bolt to which a ring was attached and that the bolt protruded through

and beyond the side of the post opposite the ring and against which plaintiff fell, inflicting the wound upon his head of which complaint is made; and that the fall was occasioned by a blow given by defendant with his left hand, but which was of no greater force than was reasonably necessary for defendant's protection and defense. It was also claimed that the personal conflict was voluntarily entered into by the parties; and that defendant should not, under the circumstances, be held responsible for the resultant injury. Upon the other hand, it was claimed by plaintiff that defendant was the aggressor, and that the assault which led to the conflict was by him. Upon this part of the case the court gave the following instruction, numbered 9, and to which defendant excepted: "The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack; and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his, or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is anyone justified in using more force than is reasonably necessary to get rid of his assailant; but if he does not bring on the difficulty, nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe. Now, if you believe from the evidence in this case that the defendant voluntarily sought or invited the difficulty in which plaintiff was injured, if you believe from the evidence that he was injured, or that he provoked or commenced or brought it on by any wilful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for him upon the ground of self-defense. In determining who provoked or commenced the difficulty or made the first assault, you should take into consideration all the facts and circumstances in evidence before you."

The jury were quite fully instructed upon the different phases of the case, and, with one other exception, to be hereafter noted, no complaint is made of instructions given. As it is the well-established rule that all instructions given should be considered and construed together, we refer to instruction No. 10, to which no complaint is made, and which we here set out: "The court instructs the jury that, if you

believe from the evidence that plaintiff began the affray and was the aggressor, then you are instructed that the defendant had a right to defend himself from such assault, and he would have the right to use that amount of force which was reasonably and apparently necessary in making his defense. And, if you believe from the evidence that the defendant was so acting in self-defense from the real and honest conviction of apparent danger, or what would seem apparent danger to a reasonable man, you will return a verdict for the defendant, unless you further believe from the evidence that the defendant unlawfully used a degree of force and violence upon the plaintiff that was not reasonably and apparently necessary under the facts and circumstances then and there surrounding the defendant."

These instructions correctly state the law. The evidence clearly and conclusively establishes the fact that the parties were in a business house in Elm Creek, and that there was a difference or quarrel between them. As to the extent of the anger displayed by each of them, the evidence is conflicting; but all agree that plaintiff left the building through the front door, closely followed by defendant, both crossing the sidewalk into the street, but to only a few feet beyond the outer edge of the sidewalk, and the conflict was immediately entered upon. Just which one made the first attack may be in some doubt, as each one places the blame upon the other. It is claimed by plaintiff that defendant made the first attack and struck him in the forehead with some deadly instrument by which the wound was inflicted, while defendant claims he did not make the attack, but acted solely in the defensive, using only his fist, and by which the wound complained of could not have been inflicted. When we consider these contentions we can see no objection to the instruction complained of as being to defendant's prejudice. If it is true, as claimed by plaintiff, that defendant sought or invited the combat, and made use of a dangerous instrument by which the injury was inflicted, or that he created the occasion in order to inflict it, or did intentionally inflict it, the instructions cannot be said to be misleading, or to mistake the law. They properly left the whole question for the consideration of the jury under "all the facts and circumstances in evidence" before them.

The next instruction of which complaint is made is No. 11, and is as follows: "You are instructed that, if you believe from the evidence that plaintiff and defendant voluntarily and by agreement entered into a fight, still I charge you that such agreement, if made, was unlawful, for the reason that such agreement, if made, would be

in violation of the laws of the state and void, and such agreement, if made, would not be any defense to this action." This instruction was given as applicable to the contention that the fight, or combat, was entered into voluntarily and by mutual agreement, and that the unsuccessful party to the strife could not transfer his cause from the street to the courts and recover damages for whatever injury he might sustain by reason of the prowess or activity of his adversary. At the time of the argument of the case at the bar of this court, the writer was of the opinion that the giving of the instruction might have been erroneous, but more mature reflection and an examination of the authorities have led to a different conclusion. It is true that an instruction of this kind would be condemned by some reputable authorities, among which are *Galbraith v. Fleming*, 60 Mich. 403, 27 N. W. 581, and *Smith v. Simon*, 69 Mich. 481, 37 N. W. 548; but it is quite clear that the great weight of authority is the other way, and that the recognized rule is that, where two parties fight voluntarily, either party may recover from the other the actual damages suffered, and the consent of the plaintiff to engage in the combat will not bar his suit to recover. In jurisdictions where punitive damages are allowed, the consent will prevent the allowance of such damages, but will not prevent recovery for the actual loss or damage.

In referring to the rule that one cannot recover for an injury to the infliction of which he has consented, the supreme court of Ohio, speaking through Judge Minshall in *Barholt v. Wright*, 45 Ohio St. 179, 4 Am. St. Rep. 535, 12 N. E. 186, says: "But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages. . . . This, however, is the full extent to which the cases have gone,"—citing cases. In *Grotton v. Glidden*, 84 Me. 589, 30 Am. St. Rep. 413, 24 Atl. 1008, it is said: "The evidence satisfies us that plaintiff's injuries

were received while he and the defendant were engaged in a voluntary fight. The defendant contends that he acted only in self-defense, but the evidence satisfies us that the fight was voluntary on the part of both parties. This brings us to the question whether, if two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive. We think he can. It seems to be settled law that each may maintain an action against the other. It is familiar law that each may be punished criminally, and it seems to be equally well settled that, by the rules of the common law, each may have an action against the other and recover full damages for all the injuries he received. The fact that the fight was voluntary is admissible in evidence, as are many other facts, to keep down the amount of the punitive damages, but not to reduce the actual damages,"—followed by citations and extracts from a number of cases. The rule is also recognized and stated in *Wiley v. Carpenter*, 64 Vt. 212, 23 Atl. 630, annotated in 15 L.R.A. 853; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538, 18 N. W. 473; *McNeill v. Mullin*, 70 Kan. 634, 79 Pac. 168; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Jones v. Gale*, 22 Mo. App. 637; *Bell v. Hansley*, 48 N. C. (3 Jones, L.) 131. See, also, 1 Cooley, Torts, 3d ed. 282, and 3 Cyc. Law & Proc. p. 1070. In *McNatt v. McRae*, 117 Ga. 898, 45 S. E. 248, which was an action for an assault and battery, it was held that cross actions in favor of each party against the other may arise out of the same affray, and such claims for damages may be presented in separate suits, or in a petition by one and a plea of set-off by the other.

We therefore find no error in the instructions complained of.

2. It is insisted that the court erred in permitting a hat which plaintiff claims to have worn at the time of the encounter to be put in evidence. It is said that the hat introduced had a hole or rent at or about the point where plaintiff was wounded, that the hat was on his head at the time, and it was claimed that the break or rent in the hat showed that it could not have been made with the fist of defendant, and from this it was argued that some heavy and dangerous instrument was used by defendant in striking the blow. The claim is that there was not sufficient preliminary proof of the identity of the hat, or that it was presented in the same condition as when found, to permit its submission to the jury. The hat introduced was shown to be the property of plaintiff and upon his head at the time of the encounter, that it was picked up at the place where plaintiff had fallen

len, and had been preserved in its present condition from that time to the time of its introduction. We can detect no error in the action of the court in that behalf.

3. The next contention is upon the ground of misconduct of the jury with reference to the hat above alluded to. From the evidence submitted upon the hearing of the motion for a new trial it appears: That, when the jury retired from the court room for the consideration of their verdict, one of the jurors, presumably by mistake and inadvertence, picked up the hat in question and carried it to the jury room, where it remained until the forenoon of the next day, when it was returned to the court room by a bailiff; that practically no attention was paid to it in the jury room; that it attracted little or no attention while there; that it had no influence on the verdict of the jurors; and that during a part of the time it was upon the table, around which the jurors were gathered, and was used as a ballot box into which the jurors placed their ballots when voting. There is no suggestion that the removal of the hat to the jury room by the juror who took it there was with any evil or corrupt intent, or that it was there used for any improper purpose, or, indeed, any purpose which could influence the deliberations of the jury, or have any effect upon the result thereof. That the taking of the hat to the jury room was an irregularity is perhaps true, and would not have occurred had the attention of the court, counsel, or juror been called to the fact; but, as the act was an innocent mistake, without wrongful intention, and it is shown beyond question that no use was made of the hat by the jury which could in any way affect or influence the minds of the jurors or work any injury to defendant, we must hold that it was without prejudice to him, and affords no ground for a reversal of the judgment. Code Civ. Proc. § 145.

Finding no reversible error in the record, it follows that the judgment of the District court must be affirmed, which is done.

LOUISIANA SUPREME COURT.

A. H. HUMPHREY

v.

H. K. MIDKIFF.

OIL CITY IRON WORKS, Limited, Garnishee, Applicant.

(122 La. 939, 48 So. 331.)

Garnishment — interrogatories — traverse.

1. Interrogatories were propounded. They

Headnotes by BREAUX, Ch. J.
20 L.R.A. (N.S.)

were answered by an officer of the corporation. They were not satisfactorily answered. They were successfully traversed.

Same — debt — unearned salary.

2. Although traversed and shown incorrect, it remained that the plaintiff [creditor] was not entitled to the amount claimed.

Unearned salary — liability to garnishment.

3. The writ of garnishment has the effect of seizing the property *in esse* at the date of the service; and it does not reach out and seize unearned salary at the date the order to answer is served.

Garnishment — debt — evidence.

4. The testimony does not show that anything was due by the garnishee at the date the proceedings were instituted and service was made.

Unearned salary — liability to garnishment.

5. Decision cited by plaintiff considered, and distinguished from the case. The salary cannot be reached by anticipation. Work to be performed cannot be drawn upon through process of garnishment.

(January 18, 1909.)

Case Note. — Garnishment of unearned salary.

It is apparently a firmly established rule which denies a creditor the right to attach by garnishment proceedings the unearned salary of his debtor. *Sanborn v. Ward*, 84 N. H. 611, 6 Atl. 27; *Thomas v. Gibbons*, 61 Iowa, 50, 15 N. W. 593; *Central Bank v. Ellis*, 20 Ont. App. Rep. 364.

A garnishee act providing for the attachment of debts "due or thereafter to become due" does not allow the attachment of wages unearned at the time of garnishment. *Thomas v. Gibbons*, supra.

Advances on a building contract not yet earned are not subject to attachment in the hands of the owner. *Excelsior Brick & Stone Co. v. Haines*, 5 Pa. Co. Ct. 631.

And, upon the theory that wages unearned are not attachable, it has been held that the salary of an execution debtor, payable in advance, is not subject to garnishment. *Reinhart v. Empire Soap Co.* 33 Mo. App. 24; *Martin v. Gayle*, 2 Disney (Ohio) 86; *Alexander v. Pollock*, 72 Ala. 137; *Callaghan v. Pocasset Mfg. Co.* 119 Mass. 173; *Van Vleet v. Stratton*, 91 Tenn. 473, 19 S. W. 428; *Scholz v. Scholz* (Mo. App.) 115 S. W. 509.

But *Teeter v. Williams*, 3 B. Mon. 562, 39 Am. Dec. 485, holds that a creditor may garnish whatever may be due his debtor for labor already performed, and whatever may become due upon an existing contract for his future labor; but that the debtor cannot be compelled to work out his contract for the benefit of the attaching creditor.

Where an employee is to be paid in advance on the first day of each month, his salary becomes due and payable on that

APPPLICATION for a writ of certiorari to review a judgment of the Court of Appeals, Third Circuit, affirming a judgment of the District Court for the Parish of Calcasieu in plaintiff's favor in a garnishment proceeding to recover unpaid salary alleged to be due the defendant. Reversed.

The facts are stated in the opinion.

Messrs. Cline & Cline, for applicant:

The salary of an employee, unearned at the time of the issuance of a writ of attachment, is not subject to the writ.

Cross, Pl. p. 3414; Roth, B. & Co. v. Hotard, 31 La. Ann. 195; Bean v. Mississippi Union Bank, 5 Rob. (La.) 336; Marchand v. Bell, 21 La. Ann. 33; Peet v. Whitmore, 16 La. Ann. 48.

Messrs. Gorham & Gorham and Williams & Williams, for respondent:

Property of the debtor coming into the hands of the garnishee after notice of seizure and before the garnishee is discharged is

day; and, if any part remains uncollected, it becomes a debt due from his employer, for which assumpsit may be maintained, and which is subject to garnishment. Gray v. Perry Hardware Co. 111 Ala. 532, 20 So. 368.

Archer v. People's Sav. Bank, 88 Ala. 249, 7 So. 53, also holds that a salary payable weekly in advance is not subject to garnishment unless the privilege of collecting it is waived by the debtor; but that the debt would not become due except in one of the following contingencies: Either the services for the given work must have been performed, or the option to draw the amount in advance must have been asserted by a request to pay.

And so, where the payment of salary or wages is subject to contingencies, nothing becomes due until such time as the condition is removed; and a garnishment process served before that date subjects nothing to the payment of the debt due the creditor. Baltimore & O. R. Co. v. Gallahue, 14 Gratt. 563; Williams v. Androscooggin & K. R. Co. 36 Me. 201, 58 Am. Dec. 742; Daily v. Jordan, 2 Cush. 390; Foster v. Singer, 69 Wis. 392, 2 Am. St. Rep. 745, 34 N. W. 395; Main Bros. v. McInnis, 4 N. W. Terr. 517; Norton v. Soule, 75 Me. 385.

Wages which, by the terms of a contract of employment, are to be paid at such times as the employer determines, and all of which are to be forfeited in case the employee violates the contract, are not attachable by a creditor, even though it had been the practice to make advances or payments on account at regular periods. Potter v. Cain, 117 Mass. 238.

Nor are wages of a judgment debtor, earned subsequent to the service of the writ and before answer, subject to attachment in the hands of the garnishee. Bliss v. Smith, 78 Ill. 359; Van Vleet v. Stratton, supra; Tracy v. Bridges, 2 Miles (Pa.) 352; Bur-20 L.R.A. (N.S.)

affected thereby; and the writ of garnishment covers the debtor's interest in a contract for the year by the terms of which the debtor is to be paid a monthly salary.

Buddig v. Simpson, 33 La. Ann. 375; J. A. Fay & E. Co. v. Ouachita Excelsior Saw & Planing Mills, 50 La. Ann. 205, 23 So. 312, 51 La. Ann. 1708, 26 So. 386.

The garnishee who has been cited in a suit must declare clearly and categorically what sums he may owe to the defendant, whether the same are due or not yet due; and, if he refuses or neglects so to state, judgment should be rendered against him for amount claimed.

Deblanc v. Webb, 5 La. 85; Gaty v. Franklin M. & F. Ins. Co. 12 La. Ann. 273; Warren v. Copp, 48 La. Ann. 810, 19 So. 746.

Breaux, Ch. J., delivered the opinion of the court:

This is a garnishment process, in which

lington & M. River R. Co. v. Thompson, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622.

But it was held in Goodwin v. Claytor, 137 N. C. 224, 67 L.R.A. 209, 107 Am. St. Rep. 479, 49 S. E. 173, that wages owing by a garnishee to the principal debtor at the time of his appearance and answer, although they were unearned at the time of service of summons, may be applied in satisfaction of the claim of the attaching creditor.

Where a contract for services covering a certain period is construed to be an entire contract, a creditor of one rendering services under such a contract may not garnishee his wages during the period, even as to the *pro rata* amount earned at the time of garnishment. Hadley v. Peabody, 13 Gray, 200; Coburn v. Hartford, 38 Conn. 290; Robinson v. Hall, 3 Met. 301.

And this rule has been held to apply even where the employer paid in advance a larger portion of the amount due than the portion of the work done bore to the whole work. Warner v. Perkins, 8 Cush. 518.

A salary payable quarterly, and not due until a future date, is not a debt "due, owing, or accruing," and cannot be attached by garnishment process. Hall v. Pritchett, 47 L. J. Q. B. N. S. 15.

Ely v. Blacker, G. & Co. 112 Ala. 311, 20 So. 570, holds that salary may be attached in the hands of a garnishee as soon as earned, though before it actually becomes due; and that the garnishee cannot relieve himself by making payments before they are actually due.

The right of duly appointed receivers in general creditors' actions, to the unearned salary of the debtors, presents a question which has not been examined in this note. Cases involving the right to attach the wages of seamen during a voyage have also been excluded, the latter class of decisions turning upon the determination of when a voyage is completed, rather than on the question under consideration here.

the plaintiff seeks to hold the garnishee liable for an amount he avers the garnishee owes to the defendant.

The facts are that plaintiff obtained a judgment against the defendant, Midkiff, and, in his proceedings to garnishee the indebtedness he alleged, that he propounded interrogatories to the defendant, "the Oil City Iron Works, Limited," that were answered by Midkiff, secretary of the company, who was defendant in the original suit of Humphrey v. Midkiff, in which a judgment was rendered against the latter for the amount which plaintiff seeks to recover from the garnishee, alleged debtor of Midkiff. He was not a disinterested witness, as he was the judgment debtor.

Among other questions propounded, he was asked to say whether defendant paid him (Midkiff, secretary, and plaintiff's debtor) any salary for his services to the company. He answered briefly enough, "No," to each interrogatory, and denied all indebtedness of the company.

Plaintiff, on rule filed by him, traversed the answers, and, on the trial of this rule, the secretary testified substantially that he was president of the company garnished, that his indebtedness to the company was large, and that, in accordance with an agreement entered into some time before the suit he gave his services to the company and credited his indebtedness to the company at the rate of \$125 per month, less his actual living expenses; that, at the date of the service of the interrogatories, the contract was in force, that he has never received any salary from the company except in accordance with the terms of the contract, that his family expenses were paid directly by the company, and at the end of each month the balance remaining between such expenses and the credited sum of \$125 was credited on his indebtedness to the company.

The alleged agreement was a subterfuge. It had not been entered into with the company.

The testimony on the traverse impeaches the answer originally given by plaintiff in answer to the interrogatories.

The contention of the garnishee is that the company cannot be held liable in a sum larger than the amount due Midkiff, defendant, by the garnishee at the date of the service of the interrogatories, or, at the most, at the date of the answers of the garnishee.

There does not appear to have been due to Midkiff anything at the date of the service. The claim is exclusively for unearned salary.

The district court decided that the garnishee was liable for the amount for which it became indebted to the defendant after the answers had been made to the interrogatories. 20 L.R.A. (N.S.)

tories and up to the time of the trial of the rule to traverse.

The garnishee does not state that the answers were originally proper answers. The garnishee company concedes their incorrectness. The ground of the garnishee is that they cannot be penalized by rendering a judgment for a larger amount than that due at the date of the service of the interrogatories, and that, as nothing was due at that date, plaintiff has no right to a judgment.

It follows the decree of the district court condemned the garnishee to pay a sum which became due after the writ of garnishment had been served. The court of appeals affirmed the judgment. The usual preliminary order was issued by this court on the application for a writ of certiorari and review. The case is now before us on the issues as made up between the parties on the application.

The writ of garnishment in this case was issued in aid of an execution. The purpose of plaintiff in matter of this writ was to seize and apply to the payment of his claim the credits of the debtor in the hands of the garnishee company. The petition, moreover, indicated that it was the intention to garnishee the amount due at the date that the writ was issued. In the petition plaintiff, judgment creditor, alleged that there "*was in possession or under the control of the Oil City Iron Works Company, Limited, rights or credits belonging to the defendant.*" (Italics ours.) This referred to an existing right, and not one to be earned by the plaintiff after the petition and interrogatories had been served. If the plaintiff be held to his allegation, he would not have a right to unearned salary on the face of the papers. As the garnishee's answers were evasive and untrue, it had the effect of driving plaintiff to the conclusion, we imagine, that he was entitled to the amount earned after the interrogatories had been served.

Unearned salary does not come within the grasp of the writ of garnishment, issued to have salary earned retained in the hands of the garnishee for the benefit of the creditor. The right of the creditor who seeks to recover the amount of wages is fixed from the moment the garnishee makes answer to the interrogatories. The writ of garnishment cannot be made to do service in securing salaries not earned at the time of the service. If it could be held otherwise the writ might be held in suspense over the debtor's head for an indefinite time while he is at work. In any event, the garnishment process should not be used as an agent to collect future earnings. That is not the intention of the law.

We have examined the decisions to which

learned counsel for plaintiff invited our attention. In *Buddig v. Simpson*, 33 La. Ann. 377, it was decided that property of the debtor falling into the possession of the garnishee after notice of garnishment is affected by the seizure. In that decision, different from the present case, the property was *in esse* at date of service. In the other case cited the raw material *in esse* belonging to the debtor in the hands of the garnishee was *in esse* at date of service. In the other nishee must account for the price after it had been manufactured. This is an extreme case, and it will not always meet with approval as a precedent, if carried too far.

In the pending case it is different. The right to the property was not *in esse*, and the whole was to be earned by human labor.

Another, and the only other, decision is not, as to the page, correctly cited, and only figures are given. It would add very much to the certainty of finding a decision, if there be error in the reference to pages in writing or printing briefs, if the title of the case were inserted in citing it, as well as the number.

Plaintiff can gain nothing by the contention that he was entitled to have the interrogatories taken *pro confesso*.

Though plaintiff, according to article 264, Code Prac., successfully contradicted the answers of the garnishee, none the less the article interposes its authority, and fixes the amount of the liability of the garnishee to the amount proved against him.

It is otherwise if he fails to answer at all. Then the interrogatories are taken *pro confesso*, and the party becomes liable for the whole amount demanded. *Marks v. Reinberg*, 16 La. Ann. 349.

Here the liability falls within the terms of the first-cited articles of the Code of Practice.

For reasons assigned, and the law and the evidence being in favor of the garnishee, it is ordered, adjudged, and decreed that the judgment of the Court of Appeals be avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that the judgment of the District Court be avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that there be judgment against plaintiff, annulling all proceedings, and that he pay all costs of all courts. The rule nisi is affirmed, and the demand of applicant is granted and made perpetual, at the costs of A. H. Humphrey, plaintiff, respondent.

Petition for rehearing denied February 15, 1909.

20 L.R.A. (N.S.)

OREGON SUPREME COURT.

JOHN H. OLSTON, Admr., etc., of William H. Olston, Deceased, Appt.,

v.
OREGON WATER POWER & RAILWAY COMPANY, Respt.

(— Or. —, 96 Pac. 1095.)

Administrator — power — settling claim.

1. An administrator may settle a claim for the negligent killing of his intestate without authority from the court.

Evidence — release — administrator.

2. It is not error to refuse to exclude from evidence a release of liability for negligently killing a person, signed by his administrator, as such, in an action by him to recover damages for the killing on behalf of the estate, on the theory that it was signed by him in his individual capacity, because it binds only him, his heirs, executors, and administrators, since the question of the intent is for the jury.

Release — seal — attack at law.

3. A release under seal may be attacked at law for fraud in the consideration, where the seal is, by statute, made only *prima facie* evidence of consideration.

Same — fraud — representations.

4. That a release of liability for negligently killing a person was induced by fraud may be found from the fact that the responsible person represented that his attorney, having full knowledge of the circumstances and cause of action, said that there was no liability for the death, and that the person signing the release need not go to the expense of looking up the facts and seeking advice, but might settle the case upon the opinion of such attorney.

(August 11, 1908.)

Case Note. — Right, in an action at law, to attack release for fraud.

The peculiar force which, at an early time, was given instruments under seal, as a rule, has been considerably abated or entirely disregarded in the more modern cases. To a great extent this result has been accomplished by statutory provision taking from instruments under seal the peculiar sanctity formerly attaching to such instruments, and placing them in the same category as unsealed instruments. The distinction between sealed and unsealed instruments has also, to a great extent, been removed by the courts themselves refusing to recognize any distinction, so far, at least, as such instruments were affected by fraud. This inclination to disregard any distinction between the two classes of instruments as affected by fraud has been applied to releases to such an extent that, as a rule, a release under seal is no more invulnerable to an attack on the ground of fraud than an unsealed release; and the question of jurisdiction, whether at law or in equity, is usually

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by Eakin, J.:

Plaintiff alleges, in his complaint, that W. H. Olston, a passenger, was killed on November 4, 1905, by being crowded from an overloaded street car during a panic, occasioned by the explosion of the jack or fuse on the car, and plaintiff, the administrator of his estate, brings this action for damages for his death. Among other defenses set up by defendant is that, on the 8th day of November, 1905, plaintiff, as administrator of the estate of decedent, duly executed to the defendant

a release under a seal for the consideration of \$500 and all funeral expenses of the decedent. Plaintiff, for reply to this answer, denies execution of the release as alleged, but states affirmatively that, being induced thereto by the false, fraudulent, and unlawful misrepresentations made by defendant with intent to defraud and deceive him, he signed the release in his individual capacity, and not as administrator of the estate of decedent, and that thereafter he rescinded said settlement, and tendered the return of all money, checks, and deposits given by the defendant for said release. And for a second and separate reply plaintiff alleges that said settlement is not binding upon the estate of the decedent or his personal representatives, for the reason that the same was made with-

determined without reference to whether it is a sealed or an unsealed instrument.

Thus, in *Wagner v. National L. Ins. Co.* 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395, Judge Taft said that, except for the peculiar sanctity anciently attaching to a sealed writing at common law, which is now disappearing, it is difficult to see how there can be any doubt about the right, in an action at law, to avoid a release by a reply of fraud.

And in *Lyons v. Allen*, 11 App. D. C. 543, in holding that a release by an employee of a claim for personal injuries, though under seal, could be impeached in an action at law for the injuries, on the ground of fraud in misrepresenting its terms to the releasor, who could not read, the court said: "If the release was, as contended by the plaintiff, procured from him by any fraudulent device or deception, and he has not substantially ratified it, he may show the facts in evidence, and avoid the release in an action at law, when set up as a bar to the action. Formerly this right of avoiding a release under seal, on the ground of fraud, in an action at law, when set up as a defense to the action, was generally denied, and the party was referred to a court of equity, in jurisdictions where remedies at common law and equity are separate. But it is now generally held, by a great preponderance of authority, that a release so set up as a defense may be avoided at law."

So, an injured person may defeat the operation of a release under seal, pleaded in bar to an action at law for the injury, by showing fraud in its procurement, although there was no actual misrepresentation as to the character and purport of the instrument executed, as there is no reason for the maintenance of any distinction between the right to attack in an action at law a release under seal and one not under seal. *Rockwell v. Capital Traction Co.* 25 App. D. C. 98, 4 A. & E. Ann. Cas. 648. While it was not claimed in the foregoing case that the instrument was other or different from what it purported to be, yet it appeared that the injured person was greatly enfeebled from pain and opiates at the time of the 20 L.R.A. (N.S.)

execution of the instrument, and that misrepresentations had been made to her husband to induce him to join in a settlement, which also induced him to bring pressure upon plaintiff to consent thereto and join therein.

While in some cases it has been held that the validity of a release under seal could not be challenged in an action at law for fraud going to the consideration, although the release was pleaded as a bar to the action, yet these cases apparently only apply to a sealed release the doctrine that is in many jurisdictions applied to unsealed releases, and nothing appears in them to indicate any intention of applying a different rule from what would have been applied to an unsealed release.

Thus, in *Johnson v. Merry Mount Granite Co.* 53 Fed. 569, the court said that a release under seal, pleaded in bar to an action for personal injuries, could not be impeached in that action for fraud in its procurement by taking advantage of plaintiff's weakened mental condition to secure the release for an inadequate consideration, and added that such a defense had no place in a court of common law, as it involved a state of facts too complex to be properly weighed and passed on by the jury.

And *Waln v. Waln*, 58 N. J. L. 640, 34 Atl. 1068, held that the consideration of a release under seal, releasing a simple-contract indebtedness, could not be controverted in an action at law upon the indebtedness.

Barnes v. Ward, 45 N. C. (Busbee, Eq.) 93, 57 Am. Dec. 590, recognized the doctrine that a release under seal could not be impeached in an action at law, and hence allowed a ward, who was suing her guardian for money in his hands belonging to her, an injunction restraining the guardian from offering in evidence, as a defense to such action, a release obtained by him from the ward by fraud and imposition.

In Illinois, as will be hereafter seen, a distinction is made between releases of unliquidated and releases of liquidated claims. As to the former, a release whether under seal or not can only be attacked for fraud in the execution, there being no distinction in

out an order of the county court authorizing the same. Defendant demurred to the second reply, on the ground that it constitutes no defense to the allegations of the answer, and the demurrer was sustained by the court. On the trial the defendant offered in evidence the said release, which is in words as follows: "Know all men by these presents that I, John H. Olston, administrator of the estate of William H. Olston, deceased, of Portland, in the county of Multnomah, state of Oregon, for and in consideration of the sum of five hundred and no one-hundredths dollars (\$500) and funeral expenses of said deceased, to me in hand paid by the Oregon Water Power & Railway Company, a corporation duly incorporated and organized under the laws of the state of Oregon, the re-

ceipt of which is hereby acknowledged, for myself, my heirs, executors, and administrators, hereby release and forever discharge the said Oregon Water Power & Railway Company, its successors and assigns, its officers, agents, and employees, of and from all actions, causes of action, suits, controversies, claims, damages, and demands of every name and nature, for and by reason of any matter, things, or thing from the beginning of the world to this 8th day of November, 1905, and especially from all claims, damages, and demands, accrued or hereafter to accrue, arising out of an accident or injury resulting in the death of said deceased, occurring by virtue of a panic resulting from a flash occasioned by the blowing out of the jack or fuse on car No. 32 of

this respect between releases under seal and releases not under seal. But this doctrine does not apply to liquidated claims. A release not under seal of such a claim is not a bar to the action, while a release under seal of a liquidated claim can only be impeached in an action at law for fraud in its execution.

The serious question with reference to the right to attack releases in an action at law for fraud is not whether the release is under seal, but whether the fraud was inherent in the execution of the instrument, or related to collateral matters to secure its execution. In determining this question the fact as to whether the release in question was or was not under seal seems usually to have been treated as of no importance. Hence, in treating herein, the question of the right to attack a release for fraud in an action at law, to which it is pleaded as a bar, no particular distinction will be made between sealed and unsealed releases, although, where it clearly appears that the release in question was a sealed instrument, mention will be made of that fact.

At common law, the doctrine was at an early time enunciated that written instruments, and particularly instruments under seal, could not be attacked or impeached in an action at law for fraud in consideration. The reason advanced for this doctrine was that, in setting aside or rescinding a contract, equity could better impose such terms as would be just and equitable between the parties as a condition to granting the relief asked; and while, as a general thing, this reason would hardly apply, at the present time, to releases, whether under seal or not, yet this early doctrine has greatly influenced the courts of this country in passing upon the right to impeach a release for fraud in an action to which it is pleaded as a bar, and in many jurisdictions a distinction is recognized, even as to releases not under seal, between the right to attack a release for fraud in its execution—that is, where it is obtained by some trick or device, with no intention or understanding on the part of the releasor of executing such an instrument—and fraud in the consideration. In these

jurisdictions it is held that fraud in the execution renders the instrument absolutely void, and that such an instrument is not a bar to an action relating to the subject-matter which it purports to release. Hence, such fraud may be shown in an action at law wherein the release is set up as a bar to the action. But fraud relating to the consideration, it is said, will only render the instrument voidable; and it can only be avoided by a direct proceeding in equity to rescind. Hence, such fraud can only be availed of to impeach a release by a direct proceeding in equity for that purpose.

Thus it has been said that if, through some fraud, a person was deceived into signing a release other and different from what he intended to sign, the fraud may be shown under a replication of *non est factum*. If, however, the facts show that the fraud and imposition related to the party's rights, by which he was induced to extinguish a valuable claim in consideration of the payment of a trifling sum, his remedy is by a direct proceeding in equity to set aside the release. *Shampeon v. Connecticut River Lumber Co.* 42 Fed. 760.

Perry v. M. O'Neil & Co. 78 Ohip St. 200, 85 N. E. 41, also recognizes the distinction between fraud in the execution of a release and fraud in securing execution, and it is said that where there is fraud in the execution of the instrument, such as misreading it, or the surreptitious substitution of one paper for another, or obtaining by some other trick or device a release which the injured person did not intend to give, an action may be maintained for the injury without first procuring a rescission of the release. In such a case the court said the release was void and could be ignored in the petition; and, if pleaded as a bar to the action in the answer, the facts showing the invalidity could be pleaded in reply; but that, if the release was not void, but only voidable, to maintain an action for the injury released, the rescission or cancellation of the release must first be obtained.

The only fraud which may be availed of in an action at law to avoid a formally executed release not under seal, of all claims

said company, in which panic of the passengers on said car, the deceased was thrown from said car to the curb at the side of the street, suffering an injury to his head resulting in his death, which accident occurred on said car while north bound at the corner of East Eleventh and Caruthers streets in the city of Portland, Oregon, on November 4, 1905, at 7:40 o'clock P. M. In witness whereof, I have hereunto set my hand and seal the day and date last above written. Executed in the presence of: Charles Olston, G. F. Martin, John H. Olston, as administrator of the estate of William H. Olston, deceased. [Seal.] Plaintiff thereupon offered to prove that said release was procured by fraudulent misrepresentations of the defendant, by which he was deceived

and misled, and induced to sign the same, to which offer defendant objected, on the ground that "the release which was introduced in testimony here cannot be contradicted in a proceeding at law for any reason other than some matter which affected the execution of it, and for the second reason that the equity court, being the proper court for a suit for cancelation for any matters which do not concern the execution of the paper itself, and that any representations which preceded it which might bring about the execution of it are only matters which can be heard in a court of equity, and consequently all these statements are immaterial." The court sustained the objection and excluded evidence of all representations or statements made in behalf of the defendant,

under a life insurance policy, is misrepresentation, deceit, or trickery, practised to induce the execution of a release which the signer never intended to execute, and upon which the minds of the contracting parties never met. Misrepresentations of fact to procure the execution of a release as actually made can only be availed of in equity. *Pacific Mut. L. Ins. Co. v. Webb*, 84 C. C. A. 603, 157 Fed. 155 (misrepresentations as to liability).

The distinction between fraud in consideration and fraud inherent in the execution of a release was also recognized in *Kosztelnik v. Bethlehem Iron Co.* 91 Fed. 606, wherein it was held that a release for personal injuries, pleaded in bar to an action therefor, could be impeached for fraud in misrepresenting its contents, which were written in English, to the injured party, who was unable to read that language. The court said that while on this ground the release could be attacked in the action for the injuries, it could not, however, be attacked in such an action for fraud in procuring its execution.

This distinction was also recognized in *Connor v. Dundee Chemical Works*, 50 N. J. L. 257, 12 Atl. 713, wherein the court said that a release pleaded in bar to an action for damages for the wrongful death of another could not be attacked on the mere allegation of fraud, but, to avail, it must also be alleged that the fraud related to the execution; since, if it related to the consideration, it would not be a shield against the release at the trial.

Also in *Hill v. Northern P. R. Co.* 104 Fed. 754, affirmed on other grounds in 51 C. C. A. 544, 113 Fed. 914, wherein a release of a claim for personal injuries was alleged to have been obtained by fraudulent representations as to the liability of the defendant, and it was held that, to attack a release for such fraud, an independent suit in equity must be resorted to; and the fact that the action was originally commenced in the state court, from which it was transferred by the defendant, a nonresident, to the Federal court, did not alter the rule, although in the state court, wherein the action was 20 L.R.A. (N.S.)

originally planted, the release could have been attacked in the original action for the fraud alleged.

To the same effect is *Vandervelden v. Chicago & N. W. R. Co.* 61 Fed. 54, as to the right to attack a release not under seal, pleaded in bar to an action at law for personal injuries, for fraud based on misrepresentations by the defendant's physician as to the extent of the plaintiff's injuries.

In Illinois, where the distinction between courts of law and equity is still maintained, it is held that there are two kinds of fraud for which a release of a claim for personal injuries may be impeached. One is where the execution of such an instrument is induced by misrepresentation or fraudulent representations as to collateral matters, or as to the nature and value of the consideration. In such cases the instrument is executed with a knowledge of its nature and character, and the fraud, if any, is as to facts outside of the instrument itself. To impeach such release, a resort must be had to a court of equity. The other kind of fraud for which such a release may be impeached is fraud which inheres in the execution of the instrument. That is to say, where the signer of the instrument is deceived into signing it by the belief that he is signing something other than that which he really does sign. A release procured through fraud of this character may be shown in an action at law for the injury if the release is pleaded as a bar to the action. *Illinois C. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245; *Chicago Union Traction Co. v. Mommson*, 107 Ill. App. 353; *Mattoon Gaslight & Coke Co. v. Dolan*, 111 Ill. App. 333; *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120; *National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492; *Papke v. G. H. Hammond Co.* 192 Ill. 631, 61 N. E. 910; *Chicago City R. Co. v. Uhter*, 212 Ill. 174, 72 N. E. 195; *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341, 72 N. E. 1060; *Hartley v. Chicago & A. R. Co.* 214 Ill. 78, 73 N. E. 398.

To authorize the impeachment of such a release in an action at law, the fraud must

leading up to the settlement, and, at the close of the trial, the court, upon the motion of defendant, directed a verdict for defendant for the reason that the evidence was insufficient to be submitted to the jury, and judgment was rendered for the defendant upon the verdict, and plaintiff appeals.

Mr. J. L. Taugher for appellant.

Mr. William T. Muir, for respondent:

The representations made by the defendant preceding the execution of the release are not admissible as evidence.

George v. Tate, 102 U. S. 584, 26 L. ed. 232; Fire Asso. v. Allesina, 45 Or. 154, 77 Pac. 123; Thomas v. Ruddell, 66 Ind. 326; Hill v. Northern P. R. Co. 104 Fed. 754; Houston v. Williams, 3 Blackf. 170, 25 Am. Dec. 84; Vandervelden v. Chicago & N. W.

R. Co. 61 Fed. 54; Saunders v. Stotts, 6 Ohio, 380, 27 Am. Dec. 263; Hartley v. Chicago & A. R. Co. 214 Ill. 78, 73 N. E. 398; Hill v. Northern P. R. Co. 51 C. C. A. 544, 113 Fed. 914; Brown v. Rice, 26 Gratt. 467; Shampau v. Connecticut River Lumber Co. 42 Fed. 760; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Ætna Ins. Co. v. Reed, 33 Ohio St. 283; Denver & R. G. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. 501; Nelson v. Minneapolis Street R. Co. 61 Minn. 167, 63 N. W. 486; Doty v. Chicago, St. P. & K. C. R. Co. 49 Minn. 499, 52 N. W. 135; Chicago & N. W. R. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913; Gant v. Hunsucker, 34 N. C. (12 Ired. L.) 254, 55 Am. Dec. 408.

A denial of liability is no fraud.

Rose v. West Philadelphia Pass. R. Co.

relate to the execution of the instrument itself, which is procured by some trick, device, or other fraudulent means, such as representations that the release merely covered time or wages lost (Illinois C. R. Co. v. Welch, *supra*; Whitney & S. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242); or that the paper signed was a receipt to show the officers of the company as evidence of money expended in behalf of the injured party (Eagle Packet Co. v. Defries; Chicago, R. I. & P. R. Co. v. Lewis; and National Syrup Co. v. Carlson, *supra*); or that it was a receipt for money paid the injured party to cover a doctor's bill occasioned by the injuries (Chicago City R. Co. v. Uhter, *supra*); or that the company wanted to have the injured person's name (Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103).

In the foregoing cases, either because of the physical condition of the injured person at the time of the execution of the instrument, or because of illiteracy, the nature of the instrument signed was not known, and the representation of the wrongdoer or its agent was relied upon as to the nature of the instrument.

But in Hartley v. Chicago & A. R. Co. *supra*, where an injured employee in an action at law attempted to impeach a release given by him to the company, on the ground that he understood that it was simply to cover time lost because of the injury, and it appeared that, while he could read and write, he did not read the paper before signing it, but, instead, relied upon representations of the general manager and attorney of his employer as to its purport, and where the release was in printed form containing at the top the words "Release of all claims," in capital letters of large type, the court said that the evidence did not tend to show that the execution of the release was fraudulently obtained, and that therefore the release was a bar to the action.

Where the fraud relates to consideration or misrepresentations as to the extent of the injury, it is not such a fraud as will 20 L.R.A. (N.S.)

permit the impeachment of a release of a claim for personal injuries in an action at law. Papke v. G. H. Hammond Co. and Mattoon Gaslight & Coke Co. v. Dolan, *supra*.

With the exception of Illinois C. R. Co. v. Welch and Papke v. G. H. Hammond Co. *supra*, it does not appear that any of the releases in the foregoing cases were under seal; and as to actions for damages for personal injuries, the foregoing doctrine apparently applies without reference to whether the release was under seal, as the damages are unliquidated and indefinite in amount; but where a claim is liquidated and the amount due thereon is definite, a distinction is made between a release under seal and one not under seal as to its impeachment for fraud in an action at law.

Thus, a release not under seal of the amount due on an insurance policy, executed by the beneficiary upon the receipt of a portion only of the amount due, is not a bar to an action on the policy for the balance remaining unpaid. Farmers' & M. Life Asso. v. Caine, 224 Ill. 599, 79 N. E. 956.

But in such a case, where the release is under seal, it can only be impeached in an action at law for fraud inherent in its execution; and if the execution was procured through misrepresentations as to collateral matters, a resort must first be had to a court of equity to reform or set it aside before an action at law can be maintained on the policy. Jackson v. Security Mut. L. Ins. Co. 233 Ill. 161, 84 N. E. 198.

The doctrine that fraud in execution may be availed of to attack a release in an action to which it is pleaded as a bar, while fraud in the consideration can only be shown to affect the validity of the release by a direct proceeding in equity, was also recognized and applied by the Missouri courts for some time. Thus, in Homuth v. Metropolitan Street R. Co. 129 Mo. 629, 31 S. W. 903, it was said that the issues raised by a reply impeaching the integrity of a release of damages for personal injuries,

9 Sadler (Pa.) 313, 12 Atl. 78; Chicago & N. W. R. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 915; Hartley v. Chicago & A. R. Co. supra.

Evidence of fraud, to set aside a release, must be clear, unequivocal, and convincing.

Pederson v. Seattle Consol. Street R. Co. 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; Mateer v. Missouri P. R. Co. 105 Mo. 320, 16 S. W. 839; The Annie L. Mulford, 107 Fed. 525; Denver & R. G. R. Co. v. Sullivan, supra; Pennsylvania R. Co. v. Shay, 82 Pa. 198; East St. Louis Packing & Provision Co. v. Hightower, 9 Ill. App. 297.

An administrator may compromise disputed claims in favor of the estate which he represents.

Weider v. Osborn, 20 Or. 310, 25 Pac.

on the ground of fraud in the execution, where such release was pleaded as a bar to an action for the injuries, could be tried in such action without a resort to equity; but where the signatures were admitted and the contents were read and its purport understood, courts of law would regard it as binding between the parties. To get rid of such instrument on the ground of fraud inducing its execution by the misrepresentation by defendant's physician of the extent of plaintiff's injuries, resort must be had to a court of equity.

It was also recognized in Girard v. St. Louis Car Wheel Co. 123 Mo. 358, 25 L.R.A. 514, 45 Am. St. Rep. 556, 27 S. W. 648, wherein it was held that a release by an employee of a claim for personal injuries, where, at the time of its execution, he was mentally incompetent to contract, was absolutely void, and could be impeached in an action at law when offered as a bar to an action for the injuries.

It was also applied in Och v. Missouri, K. & T. R. Co. 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962. There was a difference of opinion among the judges in this case as to whether the release in question—which was of a claim for personal injuries received by a passenger on a railroad—was submitted to the jury on the theory that there was fraud in its inception because of the mental condition of the injured person at the time of the execution, together with fraudulent representations by an agent of the company as to the contents of the release, or whether it was fraud as to a collateral matter, being misrepresentation by the company's physician as to the extent of the injury. It was, however, agreed, that the question as to fraud in the inception of the instrument was properly raised in the action at law, and that any fraud in procuring the execution could not be relied upon to impeach it.

The same distinction was also made in Dwyer v. Wabash R. Co. 66 Mo. App. 335, as to a release of a claim for personal injuries.

And the doctrine was also applied in Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205, wherein it was held that a release 20 L.R.A. (N.S.)

715; Parker v. Providence & S. S. B. Co. 17 R. I. 380, 14 L.R.A. 414, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102; Chadbourn v. Chadbourn, 9 Allen, 173; Bean v. Farnam, 6 Pick. 269; Chase v. Bradley, 26 Me. 531; Chouteau v. Suydam, 21 N. Y. 179; Wood v. Tunncliffe, 74 N. Y. 38.

Eakin, J., delivered the opinion of the court:

The second reply to the answer, namely, that the administrator cannot settle an unliquidated claim for damages without an order of the county court, involves the effect of our statute upon the common-law powers of the administrator. It is settled by Weider v. Osborn, 20 Or. 307, 25 Pac. 715, that Bellinger & C. Anno. Codes &

of damages for slander, with knowledge on the part of the releasor as to the character of the instrument and its purpose and effect, could not be avoided, when interposed as a bar to an action for the slander, on the ground that its execution was induced by fraudulent representations that the defendant never uttered the slander, and also by undue influence. The court said that, on such grounds, the release could only be attacked by a direct proceeding in equity for that purpose.

But this case was again before that court in 150 Mo. 245, 51 S. W. 668, on an appeal by the defendant from a verdict against him for slander, which had been rendered after the release had been set aside by the court of equity; and in a separate opinion the court said that the former opinion was erroneous under §§ 242 and 252, Rev. Stat. 1889, which, in substance, provide that, when a release is offered as an affirmative defense, the plaintiff may meet it by showing fraud in its procurement. This case may therefore be said to settle the rule in Missouri that a release may be impeached by fraud without reference to whether the fraud was inherent in its execution, or whether it related to collateral matters to procure its execution.

It was followed as authority on this point in Cardwell v. Stuart, 92 Mo. App. 586, as to a release by an heir to an administrator, which was procured by false representations as to the amount of the estate being administered.

It was also followed in Lomax v. Southwest Missouri Electric R. Co. 119 Mo. App. 192, 95 S. W. 945, which, however, held that sufficient evidence of fraud in procuring the release had not been shown.

It is now settled by statute (Rev. Stat. 1899, § 654), that a plea of fraudulent or wrongful procurement of a release pleaded in bar to an action can be set up in plaintiff's reply, and that that issue should be tried by a jury, with and as a part of the whole case, and a general verdict returned. Goodson v. National Masonic Acci. Asso. 91 Mo. App. 339.

In other jurisdictions the rule applied in

Statutes, § 1168, prohibiting the sale of personal property by an administrator except upon an order of the county court or judge thereof, applies only to tangible property, and has no application to choses in action. At common law the executor and administrator has an absolute power of disposal over the whole of the personal effects of decedent (1 Williams. Exrs. & Adms. pp. 485, 545), with full power to compromise or accept any composition or otherwise settle any debt, claim, or thing whatsoever (Id. p. 713), and Bellinger & C. Anno. Codes & Statutes, § 1211, authorizing certain debts to be compounded, applies only to those of insolvent debtors, and does not include the adjustment or settlement of an unliquidated claim for damages

(Washington v. Louisville & N. R. Co. 34 Ill. App. 658, Id. 136 Ill. 49, 26 N. E. 653; Moulton v. Holmes, 57 Cal. 337; Parker v. Providence & S. S. B. Co. 17 R. I. 376, 14 L.R.A. 414, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102). Therefore, as to an unliquidated claim for damages, the powers of an administrator remain in this state as at common law, and he may liquidate and accept settlement of such a claim without special authority from the county court.

Plaintiff objected to the introduction of the release in evidence, for the reason that it is only his individual release, and does not bind the estate. Although it states that "for myself, my heirs, executors, and administrators, hereby release," etc., yet the circumstances under which it was given

OLSTON v. OREGON WATER POWER & R. CO. also prevails and a release may be attacked for fraud, whether relating to the execution or consideration, in any action wherein the release is relied upon. As in the Missouri cases, most of the decisions so holding are influenced by statutory or Code provisions, combining to a greater or less extent legal and equitable remedies. Wagner v. National L. Ins. Co. 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395, while clearly recognizing the distinction still maintained between actions at law and equity by the Federal court, held it proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud was in the execution or in a misrepresentation of material facts inducing the execution. This case involved both fraud in the execution of the surrender of a life insurance policy as well as fraud in its procurement. The decision is by Judge Taft, who apparently gave the matter serious consideration. On this point he said: "The law side of a court of the United States is a court of common law with no equity jurisdiction, except such as the common-law courts of England exercised before the acts of Parliament, which, in terms, gave them certain equitable powers. A close study of the two concurrent systems of law and equity between Lord Mansfield's time and the passage of the act of 1854 (17 & 18 Vict. chap. 125), which, for the first time, gave the courts of law power to entertain equitable pleas and replications, would doubtless show that the more enlightened and liberal course of the chancellor in disregarding forms, and looking to the substance, and in avoiding circuitry of action by settling controversies in one suit, had a direct effect upon the procedure in the common-law courts. Certain it is that early in this century, and perhaps earlier, the common-law courts began to assert what they called an equitable jurisdiction to defeat certain inequitable defenses. The manner of doing this we shall refer to later. By the judicature act of 1873, the courts of law finally obtained full equitable powers. It is not always an easy matter to determine

whether the procedure approved in cases decided in this period of transition is based on common-law or equitable principles. When we consider the American authorities, we are still in greater perplexity, because in some states the distinction between law and equity pleading and practice has been abolished as far as possible; in other states it has been modified; and in others it remains comparatively intact. This much must be said, however: That, although the distinction between law and equity procedure has always been maintained in courts of the United States, it is natural and it is proper that the relaxing of the rigid lines between the two jurisdictions in England and in most of the states of this country should render courts of the United States, sitting as courts of law to-day, less acute than in earlier days to exclude pleas and replications having an equitable flavor, which would have been of doubtful validity in a court of law presided over by Lord Holt or Sir Matthew Hale, or even by Lord Kenyon or Lord Ellenborough. Even courts of common law must partake of the spirit of progress.

"But, whatever the proper rule may have been as to other forms of specialty, the history of the course of the English and American courts in defeating releases which would have been set aside in equity justifies the conclusion that there was more liberality in allowing replications to avoid them than in the case of other specialties. The inconvenience of compelling a plaintiff in an action at law, who was met by a plea of release, to resort to an expensive and vexatious proceeding in equity to set it aside for fraud, led courts of law to exercise what has already been alluded to as their equitable jurisdiction to defeat the plea."

So, where a release for personal injuries is obtained by fraud or misrepresentation, it is void, and the question of its validity may be tried in an action for the injuries; and this rule applies to a release obtained by fraud, misrepresentation, and undue influence relating to collateral matters. Busian v. Milwaukee, L. S. & W. R. Co. 58 Wis. 325, 14 N. W. 462. In this case the

show that the payment which it acknowledges was to cover the whole liability of the defendant, not only in his own interests, but in the interest of his mother, brother, and sisters, and that he was appointed administrator of the estate because he could not individually receipt for it. It is a claim in which the individual heirs have no direct interest. The fund is the property of the estate. By *Bellinger & C. Anno. Codes & Statutes*, §§ 379, 381, the heirs have no remedy for damages occasioned by an injury to the person of the decedent. The release is signed by "John H. Olston, as administrator of the estate of William H. Olston, deceased," which shows an intention to bind the estate, especially as it alone was entitled to receive the money. However, if

court remarked that, if the release was obtained by fraud and misrepresentation, it is void, and that question could always be tried in a court of law before the adoption of the Code. Citing 2 Chitty, Pl. 16th Am. ed. 455.

In New York, since the adoption of the Code, all actions relating to the same subject-matter, whether of an equitable or legal character, may be combined. Hence, a release of money loaned may be impeached for fraud in an action to recover the money, and where such an action is pending it must be attacked there, and cannot be attacked in a proceeding in equity for that specific purpose. *Dambman v. Schulting*, 51 How. Pr. 337.

Whether a release of the amount due on an insurance policy was fairly obtained is a question of fact, which may be raised in any action where the release is made the basis of a defense. *Rauen v. Prudential Ins. Co.* 129 Iowa, 725, 106 N. W. 198 (release procured by false representations as to liability).

It was also stated in *Yaple v. New York, O. & W. R. Co.* 57 App. Div. 265, 68 N. Y. Supp. 292, that there was no doubt about the right in an action for personal injuries to impeach a release thereof because of fraud in procuring it.

A release of a claim for personal injuries, procured by misrepresentations as to the extent of the injuries, may be impeached on the trial of an action for the recovery of the injuries. *Fleming v. Brooklyn Heights R. Co.* 95 App. Div. 110, 88 N. Y. Supp. 732.

An injured employee may maintain an action to cancel a release procured by the fraudulent representations of the wrongdoer's physician as to the extent of his injuries, and also recover in the same action damages for the injury. *Galveston, H. & S. A. R. Co. v. Cade* (Tex. Civ. App.) 93 S. W. 124.

A release of a claim for personal injuries, obtained from the injured party by the exercise of undue influence upon him when in a feeble and nervous condition, caused by the injuries, and also by the use of false and fraudulent representations as to the

the intention is ambiguous or doubtful, it is a question of fact for the jury to determine, and the court was not in error in refusing to exclude the release on that ground.

Defendant contends that the release cannot be attacked at law for fraud in procuring the settlement upon which the release was executed. The general rule is that courts of equity and courts of law have concurrent jurisdiction of fraud. There are exceptions to this rule, however, based upon whether or not there is a remedy at law, and whether it is adequate. If there is a remedy at law, the fraud may be established in that jurisdiction; but, if that remedy is not adequate, resort may be had to a court of equity. It is said that, where

extent of the injuries, may be impeached in an action at law for the injuries, without first proceeding in equity to have the release set aside or rescinded, where, by the Code, legal and equitable rights are administered in a single court and in one form of proceeding. *Missouri P. R. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066.

In North Carolina, under the Code, a defendant to an action for damages for personal injuries may allege a release as a defense, and the plaintiff, by reply, may attack its validity on the ground of fraud in its procurement, going to the consideration. *Bean v. Western North Carolina R. Co.* 107 N. C. 731, 12 S. E. 600.

In Tennessee, a release of a claim for personal injuries, pleaded in bar to an action at law for damages therefor, may be impeached for fraud or misrepresentation either in its execution or in the inducement to the execution. *Brundige v. Nashville, C. & St. L. R. Co.* 112 Tenn. 526, 79 S. W. 1027 (action by employee; fraud in execution and consideration); *Memphis Street R. Co. v. Giardino*, 116 Tenn. 368, 92 S. W. 855, 8 A. & E. Ann. Cas. 176 (fraud based on mental incapacity and inadequate consideration).

A release of a claim for personal injuries may also be attacked in England for fraud in the consideration as well as in the execution. Such was the holding as to a release of a claim for personal injuries not under seal, in *Hirschfeld v. London, B. & S. C. R. Co.* L. R. 2 Q. B. Div. 1, where, in an action for personal injuries, a reply to an answer setting up a release as a bar to the action was sustained on demurrer; although, as a ground for impeaching the release, it alleged fraud by the defendant's physician in obtaining it by falsely representing that the plaintiff's injuries were slight and of a temporary character, and that, if they turned out to be more serious, the release, which was absolute in its terms, would not affect his right to recover. In disposing of the question, Mellor, Judge, said: "I think that there is nothing in law, and certainly nothing in equity, which says that a man who has been induced to execute a deed in

a court of law can get hold of the whole matter, it is as competent to try questions of fraud as a court of equity. *Rust v. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172. The law relieves against fraud negatively by preventing either a recovery or a defense founded upon an instrument induced by fraud. *Lamborn v. Watson*, 6 Harr. & J. 252, 255, 14 Am. Dec. 275. Fraud may be pleaded at law when the relief sought in a particular case is such as can be effected by a judgment. *Ankrim v. Woodworth*, Harr. Ch. (Mich.) 355; *Wheeler v. Clinton Canal Bank*, Harr. Ch. (Mich.) 449; *Wing v. Sherrer*, 77 Ill. 200; *Slack v. McLagan*, 15 Ill. 242; 14 Am. & Eng. Enc. Law, pp. 172, 174. At common law there is an exception to this rule in the case of sealed

instruments; but it is general as to all contracts not under seal. 1 *Bigelow*, Fr. 174, 175; *Sanford v. Royal Ins. Co.* 11 Wash. 653, 40 Pac. 609; *East Tennessee, V. & G. R. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350; *Hoitt v. Holcomb*, 23 N. H. 535. A release at common law is required to be under seal, and therefore is a specialty, in which a consideration is conclusively presumed. *Leake*, Contr. 653. And therefore it cannot be questioned in a law action except for fraud or deceit affecting its execution,—that is, upon a plea of *non est factum*,—but, for fraudulent representations inducing the settlement,—that is, affecting the consideration,—equity alone can relieve. *Bigelow*, Fr. 326, says: "At common law, it has generally been held incompetent to a de-

consequence of a misrepresentation as to its effect has no defense." And *Lush*, Judge, remarked that, while he did not think it necessary to determine that question, yet, if it were before him, he would not have the least hesitation in holding that fraud in the procurement of a release, by misrepresenting its effect, constituted a defense thereto.

And in *Stewart v. Great Western R. Co.* 2 De G. J. & S. 319, on a bill to restrain the defendant railway company from setting up a plea of release of a claim for personal injuries in an action at law for such injuries, on the ground of fraud in its procurement by falsely representing the extent of the injuries, in granting relief the Lord Chancellor remarked that, even in the action at law, the company would be held responsible for the fraudulent conduct of their agent in procuring the release.

A release of a note may, in an action on the note, to which it is pleaded as a bar, be shown to have been made to enable the maker to procure the dismissal of proceedings against him in bankruptcy, with an express understanding with the holder that the note was not to be thereby released, but was later to be paid in full. *Scott v. Scott*, 105 Ind. 584, 5 N. E. 397.

Where a release of money due under an insurance policy was procured by fraudulent representations as to the liability of the company, and the execution of the instrument was procured late at night by the agent of the company agreeing to bring the papers back in the morning and arrange a settlement satisfactory to the insured, the court, in *Sanford v. Royal Ins. Co.* 11 Wash. 653, 40 Pac. 609, said that it would best harmonize with the spirit of the Code system to allow the validity of the release to be attacked in the action on the policy, in bar of which the release had been pleaded.

In the following cases the question of fraud in obtaining a release was held a proper one to be submitted to the jury along with other questions in the action with reference to which the release was pleaded as a bar, although the question here under consideration was apparently not considered: *O'Brien v. Chicago, M. & St. P. R. Co.* 89 20 L.R.A. (N.S.)

Iowa, 644, 57 N. W. 425; *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Butler v. Richmond & D. R. Co.* 88 Ga. 594, 15 S. E. 668 (fraud in execution); *Wells v. Morrison*, 91 Ind. 51; *O'Neil v. Lake Superior Iron Co.* 63 Mich. 690, 30 N. W. 688; *Burik v. Dundee Woolen Co.* 66 N. J. L. 420, 49 Atl. 442 (fraud in execution); *Ettinger v. Jones*, 139 Pa. 218, 21 Atl. 137 (release under seal); *Bjorklund v. Seattle Electric Co.* 35 Wash. 439, 77 Pac. 727, 1 A. & E. Ann. Cas. 443; *Ball v. McGeoch*, 81 Wis. 160, 51 N. W. 443; *Sheanon v. Pacific Mut. L. Ins. Co.* 83 Wis. 507, 53 N. W. 878.

In view of the doctrine that fraud in execution is available in an action at law to impeach a release pleaded in bar thereto, while fraud in the consideration is not, it becomes important in many cases to distinguish between the two kinds of fraud. The following cases are therefore important as illustrating fraud in execution, sufficient to impeach a release in the action at law to which it is pleaded as a bar:

Thus, a release of a claim for personal injuries by an injured person at a time when he was mentally incapacitated from contracting is not a bar to an action for injuries. *Gibson v. Western New York & P. R. Co.* 164 Pa. 142, 44 Am. St. Rep. 586, 30 Atl. 308; *Julius v. Pittsburg, A. & M. Traction Co.* 184 Pa. 19, 39 Atl. 141; *Alabama & V. R. Co. v. Jones*, 73 Miss. 110, 55 Am. St. Rep. 488, 19 So. 105.

So, where an injured person, illiterate and unable to read or write, except to sign her name, is induced to sign a release of all damages occasioned by the injury by the fraudulent representations that it is a mere receipt for servant hire, and it also appears that, at the time, she was mentally and physically incapacitated from acting in the matter, the receipt may be impeached in an action at law for the injuries. *Perry v. M. O'Neil & Co.* 78 Ohio St. 200, 85 N. E. 41.

And a release of a claim for personal injuries, from an illiterate employee, procured by fraudulently misrepresenting the contents, is utterly void, and is no defense to an action at law for the injuries. *Hayes v.*

fendant sued at law on a specialty to plea that the instrument was obtained by false representations. Such defense must be made in equity; but it is otherwise of the execution of the instrument, as where the bond is misread to the obligor, or where his signature is obtained to an instrument which he did not intend to sign. In such cases, fraud may be alleged at law. The ground of this rule seems to be that to admit evidence of fraud not relating to the execution of the deed would be to allow the obligor to disprove the presumption of consideration, which presumption, in the case of a specialty, is an absolute one, not to be rebutted. Some courts, however, admit the plea of fraud as to the consideration, as well as to the execution of the instrument; and in other courts it is allowed by statute." The court, in *Hartshorn v. Day*, 19

How. 211, 222, 15 L. ed. 605, 611, which is the leading case on this question, says: "The general rule is that, in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the states where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can

Atlanta & C. Air Line R. Co. 143 N. C. 125, 55 S. E. 437, 10 A. & E. Ann. Cas. 737.

So, a release in full for injuries, if executed by the injured party with the belief that it was only a receipt for wages, which belief was induced by the fraud of the releasee, is not a bar to an action at law for the injuries. *Cleary v. Municipal Electric Light Co.* 47 N. Y. S. R. 172, 19 N. Y. Supp. 951, affirmed without opinion in 139 N. Y. 643, 35 N. E. 206.

To the same effect are *Shaw v. Webber*, 79 Hun, 307, 29 N. Y. Supp. 437, affirmed without opinion in 151 N. Y. 655, 46 N. E. 1151; *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170, 3 N. E. 65 (mental incapacity to execute release).

And it has been held that a release of a claim for personal injuries may be attacked in an action to recover for injuries, on the ground that, when it was signed, the signer did not know that it was a release, and was not informed of that fact, and that she was induced to sign it by false representations as to the nature and extent of her injuries. *O'Meara v. Brooklyn City R. Co.* 16 App. Div. 204, 44 N. Y. Supp. 721.

An action may be maintained at law for personal injuries, notwithstanding the written release, if it was obtained by fraudulent representations that the instrument signed was merely a receipt for money paid for lost time. Under such circumstances it is unnecessary first to sue in equity to cancel the release. *St. Louis, I. M. & S. R. Co. v. Smith*, 82 Ark. 105, 100 S. W. 884.

And a release by an employee of a claim for personal injuries, induced by false representations as to the extent of his injuries, executed under the belief that it was for his wages and expenses while recovering from the injuries, constitutes no defense to an action for the injuries. *St. Louis, I. M. & S. R. Co. v. Hambright*, 87 Ark. 614, 113 S. W. 803.

So, an employee who signs an alleged discharge or acquittance for damages because of his injuries, without knowing its contents, and without intending to sign such

an instrument, is not bound by it, although it is pleaded as a bar to an action for the injuries. *Schultz v. Chicago & N. W. R. Co.* 44 Wis. 638.

While not discussing the question of jurisdiction in *Union P. R. Co. v. Harris*, 158 U. S. 328, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, the question whether a release of a claim for personal injuries was obtained when the injured person was so mentally enfeebled by opiates and the shock and pain of the injuries as to be unable to enter into contractual relations was held to have been properly submitted to the jury, as affecting the validity of the release as a bar to an action for the injuries.

To the same effect also, as to the question of fraud in procuring the release, based in part upon the physical condition of the injured person and also upon false representations made to him as to the nature of the release, is *Bliss v. New York C. & H. R. R. Co.* 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65.

To same effect, also, is *Blackburn v. Boston & N. Street R. Co.* (Mass.) 87 N. E. 579 (representation that releasor's attorney advised its execution).

A release not under seal, of damages for fraud and deceit in the sale of real estate, if regarded as a mere declaration or admission, is subject to explanation the same as a receipt, without proof of fraud or mistake; and, if considered as a release or agreement, it is subject to impeachment for mutual mistake, fraud, or any misrepresentation by which the party was induced to sign it without knowing its contents. *Croekie v. Hirshfield*, 50 App. Div. 87, 63 N. Y. Supp. 365. To the same effect is *Creshkoff v. Schwartz*, 53 Misc. 576, 103 N. Y. Supp. 782, as to a release of a claim for damages for fraud and deceit in the sale of steamship tickets, where the release was procured from one unfamiliar with the English language, by fraudulently representing that it was an agreement, in consideration of a note of even date, not to sue for a stated period.

be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed. Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practised upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence." To the same effect are: *George v. Tate*, 102 U. S. 564, 26 L. ed. 232; *Papke v. G. H. Hammond Co.* 192 Ill. 631, 61 N. E. 910; *McArthur v. Johnson*, 61 N. C. (Phill. L.) 317, 93 Am. Dec. 593; *Saunders v. Stotts*, 6 Ohio, 380, 27 Am. Dec. 263; *Truman v. Lore*, 14 Ohio St. 144, 155; *State ex rel. Jones v. Jones*, 131 Mo. 194, 33 S. W. 23; *Vandervelden v. Chicago & N. W. R. Co.* (C. C.) 61 Fed. 54; *Wyche v. Macklin*, 2 Rand. (Va.) 426; *Phillips v. Potter*, 7 R. I. 289, 82 Am. Dec. 598; *Hartley v. Chicago & A. R. Co.* 214 Ill. 78, 73 N. E. 398. In the case of *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66, the release was a sealed instrument, and the proceeding was in equity to cancel it. The lower court dismissed the complaint because there was a remedy at law, and the decree was reversed because the release, being under seal, could not be attacked at law for fraud; the court saying: "If the release had in fact been procured by fraud, he could have shown this at law; the fact that the release was under seal out of the way." *Hill v. Northern P. R. Co.* 51 C. C. A. 544, 113 Fed. 914, and *Papke v. G. H. Hammond Co.* supra, also make the distinction that it is the seal that excludes the proof of fraud at law, citing these United States cases. Judge Putnam, in *Johnson v. Merry Mount Granite Co.* (C. C.) 53 Fed. 569, 572, in holding that the seal is the distinguishing feature that precludes proof of fraud in the consideration, that being, at common law, the effect of the seal, says: "However, it must be admitted that, on account of want of careful discrimination in the various directions which I have suggested, late text-writers, and even courts of common law, have not always distinguished between the remedy in equity and that at common law, when fraud is alleged as an answer to a release under seal or other deed." Defendant criticizes the opinion in the case of *Wagner v. National L. Ins. Co.* 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395, 404, as being contrary to the holding of the other United States courts; but the final conclusion in that case is fully in accord with all the cases above cited on that question. The release in the *Wagner Case* is 20 L.R.A. (N.S.)

but a receipt not under seal. Judge Taft, who writes the opinion, says: "We find no reason, therefore, to modify the remark made by this court, speaking through Judge Lurton in *Lumley v. Wabash R. Co.* 22 C. C. A. 67, 43 U. S. App. 476, 489, and 76 Fed. 73, where he said: 'If the release had in fact been procured by fraud, he [the plaintiff] could have shown this at law, if the fact that the release was under seal had been out of the way.' The remark was, perhaps, not necessary to the case then before the court, but in this case, where the question calls for decision, we have no difficulty in confirming it."

We find that the rule at common law permitted any writing not under seal to be attacked at law for fraud in the consideration in all cases where the relief sought could be obtained in that jurisdiction, and a bond or writing obligatory, namely, a specialty, can be attacked at law for fraud in the execution of it, but not for fraud in the consideration. In many of the states the seal has lost much of its significance by the changes which the statute has made in the common law. In some the distinction between sealed and unsealed instruments has been abolished. In 1893 Missouri dispensed with private seals entirely (*Laws 1893*, p. 117); also, *Washington* (*Ballinger's Anno. Codes & Statutes*, § 4523 [*Pierce's Code*, § 4438]); also, *Kansas* and *Nebraska*; while others still recognize the seal as prima facie evidence of consideration, but permit defenses at law to sealed instruments the same as to unsealed. This was the Missouri statute of 1845 (*Rev. Stat. 1845*, ch. 136, art. 7, § 20); also, *Alabama* (*Giles v. Williams*, 3 Ala. 316, 37 Am. Dec. 692); *New York* (*Case v. Boughton*, 11 Wend. 106); *Michigan* (*Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 73), and *Iowa*, *Indiana*, and *New Hampshire*. And our own statute modifies the common-law effect of the seal, making it prima facie evidence of consideration. *Bellinger & C. Anno. Codes & Statutes*, § 765, provides: "The seal affixed to a writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon. A writing under seal may therefore be modified or discharged by a writing not under seal or by an oral agreement otherwise valid." And "primary evidence" is defined by § 686, Id.: "Primary evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence." Section 767, Id., relating to releases, provides: "An agreement in writing, without a seal, for the compromise or settlement of a debt or controversy, is as obligatory as if a seal

were affixed." The reason that want of, or fraud in, the consideration of a specialty, cannot be shown at law, is that the seal conclusively imports a consideration. 1 Parsons, Contr. (9th ed.) * 428; 4 Am. & Eng. Enc. Law. p. 664; 7 Am. & Eng. Enc. Law. p. 93; Ortman v. Dixon, 13 Cal. 33. And the effect of the seal, by our statute, being only prima facie evidence of the consideration, gives to a sealed instrument no greater significance than to one unsealed, which expresses the consideration on its face, and either may be attacked at law for fraud in the consideration as well as for fraud in the execution. The following additional cases are to that effect; Withers v. Greene, 9 How. 213, 13 L. ed. 109; Aller v. Aller, 40 N. J. L. 446; Girard v. St. Louis Car Wheel Co. 123 Mo. 358, 25 L.R.A. 514, 45 Am. St. Rep. 556, 27 S. W. 648; McCarty v. Beach, 10 Cal. 461; Northern Kansas Town Co. v. Oswald, 18 Kan. 336; Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181; Huston v. Williams, 3 Blackf. 170, 25 Am. Dec. '84. In Paddock v. Hume, 6 Or. 82, which was an action upon a bond, it is suggested that, if want of consideration, or that it was obtained by fraud, had been pleaded in the answer, it would have been a good defense; and to the same effect is Taylor v. Fleckenstein (C. C.) 30 Fed. 99, which is an action on a bond under our statute. Therefore the release in question, although under seal, may be attacked in a law action for fraud in the consideration.

It is further contended by the defendant that, even if the statements made to plaintiff which are alleged to have been false and fraudulent were so, yet they were only statements of opinions, and not representations of fact. The sufficiency of the allegations of the fraudulent conduct contained in the reply was not raised in the lower court, nor was the evidence objected to on the ground that it tended to prove statements of opinions, and not facts, and seems to be raised here by the brief for the first time. The evidence offered at the trial tended directly to prove the allegations of fraud contained in the reply, and therefore the correctness of the court's ruling in excluding the evidence depends upon whether those allegations are sufficient. They are in the following words: "That it would be useless expense for said John H. Olston to get legal advice from any lawyer concerning the matter; that the attorney and legal adviser of the defendant company, as a person skilled in the law, had authorized the defendant company, and its agents and officers to tell said John H. Olston that there was no responsibility on the part of the defendant company for said accident or death, and that it was not liable in damages in

any amount because of said accident or death of said deceased; that if said John H. Olston, or any of the heirs at law of the said deceased, brought any action at law against the Oregon Water Power & Railway Company, the company would keep such action in court for ten years or more, and would make it cost John H. Olston or any heir or heirs of said deceased that might bring such action all the money he or they might be worth, and would prevent him, or them, from recovering any damages whatever." Although the matter alleged and offered in proof as constituting the fraud is largely a matter of opinion, yet sometimes a statement of an opinion is necessarily based upon a fact or carries with it such an inference of fact that it can be interpreted as a statement of fact, and where it is known to be false and made with intent to deceive, it may be actionable. It is said, in 20 Cyc. Law & Proc. p. 18: "An expression of opinion may be so blended with statements of fact as to become itself a statement of fact. Where one of the parties has superior knowledge on the subject, his expression of an opinion which he knows he does not entertain, because it is contrary to the facts, may be actionable if made for the purpose of inducing another to act upon it, which he does to his injury." To the same effect is 14 Am. & Eng. Enc. Law, p. 35. In an English case (Smith v. Land, & House Property Corp. L. R. 28 Ch. Div. 7, 15), in discussing this question, it is said: "It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. . . . But, if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." In Stebbins v. Eddy, 4 Mason, 414, 423, Fed. Cas. No. 13,342, the court says: "It has been suggested at the bar that fraud cannot be predicated of belief, but, only of facts: but this distinction is quite too subtle and refined. The affirmation of belief is an affirmation of a fact, that is, of the fact of belief; and if it is fraudulently made to mislead or cheat another, to abuse his confidence, or to blind his judgment, it is in law and morals just as reprehensible as if any other fact were affirmed for the like purpose. The law looks not to the nature of the fact averred, but to the object and design of the affirmation." In People v. Peckens, 163 N. Y. 576, 591, 47 N. E. 883, 887, Mr. Justice Martin says: "It is insisted that many of the representations to the complainant and her husband, which induced the making and delivery of her

deed, were expressions of opinion, and, although false, and known to be so, no liability resulted. As a general rule, the mere expression of an opinion, which is understood to be only an opinion, does not render a person expressing it liable for fraud; but where the statements are as to value or quality, and are made by a person knowing them to be untrue, with an intent to deceive and mislead the one to whom they are made, and he is thus induced to forbear making inquiries which he otherwise would, they may amount to an affirmation of fact, rendering him liable therefor. In such a case, whether a representation is an expression of an opinion or an affirmation of a fact is a question for the jury. The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing." The allegations of fraudulent representations, and of which proof was offered and excluded by the court, are to the effect, among other things, that the defendant's attorney, having full knowledge of the circumstances and cause of the accident, says that the company is not liable in damages for the death of the decedent, and that plaintiff need not go to the expense of looking up the facts or to seek advice, but urges the defendant to act upon these opinions; and this, at least, may be interpreted as a representation of fact, and the evidence should have been submitted to the jury upon these questions. Therefore the court erred in excluding the evidence offered by plaintiff to show fraud in the consideration for the release, and, as this necessitates the reversal of the judgment, it is unnecessary to consider the other assignments of error.

The judgment is reversed, and cause remanded.

A petition for rehearing having been filed, **Eakin, J.**, handed down the following response on October 6, 1908:

The motion for rehearing is based largely upon the idea that the opinion in effect holds that equitable defenses may be pleaded at law; but such is not the intent of the opinion. Counsel for defendant have attributed that effect to it upon their conclusion that the fraud relied on is "equitable fraud," probably meaning fraud over which equity has exclusive jurisdiction. The opinion is to the effect that, even if this is an instrument under seal, yet by operation of our statute it is deprived of the solemnity formerly ascribed to it by reason of the seal. Now the seal is primary evidence of a consideration, which means that the presumption thus arising may be overcome by evidence to the contrary, and is therefore sub-

ject to defenses at law, the same as a simple contract in which the consideration is expressed. If a simple contract is induced by fraud, the defrauded party may rescind it without the aid of equity, and may plead the fraud in defense of an action to enforce it or to recover damage for its breach. 24 Am. & Eng. Enc. Law, p. 343; 14 Am. & Eng. Enc. Law, p. 158; 9 Cyc. Law & Proc. p. 433; Brown v. Freeman, 79 Ala. 406; Strayhorn v. Giles, 22 Ark. 517; Miliken v. Thorndike, 103 Mass. 382; Irving v. Thomas, 18 Me. 418. And our statute having reduced sealed instruments to the footing of simple contracts that express consideration, fraud in the consideration is recognized at law and is not exclusively an equitable defense. The only authority cited by defendant in the motion that seems to conflict with this view is Vandervelden v. Chicago & N. W. R. Co. (C. C.) 61 Fed. 54. This case recognizes the force of the Iowa statute abolishing the effect of the seal, but ignores that fact and holds that, because the instrument is sealed, the defense of fraud is cognizable only in equity. But in Williams v. Haines, 27 Iowa, 251, 1 Am. Rep. 268, it is held that, by reason of the statute having abolished the distinction between sealed and unsealed instruments, defenses to sealed instruments going to the consideration may be pleaded at law.

Counsel seek to make a distinction between the effect of the Alabama statute, as construed in Withers v. Greene, 9 How. 213, 13 L. ed. 109, and our own; but that statute only admits defenses to sealed instruments "as if the said writing had not been sealed." Referring to that statute, Justice Daniel says: "By the enactment herein first cited it is obvious that specialties are divested of any force or solemnity at any time ascribed to them by reason of their having a seal annexed, and are placed with respect to all inquiries which may be instituted into the validity of their consideration precisely upon the footing of parol agreements." The same is true of the New Jersey statute (Rev. Stat. 1874, p. 380, § 16), which reads: "In any action upon an instrument in writing, under seal, the defendant in such action may plead and set up as a defense therein, fraud in the consideration of the contract upon which recovery is sought, as fully and to all intents and purposes as if such instrument were not under seal" (see *Aller v. Aller*, 40 N. J. L. 446), thus permitting such defenses of fraud, and only such, as are permissible to unsealed instruments, and placing sealed instruments on the footing of simple contracts in that particular.

By our statute, quoted in the opinion, the effect of the seal is eliminated, except

as to the time of commencing actions or suit thereon, and that it shall be primary evidence of a consideration and is as comprehensive as that of either Alabama, New Jersey, or Iowa. Therefore we hold that the defense pleaded is not an equitable defense, but a legal one. This in no manner conflicts with the decision in *Fire Asso. v. Allesina*, 45 Or. 154, 77 Pac. 123, or *Cohn v. Wemme*, 47 Or. 146, 81 Pac. 98, 8 A. & E. Ann. Cas. 508, both of which cases relate to awards. The rule is that an award is a final judgment, both at law and in equity. It is said that an award is entitled to that respect which is due to the judgment of a court of last resort (2 Am. & Eng. Enc. Law, p. 794; 3 Cyc. Law & Proc. p. 728), and therefore cannot be classed with contracts, sealed or unsealed.

The motion is denied.

PENNSYLVANIA SUPREME COURT.

ESTHER A. SMITH, Appt.,
v.
METROPOLITAN LIFE INSURANCE
COMPANY OF NEW YORK.

(222 Pa. 226, 71 Atl. 11.)

Insurance — death of beneficiary — effect.

1. Death within the lifetime of the insured terminates the interest of the bene-

Case Note. — *Right of insurance company, in making payment of proceeds of life policy, to rely on clause giving company option as to payee, and making receipt conclusive evidence of payment to proper person.*

SMITH v. METROPOLITAN L. INS. Co. decides a question upon which there is apparently some lack of uniformity, although this may, in some instances, at least, be traced to the provisions of the particular policy in suit.

This note includes only cases where payment had actually been made by the company to another than the plaintiff, and a provision like the one in question was invoked as a defense.

A clause similar to that in the SMITH CASE, providing that the company might pay the sum due to any relative or to any other person appearing to said company to be equitably entitled to the same, and that a receipt signed by such person, or other sufficient proof of payment, should be conclusive evidence of payment to the person entitled to receive the amount, was held to protect the defendant company in *Bradley v. Prudential Ins. Co.* 187 Mass. 226, 72 N. E. 989, where the action was by an administrator to recover the proceeds of a policy held by his intestate in favor of her ex-

20 L.R.A. (N.S.)
ficiary of life insurance policies, and leaves the insured free to make other disposition of the policy.

Same — change of, beneficiary — estoppel.

2. An insurance company which furnishes blanks for change of beneficiary, and accepts and recognizes a designated change for a period of years, is estopped to claim that the change was not made in strict accordance with its by-laws.

Same — wrongful payment — contract rights.

3. A life insurance company cannot absolve itself from liability to the beneficiary duly designated by the insured for the proceeds of the policy by paying them to the administrator of the insured, although the policy provides that the production by the corporation of the policy and of a receipt signed by any person furnishing satisfactory proof that he is executor of insured shall be conclusive proof that the sum had been paid to the person lawfully entitled to receive the same.

(October 5, 1908.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Schuylkill County in defendant's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Mr. James B. Reilly and George W. Ryan for appellant.

executors or administrators or assigns, and payment had been made by the company in good faith to one who was living with the insured as her husband, and who had paid part of the premiums and all the funeral expenses.

The same rule was followed in *Thomas v. Prudential Ins. Co.* 148 Pa. 594, 24 Atl. 82, where the action was by an administrator, and the company successfully defended under the same clause because payment had been made to the decedent's landlady, to whom he was indebted for board and funeral expenses.

Brennan v. Prudential Ins. Co. 170 Pa. 488, 32 Atl. 1042, construing the same clause, follows the *Thomas Case*, supra, and holds that payment by the company, in the exercise of the discretion given it by the policy, to one appearing to be equitably entitled to the proceeds, is a complete defense to an action by the personal representative of the deceased, even though settlement was made for a less amount than named in the policy, if made in good faith, and in an honest effort to meet and discharge the obligations of the contract. As to why the payee in this case was equitably entitled to the proceeds does not appear. The principle thus announced is followed in *Sheridan v. Prudential Ins. Co.* 128 Ill. App. 519 (aff.)

Messrs. R. H. Koch and Guy E. Farquhar, for appellee:

An insured cannot, without the consent of the beneficiary's legal representatives or heirs, change the sole benefit under a policy of insurance taken out on his life for such beneficiary.

Waltz v. Mutual Aid Soc. 5 Pa. Co. Ct. 208; Anderson's Estate, 85 Pa. 202; Brown's Appeal, 125 Pa. 303, 11 Am. St. Rep. 900, 17 Atl. 419; Entwistle v. Travelers' Ins. Co. 202 Pa. 141, 51 Atl. 759; Herr v. Reinoehl, 209 Pa. 483, 58 Atl. 862; Watt v. Gideon, 22 Pa. Co. Ct. 499; Jones v. Jones, 23 Pa. Co. Ct. 254; Glanz v. Gloeckler, 104 Ill. 573, 44 Am. Rep. 94; Weston v. Richardson, 47 L. T. N. S. 514; Pence v. Makepeace, 65 Ind. 345; Allis v. Ware, 28 Minn. 166, 9 N. W. 666.

Mitchell, Ch. J., delivered the opinion of the court:

Gordon took out five separate policies of insurance on his own life. No beneficiary or person to whom the insurance should be paid on the death of the insured was named in any of the policies, but, in the applications for three of them, in answer to the printed question as to whom the money should be payable, the name of his wife was written. In the other two there was not even this designation of a beneficiary, but it was conceded at the trial that the insurance was intended for her benefit, and

that the policies were handed to her by the insured. The trial court, therefore, treated all the policies as alike in her favor as beneficiary, and for the purposes of this case no question on this point need be considered. The wife died first, and subsequently the husband, by written order, on a blank "change of designation" furnished by the company, appointed his daughter, the plaintiff, as the beneficiary. She brought suit, and on the trial was nonsuited on the ground that the interest in the policies had vested in the wife, and at her death passed to her administrator as part of her estate.

In support of this result, reliance is had principally on the cases of Anderson's Estate, 85 Pa. 202, Brown's Appeal, 125 Pa. 303, 11 Am. St. Rep. 900, 17 Atl. 419, and Entwistle v. Travelers' Ins. Co. 202 Pa. 141, 51 Atl. 759. The facts, however, in these cases were so different that none of them can be regarded as a controlling authority for the present. In Anderson's Estate the policy was payable to the wife, "her executors, administrators, or assigns." The insured (husband) having died insolvent, the money was claimed by his creditors, but it was held that it was an asset of the wife. In Brown's Appeal the policy was payable to the wife, and, in case of her death before that of the insured, then to her children. The wife and the husband jointly executed an assignment, and, after the wife's death, it was held on inter-

firmed without comment in 230 Ill. 33, 82 N. E. 426), where the facts were, in a general way, parallel with the Brennan Case.

And such a clause is again held valid in State, Metropolitan L. Ins. Co., Prosecutor, v. Schaffer, 50 N. J. L. 72, 11 Atl. 154, where payment of the proceeds was made to the decedent's daughter, who produced to the company the policy and the premium receipt book. The court said that, whatever interest the beneficiary had in the policy, it was subject to the conditions of the contract, which operated as an appointment by both the assured and the beneficiary of certain persons, any of whom were authorized to receive payment of the sum agreed. The condition here in question provided that "the production by the company of this policy and a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary or an executor or administrator, husband or wife, or relative by blood, or connection by marriage, of the assured, shall be conclusive evidence that such sum has been paid and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company, under this policy, have been fully satisfied."

Pfaff v. Prudential Ins. Co. 141 Pa. 562, 21 Atl. 663, held that, in an action on a policy providing that payment might be

made to executor, administrator, husband, wife, or relation by blood or marriage, and that the production of a receipt signed by any or either of such persons should be conclusive evidence of payment to the person entitled thereto, an affidavit of defense, averring payment to the insured's mother, and her receipt therefor, is sufficient to prevent a rule for summary judgment.

But the Brennan Case, *supra*, is criticized in Shea v. United States Industrial Ins. Co. 23 App. Div. 53, 48 N. Y. Supp. 548, where a mother, at the time of insuring her daughter's life, was made the beneficiary by the insurance company. The policy contained the clause passed upon in the Brennan Case, giving the company the option to pay any relative by blood or marriage, or anyone appearing to be equitably entitled to the proceeds, together with the provision as to the production of a receipt, etc. Relying on this clause, the company resorted to fraudulent means to effect a settlement with the husband of the deceased, but the court denied its right to make payment to the husband under the provision in question, holding that its representations to the plaintiff that she should be the beneficiary amounted to an agreement to that effect that was a present election by the company to exercise its option under the clause in question in favor of the plaintiff.

In Wilkinson v. Metropolitan L. Ins. Co.

pleader that the children had title under the original contract, and it could not be devested by the assignment. In *Entwistle v. Travelers' Ins. Co.* the insurance was payable to the wife, and, if she died before the husband, then to the children; but, if the husband survived both wife and children, then to his legal representatives. By the terms of the policy, its value was convertible into cash at the option of the holder after fifteen years. Husband and wife sought to exercise the option, but it was held that the children had a beneficial interest which brought them within the term "holders," and could not be devested without their sanction. In all the foregoing cases the contingency presented by the state of facts was one expressly provided for in the policy, and it is beyond question that, where such is the case, the terms of the policy, which is the substantial contract of the parties, must govern. But where, as is this case, a state of facts exists for which the policy makes no express provision, a very different question is presented. In *Brown's Appeal* it was said that the death of the wife in the lifetime of her husband "extinguished her interest in the policy," and in *Entwistle v. Travelers' Ins. Co.* "the interest of the wife was

wholly contingent upon her surviving her husband. . . . If the wife die before the insured, she will take nothing under the policy." These expressions, of course, and the decisions in which they were used, were based, as already said, on the language of the policies; but the same result would follow upon general principles. Where all the conditions of fact expressly provided for in any contract have failed, and the contract is silent as to anything further, regard must be had to the fundamental intent and effect of the contract. The contract of life insurance contemplates a payment by the insurer upon the death of the insured. That is the certain primary intent, and does not admit of doubt.

The secondary question, to whom is the payment due, is contingent on the circumstances. The naming of a beneficiary to whom payment is to be made a gift of a benefit in future, but is contingent on the circumstances. Thus it carries with it no obligation to the beneficiary that the donor will keep the policy alive by continuing to pay the premiums. That is contingent on his doing so voluntarily. And the nature of the thing given would seem to imply that the beneficiary must survive the in-

63 Mo. App. 404, an assignee of a policy, having paid the premiums, had surrendered the policy and his receipt book to the company, as required by the policy preliminary to a settlement. Afterward the company paid the amount of the policy to the widow of the deceased, and defended its action under the same clause that was construed in *SMITH v. METROPOLITAN L. INS. CO.* It was held that the assignee was a lawful beneficiary, belonging to one of the classes mentioned in the condition of the policy in question, and entitled to the proceeds, and that the company was not at liberty to make an arbitrary selection of any other person belonging to the designated classes.

This ruling is followed in *Wilkinson v. Metropolitan L. Ins. Co.* 64 Mo. App. 172, where the facts were practically the same, except that the company paid the proceeds to the public administrator instead of to a relative of the deceased. The defense and holding were the same as in the first case.

Carraher v. Metropolitan L. Ins. Co. 11 N. Y. S. R. 665, in passing upon the same clause that was construed in the *Schaffer Case*, supra, distinguishes that case, and holds that such a clause does not protect the company in making payment to any one of the persons designated in the provision, where a beneficiary was specifically named in the policy. Referring to the *Schaffer Case*, the court said: "In that case, the son was the beneficiary named, but it did not appear that the son ever had possession either of the policy or the premium receipt 20 L.R.A. (N.S.)"

book, or that he ever knew of the existence of the policy until after the death of the assured. In the present case, the policy was delivered to the beneficiary (the plaintiff). She paid the premiums thereon, and she gave notice of the death of the assured, and surrendered the policy and premium book to the company, accompanied by a demand for payment. The plaintiff here had a vested interest in the policy. In the *Schaffer Case* the son never acquired a vested interest therein."

McNally v. Metropolitan L. Ins. Co. 199 Pa. 481, 49 Atl. 299, was an action by a named beneficiary where the company had made payment to the duly-appointed administrator by virtue of the following condition: "The production by the company of this policy and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary or an executor or administrator, husband or wife, or relative by blood or connection by marriage of the assured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same; and that all claims and demands upon said company under this policy have been fully satisfied." A *per curiam* decision was rendered in favor of the plaintiff, but there was no attempt to distinguish the opposing decisions, except to say that the provisions of the policy in question differed materially from some of the provisions in the policies of the Prudential Company.

sured. Thus, in the present case, the gift is equivalent to a provision that, when the husband dies, having kept the policy alive, the wife shall be entitled to the money. But the intent is to provide for her, not for any other, and, if she has died first, the expressed intent is incapable of fulfilment. and we are not at liberty to supply a further intent which the donor did not indicate. He might have done so by naming her executor, or administrator, or children, at his own choice, but, as he did not do so, we are not authorized to make a choice for him. The natural presumption is that he did not desire such result, nor intend to continue to pay premiums for the benefit of any other person. At the inception of the contract the whole disposition of the insurance money was within the control of the insured. He might have provided in the policy for its disposition under any and all conditions, but he did not. By the designation of his wife as the party to receive it, he vested a right in her, and, to that extent, parted with his control. But he did nothing more, and, on her death before his, the condition failed, and the right of control, which he had only parted with on condition, returned to him, and, in the absence of any further disposition by him, would have become an asset of his estate.

The cases relied upon by the learned court below, as already said, differed so entirely in their essential facts that they are not authority for this. No Pennsylvania case has decided the question now raised. Outside of this state the decisions are not in entire harmony, but the weight of authority is with the views above expressed. In 13 Am. & Eng. Enc. Law, p. 654, the general rule is thus stated: "Ordinarily where the insured survives those specified to take at his death, the insurance money, where no other disposition is made of it, becomes, at his death, a part of his estate, to be administered as his will, or, in the absence of a will, as the law directs. . . . But where a person, as a husband, takes out a policy on his life in favor of another, as the wife, without further mention, and pays the premiums, and he survives the beneficiary, he may change the policy for the benefit of any other person, as a subsequent wife." *Id.* p. 656.

This brings us to the consideration of the plaintiff's claim. The wife, the beneficiary designated in the applications, died in 1897, and the next year the insured substituted his daughter, the plaintiff, as beneficiary. The testimony was that, desiring to do so, the insured applied to the agent of the insurance company, was furnished by him with printed blanks, called "change of des-

ignation," which he executed, thereby substituting his daughter, the plaintiff, as beneficiary, in place of his wife, who was dead. These changes of designation were delivered to the defendant company, and were accepted by it. The company thus recognized the right to change the beneficiary, accepted the method of doing so, and for more than seven years the insured continued to pay, and the company to receive, the premiums on the basis of such change. Whether the papers were strictly in accordance with the requirements of the by-laws of the company is immaterial. So far as the case was developed, every element of estoppel exists to prevent the company from now disputing their validity. As the trial in the court below, however, resulted in a nonsuit, no evidence was given for the defendant, but it appears from the affidavit of defense that the company paid the insurance money to one Thomas S. Gordon, executor of the insured, and reliance is apparently placed on a clause in the policies, varying somewhat in expression, but substantially to the effect, that "the production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the executor or administrator, husband or wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." Similar clauses are not uncommon in the class known as "industrial insurance," where the amounts and estates are small and the purpose is to avoid the necessity of the expense of formal administration by law. But they are not intended, and could not be allowed, to override rights fixed by the policies. If, for example, the wife had survived the husband in this case, no such clause as that quoted could make a payment to his executor a valid defense against her vested claim as primary beneficiary. If the plaintiff's substitution as beneficiary was valid, as *prima facie* it appears to be, the payment to Thomas S. Gordon, as executor of the insured, is no defense.

But it is intimated that the fact as well as the good faith of the nominal substitution as between father and daughter are open to question. As the case did not reach the stage for evidence on that point, we express no opinion upon it.

Judgment reversed, and procedendo awarded.

PENNSYLVANIA SUPREME COURT.

PHILADELPHIA COMPANY et al.,
v.
BARONETT F. RENNER et al., Appts
(222 Pa. 512, 71 Atl. 1056.)

Draft — payable through clearing house — effect.

That a draft for rent which may be paid by check or draft is made payable through a particular clearing house does not render it ineffectual as a tender, and justify a forfeiture of the lease for nonpayment of rent.

(January 4, 1909.)

APPEAL by defendants from a decree of the Court of Common Pleas for Greene County restraining them from interfering with plaintiffs' right to drill for oil and gas on certain lands leased by them from defendants. Affirmed.

The facts are stated in the opinion.

Messrs. Frank W. Downey and James J. Purman, for appellants:

The words, "payable only through Pittsburg Clearing House," destroyed the right to demand the money, and limited the manner of payment.

2 Dan. Neg. Inst. § 1712; Gray v. Donahoe, 4 Watts, 400; 1 Field, Lawyers' Briefs, §§ 588, 590, 593, 594; Crane v. Fourth Street Nat. Bank, 173 Pa. 567, 34 Atl. 296; Philler v. Patterson, 168 Pa. 468, 47 Am. St. Rep. 896, 32 Atl. 26.

Mr. A. H. Sayers for appellees.

Elkin, J., delivered the opinion of the court:

As this case has developed, the only question to be determined here is whether, at the time this proceeding was instituted, there had been a forfeiture of the lease by failure to pay the rental according to the terms of the contract. The appellants claim the right to declare a forfeiture, which the appellees deny. The clause under which a forfeiture is asserted provides that the lease shall become null and void unless a well shall be completed on the premises within sixty days from the date thereof, or unless the lessee shall pay at the rate of \$30 quarterly, in advance, for each additional three months such completion is delayed. The well was not completed within

Note. — The above case seems to be one of first impression as to whether the fact that a check has across its face the words "payable only through" a named clearing house will render it ineffectual as a tender under a contract which permitted payment by check, as an extensive search has failed to disclose any other case involving that question.

20 L.R.A. (N.S.)

sixty days, but the quarterly payments were made from time to time during a period of nine years up to and including the rental due August 17, 1907, as to which payment the controversy in the present proceeding arises. The lease provides that the quarterly payments may be made direct to the lessors, or to Baronett F. Renner, one of the complainants, at Garrison postoffice, by check or draft. Payment was tendered in due time by a check or draft, drawn upon the Farmers' Deposit National Bank of Pittsburg, for the sum of \$30, which check or draft was deposited in the mails for transmission and was received by Renner, November 16, 1907, one day before the payment was due. He refused to accept the draft, and returned the same by first mail to the lessee, upon the ground that across its face were printed the words "payable only through the Pittsburg Clearing House;" the contention then and now being that a draft made payable through the clearing house was not a compliance with the contract. The objection is too technical to be substantial. The contract only provided that the payment could be made by check or draft, and nothing is said about the method of collection. What Renner had the right to demand was a check or draft, drawn by the lessee on a bank, which, when paid, was a compliance with the very letter of the covenant. He received in due time a draft drawn upon a responsible banking institution, calling for the payment of the proper sum to meet the advance rental, and all that he had to do was to deposit it for credit with the bank in which he did business, and collection would follow in due course of banking. The fact of payment was what the lessor was interested in, and not the method of making it, so long as the terms of the contract were not violated. It was immaterial to the lessor whether the draft was paid over the counter of the banking institution drawn upon or through the clearing house, if, in point of fact, it was paid, or would have been paid, and he had received or would have received the benefit of it. That the draft was good is not denied, and that it would have been paid through the clearing house, if presented, is not questioned. Certainly, under these circumstances, complainant was not justified in returning the draft and declaring a forfeiture of the lease. For a long period of years the lessee had paid the quarterly rentals by draft just as was done in this instance, except the former drafts were not made payable through the clearing house; but, as hereinbefore suggested, this, at most, only affected the method of collection in due course of banking, and

did not deny to the lessor any substantial right under the contract.

We find no reversible error, and the decree is affirmed at the cost of appellants.

RHODE ISLAND SUPREME COURT.

STEVENS & COMPANY

v.

NED C. STILES, Appt.

(— R. I. —, 71 Atl. 802.)

Secrets — employee — injunction.

One employed by an optician to examine the eyes of patients and prescribe lenses will, after leaving his employment, be enjoined from making use of names, addresses, and prescriptions which he copied from his employer's records, although his contract did not expressly forbid his making use of such knowledge, and the information he is attempting to use relates exclusively to per-

sons examined by him and the records of whose cases he himself made.

(February 4, 1909.)

APPEAL by defendant from a judgment of the Superior Court for Providence and Bristol Counties temporarily enjoining him from making use of names, addresses, and prescriptions pertaining to plaintiff's business. Affirmed.

The facts are stated in the opinion.

Mr. John I. Devlin for appellant.

Mr. Mendell W. Crane for appellee.

Johnson, J., delivered the opinion of the court:

This is an appeal from the decision of the superior court, granting a preliminary injunction. The complainant, a corporation, carried on, under the name of "Villers Company, the Modern Optical Shop," the business of examining the eyes of persons, by expert opticians, and prescribing, manufacturing, and selling eye-glasses. The

Case Note. — Protection of trade secrets.

This subject is considered in a note to *Vulcan Detinning Co. v. American Can Co.* 12 L.R.A.(N.S.) 102. Only cases subsequent thereto will be included herein. But few cases on the subject have been reported since that note. Those that have been are in harmony with the doctrine therein stated, which also finds support in *STEVENS & Co. v. STILES*.

The doctrine of *Vulcan Detinning Co. v. American Can Co.* was reaffirmed by the New Jersey court in 69 Atl. 1103, when that case was again presented to it.

This doctrine was also recognized and applied to employees of a paint manufacturing company in *Elaterite Paint & Mfg. Co. v. Frost*, 105 Minn. 239, 117 N. W. 388. In this case there was no express contract on the part of the employees not to divulge secrets learned during employment, but nevertheless certain employees and a rival company subsequently employing them were restrained from using or making use of secret formulas for the manufacture of paint from elaterite, of which formulas one of the employees had obtained knowledge through his employment, while the other employee restrained was the original discoverer of the formula, but had sold and transferred it to his employers under an agreement not to make use of or divulge it to the prejudice or detriment of his employer. In reaching its conclusion, the court said that the law was undisputed that equity recognized a secret in trade as property, and would protect trade secrets by injunction as against those who sought to disclose or use them by a violation of confidential relations or contract stipulations, express or implied, arising from their relations to, or dealings with, the owner thereof.

It was also applied in *Witkop & H. Co.* 20 L.R.A.(N.S.)

v. Boyce, 61 Misc. 126, 112 N. Y. Supp. 874, as to a traveling salesman who was restrained from making use of knowledge or information gained from a former employer's list of customers. Although there was an express contract by the employee not to make use of such knowledge to the detriment of his employer, yet the decision is not based upon that ground, but on the theory that, irrespective of any express contract between the parties, equity would restrain the acts complained of because they arose out of a violation of duty having its origin in the relation of employer and employee, and an implied contract that an employee would not divulge confidential knowledge gained in the course of his employment, or use such information to the employer's prejudice.

It was also held in the foregoing case that the names of the customers of a business concern whose trade and patronage had been secured by years of business effort, in advertising, and the expenditure of time and money, constituting a part of the good will of the business which enterprise and foresight had built up, should be deemed just as sacred, and entitled to the same protection, as the secret of compounding some article for manufacture and commerce.

A very similar question is the right of an employer to be protected against the breach of an express contract by an employee not to engage in a competing business. Relief is usually given in such cases upon the theory of the protection of the employer against the use of trade secrets, confidential information, etc., gained by the employee during his employment. This subject will be found discussed and the cases passing thereon gathered in a note to *Simms v. Burnette*, 16 L.R.A.(N.S.) 389.

respondent was employed by the complainant, at its place of business, to examine the eyes of customers and patrons of said complainant, prescribe glasses, etc. He had access to the books and records of the complainant, and, as a part of his duties, made a record of cases, showing the names and addresses of patrons, and the particular sort of lenses required by such patrons. It was alleged that the respondent surreptitiously, fraudulently, and without the knowledge of the complainant, copied the names of a great number of such patrons, with their postoffice addresses, from such records, and, after leaving the employ of the complainant, sent circular letters to persons whose names and addresses he had thus acquired, soliciting their patronage, and that the business of the complainant suffered thereby. On hearing upon the prayer of the complainant for a preliminary injunction, the court below found, as a matter of fact, that the respondent did surreptitiously copy the names and addresses of the complainant's customers from the records of the complainant, and had made use of such list of names and addresses in addressing circulars to the complainant's customers. The court said upon this point: "We are of the opinion that the surreptitious copying of the names and addresses of the complainant's customers from its records is a violation of confidence against which equity can enjoin, and that equity can enjoin against the use of such lists so unfairly obtained. It is true that equity will not enjoin against an employee carrying away such skill and intelligence as he can carry in his head, other than trade secrets. This would not permit him to copy the records of his employer for future use." A decree was entered September 26, 1908, "that the respondent, Ned C. Stiles, and his agents and servants, be, and they hereby are, enjoined and restrained, until the further order of this court, from using the names and addresses of the complainant's customers, which he copied from the records of the complainant, from soliciting the patronage of such customers whose names he thus obtained, and from divulging the names and addresses of said customers of the complainant to anyone else." From this decree the respondent appealed.

Counsel for the respondent makes no question that equity will restrain the disclosure of confidential communications, trade secrets, and the contents of private papers. But he urges that, in the case at bar, the relations of the parties were not confidential; that there was no agreement that respondent, upon severing his relations with the complainant company, should not enter into competition with it; that the

only names copied from complainant's lists were those of customers he personally examined; and that to copy and use such a list of names is not a breach of trust or a breach of confidence. As to the argument that the relations of the parties were not confidential, we do not understand that the fact of agency is denied. It is admitted that the respondent was in the employ of the complainant in its store, examining the eyes of patrons, prescribing glasses, and making records of the cases examined and treated, as also of prescriptions which came to the store from physicians outside. We do not see how such relations can be considered as other than confidential. As to the absence of an agreement not to enter into competition with the complainant, it is sufficient to say that the decree does not enjoin such action on the part of the respondent. Particular stress is laid upon the claim that the only names copied from complainant's lists were those of customers whom the respondent personally examined, and it is argued that to copy and use such a list of names is not a breach of trust or a breach of confidence. The argument does not commend itself to us. It is elementary that what is done by the agent in the course of his employment is, in the legal sense, done by the master himself. The respondent could have no more right to copy records made by himself, while acting for the complainant, than he would have to copy any other records of the complainant to which he had access.

In *Lamb v. Evans* [1893] 1 Ch. 218, the plaintiff was the proprietor and publisher of a trade directory entitled "The International Guide to British and Foreign Merchants and Manufacturers." It had a continental section, which contained a list of continental traders who desired to advertise in this book. These advertisements were arranged under special headings, denoting the nature of the business, which were arranged alphabetically. Each heading was given in English, French, German, and Spanish, and under it the names of the traders who came within it were alphabetically arranged. In some cases only their names and addresses were given; in others, more elaborate advertisements were furnished. The headings were prepared by the plaintiff, or by persons employed and paid by him. Each of the defendants Evans was employed by the plaintiff to canvass for advertisements in a certain district on the continent. In each case the plaintiff agreed to employ the canvasser exclusively in that district, and the canvasser agreed to work therein for the plaintiff exclusively. Each was remunerated by a large commission on the amount received by him for

advertisements, and agreed to furnish all blocks and translations relating to his canvass free of charge. The blocks, however, were generally furnished by the advertisers, and handed over for the purpose of printing the advertisements. After the engagement of the defendants Evans came to an end, they entered into the service of a rival publication, and assisted in adding thereto a "continental section." The plaintiff brought his action against the defendants Evans and the publisher of the rival directory. The defendants were enjoined "from using blocks or materials obtained by the defendants E. A. Evans and T. H. A. Evans, or either of them, while in the employment of the plaintiff, and for the purposes of his said work, or any copies thereof, for the purposes of any work other than the said work of the plaintiff." The decree was affirmed on appeal, only being modified so as to permit the publishing of copies at the request, or by the direction, of the advertisers to whom the blocks belonged. Lindley, L. J. (page 226), says: "What right has any agent to use materials obtained by him in the course of his employment, and for his employer, against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal. No case, unless it be the one which I will notice presently, can, I believe, be found which is contrary to the general principle upon which this injunction is framed, *viz.*, that an agent has no right to employ, as against his principal, materials which that agent has obtained only for his principal, and in the course of his agency. They are the property of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got. It is said that *Reuter's Teleg. Co. v. Byron*, 43 L. J. Ch. N. S. 661, before Sir G. Jessel, is opposed to this. If that case went on the ground that the Master of the Rolls was not satisfied that the case was plain enough for him to grant an interlocutory injunction, there is nothing more to be said about it; but, if the decision goes further than that, I think that undoubtedly the principle was applied there more narrowly than it ought to have been." Bowen, L. J. (page 231), says: "You must look at the whole transaction, and make up your mind what the parties must have intended, if the transaction is to have any business-like efficacy at all. If you see that it could

not have been intended by the parties that the agent should be allowed to deal in the way he is proposing to do, with materials obtained in the course of his agency, then the law will imply that it was part of the bargain that he should not do so. It is said by Mr. Farwell that it must have been intended that the confidential fetter imposed upon the use of these documents should terminate as soon as the book was published for which they were being compiled, and he urges that otherwise we should be importing questions of copyright into the discussion of this branch of the case. On the contrary, it is by insisting on that view that he imports the idea of copyright into this part of the case. The point we are now considering has nothing to do with it. It is perfectly true that you must look at the whole transaction to see what the documents and materials had been collected for; but that would, by no means, sufficiently protect the employer if the agent was to be left free to do what he liked with the materials the moment the volume was published. That argument, it seems to me, cannot prevail." Kay, L. J. (pages 234, 235), says: "The illustrations given in argument show that there might be some material collected by the defendants while they were the plaintiff's agents, and for the purposes of his book, which material could be legally used for the new book. The argument was put most forcibly, as I followed it, in this form: Why should they not retain these notebooks in their hands, having now left the plaintiff's employ, and use them in order to find out the persons abroad with whom they had formerly entered into engagements, and to obtain from those advertisers authority to put advertisements of theirs into a rival publication, to be published as a rival of the plaintiff's book? The answer is a very simple one. All those materials were obtained while you, the defendants, were acting as the plaintiff's agents, while you were in that confidential relation to him, and for the purpose for which he employed and paid you, *viz.*, of compiling this book of the plaintiffs; and therefore to allow you to use any of those materials for your own purposes would be allowing you to use them for a purpose for which they were not compiled; you, while you compiled them, being in the position of the plaintiff's agent, and there being a confidential relation between you and the plaintiff."

In the earlier case of *Morison v. Moat* (1851) 9 Hare, 241, an injunction was granted to restrain the use of a secret in the compounding of a medicine not patented, and to restrain the sale of such medicine by a defendant, who acquired a knowledge

of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. Vice Chancellor Turner said (page 255 of 9 Hare): "The subsidiary ground brought forward by the bill, of the defendant's selling his medicines under the original name and description, was relied upon rather in support of the case of breach of faith and of contract than as a separate and distinct ground for the interference of the court. Upon that part of the case it is sufficient, therefore, to observe, that there might be difficulty in maintaining it, at all events, until the plaintiffs should have established their right at law. The true question is whether, under the circumstances of this case, the court ought to interpose by injunction, upon the ground of breach of faith or of contract. That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others again it has been treated as founded upon trust or confidence, meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but, upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." The decree was affirmed on appeal. 21 L. J. Ch. N. S. 248. See also *Yovatt v. Winyard* (1820) 1 Jac. & W. 394, where Lord Eldon, upon the express ground of breach of trust and confidence, granted an injunction to restrain the defendant, who had been the plaintiff's assistant in his business, from using or communicating recipes which he had surreptitiously copied while in the plaintiff's service. In *Abernethy v. Hutchinson* (1824) 3 L. J. Ch. 209, 1 Hall & T. 28, the question again came before Lord Eldon. In this case Mr. Abernethy had filed a bill to restrain the publication of lectures delivered by him at St. Bartholomew's Hospital, which had been taken down by someone present when they were delivered. The injunction was granted upon the ground of breach of confidence. In *Prince Albert v. Strange* (1849) 1 MacN. & G. 25, Lord Cottenham said: "This case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract would of itself entitle the plaintiff to an injunction."

Robb v. Green (1895) 64 L. J. Q. B. N. S. 593, is a case on all fours with the case at 20 L.R.A. (N.S.)

bar. The defendant, being employed by the plaintiff as manager of his business, as a dealer in pheasants and pheasants' eggs, and having confidential access to his master's books for the purposes of his business, copied from the plaintiff's order book the names and addresses of the plaintiff's customers, with a view to using them to facilitate his canvass for their custom after he had left the plaintiff's service, and had set up a business on his own account, and did so use them. It was held, on the authority of the cases cited, *supra*, that the defendant had committed a breach of his implied promise that he would not abuse his master's confidence in matters appertaining to his service, and that he was liable in damages for any loss caused to the plaintiff by reason of such breach, and judgment was entered for damages, "and for the injunction as prayed,—namely, that the defendant may be ordered to deliver up to the plaintiff, to be destroyed, the list of the names and addresses of the plaintiff's customers and their keepers, copied or extracted by the defendant from the plaintiff's books, and all copies or extracts of or from such list now in his possession or under his control, and that the defendant be restrained from making use of the information obtained by him by copying or extracting such names and addresses." This case furnished another opportunity for a review of the cases considered *supra*, and for the use by the court of some very lucid and vigorous language in passing upon the defendant's claim that, in copying from the plaintiff's order book while in his employ, the names and addresses of the plaintiff's customers, with a view to using them to facilitate his own canvass for their custom after he had left the plaintiff's employ and set up a business on his own account, and in so using them, he had done only that which he had a right to do. Thus *Hawkins, J.* (page 597): "As to the third contention, I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant, that he shall perform his duty, especially in these essential respects,—namely, that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service; and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service. It would be monstrous to suppose that a servant would be absolved from the observance of these essential elements to good service unless they were in terms specially provided for

in the contract." And again (page 599), speaking of the argument of defendant's counsel: "Having gone thus far, they are compelled, in order to justify the conduct of the defendant, to contend that a servant might, in his master's service, having confidential access to his master's books for the purposes of his business, copy, as in this case, the names and addresses of his master's customers with a view to use them to facilitate his canvass for their custom, as soon as he should see fit, after the termination of his service; in short, to canvass with the aid of stolen material, without which, having regard to the wide extent over which the customers were spread, practically he could not canvass at all. I confess this seems to me a startling proposition, and to it I do not assent." The decision was affirmed on appeal. See also *Helmore v. Smith* (1886) 56 L. J. Ch. N. S. 145; *Tuck v. Priester* (1887) 56 L. J. Q. B. N. S. 553; *Pollard v. Photographic Co.* (1888) 58 L. J. Ch. N. S. 251; *Merryweather v. Moore* (1892) 61 L. J. Ch. N. S. 505; and *Louis v. Smellie* (1895) 73 L. T. N. S. 226.

The same doctrine prevails in this country. Judge Story, after speaking of the prevention by injunction of the use of names, marks, letters, or other indicia of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman when they are not so, states the doctrine broadly, as follows: "Upon similar grounds of irreparable mischief, courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment. And it matters not in such cases whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests." 2 Story, Eq. Jur. § 952. In 1. High on Injunctions, § 19, it is thus stated: "The disclosure of secrets which have come to one's knowledge during the course of a confidential employment will be restrained by injunction. And where a confidential relationship has existed, out of which one of the parties has derived information or secrets concerning the other, equity fastens an obligation upon his conscience not to divulge such knowledge, and enforces the obligation, when necessary, by injunction. Thus, persons who, in the capacity of attorneys, agents, or in other confidential relations, have obtained the custody of the books and documents of their principals, or have come into possession of secrets relating to their affairs, will be restrained from making them public." See also 5 Pom. Eq. Jur. § 267. In *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664, there was a contract not to disclose secrets

as to machinery. The court, Gray, J., says (page 461 of 98 Mass.): "A secret of trade or manufacture does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value. Even if, as is argued in support of the demurrer, the process is liable to be inspected by the assessor of internal revenue or other public officer, the owner is not the less entitled to protection against those who in, or with knowledge of, violation of contract and breach of confidence, undertake to disclose it or to reap the benefit of it." He also quotes, with approval, the statement of the doctrine by Judge Story, supra, and also the language of Lord Cranworth in the opinion in *Morison v. Moat*, on appeal: "The principles that were argued in this case are principles really not to be called in controversy. There is no doubt whatever that, where a party who has a secret in a trade employs persons under contract, express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret and then set it up against their employer." 21 L. J. Ch. N. S. 248. In *Loven v. People*, 158 Ill. 159, 42 N. E. 82, the bill alleged, *inter alia*, that Loven fraudulently, and without the knowledge or consent of his employers, copied the names of a great number of their customers, together with postoffice addresses, by means of his duties as correspondent, from the books kept by his employers. A decree was entered enjoining Loven "from in any manner corresponding with complainant's agents or customers, or soliciting them to buy defendant's medicines of any kind, or divulging the names of complainant's customers and agents, or any of the secrets of the business, or interfering therewith."

Upon the authorities considered, it is clear, not only that equity will restrain defendants from disclosing secrets pertaining to plaintiff's business, where the knowledge of such secrets has been acquired while in the employ of the plaintiff, under an agreement that, in consideration of the employment, they would not divulge such secrets, but also that, in such case, it is not necessary that there should be an express covenant upon the part of the defendant not to disclose the secrets of the plaintiff's business, if such agreement may fairly be implied from the circumstances of the case and the relation of the parties. See also *Stone v. Goss*, 65 N. J. Eq. 756, 63 L.R.A. 344, 103 Am. St. Rep. 794, 55 Atl. 736; *Westervelt v. National Paper & Supply Co.* 154 Ind. 673, 57 N. E. 552; *Eastman Kodak Co. v. Reichenbach*, 79 Hun, 183, 29 N. Y. Supp. 1143.

Our conclusion is that the doctrine that

equity will restrain as well from breach of trust or confidence arising from the confidential relation of employer and employee as from breach of express contract is clearly established by the authorities, and is in accordance with sound reason.

The preliminary injunction was properly granted. The appeal is dismissed, the decree below is affirmed, and the cause is remanded to the Superior Court for further proceedings.

WASHINGTON SUPREME COURT.

ELIZABETH HASE, Appt.,

v.

CITY OF SEATTLE, Respt.

(— Wash. —, 98 Pac. 370.)

Municipal corporation — negligence — notice — residence.

1. A provision in a municipal ordinance making notice a prerequisite to suit against the municipality for damages caused by its negligence, that the notice must state the injured person's place of residence for a year past, is unreasonable, and omission of such statement from the notice will not defeat an action.

Same — location.

2. A statement in a notice of claim for an injury alleged to have been due to the negligence of a municipal corporation, that it was caused by falling through a defective sidewalk, the location of which is stated, is a sufficient compliance with a requirement that the notice must describe the defect that caused the injury.

(Mount and Fullerton, JJ., dissent from proposition 1.)

(December 8, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Case Note. — *May injured person's place of residence be required to be stated in notice of accident or injury as condition of liability of municipality.*

The rule laid down in the first headnote to HASE v. SEATTLE has since been reaffirmed in Jones v. Seattle (Wash.) 98 Pac. 743; and Wurster v. Seattle (Wash.) 100 Pac. 143.

In Johnson v. Troy, 24 App. Div. 602, 48 N. Y. Supp. 998, it appeared that the city charter required, as a prerequisite to a suit against the city for injury, that the claimant should present a statement of his claim to the city comptroller, in which he should

Messrs. Shorett & Shorett for appellant. Messrs. Scott Calhoun and James E. Bradford, for respondent.

The charter provision which requires that the claim must "accurately locate and describe the defect" causing the injury is not complied with by stating that complainant fell through a defective sidewalk at a certain place.

Mears v. Spokane, 22 Wash. 323, 60 Pac. 1127; Lord v. Saco, 87 Me. 231, 32 Atl. 887; Noonan v. Lawrence, 130 Mass. 161; Miles v. Lynn, 130 Mass. 398; Gardner v. New London, 63 Conn. 267, 28 Atl. 42; Biesiegel v. Seymour, 58 Conn. 43, 19 Atl. 375; Lilly v. Woodstock, 59 Conn. 219, 22 Atl. 41; Dolan v. Milwaukee, 89 Wis. 497, 61 N. W. 564; Paddock v. Syracuse, 61 Hun, 8, 15 N. Y. Supp. 387; Madden v. Springfield, 131 Mass. 441; Dalton v. Salem, 131 Mass. 551; Shea v. Lowell, 132 Mass. 187; Cronin v. Boston, 135 Mass. 110; Lyon v. Cambridge, 136 Mass. 419.

The notice as to residence is a reasonable and important requirement.

Johnson v. Troy, 24 App. Div. 602, 48 N. Y. Supp. 998; Borst v. Sharon, 24 App. Div. 599, 48 N. Y. Supp. 997; Mears v. Spokane, supra.

Dunbar, J., delivered the opinion of the court:

The appellant brought an action against the city of Seattle for damages resulting from personal injuries. A claim for damages for said injury was filed with the city clerk of said corporation, and later a suit brought thereon. At the trial the claim provided for by ordinance was offered in evidence, and objection was made to its introduction, which was sustained by the court. The court directed the jury to return a verdict in favor of the city, which was done. Judgment of dismissal was entered, and appeal followed. So that the only question in the case is whether the claim presented by the appellant to the city council was sufficient.

The principal objection urged to the claim,

give his residence by street and number, and that plaintiff's residence was not numbered. It was held that while the law would not require the performance of an impossibility, and where no number existed, none need be stated, still, the impossibility of complying with one requirement did not relieve him from complying with another, and, the street on which he lived being named, he should have given it in his notice, since the court will not say that is unimportant and may be disregarded which the legislature has declared to be necessary. No other cases on this question have been found.

and the one on which the court rejected it, is that the claimant did not state her residence for the past year, and this alleged defect was the cause alleged by the city for refusing the claim. It is also insisted that the notice was not sufficient, in that it did not clearly set forth the defect in the sidewalk which was the alleged cause of the accident. The claim presented was as follows: "To the City Council of the City of Seattle: The undersigned, Elizabeth Hase, hereby presents to the said city council her claim for damages against the city of Seattle, a municipal corporation of the state of Washington, in the sum of \$10,000, which said claim is hereby filed with the clerk of said city of Seattle; that said claim for damages is on account of personal injuries sustained by the said Elizabeth Hase in the said city of Seattle on the 23d day of March, 1907, at 9:30 p. m.; that said injuries consist of pain from a broken left forearm (a fracture known as 'Colles fracture'); also suffers much pain from being bruised through the chest, between the shoulder blades, and across the small of the back, and since the accident she has suffered nervous chills; that the said injuries were sustained by the said Elizabeth Hase on said date in the city of Seattle on the west side of Sixth avenue, between Blanchard street and Bell street; that the said injuries were caused by said Elizabeth Hase falling through a defective sidewalk." The ordinance demanding the presentation of the notice was as follows: "All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued; and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of the claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until after the same has been presented to the city council and sixty days have elapsed after such presentation."

Counsel for appellant vigorously inveigh against the application of the rule of liberal construction, insisting that the city is authorized under the laws and Constitution to make such provisions as it deems necessary for its protection, and that it is not the

province of the court to destroy such provisions by construction. So far as the first proposition is concerned, it is not a question of construction, liberal or otherwise, for the ordinance plainly provides that the claimant must state in his notice his residence for one year last past. This language is not susceptible of any two meanings, and therefore the only question to be considered is the right of the city to make such a demand of a claimant as a prerequisite to waging his claim for damages. It is insisted that the uniform trend of authority is that such charter provisions are constitutional and wise, and some authorities are cited to sustain that contention, among them *Scurry v. Seattle*, 8 Wash. 278, 36 Pac. 145. An examination of this case, however, convinces us that it does not announce all that is claimed for it by learned counsel. All that that case held was that the provision of the freeholders' charter of Seattle, declaring that no action shall be maintained against the city for any claim for damages unless such claim had been presented to the city council within six months after the time when such claim for damages had accrued, was not unconstitutional and void as being in contravention of the statute of limitations with reference to the commencement of actions; but it was also held in that case that the only limitation of the right of the city to make a provision concerning the time in which a claim for damages should be presented would be the limitation of a reasonable time, and that must necessarily always be a limitation to be taken into consideration else cities would be conferred with power to destroy rights existing at the common law. As showing that it never was the idea of this court that the power of cities is unlimited, it was held in *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847, that, although the freeholders' charter of a city may provide an ample method for the condemnation of private property for use as a public street, and legislative enactment may confer upon cities organized under freeholders' charters the authority to appropriate private property to corporate uses, such power was inoperative, in the absence of an act of the legislature conferring the right of eminent domain, and prescribing the method by which it should be exercised. And in *State ex rel. Snell v. Warner*, 4 Wash. 773, 17 L.R.A. 263, 31 Pac. 25, it was held that, under article 11, § 10, of the Constitution, authorizing a city of 20,000 or more inhabitants to form a charter for its own government, and providing for amendments thereto, no authority is given such city to extend its boundaries by amendment to its charter; the court in that case saying: "While the provisions of the

Constitution are to be given every liberal interpretation when the accomplishment of the purpose to be attained by them is at stake, we are bound to remember that they are somewhat unusual and extraordinary provisions, and that they are indirect restrictions on the power of the legislature, which can prescribe rules for the government of every municipal corporation but these."

It must be borne in mind that the powers claimed by the city in this case, and in fact in all cases of this character, are restrictions on common-law rights. In *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077, it was held that the power conferred by the Constitution and laws did not extend to the municipality power to impose a qualification of registration upon the electors. In *State ex rel. Fawcett v. Superior Ct. (Fawcett v. Pritchard)* 14 Wash. 604, 33 L.R.A. 674, 45 Pac. 23, it was held that these constitutional provisions would not sustain charter provisions providing a tribunal for determining election contests. There we said: "But we must not lose sight of the elementary proposition that municipal corporations have only the powers which are specially conferred upon them by the legislature, or such other powers as by necessary implication flow therefrom." But this identical question has been decided by this court in *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, where it was held that such charter provisions and restrictions could only be maintained where such conditions and restrictions were reasonable. This was a case for personal injuries alleged to have been sustained by reason of a defective sidewalk. So that the question there discussed was the identical question at issue in this case; and in aid of the construction of the requirement in the ordinance in that case this court said: "But it is not the rule that a city may say whether or not it shall be held for personal injuries caused by its neglect of duty. Charter provisions of the character in question, whether enacted by the legislature, or, as in the present case, by the city itself, are to be upheld only so far as they are reasonable and tend to the due administration of justice. When such provisions so far depart from reasonableness as to amount to a denial of justice, they are void." So that the question in this case is resolved into a question of the reasonableness of the ordinance requiring the claimant to give his residence for one year last past.

It seems to us that this provision is unreasonable, and would in no way aid the city in the investigation of the claim. This court, in common with all other courts, has uniformly held that the object of these ordinances and the theory upon which they were

sustained was notice, so that the city might be able to prepare for the trial of the cause if it was deemed expedient not to settle the claim. From an excerpt from the opinion of the court it seems that the court was influenced largely by the report of an Oregon case, wherein it was ascertained that a professional fraud, who was permanently crippled, had been claiming in different actions that the cause of the injury to his leg was falling through sidewalks in different cities, and had secured judgments fraudulently in different cities in Oregon; that the fraud had finally been discovered, and the claimant sent to the penitentiary. But the fact that fraud in an exaggerated case may be perpetrated upon a city is no reason for the enactment of unreasonable restrictions. Fraud is perpetrated sometimes, not only upon municipal corporations, but upon other corporations and upon individuals, in claims and suits of different characters. A provision requiring claimant to give a present residence, as was the case in *Johnson v. Troy*, 24 App. Div. 602, 48 N. Y. Supp. 998, cited and relied upon by counsel, might be held to be reasonable, for the reason that it would give the city authorities an opportunity to see the claimant and to talk with him, ascertain something of his appearance, or to make advances towards settlement of his claim, if deemed expedient. But to require anything further than that seems to be unnecessary and savors somewhat of inquisitiveness. If a requirement of this kind should be sustained, it is difficult to tell where the subject of biography would end. If the object is to inquire into the character or reputation of the claimant, then it might as well be said that the city had a right to demand, as a prerequisite to commencing an action, that the claimant should give the place of his birth, the different localities in which he had resided from that time up until the filing of the claim, his calling or profession, his parentage, associations, and a thousand and one other things that might be interesting to the city as a matter of idle curiosity. We have not been able to find any case exactly on this point, for it seems that it has never occurred to any other city to place any such provision in its charter. Believing that the provision is unreasonable and uncalled for, especially in consideration of the other requirement prohibiting the commencement of the action for sixty days from the date of the presentation of the claim, thereby allowing ample time for all pertinent investigation, we think the court erred in rejecting the admission of the notice on that ground.

The other objection urged by counsel for the respondent is that the language used, viz., "that the said injuries were caused by

said Elizabeth Hase falling through a defective sidewalk," the location of the sidewalk having been described, is not such a description of the defective sidewalk as is demanded by the ordinance in the provision that "all such claims for damages must accurately locate and describe the defect that caused the injury;" and *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127, is relied upon to sustain this contention. In that case the language of the claim was as follows: "Which injuries were caused by defects and obstruction in the sidewalk of the said city," describing the location; and this court said, in sustaining the objection to the claim, that: "To state that the injury was caused by a defect and obstruction in the sidewalk is but to state the general ground upon which a city in every case is liable for injuries sustained upon its streets; but it states no cause for the particular injury. The charter provision is intended to require notice to be given of the cause of the particular injury, and a notice that fails so to do cannot be made the basis of an action against the city for personal injuries."

It seems to us that the case at bar does not fall within the reason of the rule announced in that case. There it could not be ascertained, from the claim presented, whether the defect was too narrow a sidewalk, or whether it was a temporary obstruction on the sidewalk, or whether it was something hanging down from above and obstructing the sidewalk. In fact, it gave no notice whatever of the character of the defect, and the officers of the city might not have been able to ascertain the character of the defect by a visit to the location. But claims of this kind must be viewed certainly with all the liberality of a pleading, and under the liberal provisions of our Code there can be no question that there was enough in the notice in the case at bar in this respect to put the city on notice that it was the sidewalk itself that was defective, that it was no pendent obstruction, and that it was no obstruction of any kind on the top of the sidewalk. These things they would not naturally look for under the notice given in this case; for where the allegation is that the claimant fell through a defective sidewalk, any ordinarily intelligent mind would immediately reach the conclusion that there was a hole in the sidewalk, or some aperture through which the claimant fell. This case, instead of being governed by the *Mears Case*, *supra*, falls more squarely within the rule announced in *Faddin v. Seattle*, 50 Wash. 561, 97 Pac. 658, where the language of the claim was, "Fell through said sidewalk, owing to its defective condition, into a hole thereunder;" and this 20 L.R.A. (N.S.)

language was held sufficient to give notice to the city of the defect complained of.

The rule of all the cases was summarized by this court in *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431, where it was said: "This court has uniformly placed a liberal construction upon the requirements of such notice, holding that the notice had a common-sense object; viz., to apprise the officers of the municipality of the location, so that it might be examined with a view to preparing a defense to the action if it was thought a defense should be made; that, if it directs the attention of said officers with reasonable certainty to the place of the accident, the requirements of the notice have been met; and that it was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by meritorious claimants." Surely this notice did direct the attention of the officers with reasonable certainty to the place of the accident, and, when they were once there, the announcement made to them by the notice, that the claimant fell through a defective sidewalk at that particular point, was an announcement sufficiently plain to direct an intelligent investigation on the part of such officers. The evident spirit of this character of objections is to prevent a hearing on the merits, and therefore cannot be sustained.

The judgment will be reversed, and the court instructed to overrule the objections to the introduction of the claim, and proceed with the trial of the cause.

Hadley, Ch. J., and Rudkin and Crow, JJ., concur.

Mount, J., dissenting:

I cannot agree that the provision of the city ordinance requiring the claimant to give his residence for one year last past is an unreasonable requirement. I therefore dissent.

Fullerton, J., concurs.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN EX. REL.
FRANCIS E. MCGOVERN

v.

ORREN T. WILLIAMS, Circuit Judge.

(136 Wis. 1, 116 N. W. 225.)

Courts — superintending control.

1. The superintending control extends to reviewing the decision of the trial court that a grand juror was incompetent to act, which results in its refusal to proceed with

the trial, and to requiring it to do so by mandamus if the decision was erroneous.

Jury — competence.

2. The presence upon the grand jury of the man intended by the jury commissioners is shown by the fact that although, in placing his name in the box, an initial was misplaced, and the statute did not require his residence to be designated on the paper slip, yet they substituted for the residence of the man bearing the name so written on the slip that of the one who served on the jury.

Mandamus — control of trial court.

3. The issuance of a writ of mandamus to compel a court to proceed to hear a cause is not prevented by the fact that the effect of so doing will result in requiring the overruling of an order quashing an indictment

for disqualification of a member of the grand jury.

(May 8, 1908.)

PETITION for a writ of mandamus to compel respondent to proceed with the trial of a criminal case. Issued.

Statement by Dodge, J.:

By the petition and alternative writ of mandamus it is made to appear that on April 1, 1904, an indictment was returned by a grand jury against one Biersach charging him with crime. To that indictment, when called up in the circuit court for Milwaukee county, three pleas in abatement were interposed. The second and third pleas

Case Note. — Superintending control over inferior tribunals.

The present note is, to the extent hereinafter indicated, supplementary to an exhaustive note appended to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33, on "Superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal," to which reference is made for the earlier decisions on the subject. In view of the very full citation of authorities in such note, the present note will not include cases where the power of superintending control has been exercised without being designated as such, but will be limited, with but few exceptions, to a review of those decisions in which the existence and exercise of the power has been discussed *eo nomine*.

Before entering upon such review, however, it may not be amiss, in connection with the case reported, to call attention to the various opinions rendered by members of the Wisconsin supreme court in the case of State ex rel. Umbreit v. Helms (Wis.) 118 N. W. 158; and especially to the concurring opinion rendered by Marshall, J., by whom the entire subject is elaborately considered with the intention of more clearly defining the scope of the superintending control of the supreme court over other courts, and the conditions under which such power should be exercised; which opinion closes with the following recapitulation:

"(1) The second constitutional grant of power to this court, that of 'general superintending control over all inferior courts,' is not limited other than by the necessities of justice. It extends to judicial as well as jurisdictional errors.

"(2) The necessities of justice, in a legal sense, do not reach beyond the scope of governmental policy as to righting wrongs by judicial interference; as, for example, it stops in criminal cases at the constitutional prohibition of a second jeopardy.

"(3) The grant of superintending control, though without specified means or instrumentalities for its exercise, includes, by necessary implication, all common-law writs 20 L.R.A. (N.S.)

and means applicable thereto, and all power necessary to make such writs and means fully adaptable for the purpose.

"(4) The extent of the power of superintending control, as to any particular group of circumstances, is not measurable by that of the common-law writ most adaptable in its ordinary scope to vitalize such power in regard to such circumstances. Such extent is referable to the necessities of the case; and the ordinary use feature of the writ is to be expanded to meet the exigencies thereof.

"(5) The common-law writs, with the power indicated, to adapt them, leaves no part of the court's superintending control power to be necessarily dormant for want of means to vitalize it.

"(6) The existence of error in the field of the controlling power does not, necessarily, upon proper request in form, require the doors of the jurisdiction to open. When that should occur rests in sound judicial discretion.

"(7) By the policy of this court its superintending control power is to be exercised only when the right of the matter involved is plain, there is no other efficient remedy for its invasion or denial, such invasion or denial is prejudicial, and, generally, and especially as to errors not strictly jurisdictional, the case presents circumstances of exceptional or extraordinary hardship."

In general.

The power of superintending control over inferior courts is a high power which enables the supreme court, by the use of all necessary and proper writs, including the writ of mandamus, to control the course of litigation in inferior courts when such a court either refuses to act within its jurisdiction, or acts beyond its jurisdiction, to the serious prejudice of the citizen. State ex rel. Tewalt v. Pollard, 112 Wis. 232, 87 N. W. 1107.

The high prerogative authority of superintending control of the supreme court over inferior courts applies as well to criminal

have been overruled, and are not material of statement. The first plea set forth that the grand jury was illegally constituted, in that one John George Davies served thereon, who was not selected by the jury commissioners, and whose name was not placed upon the general jury list, and was not drawn from the box as one of the seventeen men to constitute the grand jury in question, whereby he was incompetent to serve. The court took testimony with reference to the identity of the person who had been selected by the jury commissioners and designated by the name George J. Davies, his name having also been drawn from the box as one of the grand jury, and reached the conclusion that the John George Davies who served upon the grand jury was not the

person so selected and drawn by the jury commissioners. As a result of such conclusion, he ordered that the indictment be abated and quashed, and refused to proceed further with the trial of the charge therein made. He, however, did not formally discharge the prisoner, but entered a stay of proceedings to enable an application to this court for such relief as might be deemed proper. The evidence on which the circuit court reached its determination is set forth in the petition, and all other facts material to the action of this court are conceded by the respondent to be so set forth, so that a final determination might be reached upon the motion to dismiss the writ and petition, which was interposed by the respondent.

as to civil cases. *State ex rel. Umbreit v. Helms*, supra.

The only questions the supreme court must determine as preliminary to the exercise of its power of general supervision are whether there exists any error or abuse in the court of inferior jurisdiction, without other remedy expressly provided, and whether the exercise of the power is "necessary for the furtherance of justice and the due administration of the law." *Hyde v. Superior Ct.* 28 R. I. 204, 66 Atl. 292.

Construction of constitutional and statutory grants.

Under this head may be found decisions involving more particularly matters of construction of various constitutional and statutory provisions; but other decisions also placing a construction upon like provisions may be found under the specific heads, and notably, under the heads "Over what courts or jurisdictions power may be exercised" and "Modes in which power may be exercised," *infra*.

The original jurisdiction to control the action of a judge of a county court, to compel him to reinstate and try criminal cases *nolle prosequi* by him, resides in the circuit, and not the supreme, court. *Ex parte State ex rel. Atty. Gen. (Ala.)* 47 So. 742.

Under Const. 1874, art. 7, § 14, providing that the circuit courts shall exercise a superintending control and appellate jurisdiction over county, probate, court of common pleas, and corporation courts, and justices of the peace, and shall have power to issue, hear, and determine all the necessary writs to carry into effect their general and specific powers; and § 4, art. 7, which provides that the supreme court, except in cases otherwise provided by the Constitution, shall have a general superintending control over all inferior courts of law and equity, and that, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto and other remedial writs, and hear and determine the same, the supreme 20 L.R.A. (N.S.)

court has no concurrent jurisdiction with the circuit court to issue writs of mandamus, etc., in aid of appellate and supervisory jurisdiction of the circuit courts over inferior courts, but only in aid of its own appellate and supervisory jurisdiction; and its supervisory jurisdiction over probate courts comes not originally, but by way of appeal and supervision through the circuit courts. *Featherstone v. Folbre*, 75 Ark. 510, 88 S. W. 554.

Under § 119 of the Constitution, empowering the court of appeals to issue such writs as may be necessary to give it a general control of inferior jurisdictions, such court has jurisdiction to intervene by a writ of prohibition to stay an inferior court from proceeding out of its jurisdiction. *Shackelford v. Patteson*, 110 Ky. 863, 62 S. W. 1040; *Louisville & N. R. Co. v. Miller*, 112 Ky. 464, 66 S. W. 5; *Campbellville Teleph. Co. v. Patterson*, 114 Ky. 62, 69 S. W. 1070; *Com. v. Jones*, 118 Ky. 889, 82 S. W. 643, 4 A. & E. Ann. Cas. 1192; *Hargis v. Parker*, 27 Ky. L. Rep. 441, 69 L.R.A. 270, 85 S. W. 704; *Renshaw v. Cook*, 33 Ky. L. Rep. 860, 895, 111 S. W. 377.

The supreme court has original jurisdiction of an application for a writ of mandamus to compel the issuance of an execution on a judgment, the power to issue original remedial writs as they were known at common law being conferred on the court by Const. art. 6, § 3, which provides that "the supreme court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same," and is entirely independent of the provisions of § 12 of the same article. *State ex rel. Kansas City v. Renick*, 157 Mo. 292, 57 S. W. 713.

The power of superintending control vested by Constitution, Art. 6, § 3, in the supreme court, may be exercised whether or not it has appellate jurisdiction over the case in the inferior court. *State ex rel. Anheuser-Busch Brewing Asso. v. Eby*, 170 Mo. 497, 71 S. W. 52; *State ex rel. Wm.*

A large number of other indictments were presented by the same grand jury, the validity whereof is assailed on the same ground. The ruling of the circuit court will prevent the trial of such offenses, many of which are now barred by statutes of limitation, so that great and irreparable injury is done the public, and the administration of justice obstructed, if, as claimed by relator, the ruling of the circuit court is wrong.

Messrs. Frank L. Gilbert, Attorney General, Francis E. McGovern, and Franz C. Eschweiler, for relator:

In the very language of the Constitution itself is found not only the power to grant the relief prayed for, but also the duty to exercise it.

J. Lemp Brewing Asso. v. Eby, 170 Mo. 528, 71 S. W. 1133; *State ex rel. St. Louis Brewing Asso. v. Eby*, 170 Mo. 529, 71 S. W. 1133; *Koehler v. Snider*, 177 Mo. 546, 76 S. W. 1032.

The supreme court has power to require one of the courts of appeals to reinstate an appeal and to exercise its jurisdiction by hearing and determining a cause of which it has jurisdiction, under Constitution, art. 6, § 3, and § 8 of the amendments adopted in Nov. 1884, granting "superintending control over the courts of appeals by mandamus, prohibition, and certiorari." *State ex rel. Stanberry v. Smith*, 172 Mo. 618, 73 S. W. 134.

The Cape Girardeau court of common pleas, the powers of which are derived from acts of the legislature, and to which the express grant of superintending control is limited to justices of the peace of the county in civil cases, has no superintending control over the probate court,—especially in view of § 1674, Rev. Stat. 1899, which confers upon circuit courts superintending control over probate courts in all cases not expressly prohibited by law; nor can a grant of such power be inferred from § 1461, Rev. Stat. 1899, providing that "whenever the term 'circuit court' is used in any law general to the whole state, the same shall be construed to include 'courts of common pleas' unless such construction would be inconsistent with the evident intent of such law, or of some law specially applicable to courts of common pleas," such construction being inconsistent with the evident intent and purpose of the statute creating the Cape Girardeau court of common pleas; nor from § 4449, Rev. Stat. 1899, providing that "the supreme court and each division thereof, the two courts of appeals and the circuit and common pleas courts, within their several jurisdictions, and also the judges thereof to the extent hereinafter provided in this article, shall have power to hear and determine proceedings in prohibition," such section not being the origin of the power to issue the writ, but simply an enactment indicating the procedure in the exercise of 20 L.R.A. (N.S.)

Att. Gen. v. Blossom, 1 Wis. 317; *State ex rel. Brownell v. McArthur*, 13 Wis. 407; *Att. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *State ex rel. Buchanan v. Kellogg*, 95 Wis. 672, 70 N. W. 300; *State ex rel. Att. Gen. v. Circuit Ct.* 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193; *State ex rel. Spence v. Dick*, 103 Wis. 407, 79 N. W. 421; *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 1081, 105 Wis. 164, 83 N. W. 320; *State ex rel. Oshkosh, A. & B. W. R. Co. v. Burnell*, 104 Wis. 251, 80 N. W. 460; *State ex rel. Rose v. Superior Ct.* 105 Wis. 651, 48 L.R.A. 819, 81 N. W. 1046; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *State ex rel. Tewalt v. Pollard*, 112

the power to hear and determine proceedings in prohibition. *Koehler v. Snider*, supra.

The supreme court has the same power to control the action of the courts of appeals with respect to their jurisdiction, and to prevent them from taking judicial action in excess of their jurisdiction, that it has as regards other courts of inferior jurisdiction. *State ex rel. Sale v. Nortoni*, 201 Mo. 1, 98 S. W. 554.

Where, by reason of the presence of a constitutional question, the supreme court would have exclusive jurisdiction of an appeal, a court of appeals has no supervisory jurisdiction over the circuit court. *Ibid.*

The power of general supervisory control over all inferior courts, conferred upon the supreme court by Const. art. 8, § 2, is distinct and separate from its appellate jurisdiction, and from the power conferred by § 3 to issue and to hear and determine the writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and injunction, and such other original and remedial writs as may be necessary or proper to complete the exercise of its appellate jurisdiction. *State ex rel. Whiteside v. First Judicial Dist. Ct.* 24 Mont. 539, 63 Pac. 395.

The restrictions imposed in the constitutional provision conferring upon the supreme court a general supervisory control over all inferior courts, "under such regulations and limitations as may be prescribed by law," do not, it seems, render such power dormant, in the absence of procedure provided by the legislature, so that the legislature, by failing to act, can render such power of no avail; but, in the absence of legislative action, the court has the power to establish rules therefor. Sufficient legislative sanction to enable the court to exercise such power is, however, found in § 205, Code of Civil Procedure, which provides: "When jurisdiction is, by the Constitution or this Code, or any other statute, conferred on a court or judicial officer, all the means necessary to carry into effect are also given; and, in the exercise of this jurisdiction, if the course of

Wis. 232. 87 N. W. 1107; *State ex rel. Schutz v. Williams*, 127 Wis. 236, 106 N. W. 286. 7 A. & E. Ann. Cas. 303; *State ex rel. Rinder v. Goff*, 129 Wis. 668, 9 L.R.A. (N.S.) 916, 109 N. W. 628; *Re Pierce*, 44 Wis. 411.

The relief prayed for here, to review, on behalf of the state, proceedings in a criminal case, has been granted in numerous courts.

Luton v. Circuit Judge, 69 Mich. 610, 37 N. W. 701; *Grand Rapids v. Braudy*, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472. 64 N. W. 29; *State ex rel. Bayha v. Philips* (*State ex rel. Bayha v. Kansas City Ct. of Appeals*) 97 Mo. 331, 3 L.R.A. 476, 10 S. W. 855; *Swift v. Circuit Judges*, 64 Mich. 479, 31 N. W. 434; *People ex rel. Robison v. Swift*, 59 Mich. 529, 26 N. W.

694; *Louisell v. Benzie* Circuit Judge, 139 Mich. 40, 102 N. W. 371; *People v. Murray*, 72 Mich. 10, 40 N. W. 29; *Clute v. Ionia Circuit Judge*, 139 Mich. 337, 102 N. W. 843; *Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323; *State ex rel. Smith v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076; *State ex rel. Harris v. Laughlin*, 75 Mo. 358; *People ex rel. Coberly v. Scates*, 4 Ill. 351; *Crane v. Saginaw Circuit Judge*, 111 Mich. 497, 69 N. W. 721; *McCreary v. Rogers*, 35 Ark. 298; *Com. v. Balph*, 111 Pa. 365, 3 Atl. 220; *Illinois State Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201; *Glencoe v. People*, 78 Ill. 382; *People ex rel. Oebricks Superior Ct.* 5 Wend. 114; *State ex rel. Chicago, R. I. & P. R. Co. v.*

proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." *State ex rel. White-side v. First Judicial Dist. Ct. supra*.

And in *State ex rel. Anaconda Copper Min. Co. v. District Ct.* 25 Mont. 504, 65 Pac. 1020, it is reaffirmed that the power of supervisory control is distinct and independent of the appellate power and the power to grant original writs; and that, from its nature, it must be exercised by means of instrumentalities distinct from those by which the others are made available.

The superintending authority of the King's bench over inferior tribunals is, to the extent that it may be exercised by the use of the writ of mandamus, included in and part of the original jurisdiction given by the Constitution to the supreme court. *State ex rel. Reynolds v. Graves*, 66 Neb. 17, 92 N. W. 144.

Constitution, art. 4, § 8, which provides that "the supreme court . . . shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts," gives the supreme court general supervision and control of proceedings in the lower court. *State v. Crook*, 132 N. C. 1053, 44 S. E. 32.

The supreme court, being the highest tribunal in the state, with appellate and supervisory jurisdiction over all proceedings and judgments of all inferior courts, has the inherent power to grant a writ of certiorari whenever necessary in the exercise and enforcement of this jurisdiction, and is not restricted in its use by § 10, art. 6 of the Constitution, providing that the judges of inferior courts of law and equity shall have power to issue it in civil cases, to remove such proceedings from any inferior jurisdiction into a court of law. *Tennessee C. R. Co. v. Campbell*, 109 Tenn. 640, 75 S. W. 1012.

The supreme court has not the same general power to issue the writ of mandamus "in cases warranted by the principles and 20 L.R.A. (N.S.)

usages of law" which the court of King's bench, in England, has to issue the writ to inferior tribunals. *Smith v. Conner*, 98 Tex. 434, 84 S. W. 815.

Under Const. art. 5 § 6, which provides that the courts "shall have such other jurisdiction, original and appellate, as may be prescribed by law," and Rev. Stat. 1895, art. 1000, authorizing the court of civil appeals to issue the writ of mandamus to compel a judge of the district and county courts to proceed to trial and judgment in a cause, the court of civil appeals may compel a district court to retry a cause where the granting of a new trial as to some of the parties operated as to all. *Levy v. Gill* (Tex. Civ. App.) 46 S. W. 84.

The power of superintending control given to the circuit courts by Const. art. 7, § 8, unlike the grant of power of the superintending control to the supreme court, is limited by the means afforded for its exercise,—in other words, by the functions of the original writs referred to in connection with the grant, all of which appertain to matters of jurisdiction. *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *Potter v. Frohbach*, 133 Wis. 1, 112 N. W. 1087.

Under Const. art. 5, § 2, which vests in the supreme court a general superintending control over all inferior courts, under such rules as may be prescribed by law, and Const. art. 5, § 3, which provides that "the supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction," the court is authorized, in appropriate cases, to issue the writ of prohibition to restrain the action of an inferior court in excess of its jurisdiction. *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

In courts of the United States.

In bankruptcy, the circuit court of appeals has jurisdiction, upon petition and notice, "to superintend and revise, as mat-

Smith, 172 Mo. 446, 72 S. W. 692; Bob v. State, 2 Yerg. 173; State ex rel. New Orleans v. Civil Dist. Judge, 52 La. Ann. 1275, 51 L.R.A. 71, 27 So. 697; Benness v. State, 124 Ala. 97, 26 So. 942; Ex parte Barnes, 84 Ala. 540, 4 So. 769; Ex parte Haralson, 75 Ala. 543; State v. Hart, 19 Utah, 438, 57 Pac. 415.

The doctrine here contended for has been recognized to its fullest extent in England.

R. v. Middlesex Justices, L. R. 2 Q. B. Div. 516; *R. v. Brown*, 7 El. & Bl. 757; *R. v. Pilkington*, 2 El. & Bl. 546; *R. v. Adamson*, L. R. 1 Q. B. Div. 201.

Where a party has more than one Christian name, and elects to be known by other than the first, such name is, to all intents, his Christian name.

ter of law," the proceedings of the district court; but otherwise it has no power to vacate, set aside, or modify an order of the district court except by appeal or writ of error. *United States v. Moy Yee Tai*, 48 C. C. A. 203, 109 Fed. 1.

Power of legislature to interfere.

By § 3, art. 6 of the Constitution, the supreme court is given power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, and it is beyond the power of the general assembly to abridge or enlarge the same; and therefore chapter 28 of the Code, authorizing courts of record on certiorari to review the proceedings of an inferior court or tribunal because it has abused its discretion, or to review mere questions of law of less dignity than such as go to the jurisdiction, has no application to original proceedings instituted in the supreme court of the state. *Leppel v. District Ct.* 33 Colo. 24, 78 Pac. 682.

Where the Constitution confers supervisory control over inferior tribunals, the legislature has no power to encroach upon, impair, or limit the jurisdiction thus conferred. *Home Sav. & T. Co. v. District Ct.* 121 Iowa, 1, 95 N. W. 522.

Const. art. 8, § 2, providing that "the supreme court shall have a general supervisory control," lodges this jurisdiction in the supreme court sitting as an organized judicial body, and the power of general supervision cannot be conferred upon any other body, or upon any individual or individuals, even though justices of the supreme court. *Re Weston*, 28 Mont. 207, 72 Pac. 512.

Where the Constitution has provided that "the circuit courts shall have . . . appellate jurisdiction from all inferior courts and tribunals and a supervisory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments, and decrees, 20 L.R.A. (N.S.)

21 Am. & Eng. Enc. Law, 2d ed. p. 306; *Nolan v. Taylor*, 131 Mo. 224, 32 S. W. 1144; *Steinmann v. Strimple*, 29 Mo. App. 478; *Binfield v. State*, 15 Neb. 484, 19 N. W. 607; *Hommel v. Devinney*, 39 Mich. 522; *United States v. Winter*, 13 Blatchf. 276, Fed. Cas. No. 16,743; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *People v. Lake*, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146; *King v. Hutchins*, 28 N. H. 561; *Ross v. State*, 116 Ind. 495, 19 N. E. 451; *Keene v. Meade*, 3 Pet. 1, 7 L. ed. 581; *Games v. Stiles*, 14 Pet. 322, 10 L. ed. 476; *Rooks v. State*, 83 Ala. 79, 3 So. 720; *Fincher v. Hanegan*, 59 Ark. 151, 24 L.R.A. 543, 26 S. W. 821.

Messrs. Walter Schintz and Carl Runge with Mr. Lyman G. Wheeler for respondent.

and give them a general control over inferior courts and jurisdictions," the legislature cannot take from the circuit court any part of its supervisory jurisdiction over lower courts, nor deprive the circuit court of the use of any writ so far as it may be necessary for the exercise of that jurisdiction; and a statute attempting to do this must be held to be void. *State ex rel. Tewalt v. Pollard*, 112 Wis. 232, 87 N. W. 1107.

In what courts the inherent power exists.

In the absence of negative or substitutionary provisions of statutes, the state courts of general original common-law jurisdiction have and exercise an inherent authority to revise the proceedings of inferior jurisdictions on certiorari, according to the course of the common law. Such process, however, must go from a court of general original common-law jurisdiction unless otherwise expressly provided by statute. *Sullivan v. District of Columbia*, 19 App. D. C. 210.

The court of appeals of the District of Columbia is a court of appellate jurisdiction, with no original common-law jurisdiction in matters criminal out of which the common-law writ of certiorari can issue to remove the record and proceedings of the court of an inferior criminal jurisdiction, by virtue of any supervisory power existing in it, although it has been given power as an appellate court to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction. *Ibid.*

Where application to correct should be first made.

Although Const. art. 6, § 3, gives the supreme court a general superintending control over "all inferior courts," it will, in the absence of an exigency, decline to exercise its power when application could have been made to one of the circuit courts, upon which power has been conferred by the Constitution to issue certain writs necessary to give them control over inferior courts

Dodge, J., delivered the opinion of the court:

The present application is confessedly addressed to the power vested in this court by the Constitution of superintending control over inferior courts. The meaning of that grant of power was very fully expounded in *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 1081, and the following conclusion reached and stated at page 614 of 103 Wis.: "It is very apparent that, when the makers of the Constitution used the words 'superintending control over all inferior courts,' they definitely referred to that well-known superintending jurisdiction of the court of Kings' bench. In England it was a branch of the King's power, lodged with the King's

and tribunals. *Mitchell v. Bay Probate Judge* (Mich.) 119 N. W. 916.

Over what courts or jurisdictions power may be exercised.

A county board of registrars of election is not one of the "jurisdictions" which the supreme court may control by original writs under § 140, Const. 1901, which gives the supreme court original jurisdiction "to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give a general superintendence and control of inferior jurisdiction." *Ex parte Giles*, 133 Ala. 211, 32 So. 167.

A probate court is an "inferior court" within the meaning of Const. art. 6, § 8, giving the circuit court the power to issue certain writs necessary to give them general control over inferior courts and tribunals, the term "inferior courts" being used in the sense of grade, and meaning lower courts. *Mitchell v. Bay Probate Judge*, supra.

Under the constitutional provision conferring upon the courts of appeals "the power to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other remedial writs, and to hear and determine the same, and to exercise a superintending control over all inferior courts of record in the appellate district," a writ of prohibition may be issued to an inferior court, such as a board of arbitration, whether a court of record or not. *School Dist. No. 6 v. Burris*, 84 Mo. App. 654.

The power conferred by the Constitution of "general supervisory control over all inferior courts," operates only upon inferior courts, and not upon persons. *Re Weston*, supra.

A court-martial is not an "inferior court" within the meaning of a constitutional provision giving the supreme court a general superintending control over all inferior courts, it not belonging to the judicial, but to the executive, department of the government. *State ex rel. Poole v. Nuchols* (N. D.) 119 N. W. 632. 20 L.R.A. (N.S.)

court; in this country it is a branch of the sovereign power of the people, committed by them as a sacred charge to this court, not to be exercised upon light occasion, or when other and ordinary remedies are sufficient, but to be wisely used for the benefit of any citizen when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction, to the serious prejudice of the citizens." Since that case was decided the nature of this power has been the subject of very much explanation, but hardly with the result of greater clearness or exhaustiveness than in the words just quoted. Some of the more important of the later cases are the following: *State ex rel. Mitchell v. Johnson*, 105 Wis. 90, 80 N. W. 1104; *State ex rel. Fourth*

The court of civil appeals, when acting in those cases in which its judgments are made final, is not inferior to the supreme court, which can therefore exercise no revisory power over it. *Smith v. Conner*, 98 Tex. 434, 84 S. W. 815.

Modes in which power may be exercised.

The Constitution confers upon the supreme court the control and general supervision of all inferior courts, and, for the purpose of such jurisdiction, authorizes it to make use of the writs of certiorari, mandamus, prohibition, and quo warranto, and other remedial writs; and the functions of the writs mentioned are thereby broadened by the authority of the fundamental law, in order that they may subserve the uses to which they are thus assigned. *State ex rel. New Orleans v. Civil Dist. Judge*, 52 La. Ann. 1275, 51 L.R.A. 71, 27 So. 697.

Under the plenary powers, control, and general supervision over inferior courts conferred by art. 94 of the Constitution, the writ of certiorari will issue, coupled with mandamus, when the judge of an inferior tribunal refuses to try a case, and such refusal amounts to a denial of justice. *State ex rel. Sorrel v. Foster*, 106 La. 428, 31 So. 57.

Under the Constitution, certiorari is one of the methods by which the supreme court exercises its superintending control over the courts of appeals, and may be resorted to not only in cases where it is alleged that the lower court is absolutely without any jurisdiction whatever, but it also may reach and afford a remedy in cases where such court has jurisdiction, but undertakes to exercise unauthorized powers. *State ex rel. Scott v. Smith*, 176 Mo. 90, 75 S. W. 586.

The superintending control of circuit courts over probate courts, conferred by § 1674, Rev. Stat. 1899, does not embrace an appeal from a decision of the probate court to the circuit court in a case not otherwise appealable, but can only be exercised by an original writ issuing out of the circuit court, directed to the probate court, as a writ of certiorari, mandamus, or prohibition. *Morris v. Morris*, 128 Mo. App. 673, 107 S. W. 405.

Nat. Bank v. Johnson, 105 Wis. 164, 83 N. W. 320; State ex rel. Milwaukee v. Ludwig, 106 Wis. 226, 82 N. W. 158; State ex rel. W. G. Taylor Co. v. Elliott, 108 Wis. 163, 84 N. W. 149; State ex rel. Coffey v. Chittenden, 112 Wis. 569, 88 N. W. 587; Re Gates, 117 Wis. 445, 94 N. W. 292; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; State ex rel. Milwaukee Electric R. & Light Co. v. Circuit Ct. 133 Wis. 442, 113 N. W. 722; State ex rel. Milwaukee Electric R. & Light Co. v. Circuit Ct. 134 Wis. 301, 114 N. W. 455.

It will be observed that one limitation upon the exercise of this power, stated in the first Johnson Case and many times reiterated, is the absence of any other adequate and

sufficient remedy. 2 Spelling, Extr. Relief, § 1392; High, Extr. Legal Rem. § 177; State ex rel. Meggett v. O'Neill, 104 Wis. 227, 80 N. W. 447; Re Gates, supra. We, therefore, elsewhere in this opinion, without express reiteration, must be understood as intending that qualification in all cases where it may be stated the power exists. It is not material to the present case, for both parties concede and proceed on the assumption that, if the acts of the circuit court here complained of are otherwise within reach of our superintending jurisdiction, exercisable by the writ of mandamus, other adequate remedy is wanting, and that a case of exigent prejudice to public welfare is presented. State v. Kemp, 17 Wis. 670; State v. Grottkau, 73 Wis. 589,

The writ of certiorari is not a suitable means for the exercise of supervisory control where there has been no excess of jurisdiction; but the proper instrument by which to exercise the power must be framed when the case properly arises and may be termed a supervisory writ. State ex rel. Whiteside v. First Judicial Dist. Ct. 24 Mont. 539, 63 Pac. 395.

Const. art. 7, § 2, providing that "the original jurisdiction of the supreme court shall extend to a general supervising control over all inferior courts, and all commissions and boards created by the law. The supreme court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs as may be provided by law, and to hear and determine the same," authorizes the supreme court to issue the writ of certiorari as it exists at common law, for investigation as to jurisdictional errors only, as an aid in the exercise of its general superintending control over all inferior courts. Baker v. Newton (Okla.) 98 Pac. 931.

In the exercise of the jurisdiction conferred by art. 12, § 1, of the amendments to the Constitution, which provides that the supreme court shall have final revisory and appellate jurisdiction in all questions of law and equity, and shall have power to issue prerogative writs, and shall also have such other jurisdiction as may, from time to time, be prescribed by law, under § 2 of the court and practice act, which provides that "the supreme court shall have general supervision of all courts of inferior jurisdiction, to correct and prevent errors and abuses therein when no other remedy is expressly provided; it may issue writs of habeas corpus, of error, certiorari, mandamus, prohibition, quo warranto, and all other extraordinary and prerogative writs and processes necessary for the furtherance of justice and the due administration of the law," and § 33 of the same act, which provides that "the supreme and superior courts shall have power to enter such judgments, decrees, and orders, and to frame and issue such citations, executions, and other writs and processes, as may

be necessary or proper to carry into full effect all the powers and jurisdictions which are or shall be conferred upon them respectively by the Constitution or by law," the supreme court is not confined to any narrow, technical definition of the office of the extraordinary writs named in the statute above quoted, but may use those writs in their accepted forms when adapted to the purpose sought; or it may adapt them, or modify them, or it may frame new writs and processes. Hyde v. Superior Ct. 28 R. I. 204, 66 Atl. 292.

The writ of certiorari issued in the exercise of the power of superintending control to a court of equity is not a common-law writ, but an extraordinary process, appropriate to the revisory and supervisory powers of the supreme court. Ibid.

The fact that a constitutional grant of the power of superintending control fails to name the writ of prohibition is of no moment, the court taking the necessary writs with the grant of jurisdiction. State ex rel. Tewalt v. Pollard, 112 Wis. 232, 87 N. W. 1107.

Policy governing its exercise.

The power of superintending control will not be exercised upon light occasions, or when other and ordinary remedies are sufficient (State ex rel. Milwaukee v. Ludwig, 106 Wis. 226, 82 N. W. 158; State ex rel. Umbreit v. Helms [Wis.] 118 N. W. 158); or when nothing practical may be accomplished thereby (State ex rel. Winchell v. Circuit Ct. 116 Wis. 253, 93 N. W. 16); but it will only be exercised in special emergency cases, and in order to prevent great impending present injury. (Murat v. New Orleans, 119 La. 505, 44 So. 279).

It will only be exercised where the duty of the inferior court to act within its jurisdiction, or to refrain from going beyond its jurisdiction, is plain and imperative, where such court threatens to violate that duty to the substantial prejudice of the rights of the petitioner, where all other remedies are inadequate, and the application for relief prompt. State ex rel. Milwaukee

9 Am. St. Rep. 816, 41 N. W. 80, 1063; Von Rueden v. State, 96 Wis. 671, 676, 71 N. W. 1048; United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609.

The present application is claimed to present a case where the circuit court refuses to act within its jurisdiction, for that, by reason of some preliminary consideration, it has declared that it has no right to proceed with the consideration of the charge against the accused. If that contention is sustained, it will neither be necessary nor proper in the present case to attempt a disquisition upon or further definition of the jurisdiction of this court in other directions. That the act of the circuit court is a refusal to exercise its jurisdiction and

perform its duty to consider the criminal charge against the accused seems too plain for discussion. He has declared that purpose most unambiguously, and, but for the stay entered to enable the application to this court, the accused would have been discharged, immune from further prosecution, it is said, because a new prosecution for his alleged offense is barred by the statute of limitations. Thus, *prima facie*, an obvious case is presented to which either a writ of mandamus or the old-time writ of *procedendo ad iudicium* would be appropriate to command the circuit court to perform its duty to consider and judicially pass judgment upon the controversy instituted by this indictment. To this *prima facie* case it is responded that we cannot

Electric R. & Light Co. v. Circuit Ct. 133 Wis. 442, 113 N. W. 722; State ex rel. Milwaukee v. Ludwig, *supra*.

It should be exercised with extreme caution, and only in a clear case, to aid the administration of justice, and not to defeat it or needlessly embarrass it. Quay's Petition, 189 Pa. 517, 42 Atl. 199.

A litigant cannot, as matter of right, call upon the supreme court to exercise its power of control and general supervision over inferior courts, but such power will be exercised by the court in any particular case in its wise discretion. State ex rel. Union Sawmill Co. v. Summit Lumber Co. 117 La. 643, 42 So. 195.

The supervisory power of the supreme court will only be exercised after consideration, deliberation, and a judicial determination of the merits of the controversy with reference to which it is sought to be invoked. It cannot be appealed to and a remedy had under it as a matter of course. Re Weston, 28 Mont. 207, 72 Pac. 512.

Control of lower courts' discretion.

Certiorari will not be granted, in the exercise of the power of general supervision, to review or control the discretion of the subordinate tribunal, unless it clearly appears that there has been an abuse of this discretion. Home Sav. & T. Co. v. District Ct. 121 Iowa, 1, 95 N. W. 522.

In the exercise of discretion vested in them by law, the inferior courts will not be subjected to interference under the power of superintending control merely because the views of the superior court on the subject may be at variance with those of the lower court; but there must in such case be such an abuse of discretion as would indicate a failure to hear or a bias in the consideration of the question by the trial judge. Renshaw v. Cook, 33 Ky. L. Rep. 860, 895, 111 S. W. 377.

Use in place of appeal or other remedy.

The supervisory power will not be exercised where there is an adequate remedy by 20 L.R.A. (N.S.)

appeal or otherwise (State ex rel. Johnson v. Thompson, 111 La. 315, 35 So. 582; State ex rel. Clark v. District Ct. 30 Mont. 442, 76 Pac. 1005; Baker v. Newton (Okla.) 98 Pac. 931; State ex rel. Tewalt v. Pollard, *supra*; Re Gates, 117 Wis. 445, 94 N. W. 282; State ex rel. Milwaukee Electric R. & Light Co. v. Circuit Ct. 134 Wis. 301, 114 N. W. 455); or if the applicant has an adequate remedy elsewhere (Montgomery v. Viers [Ky.] 114 S. W. 251).

The extraordinary supervisory powers of the supreme court over inferior tribunals will not be exercised where the issue raised can be reviewed on appeal, and no injury is shown beyond the ordinary delays of litigation. Murphy v. Police Jury, 117 La. 355, 41 So. 647.

Questions that may be decided on appeal will not be reviewed under the power of supervisory control if no prejudicial delay is to result, and there is no immediate necessity for the review of the cause presented on the application. McClelland v. Gasquet, 122 La. 241, 47 So. 540.

Under the supervisory powers conferred by the Constitution, the supreme court will not review the question of the guilt or innocence of the accused. State ex rel. Johnson v. Thompson, 111 La. 315, 35 So. 582.

But where the appeal, writ of error, or other remedy is slow, difficult, or inadequate, the power will be exerted. Hargis v. Parker, 27 Ky. L. Rep. 441, 69 L.R.A. 270, 85 S. W. 704; Renshaw v. Cook, *supra*; State ex rel. Whiteside v. First Judicial Dist. Ct. 24 Mont. 539, 63 Pac. 395; State ex rel. Reynolds v. Graves, 66 Neb. 17, 92 N. W. 144; Gates v. McGee, 15 S. D. 247, 88 N. W. 115,—hereinafter set forth under title, "Occasions for its exercise."

Occasions for its exercise.

—in general.

When a new jurisdiction is created by statute, and the court or officer exercising it proceeds in a summary mode or in a course different from the common law, and a remedy for the revision of its exercise is not

ascertain whether it is the circuit court's duty to proceed with the case without reviewing the obviously judicial determination made below, that the indictment is void, clearly within the court's jurisdiction to resolve either way,—a determination reached upon so clearly judicial acts as the weighing evidence and reaching conclusions upon disputed questions of fact, as also deciding uncertain questions of law as to the effect on the validity of the grand jury's action of the presence and participation of an unqualified person as a member of that grand jury. But this is no insuperable obstacle. This court is not universally restrained from reviewing acts done within the jurisdiction and judicial power of the inferior court in the exercise of superin-

tending control. *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 623, 51 L.R.A. 33, 79 N. W. 1081; *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 234, 82 N. W. 158; *State ex rel. Winchell v. Circuit Ct.* 116 Wis. 253, 93 N. W. 16. True, it is frequently asserted that the writ of mandamus issued under the power of superintending control cannot be made to serve as a writ of error, and that, when the lower court does take up any question for consideration, and in its best judgment decides, it exercises jurisdiction and performs its duty, and there is nothing left but a supposed judicial error for review. *High, Extr. Legal Rem.* 3d ed. § 188; *State ex rel. Fourth Nat. Bank v. Johnson*, supra; *State ex rel. Oshkosh, A. & B. W. R. Co. v. Burnell*, 104 Wis. 246.

given by the statute creating it, certiorari from the court having general superintendence and control over inferior jurisdictions will lie for its revision. *Home Sav. & T. Co. v. District Ct.* supra.

The court of appeals may exercise its constitutional power to prevent an inferior court from exceeding its jurisdiction before the question of jurisdiction can be presented to such court, where the situation disclosed is such that, to take the ordinary course, would be of itself to subject the complaining party to irremediable loss. *Hargis v. Parker*, supra.

Though the inferior court may have jurisdiction, but there is not an adequate remedy by appeal, the court of appeals may, in its discretion, exercise a supervisory control over the inferior court so as to prevent irreparable injury and injustice. *Renshaw v. Cook*, supra.

A proper function of the supervisory power is to control the course of litigation in the inferior courts where these courts are proceeding within their jurisdiction, but, by a mistake of law, or wilful disregard of it, are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate. *State ex rel. Whiteside v. First Judicial Dist. Ct.* supra.

The power of supervisory control is vested in the supreme court, not for the purpose of interfering at every stage of the proceedings in the district court, and directing the conduct of the business there, but only under extraordinary circumstances, where there is no other remedy, and a party litigant is, by some wrong committed by the court, liable to suffer irreparable injury. *State ex rel. Clark v. District Ct.* 30 Mont. 442, 76 Pac. 1005.

A proper case for the exercise of superintending authority is presented where the rights of the relator can be adequately protected only by the prompt rescission of the orders of the inferior court of which he complains though such orders may be reviewed in an appellate proceeding, such remedy, however, not being an adequate one. *State ex rel. Reynolds v. Graves*, supra.

The fact that it becomes necessary to re-
20 L.R.A. (N.S.)

view judicial action of an inferior court is no insuperable obstacle to the exercise of the power of superintending control in a proper case; but the general rule that mandamus issued under the power of superintending control cannot be used to serve the purpose of a writ in error to review judicial action of the trial court is subject to limitations, as where a preliminary question is involved. *State ex rel. Umbreit v. Helms* (Wis.) 118 N. W. 158.

A preliminary question respecting the control of trial courts in criminal actions arises upon any action of the court which amounts to a refusal to enter upon the trial of the case before a jury is duly impaneled and sworn to try the accused. *Ibid.*

No justification appears for the exercise of the superintending and supervisory power of the supreme court where the order and judgment against which prohibition is sought are entirely within the jurisdiction of the inferior court, and, if erroneous, will be promptly reviewable on appeal from the judgment. *Re Gates*, 117 Wis. 445, 94 N. W. 202.

The mere importance of obtaining a speedy, final settlement of a controverted question, even of a public nature, short of necessity in that regard to prevent irreparable loss of valuable rights, will not justify the exercise of the power of supervisory control. *Re Mielke*, 120 Wis. 501, 98 N. W. 245.

The superintending control of the supreme court over inferior courts will not be extended to determine whether a circuit judge should do what he has refused to do, where the error claimed to have been committed is reviewable on appeal from the order entered in the matter, or from a final determination of the matter or proceeding in which it was made, and the refusal does not deny a clear statutory right, but involves the determination of questions of law or fact, or both, of such difficulty that a judge might reasonably, proceeding considerably, commit judicial error. *State ex rel. Milwaukee Electric R. & Light Co. v. Circuit Ct.* 134 Wis. 301, 114 N. W. 455.

251, 80 N. W. 460. What limitations upon that rule appear in practical application of superintending control need not here be discussed, with one exception, which seems specially relevant to the situation before us. The courts are agreed, with but little failure of unanimity, that though the resolution of either a jurisdictional question or of a preliminary one, which precedes the consideration of the main controversy proposed to the court, may be judicial in character, none the less the court refuses to perform its duty to that controversy when it resolves the preliminary question adversely and refuses further action, and the superintending court is not precluded from considering whether or not that duty exists. There could not well be argument against

the power to direct the lower court to proceed to consider a suit when its refusal to do so was arbitrary or based on no stated reasons, but the result to the party is the same when the court states such reasons; he is equally denied the judicial consideration and determination upon his controversy which the trial court owes him as a duty. It is generally true of all official action by courts or other officers, that they are obliged, before proceeding to the performance of that official duty, to decide whether the condition exists which calls it into activity. A court must always inquire whether the law either gives it the jurisdiction or imposes upon it the duty to entertain a given controversy, and must inquire into existence of facts, either of no-

—to compel change of venue.

In *State ex rel. Rowell v. Dick*, 125 Wis. 51, 103 N. W. 229, mandamus was granted to compel a change of venue on the ground that the judge was disqualified by reason of having been concerned in the litigation as an attorney, where a statute expressly entitled the applicant to such change.

In *State ex rel. Schutz v. Williams*, 127 Wis. 236, 106 N. W. 286, 7 A. & E. Ann. Cas. 303, mandamus was granted to compel a change of venue on the ground of the prejudice of the judge before whom the case was brought for trial, which change had been denied by the inferior court, the applicant having a clear statutory right thereto.

The power of superintending control will not be used to force the trial judge into granting a change of venue where there is no clear statutory requirement for the change, and a number of questions are involved, in respect to each of which the trial court might well have hesitated as to the right thereof. *State ex rel. Milwaukee Electric R. & Light Co. v. Circuit Ct. supra*.

No case is presented for the exercise of the power of supervisory control to compel the removal of an accusation of an officer from one department of the district court to another, where it does not appear that, if the court should proceed to a determination of the cause, the relator would suffer any injury or wrong for which an appeal would not furnish him an adequate remedy. *State ex rel. Clark v. District Ct. supra*.

—to correct erroneous decision of jurisdictional question.

In *Hays v. Stewart*, 7 Idaho, 193, 61 Pac. 591, it is held that a writ of mandate will issue to require a district court to proceed with a criminal case in such court which is triable, when such court refuses to proceed at all with such case.

In *Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323, it is held that the rule that mandamus will not issue to control discretion or revise judicial action has no application to the determination of preliminary questions relating to the sufficiency of the service of summons, but that, when the tribunal or of-

ficer whose duty it is to take jurisdiction of the matter, believing erroneously that it has no jurisdiction, declines to consider the matter, mandamus will issue to compel action.

In *Com. ex rel. Barth v. McCann*, 123 Ky. 247, 94 S. W. 645, the court was equally divided upon the question whether, under the constitutional and statutory provisions conferring upon the court power to issue such writs as may be necessary to give it control of inferior jurisdictions, the court had the power to award a writ of mandamus directing the judge of a municipal police court to proceed to the trial of persons whose demurrers to the warrants under which they were arrested had been sustained by such judge.

In the absence of apparent jurisdiction over a cause in any appellate court, the supreme court has, under its supervisory jurisdiction, the authority to instruct the court of original jurisdiction to reinstate a case dismissed on the ground, and for the alleged reason, that the court is without jurisdiction, if it be manifest that the court has jurisdiction. *Reynolds v. Carroll*, 114 La. 610, 38 So. 470.

In *State ex rel. Smith v. Smith*, 69 Ohio St. 196, 68 N. E. 1044, it is held that mandamus will lie to compel a justice of the peace to proceed with a trial of a defendant over whom he has decided that he has no jurisdiction.

A proper case for the exercise of the power of supervisory control is presented where an inferior court, not in the exercise of its discretion, but in disobedience of a mandatory and imperative statute, has refused to grant a motion to dismiss a complaint, and the order denying such motion is not appealable, so that otherwise the defendant will be subjected to the great inconvenience, difficulty, and expense of trial before the action of the court can be reviewed on appeal. *State ex rel. Mitchell v. Johnson*, 105 Wis. 90, 80 N. W. 1104.

In *Re Grossmayer*, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535, it was held that a writ of mandamus may lie to compel a court to enter judgment by default, where it erroneously declines to take jurisdiction of the case after sufficient service on the de-

tice to one of the parties or of some other preliminary condition, upon which the law imposes on him the power and the duty. In so deciding, he, of course, acts judicially. Where that judicial action can be corrected by ordinary appellate procedure, there may be no need for the exertion of the more extraordinary superintending control; but where it cannot, the result of an erroneous adverse determination of the preliminary question is an effectual refusal to perform his duty and exercise his jurisdiction, as complete and as injurious as if done arbitrarily and without reason. The courts, English and American, agree with practical unanimity that such preliminary decision, however judicial in character, may be reviewed under the superintending power, and,

in case of erroneous decision thereof by the inferior court, the latter should be required, by mandamus, to proceed to perform its duty toward the principal controversy notwithstanding its decision upon the preliminary question. Merrill, Mandamus, §§ 203, 204; 2 Spelling, Extr. Relief, §§ 1394, 1403; High, Extr. Legal Rem. §§ 147, 151, 188; Hayne, New Trials & Appeals, § 323; Temple v. Superior Ct. 70 Cal. 211, 11 Pac. 699; Territory ex rel. Travelers' Ins. Co. v. Third Judicial Dist. Judge, 5 Dak. 275, 38 N. W. 439; R. v. Kent Justices, 14 East, 395; R. v. Cumberland Justices, 1 Maule & S. 190; R. v. Dayman, 7 El. & Bl. 672; R. v. Brown, 7 El. & Bl. 757; Ex parte Lewis, L. R. 21 Q. B. Div. 191; Re Grossmayer, 177 U. S. 48, 44 L. ed.

fendant, who does not appear, except specially, to contest the jurisdiction.

No case is presented for the exercise of the power of superintending control where the trial court has refused to dismiss an action upon the ground of alleged invalidity in the service of the summons. State ex rel. Milwaukee Electric R. & Light Co. v. Circuit Ct. 133 Wis. 442, 113 N. W. 722.

Exercise of power to compel reinstatement of an appeal, see State ex rel. Stanberry v. Smith, 172 Mo. 618, 73 S. W. 134, hereinbefore set forth under heading "Construction of constitutional and statutory grants."

—to correct decision of other preliminary questions.

While the decision of the inferior court upon the merits of a cause cannot be controlled by mandamus, the writ will lie to compel a judge to try a case, when he declines to try it on an erroneous determination of a question of practice preliminary to the whole case. State ex rel. Sorrel v. Foster, 106 La. 428, 31 So. 57.

The power of general supervision over inferior courts will be exercised to compel the reinstatement and trial of a case, dismissed by the inferior court upon the ground of insufficiency in the pleading, where no appeal is possible. Ibid.

To whatever extent considered final by the judge of the court *a qua* the appellate court, under its supervisory jurisdiction, may review an order overruling a motion to dismiss. McClelland v. Gasquet, 122 La. 241, 47 So. 540.

The supreme court has power in a proper case to compel the circuit court to proceed with the trial of a criminal case when it refuses to do so and wrongfully quashes the complaint, information, or indictment upon which the accused is brought to trial before a jury is impaneled and sworn. State ex rel. Umbreit v. Helms (Wis.) 118 N. W. 158.

—grant or refusal of injunction by inferior court.

Under the power of supervisory control 20 L.R.A. (N.S.)

a writ of prohibition will be issued to a circuit judge, restraining him from interfering, by order or judgment of his court, with the trial of an application for an injunction in an action between two claimants of the office of sheriff. Renshaw v. Cook, 33 Ky. L. Rep. 860, 895, 111 S. W. 377.

The power of supervisory control may be exercised to direct the modification of an injunction obtained in an action for separation, restraining a husband from disposing of any of his property. McClelland v. Gasquet, supra.

Where, upon an appeal from a conviction for the violation of a city ordinance, an injunction has been obtained restraining the municipal authorities from enforcing the ordinance against the party convicted, on the ground that it is unconstitutional, no such necessity exists as will warrant an exercise of the extraordinary power vested in the supreme court to regulate the proceedings of inferior tribunals by prohibiting the court issuing the injunction from proceeding to enforce it. People ex rel. Adams v. District Ct. 29 Colo. 1, 66 Pac. 888.

The power of supervisory control will not be exercised to compel the grant of an injunction restraining any attempt to enforce the provisions of a city ordinance alleged to be invalid, and from causing relator's arrest, trial, and conviction for the violation thereof, where the city has taken no action against the relator, such injunction not being one to which the relator is entitled as a matter of absolute right, but one which the judge may grant or refuse, in the exercise of his judicial discretion. Murat v. New Orleans, 119 La. 505, 44 So. 279.

The superintending control vested in the supreme court over inferior courts is to be exercised in a different way than by regulating or determining an action or proceeding pending in a district court upon a mere motion to vacate some order made by that court, especially when such order is within the jurisdictional authority of such court; and therefore the supreme court has no original jurisdiction of a motion for the vacation of an injunction granted in a district

665, 20 Sup. Ct. Rep. 535; *Re Connaway*, 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 951; *State ex rel. Harris v. Laughlin*, 75 Mo. 358, 366; *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076; *State ex rel. Smith v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *Hoke v. Com.* 79 Ky. 567; *Cassidy v. Young*, 92 Ky. 227, 17 S. W. 485; *Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323; *State ex rel. Keane v. Murphy*, 19 Nev. 89, 6 Pac. 840; *State ex rel. Spence v. Dick*, 103 Wis. 407, 79 N. W. 421; *State ex rel. Rowell v. Dick*, 125 Wis. 51, 103 N. W. 229; *State ex rel. Schutz v. Williams*, 127 Wis. 236, 106 N. W. 286, 7 A. & E. Ann. Cas. 303.

There is some contrariety of opinion as to just what questions are preliminary un-

der this doctrine, and when the lower court will be considered to have entered upon consideration of the merits of the controversy. The English and Kentucky cases above cited present antithetic decisions upon that distinction. The ruling of the trial court in this case, that the action of the grand jury was void, and that no indictment exists against Biersach to arouse either power or duty in the circuit court to try him, is, however, clearly a preliminary one within the most restricted definition of that term. Obviously that court has stopped short not only of any consideration of the guilt or innocence of the accused, but even of those earlier considerations, whether the facts stated in the indictment would, if proved, constitute any crime. We conclude that

court. *Smith v. Healy*, 12 Wyo. 219, 75 Pac. 430.

—miscellaneous.

Where a petition for a writ of certiorari shows that registration lists in the hands of election commissioners, and which they are about to copy and send out to the several election judges, contain fictitious names and false and fraudulent registrations, and that the judgment of the court below directs that such commissioners shall make a full and true copy of all registration lists, which will necessarily include the alleged fictitious names and false and fraudulent registrations, a case is presented which fully justifies the supreme court in assuming jurisdiction, and directing such commissioners to omit all names known to be fictitious, false, or fraudulent. *People ex rel. Hodges v. District Ct.* 33 Colo. 14, 84 Pac. 694.

A case for the exercise of the constitutional powers of the supreme court to control and correct decisions of inferior courts in special cases by means of prerogative and remedial writs is prevented where it appears that a circuit court, after another circuit court had appointed a receiver for a corporation, has enjoined such receiver from acting as such, and appointed another person as receiver, and it appears that delay caused by taking appeal may lead to the forfeiture of several mining claims upon which development work is required to be done within a brief period. *Gates v. McGee*, 15 S. D. 247, 88 N. W. 115.

The power of supervisory control may be exercised to conform to the statute the terms of a supersedeas bond, where no appeal is provided from the order made on a motion to discharge the bond on account of defect in substance or insufficiency in security. *Home Sav. & T. Co. v. District Ct.* 121 Iowa, 1, 95 N. W. 522.

The action of a trial judge in declining to recuse himself, from which no appeal lies, will be reviewed by the supreme court in the exercise of its supervisory power, where the reasons assigned in the motion to recuse are not purely frivolous, but allege bias and

prejudice in the judge. *State v. Banta*, 122 La. 235, 47 So. 538; *State v. Holliday*, 122 La. 239, 47 So. 539; *State v. Danos*, 122 La. 240, 47 So. 539; *State v. Dunlap*, 122 La. 241, 47 So. 540.

Under the provision of the Constitution which gives the supreme court superintending control over the courts of appeals by mandamus, prohibition, and certiorari, it may interfere by certiorari where a court of appeals, in the exercise of its conceded jurisdiction exceeds the bounds thereof, and, in its judgment, undertakes to dispose of a matter not before it on the appeal by directing a final judgment. *State ex rel. Manning v. Smith*, 188 Mo. 167, 86 S. W. 867.

A proper case is made for the exercise of the power of supervisory control by the supreme court where it appears that a petition for a writ of prohibition has been presented to a court of appeals in a case over which that court has no supervisory jurisdiction, although the petition for the writ of prohibition does not disclose the presence of the question which precludes the exercise of such jurisdiction. *State ex rel. Sale v. Norton*, 201 Mo. 1, 98 S. W. 554.

Under the power of superintending control, the supreme court may require an inferior court to make an order for a special election, although such court, by its neglect or refusal to make such order within the time prescribed, has lost the power and jurisdiction to do so, as otherwise it would be within the power of such courts to place at defiance the laws of the state by simply waiting until the expiration of the time in which they had the power and jurisdiction to act in the premises. *State ex rel. Wagner v. Patterson*, 207 Mo. 129, 105 S. W. 1048.

A proper case for the exercise of supervisory control is presented, in a suit for trespass upon a mining claim, although the evidence showed the prima facie right to the claim to be in the defendants, an order granting the plaintiff the right to enter and inspect all the defendant's surrounding mines for a period of forty days, for the purpose of obtaining evidence, has been granted, such order not being appealable, and the writs of mandamus or certiorari not afford-

a situation is presented to arouse the jurisdiction of this court under its power of superintending control to command the lower court to proceed to perform its duty to judicially consider and decide upon the criminal charge made by this indictment (to try the case of *State v. Biersach*) if, indeed, not precluded from so doing by invalidity of the indictment,—a question we proceed to consider.

The evidence upon which the circuit court acted, while somewhat extended, may be summarized as follows: The jury commissioners met at the December, 1903, term of the municipal court for Milwaukee county and proceeded to select at least seventy-five persons whose names should be placed upon a list from which grand jurors should be drawn. They made such selections, the names being written under their direction by one Mr. Wieber, who acted as the clerk of the jury commissioners. Upon this list was set the name "George J. Davies." The law required no further designation; but against each name was set a place of residence, and against the name George J. Davies was set "663 38th street." In 1904, when a grand jury was ordered to be called, the jury commissioners convened, being still assisted by Mr. Wieber as their clerk, and slips bearing names taken from said list were put into a box, and, among others, a slip on which was first written in Wieber's handwriting "George J. Davies, 2825 Cedar

street," upon which, at the time of the trial of this plea in abatement, there appeared a pencil line drawn through that street and number, and pencil marks placed below it reading, "663 38th street." This slip was one of the seventeen drawn from the box, whereupon from said slips a list of the seventeen persons to constitute the grand jury for that term of court was written out under the direction of the commissioners and certified by them to contain the names of those who should constitute that grand jury, and upon this list appeared the name "George J. Davies, 663 38th street," the law not requiring any other designation than merely the name. A venire was made out containing the same name and the same street number, and was by the sheriff served upon John George Davies, who resided at the place specified; the return, however, stating that it was served personally upon the person named in the venire. John George Davies attended, answered as to his qualifications, and was sworn and served as a juror. Before being sworn he informed the clerk, apparently without the knowledge of the court or of the jury commissioners, that his correct name was J. George Davies instead of George J. Davies, and thereafter it so appeared upon the clerk's books. It appeared without dispute that the juror was commonly known amongst acquaintances as George Davies; that, while he used the signature J. George,

ing any remedy. *State ex rel. Anaconda Copper Min. Co. v. District Ct.* 25 Mont. 504, 65 Pac. 1020.

The supreme court has jurisdiction, when a proper case for the exercise of supervisory power is presented, to send a case to another county for trial, or to detail one of its justices to preside at the trial. *Quay's Petition*, 189 Pa. 517, 42 Atl. 199.

Where an equity court has, after considerable expense has been incurred, set aside an interlocutory decree of partition entered by consent, some of the parties having refused to abide by the same, there is such an error or abuse where "no other remedy is expressly provided,"—no appeal lying from such action,—as will warrant the exercise of the power of supervision. *Hyde v. Superior Ct.* 28 R. I. 204, 66 Atl. 292.

A proper case for the exercise of the power of supervisory control is presented where the inferior court has violated the statutory right of creditors to the appointment, as assignee for the benefit of creditors, of a person nominated by them. *State ex rel. Fourth Nat. Bank v. Johnson*, 105 Wis. 164, 83 N. W. 320.

No case is presented which justifies the interference of the supreme court under its power of supervisory control where, after a new trial granted, one of the parties obtaining it having died, and no administrator having been appointed or executor qualified,

there is no one upon whom a notice of appeal from the order can be served. *State ex rel. Cohn v. District Ct.* (Mont.) 99 Pac. 139.

No case is made for the exercise of this power of supervisory control conferred by *Sayles's Civ. Stat.* 1897, art. 1000, which provides that courts of civil appeals "may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause, agreeably to the principles and usages of law," where it is not shown that the judge before whom a motion for a new trial is pending has been requested or has refused to make a ruling thereon. *Dunn v. St. Louis Southwestern R. Co.* 40 Tex. Civ. App. 242, 88 S. W. 532.

The power of supervisory control is not to be exercised to compel the dismissal of an action which has been brought by a lot owner on behalf of himself and others to restrain a street railway company from extending its lines, the plaintiff in which, having attempted to discontinue the action, has been permitted to withdraw, the court substituting another lot owner as plaintiff,—especially where the railway company has obtained an injunction against the commencement, by any taxpayer or abutting owner, of any similar suit pending the decision of its motion to vacate an injunction *pendente lite*. *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226, 82 N. W. 158.

he considered George his Christian name, and, not infrequently, he had been designated in correspondence and otherwise as George J. It further appeared without dispute that he had all other qualifications for service as a grand juror except the one of having been selected for the jury list by the jury commissioners. On the other hand, there was produced a man whose name was George Jeremy Davies, who passed by the name of George Davies, and whose usual signature and designation in writing was George J. Davies, who lived at 2825 Cedar street, and who also possessed all the requisite qualifications of a grand juror except that of having been selected by the jury commissioners. He had some slight acquaintance with one or two of the jury commissioners, while John George had no acquaintance with them.

The foregoing states substantially all of the material facts from which the circuit court had to decide that the man who was called and did serve on the grand jury was not the person who had been selected for the jury list by the jury commissioners. The use of a middle initial, while it is said to have no significance in law, may, of course, under some circumstances, be very significant of the identity of the person named; but that significance varies very much with circumstances, and the misplacement of an initial used by one whose current Christian name is also used is so probable and frequent an occurrence, at least, among those whose acquaintance with him is not exact and intimate, that its significance is very much diminished. While the jury commissioners had no official duty to state the place of residence of the man whom they selected, the fact that they did state it is none the less significant of the identity of the man whom they had in mind in placing the name on the jury list, and we think is of so vastly greater weight than the mere transposition of the letter "J" in his name as to entirely outweigh it; but when we add to this the apparent fact that the same jury commissioners, in the process of preparing the slip for insertion and withdrawal from the box and the record of it on the list of the grand jury actually drawn, discovered that the George J. Davies who appeared by the directory to live on Cedar street had apparently been designated thereon, and industriously caused such designation to be removed, and to be substituted therefor the residence on 38th street, we cannot avoid the conviction that it was established by overwhelming preponderance of evidence that the George Davies who lived at that place, and who appeared in court in response to the venire, in the presence of the jury commissioners, and was accepted in answer to that name, was the

identical person whom those commissioners had selected as suitable for grand jury service. Hence, without discussing the effect of the presence and participation of the wrong man on the grand jury, we must conclude that the fact was not established, and that the circuit court erred in holding the indictment invalid.

It is further urged that the relief sought in this proceeding is the vacation of a certain order, and that mandamus is not the proper remedy therefor. *State ex rel. Pfeiffer v. Taylor*, 19 Wis. 567; *State ex rel. W. G. Taylor Co. v. Elliott*, 108 Wis. 163, 84 N. W. 149; *State ex rel. Winchell v. Circuit Ct.* 116 Wis. 253, 93 N. W. 16. This contention is based upon a misapprehension. The real and practical purpose, and obviously the primary one, is to require the circuit court to perform its duty to consider and decide upon the criminal charge presented, which it has refused to do. The fact, if it be such, that some orders theretofore made in that court constitute a formal obstacle to his so doing, merely invites an enlargement of the command which this court shall issue to the effect that the trial court take formal action necessary to remove those obstacles, as ancillary to and in aid of the primary relief sought and granted. That was the exact situation in both of the *Johnson Cases*, where the thing commanded was obstructed by certain orders entered by the court, and it was urged that they could not be reversed by mandamus, even to enable the performance of an act which the court's duty required. The court said (103 Wis. page 624): "This court holds its power under no such uncertain terms. Those powers are not dependent upon the speed with which the trial court enters orders. If it becomes necessary, in the due discharge of its power of superintending control, that orders of the inferior court be vacated, this court will not hesitate to compel the vacation of such order by the inferior court by so framing its writs of mandamus." The same distinction was also noted in the opinion in *State ex rel. W. G. Taylor Co. v. Elliott*, 108 Wis. 164, 84 N. W. 149. When, therefore, it is concluded that the circuit court should be directed to proceed with his duty as above stated, it is entirely within the power of this court to command that he remove any obstacles to such proceeding which his own improper acts have erected. The command of the alternative writ goes no further than this.

We understand respondent to concede that nothing material could be added to the petition and alternative writ by return, so that therefore the merits might be decided on the present hearing.

Let imperative writ issue.

WISCONSIN SUPREME COURT.

RICHARD STENBOM

v.

BROWN-CORLISS ENGINE COMPANY,
Resp't.

C. J. RICHARDS, Receiver, Appt.

(— Wis. —, 119 N. W. 308.)

Indemnity Insurance — satisfaction of claim — receiver's note.

1. The giving to the employee of his note by a receiver appointed in supplementary proceedings to collect a judgment against an insolvent employer for injury to his employee is not a satisfaction of the claim within the meaning of an indemnity insurance policy, that no action shall lie against the insurer unless brought by the assured himself, to reimburse him for actual loss sustained and paid by him in satisfaction of a judgment, and gives the receiver no standing to enforce the policy.

Order — setting aside — right to complain.

2. A court which has entered an *ex parte* order in a supplementary proceeding to enforce a judgment against an insolvent employer in favor of an injured employee, empowering the receiver appointed in such proceeding to execute his note in satisfaction of the judgment, and bring an action for reimbursement upon a policy of indemnity insurance held by the employer, which is indefensible in character, may set the order aside as soon as its attention is called thereto, although the motion is made by the judgment debtor, who had no right to complain thereof.

(January 26, 1909.)

APPEAL by the receiver of the defendant, Brown-Corliss Engine Company, from an order of the Circuit Court for Racine County vacating a former *ex parte* order authorizing the settlement of a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, and authorizing the receiver to commence suit upon an indemnity insurance policy which had become an asset in his hands as receiver. Affirmed.

Statement by Barnes, J.:

This action was brought to recover dam-

ages for a personal injury sustained on April 10, 1905, and on January 15, 1907, judgment was rendered in plaintiff's favor for \$10,099.58. After the action was commenced, and on November 14, 1905, the defendant was adjudicated a bankrupt, and a receiver in bankruptcy was duly appointed. At the time of plaintiff's injury the defendant held a liability policy of insurance which indemnified the holder against loss by reason of injuries suffered by an employee, in a sum not exceeding \$5,000 for any one accident, and provided that the company would, at its own cost and expense, assume the defense of any action brought on account of such injury. Among other things the policy provided that it indemnified the holder "against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employee or employees of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given." The policy further provided: "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment, and after trial of the issue." It is conceded by the parties that the claim of the plaintiff could not be proved in the bankruptcy court before judgment thereon was obtained in the state court, and that, at the time of the rendition of the judgment, the time within which it might be filed as a claim in the bankruptcy proceedings had expired. Shortly after the rendition of the judgment in plaintiff's favor an execution was issued thereon, and was returned unsatisfied, whereupon supplementary proceedings were instituted and a receiver of said defendant, as judgment debtor, was appointed by a circuit court commissioner. On February 9, 1907, such receiver filed a petition in the bankruptcy court, praying that the trustee in bankruptcy should be ordered to assign and turn over to such receiver the aforesaid indemnity policy, which petition was granted. Thereafter demand for payment was made upon the insurer by the

Note. — The question whether the giving of a note is a loss or damage within a condition of a contract of indemnity is discussed in the case note to *Kennedy v. Fidelity & C. Co.* 9 L.R.A. (N.S.) 478. Since that decision was rendered, and in reliance upon the rule enunciated therein and in the cases cited in the note thereto, it was held in *Seattle & S. F. R. & Nav. Co. v. Maryland Casualty Co.* 50 Wash. 44, 18 L.R.A. (N.S.) 20 L.R.A. (N.S.)

121, 96 Pac. 509, that the execution by an employer of his note in good faith, in satisfaction of a judgment against him, obtained by his employee, was within the meaning of an indemnity policy which provided that no action should lie against the insurer as respects any loss except to reimburse the insured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.

receiver, which demand was not complied with. On February 19th the receiver filed a petition in the circuit court, alleging, among other things, that the plaintiff was ready and willing to compromise and settle his claim for \$3,000, and would accept the receiver's promissory note for such sum in settlement and satisfaction of the judgment. Upon the filing of such petition the court made an *ex parte* order directing the receiver to execute a demand, promissory, judgment note to the plaintiff in settlement of such judgment, and authorizing the receiver to commence suit on the policy of insurance. The note was executed and delivered to plaintiff, and he satisfied his judgment, whereupon the receiver commenced an action against the insurance company to collect the amount alleged to be due upon the policy. After such action was commenced, the Brown-Corliss Engine Company moved for an order vacating and setting aside the *ex parte* order authorizing the settlement, and the execution of the promissory note, and the commencement of the action against the insurance company. This motion was granted, and from the order granting the same the receiver prosecutes this appeal. The error assigned is that the court erred in making such order.

Mr. W. B. Rubin, with Messrs. **Rubin & Zabel** and **Wallace J. Ingalls**, for appellant:

The order authorizing the receiver to enforce the policy was properly issued.

Kennedy v. Fidelity & C. Co. 100 Minn. 1, 9 L.R.A.(N.S.) 478, 117 Am. St. Rep. 658, 110 N. W. 97, 1 A. & E. Ann. Cas. 1; 23 Am. & Eng. Enc. Law, 2d ed. p. 1073; *Davis v. Shearer*, 90 Wis. 250, 62 N. W. 1050; *Interstate Bldg. & L. Asso. v. Lewis*, 31 Pittsb. L. J. N. S. 83.

Mr. Robert N. McMynn with **Mr. Charles A. Vilas**, for respondent:

Where a policy of indemnity insurance contains a clause to the effect that no action shall be brought under the policy except by the assured himself, to reimburse him for loss actually sustained and paid by reason of a judgment, the injured employee has absolutely no interest whatever in the policy, and cannot reach the proceeds thereof, either by action at law or in equity.

Allen v. Aetna L. Ins. Co. 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881; *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *O'Connell v. New York, N. H. & H. R. Co.* 187 Mass. 276, 72 N. E. 979; *Carter v. Aetna L. Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178; *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509; *Beyer v. International Aluminum Co.* 20 L.R.A.(N.S.)

115 App. Div. 853, 101 N. Y. Supp. 83; *Frye v. Bath Gas & Electric Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; *Allen v. Gilman, McN. & Co.* 137 Fed. 136.

Barnes, J., delivered the opinion of the court:

The authorities seem to be quite uniform to the effect that, under a policy of indemnity insurance such as that here involved, there is no privity of contract between the insurer and the employee, and the latter cannot reach the proceeds of such policy, at least, in an action brought directly against the insurer. *Allen v. Aetna L. Ins. Co.* 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881; *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *O'Connell v. New York, N. H. & H. R. Co.* 187 Mass. 276, 72 N. E. 979; *Carter v. Aetna L. Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178; *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509; *Beyer v. International Aluminum Co.* 115 App. Div. 853, 101 N. Y. Supp. 83; *Frye v. Bath Gas & Electric Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; *Allen v. Gilman, McN. & Co.* (C. C.) 137 Fed. 136.

No good reason is apparent why the payment which the contract obligates the assured to make as a condition precedent to his right to maintain action upon the policy might not be made otherwise than in money, provided such payment is made and accepted in good faith, and there is a bona fide settlement and satisfaction of the judgment secured by the injured employee. *Kennedy v. Fidelity & C. Co.* 100 Minn. 1, 9 L.R.A.(N.S.) 478, 117 Am. St. Rep. 658, 110 N. W. 97, 10 A. & E. Ann. Cas. 1. Neither do we attach any particular significance to the fact that the suit is brought by a receiver, instead of in the name of the beneficiary designated in the policy. *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720.

The receiver here was not appointed to administer the affairs of the insolvent corporation for the benefit of creditors generally, but was appointed in a proceeding supplementary to, and in aid of, an execution issued at the instance of a single creditor, and for the sole purpose of collecting the judgment in this action. With the exception of the policy referred to, apparently all of the assets of the insolvent were turned over to the trustee in bankruptcy, for the benefit of creditors having provable claims against it. The policy by its terms was of no value to the defendant herein, or to anyone else, until the judgment of the plaintiff was satisfied.

Considering the purpose for which the re-

ceiver here was appointed, if he could pay the judgment by giving his note, and such note was received in satisfaction of the judgment, and it was satisfied, it would seem that the object for which he was appointed had been accomplished, and any further proceeding on his part was unnecessary to discharge his legitimate functions. However this may be, the proceeding was certainly novel. On its face the action taken was a mere subterfuge, resorted to for the purpose of making a nominal compliance with the terms of the insurance contract. The contract was one which the parties thereto had a right to make, and it would be trifling with its terms for a court to hold that the shadowy payment here attempted to be made conformed to its requirements. There was no bona fide payment of the judgment. The fictitious payment resorted to is too thinly veiled to stand the test of judicial scrutiny.

It may well be doubted whether the defendant in this action had any right to complain of the *ex parte* order authorizing the giving of the note and the compromise of the judgment and the bringing of the action against the insurance company. Whether it had or not, it was clearly within the province of the court to set aside the former *ex parte* order as soon as attention was called to its indefensible character. It is well settled that the matter of authorizing receivers to execute notes in proper cases, and of authorizing them to commence actions, rests in the sound discretion of the trial court, and that orders in reference to such matters, made by such courts, will be reversed only when there is an abuse of such discretion. *Neeves v. Boos*, 86 Wis. 313, 56 N. W. 909. The case might well be disposed of upon this rule of law; but, lest a decision upon this point should be construed as intimating that the *ex parte* order of the trial court might be sustained if the trial court had refused to set it aside, we deemed it best to consider the question on its merits rather than to simply hold that there was no abuse of discretion in making the order appealed from.

Order affirmed.

ALABAMA SUPREME COURT.

CORONA COAL & IRON COMPANY,
Appt.,
v.
NORA WHITE.

(— Ala. —, 48 So. 362.)

Master — runaway team — liability.

1. A coal dealer whose team is under the control of his servant all the time, whether he is hauling coal or not, to feed and care for, cannot escape liability for injury caused

by its running away when left unattended by the servant, because, at the time, he has gone to move a trunk which was not within the scope of his duty to do, since it was his duty to see that the team was not left unattended in the street.

Horse — runaway — negligence — liability.

2. The owner of a horse left by his servant unhitched and unattended in a public street is liable for injury done to others by its running away.

Highway — pedestrian — negligence — runaway team.

3. One walking on the sidewalks or crosswalks of a municipality is not negligent in failing to look to see whether or not a team which he hears approaching is running away, so as to preclude his holding the owner of the team liable for injuries caused by being struck by it, since he has a right to assume that the team is under control and will not be driven over him.

(November 26, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. C. Davis, S. D. Weakley, and J. B. Weakley for appellant.

Messrs. Bowman, Harsh, & Beddow, for appellee:

Ordinary care does not require a person to look backwards every time he hears a wagon rattling on the street, when he himself is in a position where the wagon has no rights, and would not ordinarily be expected to come.

1 Thomp. Neg. §§ 1327, 1328; *Bowser v. Wellington*, 126 Mass. 391; *Wiel v. Wright*, 29 N. Y. S. R. 763, 8 N. Y. Supp. 776.

It was, at least, a question for the jury as to whether or not defendant was responsible for the negligence of its driver.

20 Am. & Eng. Enc. Law, pp. 166, 167, § 5; *Postal Teleg. Cable Co. v. Brantley*,

Case Note. — Negligence in leaving horse unhitched in highway.

This note cites only those cases which have been reported since the preparation of the subject note upon the same question to *Moulton v. Lewiston*, B. & B. Street R. Co. 10 L.R.A. (N.S.) 845.

In *Kokoll v. Brohm & B. Lumber Co.* (N. J. L.) 71 Atl. 120 and *Francois v. Hanff* (N. J. L.) 71 Atl. 1128, it was held that the unexplained presence on a public highway of a team of runaway horses harnessed to a wagon, unattended by the owner or other person, raised a presumption of negligence on the part of the owner.

In *Stevenson v. United States Exp. Co.*

107 Ala. 683, 18 So. 321; *Williams v. Hendricks*, 115 Ala. 277, 4 L.R.A. 650, 67 Am. St. Rep. 32, 22 So. 439; *Southern R. Co. v. Wildman*, 119 Ala. 565, 24 So. 764.

Simpson, J., delivered the opinion of the court:

The appellee sued in this case for damages caused by being struck and knocked down by a wagon and team belonging to the defendant. It is not disputed that the wagon and team were left by the driver, while he went into the house to get a trunk belonging to the shipping clerk of defendant company to take the same to the depot, and that, while left unattended, the team ran away and came in collision with the plaintiff, who was walking on the street of Corona. The contention of the appellant is that it was entitled to the general affirmative charge, because, first, it was not within the scope of the driver's duties to carry a trunk of one of the employees to the depot; and, second, that the plaintiff was guilty of contributory negligence, in not turning to look when she heard the wagon and team coming down the street.

The evidence is without conflict that this team was under the care and control of *MacKimbrell*, the driver, all of the time, whether he was hauling coal for the defendant or not. He fed, hitched, and unhitched the team; and, whether it was before 7 o'clock in the morning (the hour for regular work) or not, he had charge of the team as the servant and agent of the defendant, and it was his duty not only to care for it, but to see that it was not left unattended on the street, so as to incur the danger of its running away and injuring those who had a right to be on the street.

The evidence in this case is not so clear as to authorize the court to take away from

the jury the right to determine whether or not the driver of the team was acting in accordance with the usual custom in the use of the team, and with the acquiescence of the master.

It is negligence for the owner to leave a team of horses unhitched and unattended on a public street, and he thereby becomes liable for any damage caused by their running away. *Dolfinger v. Fishback*, 12 Bush, 474, 1 Am. Neg. Cas. 288; *Doherty v. Sweetser*, 82 Hun, 556, 31 N. Y. Supp. 649, 1 Am. Neg. Cas. 333; *Shearm. & Redf. Neg.* 3d ed. p. 235, § 194; 26 Cyc. Law & Proc. pp. 1529, 1530.

A person traveling on the public streets has a right to presume that horses moving on said streets are under the control of their owners; and it is not contributory negligence to walk on the sidewalks and to cross the streets without looking up and down the street, although, of course, it would be negligence to walk right in front of a moving team. Merely hearing the team coming was not notice to the plaintiff that it was running away. The rule with regard to looking and listening, before crossing a railroad, has no application to a person crossing a street. *Moebus v. Herrmann*, 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415.

There was no error in the refusal of the court to give the general charge in favor of the defendant; and, this being the only point argued by counsel for appellant, the judgment of the court is affirmed.

Affirmed.

Tyson, Ch. J., and *Denson and McClellan, JJ.*, concur.

Petition for rehearing denied February 5, 1909.

221 Pa. 59, 70 Atl. 275, the court said: "One who leaves a horse unhitched and unattended on a city street takes the risk of what the horse may do. . . . Such an act raises a presumption of negligence, and puts on the party doing it the burden of showing circumstances which justified or excused it. How strong the presumption will be must depend largely on the circumstances. If the horse is young, skittish, nervous, or unused to the sights and sounds of a city street, the presumption would be strong; while if he is old, staid, and accustomed to city life, it might be very slight. But even a staid and veteran horse may be liable to sudden fright, or, as in this case, to sudden pain, which may induce dangerous behavior. It is, therefore, a matter for the jury."

In *Damonte v. Patton*, 118 La. 530, 8 L.R.A. (N.S.) 209, 118 Am. St. Rep. 384, 43 So. 153, 10 A. & E. Ann. Cas. 862, where it appeared that a statute provided that 20 L.R.A. (N.S.)

"the owner of an animal is responsible for the damage he has caused;" and that the driver of a cart left the horse unhitched and unattended to go back for his hat, blown off into the street, and that the horse ran away injuring a third person on the highway, it was held that the burden was on the owner of the horse to prove that he was without the slightest fault and did all that was possible to prevent the injury.

In *Swift & Co. v. Murphy*, 45 Tex. Civ. App. 497, 100 S. W. 997, it was held that where defendant claimed that its runaway horse had been properly hitched to a strap and buggy weight, but made no claim that the strap had broken, and two witnesses testified that, as they saw the horse running, there was no strap to him, it was proper for the trial court to instruct the jury that, if the driver left the horse unattended on the street without being hitched, he was guilty of negligence.

In *Denver v. Utzler*, 38 Colo. 300, 8 L.R.A.

(N.S.) 77, 120 Am. St. Rep. 108, 88 Pac. 143, it was held that one who left a horse attached to a wagon unhitched in a public highway, and without having the lines within reach, was guilty of negligence, and could not recover for a personal injury caused by the horse running away and coming in contact with an obstruction in the highway.

In *Damonte v. Patton*, supra, it was held negligence for the driver of a horse and cart to abandon the same in the street and go back for his hat, blown off by the wind, without fastening or otherwise securing the animal; and where the horse, thus left standing, ran away, the owner was held responsible for injury inflicted by the runaway's collision with a third person not guilty of contributory negligence.

In *Trenchard v. New Orleans R. & Light Co.* (La.) 48 So. 575, it was held that where a horse attached to a wagon was left standing unhitched in a public street, and ran away and collided with a street car, whereby plaintiff was injured, the owner of the horse was not entirely blameless, no matter how much the animal may have been accustomed theretofore to stand when left in that way.

In *Karstendiek v. Jackson Brewing Co.* (La.) 48 So. 958, it was held to be negligence for a driver to leave a pair of mules harnessed to a beer wagon, and not hitched, on one of the public streets in a populous part of a city, while he was in a restaurant nearby at lunch on a day of general rejoicing.

In *Hayes v. Wilkins*, 194 Mass. 223, 9 L.R.A. (N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449, it appeared that a horse, attached to a wagon, while left unhitched and unattended on a street by defendant's driver, ran away and injured plaintiff. "The court said: 'While he had the horse in custody for his master and was charged with the duty of continuing this custody as a servant, he negligently omitted to continue it, and as a consequence the horse ran away. . . . His negligence occurred while he was directly engaged in his master's business, by the mere omission of that which he should have done in the business.'"

In *Riordan v. Gas Consumers' Asso.* 4 Cal. App. 639, 88 Pac. 809, it was conceded that the driver was guilty of negligence where it appeared that he took the bridle off the horse's head before he had tied him, and while getting the feed bag, or while about to adjust the feed bag, the horse, finding himself free, ran away and collided with another buggy.

In *Hull v. Thomson Transfer Co.* (Mo. App.) 115 S. W. 1054, where the driver removed the bits from the horses' mouths in a public street to allow the team to eat, and, while the team was unsecured, a drum on the wagon filled with liquid carbonic acid exploded and caused them to run away and injure the plaintiff, it was held that the driver's negligence in leaving the team unsecured, and not the explosion, was the proximate cause of the injury.

In *Corcoran v. Kelly*, 61 Misc. 323, 113 N. 20 L.R.A. (N.S.)

Y. Supp. 686, it was held that negligence could not be predicated of the mere leaving of a wagon and team of horses unhitched and unattended in the street while they partook of their midday meal; and that where, while so unattended, one of the horses bit a passing child, the vicious propensity of the horse, and not the leaving of it unhitched and unattended, was the proximate cause of the injury.

In *Putermann v. Simon*, 127 Mo. App. 511, 105 S. W. 1098, it was held that a petition which alleged that, while plaintiff was lawfully walking along a sidewalk in a city, defendant's horse was carelessly and negligently allowed to pass on said sidewalk unhitched and unguarded, contrary to a city ordinance, and the said horse viciously sprang at plaintiff, biting him in a severe manner in the cheek, etc., stated no cause of action, since plaintiff sued for a tort which could not grow out of a violation of the ordinance, inasmuch as the ordinance was clearly enacted to prevent injury and damage from being done by the running away of unhitched and unguarded horses, and not to prevent them from biting people.

In *Southern Hardware & Supply Co. v. Standard Equipment Co.* (Ala.) 48 So. 357, it was held that the driver was not guilty of negligence *per se* regardless of an ordinance which forbade the leaving of a horse unattended in the street, simply because he was not holding the bridle or lines at the time the team started to run away, where he was loading the wagon, and grabbed the bridle before they had gone 10 feet.

In *Caughlin v. Campbell-Sell Baking Co.* 39 Colo. 148, 8 L.R.A. (N.S.) 1001, 121 Am. St. Rep. 158, 89 Pac. 53, it was held that a municipal ordinance which imposed a penalty for leaving a horse attached to a wagon in the street without fastening the horse to a stationary object, or to a ground weight weighing not less than 15 pounds, was admissible in behalf of the owner of a team as bearing upon the question of negligence in leaving the team in the street unattended, but hitched to a ground weight weighing 56 pounds.

DISTRICT OF COLUMBIA COURT OF APPEALS.

LUCIEN D. WINSTON, Appt.,
v.

ARLINGTON FIRE INSURANCE COMPANY.

(32 App. D. C. 61.)

Insurance — Limitation — inefficient repairs.

A stipulation in an insurance policy that no suit shall be brought on a contract unless

Case Note. — Effect of insurer's election to rebuild, repair, or replace the insured property after a loss.

It is an undoubted proposition of law that, when the insurer elects to repair, re-

within twelve months next after the damage occurs does not apply to a suit for damages because of the defective character of repairs which the insurer elects to make after the loss in accordance with its rights under the contract.

(November 4, 1908.)

APPEAL by plaintiff from a judgment of the Supreme Court in defendant's favor in an action brought to recover damages for breach by defendant of its contract to repair a building injured by fire. Reversed.

The facts are stated in the opinion.

Mr. D. S. Mackall, for appellant:

After an insurance company has elected to repair the insured property, its liability is for breach of the obligation to repair,

and not under the obligation to pay the insurance, and the rights and remedies of the insured are governed accordingly.

19 Cyc. Law & Proc. p. 890; Wynkoop v. Niagara F. Ins. Co. 91 N. Y. 478, 43 Am. Rep. 686; 2 May, Ins. 4th ed. §§ 433, 433a; Hartford F. Ins. Co. v. Peebles' Hotel Co. 27 C. C. A. 223, 54 U. S. App. 215, 82 Fed. 546; Beals v. Home Ins. Co. 36 N. Y. 522; Heilmann v. Westchester F. Ins. Co. 75 N. Y. 7; Good v. Buckeye Mut. F. Ins. Co. 43 Ohio St. 394, 2 N. E. 420; Lancashire Ins. Co. v. Barnard, 49 C. C. A. 559, 111 Fed. 702; Fire Asso. of Philadelphia v. Rosenthal, 108 Pa. 474, 1 Atl. 303; 1 Clement, Fire Ins. p. 292; Smith v. Glen's Falls Ins. Co. 62 N. Y. 85.

Mr. William G. Johnson for appellee.

build, or replace the insured property, under a clause in the policy giving it that option, the contract of insurance is converted into a contract of repairing or rebuilding or replacing, and the rights of the parties are to be determined by the rules of law governing such contracts. It follows, therefore, that if the insured property is defectively or incompletely rebuilt, repaired, or replaced, the remedy will be upon the new contract, and not upon the policy of insurance.

Thus, in *Henderson v. Crescent Ins. Co.* 48 La. Ann. 1176, 35 L.R.A. 385, 20 So. 658, in which this rule was adhered to, it was held that when the insurers elected to repair they were in the same position as contractors who had examined the building and made an estimate of the expense. The court said: "No original defects in the building could possibly excuse them from doing just what they had agreed to do. It was to repair the building as it originally stood, and if there were defects in the timber, weak walls, etc., it was their duty to have considered these matters before making the election. They cannot be urged as defenses for nonexecution of the contract. If the obligations of defendants thus arise from an ordinary contract to build or repair, it would seem that it is even the more imperative when the contract has been substituted for the contract to indemnify the loss in money, as the contract of insurance is to fully indemnify the insured, and to place him in as favorable a position as he was before the loss."

And in *Morrell v. Irving F. Ins. Co.* 33 N. Y. 429, 88 Am. Dec. 396, Chief Justice Denio said (p. 455) that when the insurers had elected to provide the stipulated indemnity by way of rebuilding instead of the payment of money, and had entered upon the premises of the assured party and had commenced the erection of a new building upon the site of the former one, the contract then became one for rebuilding, and the alternative which looked to the payment of money became obsolete and impracticable, and the action was then the same as it would have been if the contract had obliged

the defendant simply to rebuild in case of a loss.

Such was the conclusion reached also in the following cases: *Collins v. Etna Ins. Co.* Fed. Cas. No. 3,009; *Hartford F. Ins. Co. v. Peebles' Hotel Co.* 27 C. C. A. 223, 54 U. S. App. 215, 82 Fed. 546; *Zalesky v. Iowa State Ins. Co.* 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433; *Beals v. Home Ins. Co.* 36 N. Y. 522, affirming 36 Barb. 614; *Heilmann v. Westchester F. Ins. Co.* 75 N. Y. 7; *Wynkoop v. Niagara F. Ins. Co.* 91 N. Y. 478, 43 Am. Rep. 686; *Munk v. Maryland Casualty Co.* 116 App. Div. 756, 102 N. Y. Supp. 164; *Good v. Buckeye Mut. F. Ins. Co.* 43 Ohio St. 394, 2 N. E. 420; *Fire Asso. of Philadelphia v. Rosenthal*, 108 Pa. 474, 1 Atl. 303.

But in *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, 432, a provision in the contract of insurance that the insurer might within a reasonable time rebuild, repair, or replace the property lost or damaged, but that the insurer should not be liable for any action for the loss, unless the company should neglect for a certain period to proceed to rebuild, repair, or replace, was held not to prevent the assured, upon the failure of the insurer to complete the repairs within a reasonable time, from maintaining an action on the policy, since the contract of insurance merely suspended the right of action upon the policy during the time within which the insurer had a right to rebuild, repair, or replace the property, instead of paying the loss in money.

Where there has been a total failure by the insurer to exercise the option to repair or rebuild after having elected so to do, the authorities differ as to whether this will of itself preclude a recovery upon the policy. Thus, in *Hartford F. Ins. Co. v. Peebles' Hotel Co.* supra, it was held that after such an election no action would lie to recover the money indemnity stipulated for in the policy, and that for a total failure to repair or rebuild, as well as where the repairing or rebuilding did not result in the restoration of the building to a condition substantially like that existing before the fire, the action would be for a breach of the con-

Shepard, Ch. J., delivered the opinion of the court:

This action was begun by Lucien D. Winston against the Arlington Fire Insurance Company of the District of Columbia, on December 12, 1907. The declaration alleged that on and before June 8, 1901, plaintiff was the owner of a certain house in the

city of Washington, that was then damaged by fire. That said house was then under insurance by the defendant against loss by fire. That by the terms of said contract of insurance, the defendant had the right to pay the amount of the ascertained loss, or at its option to repair, rebuild, or replace the said house within a reasonable time

tract to repair or rebuild, and not upon the policy.

On the other hand, in *Langan v. Aetna Ins. Co.* 48 C. C. A. 174, 108 Fed. 985, affirming 99 Fed. 374, it was held that if the company, after having elected to rebuild or repair, did not in fact repair or rebuild, for any reason or for no reason, then the contract would remain unchanged, and the insured be entitled to recover the sum due under the policy.

So, in *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124, 14 Am. Rep. 27, it was held that the mere giving of notice by the insurer that it intended to rebuild the insured building would not change the contract of insurance into a contract to rebuild, and that the insurer, upon failing to rebuild within a reasonable time, would become liable to pay the amount of the insurance stipulated in the policy, with interest, and a fair rental value of the premises while the owner was thus deprived of their use.

So, in *Northwestern Nat. Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185, it was held that if the damaged or destroyed building could not, by the repairs proposed or offered to be made by the insurer, be restored to a condition practically as good as it was before the disaster, and the assured refused, for that reason to permit any repairs, such offer to repair would not relieve the insurer from liability upon the policy.

And the election to repair will, under certain circumstances, be a waiver by the insurer of defenses based upon the policy. Thus, in *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533, it was held that, where the insurer, after the loss and with full knowledge of the facts, elected to repair, such election would be a waiver of the assured's omission to state in the policy the exact state of his title and interest in the insured property.

And in *Bersche v. Globe Mut. Ins. Co.* 31 Mo. 546, it was held that the election to repair or to rebuild was a waiver by the insurer of any misrepresentation on the part of the assured, where the insurer had knowledge of the facts, and no fraud or mistake was shown.

Upon the same principle, it was held in *Wynkoop v. Niagara F. Ins. Co.* supra, that an election to repair rendered inoperative the provision in the policy as to arbitration.

So, in *Collins v. Aetna Ins. Co.* supra, it was held that the election to restore and repair the burned building was a waiver of the notice of the fire, and of the extent of the injury, as required by the policy.

Of course, if the insurer properly rebuilds an insured building or completely re-

places the insured property, there can be no action upon the contract of insurance. *Tolman v. Manufacturers' Ins. Co.* 1 Cush. 73; *Munk v. Maryland Casualty Co.* supra.

This is also true if the assured does not permit the insurer to repair or rebuild or replace, after the latter has signified its intention so to do. *Franklin F. Ins. Co. v. Hamill*, 5 Md. 170; *Beals v. Home Ins. Co.* supra.

In *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598, and in *Baroness of Pontalba v. Phoenix Assur. Co.* 2 Rob. (La.) 131, 38 Am. Dec. 205, it was held that there could be no claim for rent for the time during which the insurer was engaged in repairing, in the absence of any stipulation to that effect in the contract of insurance, if the repairs were completed within a reasonable time.

It follows, therefore, from the rule here under discussion, that, as to the question of damages for defective rebuilding or repairing, the policy of insurance is no longer to be considered; and that neither the amount of the insurance therein stipulated for nor the amount of the loss is controlling upon the amount to be recovered. *Henderson v. Crescent Ins. Co.*; *Beals v. Home Ins. Co.*; *Wynkoop v. Niagara F. Ins. Co.*; *Heilmann v. Westchester F. Ins. Co.*; and *Munk v. Maryland Casualty Co.*—supra.

Such, too, was the rule as to damages laid down in the following cases, in which it was also held that the measure of damages, where the repairing or rebuilding did not result in the restoration of the insured building to a condition substantially like that before the fire, would be the difference between the work as done and its value if it had been fully repaired: *Collins v. Aetna Ins. Co.* and *Hartford F. Ins. Co. v. Peebles' Hotel Co.* supra; *Parker v. Eagle F. Ins. Co.* 9 Gray, 152; *Morrell v. Irving F. Ins. Co.*; *Beals v. Home Ins. Co.*; *Good v. Buckeye Mut. F. Ins. Co.*; and *Fire Asso. of Philadelphia v. Rosenthal*—supra.

Where the insurer is liable for successive losses to the property insured during the life of the policy, and the property being destroyed, the insurer, under the option to repair, repairs the building at a cost less than the total amount of insurance, this will not discharge the insurer altogether from liability upon the policy; but, if the property as repaired or rebuilt is again destroyed, the insurer will be liable for the difference between the amount stipulated in the policy and its expense in replacing the property when first destroyed. *Trull v. Roxbury Mut. F. Ins. Co.* 3 Cush. 263.

after said fire. That in pursuance of said contract, and in consideration thereof, the defendant elected, and undertook to repair and reconstruct said house, including the replacing of a metal roof thereon, which had been damaged by fire, with one of like kind and quality. That disregarding its obligation, undertaking, and duty, it failed to repair and replace said roof with another of like quality, but replaced and reconstructed the same with material of an unlike, insufficient, and inferior quality. That by reason thereof the said roof became more and more defective and insufficient until, to wit, April 1, 1907, when it became necessary, to render said building inhabitable, to put an entirely new roof thereon. That defendant, though requested so to do, failed and refused, and plaintiff was compelled to put on the new roof at a cost of \$382.50, wherefore he has sustained damages to the amount of \$500.

The defendant entered three pleas to the declaration: (1) That the defendant never undertook and promised as alleged; (2) that the cause of action did not accrue within three years next before bringing suit; (3) that in the said contract of insurance it was stipulated that no suit or action on said contract shall be sustainable in any court of law or equity, unless commenced within twelve months next after the fire doing damage to the property insured; and that the plaintiff did not bring his action within twelve months next after said fire, wherefore he is barred and forever estopped from bringing this action.

Plaintiff demurred to the third plea. The demurrer was overruled; and plaintiff electing to stand upon his demurrer, judgment was rendered for the defendant. This appeal is prosecuted therefrom.

The single question for determination is whether this is an action on the contract of insurance so as to bring it within the operation of the limitation clause set out in the plea. The contract of insurance bound the defendant to pay the loss or damage occasioned by fire, not to exceed the stipulated amount. But it reserved an option to the defendant to repair and replace the building. By the exercise of this option, and election, in which the plaintiff was bound to acquiesce, the original contract of the parties was converted into a new one on the part of the defendant to repair the building and restore it to its former condition. The contract to pay the loss was thus superseded by the contract to repair. Plaintiff no longer had a right of action upon the former; his sole remedy was upon the new contract. *Wynkoop v. Niagara F. Ins. Co.* 91 N. Y. 478, 482, 43 Am. Rep. 686; *Heilmann v. Westchester F. Ins. Co.* 75 N. Y. 7, 9; *Morrell v. Irving F. Ins. Co.* 33 N. Y. 429, 437, 88 20 L.R.A. (N.S.)

Am. Dec. 396; *Beals v. Home Ins. Co.* 36 N. Y. 522, 526; *Fire Asso. of Philadelphia v. Rosenthal*, 108 Pa. 474, 478, 1 Atl. 303; *Hartford F. Ins. Co. v. Peebles' Hotel Co.* 27 C. C. A. 223, 54 U. S. App. 215, 82 Fed. 546, 548. Plaintiff's declaration set out the contract for insurance with the stipulation therein for the option to contract to repair, and alleged the election so to do; but this was by way of inducement to the statement of the cause of action, which is the failure to perform the new undertaking created by that election. As the action, then, is not upon the contract of insurance, we think that the limitation clause of that contract cannot be made to apply to the action upon the undertaking to repair by which it was superseded.

There is no difference in principle between an action of this kind and one to recover the amount of the adjusted loss or damage under an insurance contract, to which, it has been held, the limitation clause of the policy does not apply. *Smith v. Glen's Falls Ins. Co.* 62 N. Y. 85, 86; *Illinois Mut. F. Ins. Co. v. Archdeacon*, 82 Ill. 236, 239, 25 Am. Rep. 313.

We are of the opinion that it was error to overrule the plaintiff's demurrer to the plea. The judgment will therefore be reversed with costs, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

IDAHO SUPREME COURT.

I. J. STERRETT, Appt.,

v.

S. B. SWEENEY, Resp't.

(15 Idaho, 416, 98 Pac. 418.)

Limitation of actions — promissory note — part payment.

1. Under the provision of § 4817, Ballinger's Anno. Codes & Statutes (Wash.)

Headnotes by STEWART, J.

Note. — The general subject of the law governing the limitation of actions on contracts is treated in a case note to *Thomas v. Clarkson*, 6 L.R.A. (N.S.) 658, in which are cited two cases (*Obear v. First Nat. Bank*, 97 Ga. 587, 33 L.R.A. 384, 25 S. E. 335, and *Tilliard v. Hall*, 11 Tex. Civ. App. 381, 32 S. W. 863) upon the specific question whether the foreign law or the law of the forum governs as to the effect of a partial payment or acknowledgment. Other cases will be found in that note, disclosing the extent to which the law of the forum has been applied to the determination of incidental questions affecting the ultimate question of limitation.

(Pierce's Code, § 301), a partial payment made upon a promissory note, after due, and before the statute of limitations has run, fixes the date of such payment as the time from which the statute begins to run.

Same — nature of statute.

2. The statute of limitations does not mean that the debt has been paid. It is a personal privilege which the law gives to the debtor whereby he may say that the debt is stale, and for that reason should not be enforced.

Same — promissory note — part payment — effect.

3. This statute of Washington, however, says to the debtor that, if he acknowledge the indebtedness by making a payment thereon, it becomes an acknowledgment that the debt has not been discharged, and recognizes the debt as in existence, and fixes the date of payment as a new date from which the statute begins to run.

Same — waiver.

4. This statute in effect declares that the making of a partial payment by a debtor, after the maturity of the debt, and before the statute of limitations has run, is a waiver of the debtor's privilege to claim the maturity of the debt as the date from which the statute begins to run.

Same — what law governs.

5. Where a resident of this state goes into the state of Washington and makes a partial payment upon a Washington contract after its maturity, and before such contract is barred by the statute of limitations of that state, upon his return to this state, the contract follows him as made, and is enforceable under the laws of this state, and the statute of limitations of this state begins to run upon his re-entry into this state after such payment.

Same — comity between states.

6. In order to determine the application of the statute of limitations of this state to a contract entered into in the state of Washington, it is necessary to examine said contract and the laws of the state of Washington for the purpose of determining the date from which the statute runs.

Trial — findings — sufficiency.

7. A general finding that all the material allegations of the answer are supported by the evidence, and true, and that all the material allegations of the complaint in conflict with the foregoing findings are unsupported by the evidence, and untrue, is insufficient to support a judgment.

Limitation of actions — residence.

8. Whether residence within this state for the statutory period will prevail as a plea in bar upon a written contract depends upon the nature of the contract, its maturity, and the date from which the statute begins to run.

(November 21, 1908.)

APPEAL by plaintiff from an order of the District Court for Nez Percé County, 20 L.R.A. (N.S.)

ty denying a motion for new trial after verdict for defendant in an action brought to recover upon certain promissory notes. Reversed.

The facts are stated in the opinion.

Mr. I. N. Smith for appellant.

Mr. George W. Tannahill, for respondent:

Limitation is governed by the law of the forum in which the suit is brought.

Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 415, 83 S. W. 106; Arrington v. Arrington, 127 N. C. 190, 52 L.R.A. 204, 80 Am. St. Rep. 791, 37 S. E. 212; M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177; Drake v. Bigelow, 93 Minn. 112, 100 N. W. 664; Montague v. Cummings, 119 Ga. 139, 45 S. E. 979; Krogg v. Atlanta & W. P. R. Co. 77 Ga. 202, 4 Am. St. Rep. 79; O'Shields v. Georgia P. R. Co. 83 Ga. 621, 6 L.R.A. 152, 10 S. E. 268; Medbury v. Hopkins, 3 Conn. 472; Blackburn v. Morton, 18 Ark. 384; Thompson v. Tioga R. Co. 36 Barb. 79; Worth v. Wilson, Wright (Ohio) 162; Pulsifer v. Greene, 96 Me. 438, 52 Atl. 921; Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; Wright v. Moradant, 77 Miss. 537, 78 Am. St. Rep. 536, 27 So. 640.

The acknowledgment, to revive a debt, must be unqualified and the promise definite.

Braithwaite v. Harvey, 14 Mont. 208, 21 L.R.A. 101, 43 Am. St. Rep. 625, 36 Pac. 38; Biddel v. Brizzolara, 56 Cal. 382; Bell v. Morrison, 1 Pet. 362, 7 L. ed. 179; McCormick v. Brown, 36 Cal. 185, 95 Am. Dec. 170.

Stewart, J., delivered the opinion of the court:

This action was commenced May 3, 1905. The complaint contains three causes of action. The first is founded upon a promissory note executed by defendant to plaintiff for the sum of \$700, dated July, 1890, and payable on or before October 1, 1890. The place of payment is not stated in the note. The note, however, is dated at Walla Walla, Washington. It is alleged that payments were made upon said note as follows: December 10, 1890, \$70; December 10, 1901, \$125. That latter payment was indorsed upon said note by the defendant himself at the time the payment was made. Then follow allegations as to non-payment and amount alleged to be due. The statutes of the state of Washington are set forth as a part of said cause of action, as follows: Section 4816, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 300): "No acknowledgment or promise shall be sufficient evidence of a new continuing contract whereby to take the case

out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." Section 4817, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 301): "When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made." Section 4798, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 281): "Within six years: (1) An action upon a judgment. . . . (2) An action upon a contract in writing, or liability, express or implied, arising out of a written agreement. (3) An action for the rents and profits . . . " the said statute being the statute of limitations relative to contracts in writing.

The second cause of action is founded upon a promissory note alleged to have been executed by defendant to plaintiff at Walla Walla, Washington, June 8, 1893, for the sum of \$2,000, payable four months after date, at the Baker-Boyer National Bank of Walla Walla, Washington. It is also alleged that payments were made upon said note as follows: November 20, 1893, \$20; November 13, 1901, \$500; that the last payment was indorsed on said note by defendant himself at the time the said payment was made. Then follow allegations of non-payment, the amount due, and the reasonableness of the attorneys' fees claimed and provided for in said note, and also the same allegations as to the statutes of Washington as set forth in the first cause of action.

The third cause of action is founded upon a promissory note alleged to have been executed by defendant to plaintiff at Walla Walla, Washington, on October 5, 1893, for the sum of \$1,700, payable sixty days after date, at the First National Bank of Walla Walla, Washington. It is also alleged that payments were made upon said note as follows: January 27, 1898, \$50; November 14, 1901, \$500; that the last payment was indorsed on said note by the defendant himself at the time said payment was made. Then follow allegations of non-payment, the amount still due, the reasonableness of the attorneys' fees claimed, as provided for in said note, and also the same allegations as to the statutes of Washington as set forth in the first cause of action.

Thereafter an amendment was filed to the complaint, in which the plaintiff alleged 20 L.R.A. (N.S.)

that, within a period of five years last past prior to the commencement of this action, said defendant acknowledged the existence of the said indebtedness in an instrument in writing, signed by himself, and that the said defendant is the person to be charged with such acknowledgment and with such indebtedness. By such acknowledgment said defendant promised and agreed to pay the said indebtedness set out in the first cause of action. Then follow the same allegations as to the second and third causes of action. The defendant, in his answer, admits the execution of the several notes set forth in the complaint, but denies that said notes were executed or delivered in the state of Washington, and denies that they are Washington contracts; denies that there is anything due upon said notes, and denies that the payments alleged to have been indorsed upon said notes by the defendant were so indorsed by the defendant; denies that defendant acknowledged the existence of said indebtedness in writing; alleges that defendant has no knowledge or information as to whether or not the payments shown to have been made upon said notes were, in fact, made, and on that ground denies the same; alleges want of knowledge or belief as to the Washington statutes as pleaded, and upon that ground the defendant denies the existence of same. As a part of said answer and as a fourth defense, the defendant alleges that each of said causes of action, as set forth in the complaint, was barred by the provisions of § 4051, Idaho Rev. Stat. 1887, and § 4798, Ballinger's Anno. Codes & Statutes (Wash.). During the trial it was admitted by counsel that the statutes of the state of Washington existed and were in force as alleged in the complaint. Trial was had by the court, and the court made its findings of fact and conclusions of law. It found the making and delivery of each of the notes set forth in the complaint, the making of the payments indorsed, that said notes were governed by the laws of the state of Idaho, and were barred by the provisions of § 4051, Rev. Stat. 1887; that the letter introduced in evidence and relied upon by the plaintiff for the purpose of renewing and reviving the notes was insufficient to revive said notes or extend the statutes or remove the bar of the statutes; that all of the material allegations of the defendant's answer are supported by the evidence and true; and that all of the material allegations of plaintiff's complaint in conflict with the foregoing findings are not supported by the evidence, and untrue. There was no finding as to whether said notes were Washington contracts, or whether said notes were barred

by the provisions of § 4798, Ballinger's Anno. Codes & Statutes (Wash.). As conclusions of law the court found that said notes set forth in the complaint were barred by the provisions of § 4051 of the Revised Statutes of Idaho; that the defendant is entitled to have the action dismissed and recover his costs. Judgment was rendered accordingly. Motion for a new trial was made and denied. This appeal is from the order overruling the motion for a new trial and from the judgment.

Before entering into a discussion of the merits of this case, it is proper to refer to what seems to have been a clerical error running throughout the case. It is alleged in the complaint, and the court finds, that § 4051 of the Revised Statutes is the section applicable to the contract alleged in the complaint. This evidently is a clerical error, and the reference no doubt was intended to be to § 4052. While counsel for appellant takes advantage in his argument of this clerical error, we are not inclined to permit what plainly appears to be a clerical error to affect the substantial rights of the parties in this case. The appellant assigns as error the holding and deciding by the court that the said notes and each of them were and are barred by the statute of limitations, and the rendering of a decision for the defendant. These two assignments of error in our opinion are both well taken. Under the provisions of § 4817, of Ballinger's Annotated Codes & Statutes of Washington, supra, when any payment of principal or interest has been or shall be made upon any existing contract, whether it be by bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be after the same shall have become due, the limitation shall commence from the time the last payment was made. The first note was dated July, 1890, and was due on October 1, 1890. The statute of limitations, therefore, would begin to run on October 1, 1890, unless a new date was fixed according to the statutes of Washington by a payment on the principal or interest after said note became due. The second note was dated June 8, 1893, and became due October 8, 1893, and the statute of limitations would begin to run October 8, 1893, unless a new date was fixed according to the statutes of Washington by a payment on the principal or interest after the note became due. The third note was dated October 5, 1893, and was due on December 5, 1893, and the statute of limitations would begin to run December 5, 1893, unless a new date was fixed as above stated. This statute evidently has reference to payments made on contracts before the statute

has run against them. *Creighton v. Vincent*, 10 Or. 56. If, however, the statute is complete before payment is made, and the debt becomes dead, then to revive or continue the contract the acknowledgment should be in writing, as provided in § 4816, Ballinger's Anno. Codes & Statutes (Wash.). If this rule be correct, then it is apparent that the plaintiff cannot recover in this case upon the first cause of action, as it appears that the statute was complete at the time the second payment was made. In other words, more than six years had expired between the date of the first payment, December 10, 1890, and the second payment, December 10, 1901. In order, therefore, to revive or continue this contract under the statute of Washington, it was necessary that the defendant sign some writing whereby he acknowledge or promise to pay said debt; otherwise the statute of limitations would apply to said indebtedness. This, however, is not true as to the second and third causes of action, as it will be observed that the statute was not complete between the maturity of either of said notes and the first payment thereon, or the first payment and the second payment, or after the last payment and the commencement of this action. Under the statutes of Washington, therefore, neither the second nor the third cause of action was barred by the statute of limitations of the state of Washington.

If the notes sued upon were Washington contracts, then the laws of the state of Washington became a part of said contracts, and the effect upon such contracts of the payments made after the notes were due, and before the statute of limitations had matured, was to fix a new date from which the statute would begin to run. The statute of limitations does not mean that the debt has been paid. It is a personal privilege which the law gives to the debtor, whereby he may say to the creditor: "You have waited so long before action has been instituted to collect the claim that it has become stale, and for that reason you should not be permitted to maintain an action thereon." This Washington statute, however, comes to the relief of the creditor, and says to the debtor: "If you acknowledge an indebtedness by making a payment thereon, it becomes an acknowledgment upon your part that the debt has not been discharged; and, by reason of your recognizing the existence of the indebtedness, the law fixes such recognition as a new date from which the staleness of the claim may be determined, and from which the right to maintain an action thereon may be reckoned." The statute in effect says that, by making such payment, the debtor waives

the privilege of having the time prior to such payment reckoned as a part of the time to be computed under the statute of limitations, and denies to the debtor the right to plead the statute as a bar until the required time shall have run after such payment. *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637; *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639. This is also true in the absence of a statute. *Hopkins v. Stout*, 6 Bush, 375; *English v. Wathen*, 9 Bush, 387; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663. If, then, the payments made were a recognition by the defendant of the existence of said contract and his liability thereon, and fixed the date of payment as the time from which the statute of limitations should begin to run, then the defendant could not plead the statute of limitations of the state of Washington as a bar to an action upon said notes until the expiration of six years from the date of the last payment thereon. The trial court seems to have concluded that the payments made upon the notes sued upon did not keep said notes alive in the state of Idaho, or prevent the statute of limitations of this state from running against the same, and that the defendant's residence within this state for the period of five years was sufficient to sustain the plea of the statute, and bar the plaintiff's right to recover upon said notes.

This position is untenable in the light of the law of the state of Washington and the effect the law of that state gave to the act of payment. When the defendant entered the state of Washington and made partial payments upon the notes sued upon, and thereafter returned to this state, he returned with his liability fixed, and a new date was established for the beginning of the statute. The statute of limitations of that state would not become complete until the expiration of six years from the date of the last payment made upon said notes, and the statute of this state would not become complete until five years from the date of such last payment, or 1906. By making such payment, the defendant recognized said notes as live contracts, and such live contracts followed him into this state, and the statute would begin to run in this state upon his re-entry into the state after such payment. The mere fact that the defendant had resided within this state for a period of more than five years prior to the commencement of this action would not be sufficient to avail him of the plea of the bar of the statute. Such plea must be determined in the light of the contracts and the statutes of the state of Washington, where the contracts were made, as the statute of that state entered into and be-
20 L.R.A. (N.S.)

came a part of said contracts. 9 Cyc. Law & Proc. p. 582; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *United States ex rel. Gaines v. New Orleans* (C. C.) 17 Fed. 483; *Parsel v. Barnes*, 25 Ark. 261; *Collins v. Collins*, 79 Ky. 88; *Fowler v. Smith*, 2 Cal. 568. We think, in order to determine the questions involved in this case, as to whether or not the contracts sued upon were barred by the statute of limitations of this state, it was necessary to examine and determine the question as to whether or not said contracts were Washington contracts, and alive and binding upon the defendant at the time that he returned into this state, after making such partial payments. If said contracts were Washington contracts, and it was necessary to determine this question before the court could conclude whether the action was barred by the statute of limitations of this state, then it was necessary for the court to make a finding whether the notes sued upon were Washington contracts, and whether or not the defendant acknowledged the existence of said contracts in the state of Washington by making payments thereon, and thereby fixed the time of such payment as the date from which the statute would begin to run. Upon this question the court made no finding whatever. The court, however, did find generally that all the material allegations of the answer were supported by the evidence and true, and that all the material allegations of the plaintiff's complaint, in conflict with the foregoing findings, were unsupported by the evidence, and untrue. This finding is not sufficient. *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490; *Olympia Min. Co. v. Kerns*, 13 Idaho, 514, 91 Pac. 92; *Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339.

It follows from this discussion that the trial court failed to find upon all the material issues in the case. The judgment will be reversed and a new trial ordered. Costs awarded to appellant.

Allshie, Ch. J., and Sullivan, J., concur.

LOUISIANA SUPREME COURT.

FENNER B. CROSSETT, Appt.,

v.

J. W. CAMPBELL et al.

(122 La. 659, 48 So. 141.)

False Imprisonment—ejection from ball grounds.

Plaintiff entered upon grounds which were lawfully in possession of schoolboys,

Headnote by MONROE, J.

who were giving a free picnic and who had given notice, in advance, that later in the day a game of baseball would be played, to which a trifling admission fee would be charged. When the game was about to begin he refused, though repeatedly requested so to do, to pay the fee or go out, and he was thereupon taken by the arm by a citizen—one of the assembled guests or patrons—acting in behalf of the boys, though without special authority, and led in the direction of the gate, always with the privilege of paying and staying, and the alternative of not paying and going. Before reaching the gate, he paid the fee, and thereafter stayed and witnessed the game.

Held, that the restraint imposed was not total, and did not render it impossible for plaintiff to stay where he was, or otherwise control his movements; that, being at all times able to release himself on payment of the fee, for which, if he stayed, he was morally and legally bound, the restraint

imposed on him, merely as a means of his ejection, until he elected to pay, was the result of his voluntary persistence in an unlawful act, did not deprive him of "free egress," and affords no ground for an action in damages for false imprisonment.

(December 14, 1908.)

APPPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Winn in defendants' favor in an action brought to recover damages for alleged false imprisonment. Affirmed.

The facts are stated in the opinion.

Mr. John H. Mathews, for appellant:

False imprisonment is any unlawful detention of the person,—an unlawful restraint upon a man's freedom of locomotion.

Cooley, Torts, 2d ed. p. 196; 12 Am. & Eng. Enc. Law, p. 733; 19 Cyc. Law & Proc.

Case Note.—*May false imprisonment be predicated of a partial or conditional restraint.*

To constitute a false imprisonment two elements must concur: (1) There must be a restraint; (2) such restraint must be unlawful. A certain inconsistency discernible in the case reported, in that, while the decision is ostensibly upon the ground that the restraint, being partial and conditional, did not amount to an imprisonment, the court seems to have been influenced by its view that the restraint was properly imposed, becomes apparent upon its comparison with other decisions involving the question whether a partial restraint, or a restraint which may be voluntarily determined by the person restrained, amounts to a false imprisonment.

While some cases appear to lend countenance to the view that a partial interference with one's liberty, such as an obstruction of passage, does not amount to false imprisonment, the conclusion arrived at would seem to be based more properly upon the ground that such interference does not amount to a restraint in the sense of an imprisonment. The true test seems to be, not the extent of the restraint (where the interference amounts to a restraint), but the lawfulness thereof.

Partial restraint.

The case usually cited as authority for the view that a restraint, to amount to a false imprisonment, must be total, is *Bird v. Jones*, 7 Q. B. 742, the facts in which were as follows: A part of a public highway was inclosed and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but, after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the 20 L.R.A. (N.S.)

defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself." It was said by Coleridge, J.: "I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment, neither more or less, from their being wrongful or capable of justification. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom. It is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own." The notion that a restraint must be total seems to be derived from the statement made by Patteson, J., in his concurring opinion, that imprisonment is a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him.

In *Wright v. Wilson*, 1 Ld. Raym. 739, it was held that an action for false imprisonment will not lie for fastening one of two doors in a room in which the plaintiff was,

p. 333; 3 Elliott, Ev. §§ 2101, 2115; Wells v. Johnston, 52 La. Ann. 717, 27 So. 185.

Mr. Casimir Moss for appellees.

Monroe, J., delivered the opinion of the court:

This is an action for damages in which plaintiff appears before this court as appellant from a judgment rejecting his demands.

He states his supposed cause of action by alleging that "petitioner was in company with his wife and friends on an open lot, in the village of Dodson, . . . behaving himself, in every respect, as a good citizen should do; . . . that, while so situated, J. W. Campbell, the marshal of the town, . . . and W. C. Johnson, acting in conjunction with and aiding and assisting each other, did, with force and arms, unlawfully arrest, detain, and imprison your petitioner,

although he could not go through the other without trespassing.

In Sullivan v. Old Colony R. Co. 148 Mass. 119, 1 L.R.A. 513, 18 N. E. 678, it was held that the removal of a disorderly passenger from a passenger car, without arresting him, and placing him in the baggage car to carry him to his destination, may be reasonable and proper conduct on the part of a railroad company, and not render it liable for assault or imprisonment.

On the other hand, in Bloomer v. State, 3 Sneed, 66, a prosecution for an assault, an instruction that, if the defendant met the complainant in the road, and, by means of threats, or otherwise, stopped him, and, in consequence of such conduct on the part of the defendant the complainant was stopped, and not permitted to pass along the public highway, as he had the right to do, this would be an illegal imprisonment, and in law an assault on the part of the defendant, was held to be correct.

In Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000, it was held that evidence that plaintiff, who was suspected of theft, was called into an office, where she was informed that an officer was at hand to arrest her if she did not produce the stolen articles; that when she turned to go out, making no forcible effort to do so, another person present stood with his hand on the door; that she was told that she had just one hour to produce the things or acknowledge her guilt; and that she felt that she was a prisoner; and that there was an officer in the adjoining room; and that the parties proceeded, with her consent, to her house to make a search,—such facts were sufficient, if believed by the jury, to justify a finding the plaintiff understood that she was under restraint.

In Fotheringham v. Adams Exp. Co. 1 L.R.A. 474, 36 Fed. 252, it was held that an action for false imprisonment lies where a person was constantly guarded by detectives for two weeks, so that he was at no time free to come and go as he pleased, and his movements were at all times subject to

by seizing hold of your petitioner's body, and drawing a deadly weapon on your petitioner, and, in this manner, dragged your petitioner through a large assembly of people congregated there, and did in this manner forcibly detain petitioner, against his will, for some considerable time; . . . that there never did exist any warrant or legal process whatever authorizing either the said J. W. Campbell or the said W. C. Johnson to take petitioner in their custody or to detain or imprison him; . . . that said acts furnish an instance of false imprisonment for which they should be held liable *in solido*; . . . that, on account of said false imprisonment, he has suffered damages . . . in the sum of \$3,000; and he prays judgment against the defendants *in solido*."

An exception of no cause of action was

the control and direction of those who had him in charge, who frequently urged him to make a confession of guilt.

With regard to cases arising under criminal statutes, it may be observed that such statutes seem to require a lesser interference with a person's liberty to constitute false imprisonment than is the case in civil action.

In People v. Wheeler, 73 Cal. 252, 14 Pac. 796, a conviction for the crime of false imprisonment, defined by statute as being "the unlawful violation of the personal liberty of another," was sustained where it appeared that the complainant was seized, thrown down, tied, and carried away by defendants for the purpose of ejecting him from land upon which it was claimed he was trespassing.

In Woods v. State, 3 Tex. App. 204, a conviction under a statute providing that false imprisonment is committed by the use of any "means which restrains the party detained from removing from one place to another, as he may see proper," was sustained under evidence showing that the prosecuting witness was simply forbidden to plow a field, but was not prevented otherwise from going where he pleased.

So, also, in Harkins v. State, 6 Tex. App. 452, a conviction under the same statute was sustained upon evidence showing that the parties, while riding along the road, began to quarrel, that witness, fearing a difficulty, left the road with the intention of pursuing his journey away from the road and avoiding the defendant, who compelled him to return and ride along in his company; as, under the statute, to stop a man going in any direction he sees proper, though without detaining him in a particular spot, may constitute false imprisonment.

Conditional restraint.

It seems to be uniformly held that a restraint may be none the less an imprisonment though it may lie within the power of the person restrained to obtain his release

filed and overruled, and, defendant having answered, the case was tried on its merits, developing the following facts: The boys of the Dodson High School, having decided to celebrate their commencement by giving a public picnic, to be followed in the afternoon by a game of baseball, secured from the Tremont Lumber Company the use of certain ground, owned by the latter, from which they removed the stumps and other obstructions, and which they inclosed by encircling it with a rope and a wire. No charge was made for participation in the picnic, but, in order to provide balls and bats, and to aid in paying the expenses of the visiting, Winfield, High School team, the Dodson boys found it necessary to charge a fee of 25 cents to those who chose to remain, or to come, after dinner, within the inclosure and witness the baseball game, and notice of their intention in that respect was published in the Dodson paper, and was also served on many of the citizens by means of postal cards, plaintiff being one of those to whom such a card was mailed. He, however, seems to have conceived the idea that the charge was an imposition, and, before going to the grounds, announced his determination not to pay it. He says in his testimony: "About 2 o'clock the professor got up on a stump and announced for everybody to go down to the gate so that they could collect their 25 cents. Most of the ladies went, and a good lot of men. Some of them stood around and did not go."

Plaintiff's wife was one of the ladies who "went." She gave the gate keeper 10 cents, and told him she would give him the remaining 15 cents (to make up the 25 cents for her admission) before she left the grounds, and her assurance was accepted, without discussion, as satisfactory. Plaintiff, though he had in his pocket more than enough

money to pay the charge, was one of those "who stood around and did not go." In that situation, appeals were made by the boys to plaintiff, and to those who assumed a like position, either to pay or to go out, and most of them did one thing or the other. Plaintiff did neither. One of the boys, being asked, "What did you propose to do if a person came on the ground that day and did not want to pay a fee," replied, "We did not think that any one would want to run over us in that way. . . . Didn't think very much about that." Campbell, the marshal, had had a talk with the mayor, in which the latter had expressed the opinion that no one could be arrested or otherwise dealt with under the town ordinances for refusing to pay the admission fee, and the marshal, acting on that opinion, contented himself with merely appealing to the recalcitrants either to pay or go out. He says he explained to plaintiff and others why the charge was made, and told them, "I believe I would pay or just go out, and not create any contrariness." He did nothing more. Johnson, a citizen of the town and a friend of the boys, seems rather to have urged the matter upon the few who persisted in holding out, and, it being said by some of them, "Everybody has gone out except that Dodson fellow [referring to plaintiff], and if he will go out we will go out too," he approached plaintiff, who had already been appealed to several times, and, at this point, there is some variance in the testimony. One or two witnesses say that Johnson asked plaintiff whether he had paid; that plaintiff replied that he had not; that Johnson then requested him to go to the gate, and took him by the arm; that plaintiff resisted, slightly, at first, and then walked in the direction of the gate, all the witnesses agreeing that he settled the matter by pay-

ing by complying with the requirements of the person imposing the restraint.—at least, where such requirements are without legal justification.

Thus, a false imprisonment was held to have been effected where defendant, finding plaintiff in a corn crib, refused to allow him to come out until he should answer his questions whether plaintiff had made certain derogatory remarks concerning the defendant's family (*McNay v. Stratton*, 9 Ill. App. 215); where defendants, having summoned the plaintiff to their house, locked the doors upon him, and threatened him with great personal violence unless he admitted that he had promised to marry their sister, and would then agree to pay the damages for the breach of such promise (*Hildebrand v. McCrum*, 101 Ind. 61); where plaintiff was required, at the point of a revolver, to unlock his safe for the purpose of determining whether it contained money alleged by the 20 L.R.A. (N.S.)

defendant to have been stolen from him by the plaintiff (*Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005); where, a mistake having been made in serving an order given by plaintiff in defendant's restaurant, a dispute arose as to the amount of his bill, and defendant had him arrested upon his refusal to pay the larger amount claimed (*Buchanan v. Goettmann Bros.* 29 Pittsb. L. J. N. S. 302); where plaintiff was detained, though without actual or offered violence, by a dispute as to whether he had paid certain ferryage, the ferryman telling him he should not go on until he paid it, which he did (*Smith v. State*, 7 Humph. 43); where plaintiff, arrested under a void writ of ne exeat was compelled, in order to avoid imprisonment, to make a promise that he would not run away, and to procure others to vouch for him (*Bonesteel v. Bonesteel*, 28 Wis. 245).

ing before reaching the gate. Plaintiff says that Johnson asked if he had been to the gate; that he replied, "No, my wife has made arrangement;" that Johnson then said, "Consider yourself under arrest for resisting an officer," and grabbed him by the arm; that he "finally got loose, . . . was not trying very hard, and, when he did, Johnson grabbed him again," and "threw his hand back like he was going to pull a gun;" that he (plaintiff) said, "You can't arrest me, for I am not bothering you;" that Johnson said, "Pay up, then, pay up;" and that he went with Johnson for a distance of some 75 yards, when he paid up and was released. Johnson says: "I said, 'Mr. Crossett, everybody has gone out but you, and it don't look nice for you to stay;'" and I said, "If I was you, I would go out, and act nice about it," and he said, "My wife paid," and I said, "Did she pay for you?" and I asked Mrs. Crossett did she pay for him, and she said, "No;" and I said, "Crossett, you will have to go out and (or) pay," and I took him by the right arm and started, and he said he would go, and then he stopped and asked me if I was going to take him to the calaboose, and I told him, "No." We went to the other side of the cold drink stand, which I reckon was 20 or 30 steps,—I guess it took about 20 or 30 seconds,—and he said, "Hold on, I will pay you my quarter, and I will prosecute you." Plaintiff thereupon produced a dollar, from which the gate keeper, who came up at the moment, gave him 75 cents in change, and the matter ended, plaintiff returning to his wife and remaining, without further disturbance, to witness the game. A witness by the name of Dean says that Johnson had a pistol in the rear pocket of his trousers, and partly drew it out at one time, but it is shown beyond question that he was in his shirt sleeves and was wearing linen trousers, and several witnesses testify that they saw no pistol, and that they could not very well have helped seeing it if he had had one. Johnson himself swears that he had no pistol.

It will be observed from the foregoing statement of the facts of the case, as disclosed by the evidence, that instead, as he alleges, of being on "an open lot," plaintiff, at the time of the incident out of which this suit arises, was upon a lot, the use and enjoyment of which had been granted by the owner to the Dodson High School baseball team, which the members of that team had cleared of stumps and other obstructions and had inclosed, or partially inclosed, with a wire and rope for their own purposes, and of which they were in full possession; and that, instead of his "behaving himself, in every respect, as a good citi-

zen should do," he was engaged in a most unreasonable and wrongheaded interference with a lot of schoolboys and other persons who were exercising, innocently, their legal right to amuse and be amused, upon property over which, for all the purposes of this case, they had absolute control. It will also be observed that, whereas plaintiff alleges that, "on account of said false imprisonment," he suffered the damages for which he prays judgment, the facts are that he was given the alternative of staying where he was upon complying with a condition rightfully imposed, or of removing himself from premises where otherwise he was an intruder and a trespasser; and that, upon his refusal to do either the one thing or the other, he was in course—not of being imprisoned upon but—of being ejected from the premises (with the privilege reserved to him of remaining where he was, on complying with the required condition, or of going elsewhere, without so complying, as he pleased), when he concluded to comply with the condition, and the trouble ended. There was, therefore, never an instant of time during which his release from the restraint imposed upon him was not entirely within his own control, and might not have been accomplished by his paying the trifling amount of money demanded of him, and he was never restrained from doing anything save the unlawful thing of remaining upon the boys' playground, against their wishes, in violation of their rights, and to their disturbance and the disturbance of their assembled guests. Our law (Rev. Stat. § 796) imposes a penalty for "false imprisoning," but does not define the offense. It is elsewhere defined as follows: "False imprisonment is the unlawful and total restraint of the liberty of the person. . . ."

"The right violated by this tort is 'freedom of locomotion.' It belongs, historically, to the class of rights known as simple or primary rights (inaccurately called absolute rights), as distinguished from secondary rights, or rights not to be harmed. It is a right *in rem*; it is available against the community at large. The theory of the law is that one interferes with the freedom of locomotion of another at his peril. . . . The right of freedom of locomotion is violated when one is wrongfully detained against his will, or is in any way deprived of, as distinguished from obstructed or subjected to inconvenience in, his right to come or go or stay when and where he wishes. Some conduct imposing restraint or detention is essential; but any conduct resulting therein is sufficient. It is the unlawful interference with the wish or desire of plaintiff which the law seeks to compensate. Free egress must therefore be impossible;

the restraint must be total." 19 Cyc. Law & Proc. pp. 319, 322.

A note to the paragraph last above quoted reads: "If plaintiff is free to go where he wants to, he cannot sustain an action of false imprisonment; if he is prevented from going where he may have a right to go, a mere partial obstruction to his will may be the basis of some other form of action, but not of the one here under consideration. *Bird v. Jones*, 7 Q. B. 742; . . . *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 663."

"There is no legal wrong unless the detention was involuntary." 19 Cyc. Law & Proc. p. 323.

A note to this paragraph reads: "One who submits to arrest and imprisonment rather than pay a small license fee, illegally exacted, but which he might have recovered back, without serious injury or damage, has no cause of action. *Cottam v. Oregon City* (C. C.) 98 Fed. 570."

And, again, we find that it has been held that "where the contest is for possession of personal property, and there is no intent to detain the person, false imprisonment is not made out. *McClure v. State*, 26 Tex. App. 102, 9 S. W. 353." [19 Cyc. Law & Proc. p. 322, note.]

Applying the definition and interpretation thus given to the case at bar, it will be noticed that free egress from the baseball grounds was at all times possible to the plaintiff, and that Johnson's purpose was not to imprison him in the grounds, but to eject him from them, though the privilege was accorded him of remaining there on his complying with a reasonable and lawful condition, and that it was entirely and at all times within his power to release himself from the restraint incidental to his proposed ejection by the payment of the admission fee, for which, if he stayed, he was morally and legally bound. Such restraint was therefore of his own doing, and was not involuntary.

It is said that the defendant Johnson should be held liable in any event, because, disclaiming, as he does, authority either from the marshal or the boys, he was without right, as an individual, to interfere in the matter. It might, perhaps, be answered that an individual has the right to interfere where a breach of the peace or a misdemeanor is committed, or threatened, in his presence, and that, apart from the fact that plaintiff was unlawfully disturbing the boys in their enjoyment of the premises in question,—a course of conduct the tendency of which was to provoke acts of violence,—he was, by his unauthorized presence, disturbing and invading the rights of a peaceful assemblage of which Johnson was a member, 20 L.R.A. (N.S.)

in violation of a statute which denounces such disturbance as an offense punishable by fine and imprisonment. Rev. Stat. § 929.

We, however, prefer to base the decision upon the ground first stated; to wit, that the restraint of which plaintiff complains was voluntary, in that it always rested with him to terminate it by desisting from the doing of an unlawful act, and that "free egress" was always open to him.

Judgment affirmed.

Petition for rehearing denied January 18, 1909.

LOUISIANA SUPREME COURT.

SIDNEY J. GILLY

v.

ABRAHAM I. HIRSH, Appt.

(122 La. 966, 48 So. 422.)

Nuisance — auction — interference — damages.

1. The auction business is not a nuisance *per se*, but it may be so conducted as to become a nuisance; and, where an auctioneer,

Headnotes by MONROE, J.

Case Note. — Auction as a nuisance.

It was held in *Com. v. Passmore*, 1 Serg. & R. 217, to be a common-law nuisance for an auctioneer to deposit goods in a street, in front of his place of business, and suffer them to remain there for the purpose of being sold at auction, passage along the street being thereby rendered less convenient, although not entirely obstructed.

And in *Com. v. Milliman*, 13 Serg. & R. 403, it was also held to be an indictable nuisance for a constable to sell property at auction, under an executio., in a public street, thereby obstructing it.

And the fact that it was provided by statute that a constable, in making such a sale, "shall expose the goods for sale by public vendue," will not relieve him from liability, it not being necessary that a "public vendue," shall be held in the public streets. *Ibid*.

The exemption of auctioneers from a municipal ordinance prohibiting, under a penalty, placing goods in the streets (assuming it to be within the power of a municipality to adopt such ordinance), merely exempts auctioneers from the penalty imposed on others for a violation thereof, and leaves the law as to nuisances as it before existed. *Com. v. Passmore*, supra.

And a municipal ordinance prohibiting the sale or exposure for sale of goods at auction in the public streets has been upheld on the ground of keeping them free from nuisances. See *White v. Kent*, 11 Ohio St. 550; *Com. v. Ellis*, 158 Mass. 555, 33 N. E. 651.

engaged in selling goods similar to those dealt in by a merchant next door, keeps a number of employees standing about, who molest and interfere with customers, whether actual or prospective, who are looking into his neighbor's show window, and otherwise interferes with his neighbor's business, an injunction will issue to restrain him. If, however, the neighbor be damaged because the auctioneer undersells or oversells him, or sells inferior goods, it is *damnum absque injuria*. And when the complaint is that the auctioneer deals unfairly with his own customers, it is a matter between him and them, or between him and the state.

Auctioneer — license — forfeiture — civil suit.

2. The license of an auctioneer may be forfeited, in a criminal prosecution, for certain unfair dealings in the conduct of his business; but no such penalty can be imposed in a civil suit, brought by a neighboring merchant; nor can the latter be permitted to put the auctioneer out of business by signs or publications reflecting upon the character of his business.

Costs — division.

3. When plaintiff obtains judgment on his demand, and defendant obtains judgment on his demand in reconviction, each of the parties should pay the costs incurred in obtaining the judgment against him.

(January 18, 1909.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in plaintiff's favor in an action brought to enjoin defendant from continuing certain acts alleged to reflect upon plaintiff's character and business and for damages alleged to have been caused thereby. Modified.

The facts are stated in the opinion.

Messrs. Foster, Milling, & Godchaux, and Alexis Brian, for appellant:

A license issued by a city council authorizing the doing of a legitimate business will not justify the party holding the same to conduct an illegitimate business.

Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7; Wood, Nuisances, §§ 743, 746, 751; Koehl v. Schoenhausen, 47 La. Ann. 1316, 17 So. 809.

If a business, authorized by law, and conducted under a license, becomes a private nuisance, it may be abated by injunction.

Blanc v. Murray, *supra*.

An auction place which sells fake jewelry, under misrepresentation as to its origin, character, and value, maintains cappers and by-bidders, creates an unusual amount of noise by hallooing in loud voices, clapping hands, and making other noises to attract passers-by, and which disturbs occupants of adjacent property, may be closed by injunction.

20 L.R.A. (N.S.)

Froelicher v. Southern Marine Works, 118 La. 1077, 43 So. 882; State ex rel. Denis v. King, 105 La. 732, 30 So. 101.

Mr. P. L. Fourchy, with Mr. Henry L. Garland, Jr., for appellee.

Monroe, J., delivered the opinion of the court:

Plaintiff represents that he is engaged in business at 507 Canal street, New Orleans, as an auctioneer, selling jewelry and other personal property. That defendant has the adjoining store, in which he also sells jewelry and other wares. That, for the malicious purpose of injuring him, defendant has hung in his show window, adjoining the entrance to plaintiff's store, a sign, in large letters, reading:

Don't be Misled.

This store and window display has no connection with the would-be auction, next door. Our entrance is at the corner.

That the sole object and effect of the sign is to excite the distrust of plaintiff's customers as to the honesty of his business, to his great prejudice, and that he has been damaged to the extent of \$1,500. That defendant has repeatedly reported him to the mayor and police as "a criminal, carrying on an unlawful business, and has maliciously sought to injure his character and his business, and, by his said acts and slanderous charges and accusations, has damaged petitioner in his character and reputation, in the sum of \$1,000. That unless . . . enjoined from the further display of said sign, and from harassing petitioner, boycotting and picketing petitioner's place of business, and from buttonholing and soliciting the customers entering and leaving. . . . the said Hirsch will inflict upon petitioner, and upon his business, repeated and irreparable damages and injury, for which no adequate redress could be obtained."

Wherefore he prays for an injunction and for judgment, condemning defendant in damages in the sum of \$2,500.

In answer to a rule nisi, ordering him to show cause why a preliminary injunction should not issue, and by way of answer to the merits and of reconventional demand, defendant admits that he is exhibiting the sign, as alleged, but denies that he is doing so from any malicious motive. And he further denies that he has in any manner harassed plaintiff, or boycotted or picketed his store, or buttonholed or solicited his customers. And he alleges that the sign is necessary for his own protection, for the reason that plaintiff sells at auction, next door to defendant's jewelry store, articles of

jewelry and notions upon flagrant misrepresentations as to their origin and worth, and at exorbitant prices, being assisted therein by half a dozen or more cappers, or dummy bidders, who are employed to inveigle passers-by into entering said auction shop and bidding on said articles; that defendant recently caused the arrest of one of said cappers as a dangerous and suspicious character, and he was convicted and fined; that said cappers, under the direction of said Gilly, resort to all manner of artifices, both by words and acts, to induce persons who stop at respondent's show window, and who, if unmolested, would become customers of respondent, to enter said auction shop; that the said cappers, among other artifices, represent to said passers-by that said show window of respondent and said auction shop of plaintiff are one and the same place, and that the same grade and character of articles are being sold at public auction, in plaintiff's said shop, as are being displayed in respondent's show window; that the said cappers often ". . . gather around a prospective customer of respondent and rush and crowd him into said auction shop, thus preventing said prospective customer from entering respondent's store, and consequently resulting in damage and injury to respondent, in actual loss of business and in damage to his personal and business reputation, for which respondent reserves the right to sue in a proper proceeding; . . . that the reputation of said auction shop is bad; that it was, and is, necessary for the protection of the reputation of respondent's establishment that he give, by means of some sign, due notice to the public that his store is in no manner connected with said auction shop."

He further, and for the purposes of his demand in reconvention, alleges:

"That he is engaged in the business of retailing jewelry, notions, etc.; . . . that by fair dealing . . . he had built up a remunerative trade, and was continually increasing his business, . . . until about eighteen months ago . . . plaintiff established, . . . immediately adjoining respondent's show window, a small shop, . . . where said Gilly and his employees sell jewelry, notions, etc., at auction; . . . that the auctioneer . . . is continually crying out in a loud voice, clapping his hands and making other noisy demonstrations, in his endeavors to attract people from the street, to sell his wares, and to harass respondent, his employees, and customers; that said auction shop is the rendezvous of cappers, loafers, and other dangerous and suspicious characters, who often insult, abuse, and revile respondent and his employees; that the said noise, boisterous conduct, and vile language

of said plaintiff, his employees, and associates . . . are distinctly audible in respondent's store, and have caused respondent damage, to his health, feelings, and peace of mind, in the sum of \$300; . . . that the said Gilly sells in said auction shop, at public auction, articles . . . of a worthless character; . . . that said Gilly and his said employees take advantage of the proximity of respondent's store, . . . and of the attractive display of first-class goods made by respondent in his show window, to create the impression, by representations to that effect, and otherwise, among respondent's customers, actual and prospective, and the public at large, that said auction shop is part and portion of respondent's store; . . . and that respondent has been damaged, in his personal and business reputation, by being classed and associated with said shop as aforesaid, in the sum of \$1,500; . . . that, by reason of the aforesaid noise, vile language, and disreputable dealings carried on, and of the dangerous and suspicious characters congregated in said auction shop, the same constitutes a public and private nuisance, which should be abated by injunction . . . restraining said Gilly, his agents, and employees from further operating said auction shop."

And he prays that plaintiff's demand be rejected, and that he and his agents and employees be enjoined from further operating said auction shop, from inducing, crowding, or rushing persons from in front of respondent's show window into said auction shop; from representing to persons who stop at respondent's show window, or to any persons, that respondent's store is a part and portion of said auction shop; and from in any manner interfering with the orderly conduct of respondent's business. He further prays for damages, and costs.

After a full hearing in the district court there was judgment as follows:

"Enjoining the said defendant from placing in his show window a sign or card reflecting on plaintiff or his business, and especially the card, 'Don't be Misled. This store and window has no connection with the would-be auction next door'—and enjoining the said defendant from obstructing, interfering with, accosting, and buttonholing plaintiff's customers at or near the door of plaintiff's place of business, for the purpose of preventing their entrance therein and there transacting business with plaintiff. It is further decreed that there be judgment in favor of plaintiff in reconvention, and against the said Sidney J. Gilly, enjoining and restraining the said Gilly, his agents, and employees . . . from inducing, rushing, or crowding persons from in front of the show window of the said . . . Hirsh

into the auction store of the said Gilly, from representing to persons who stop at the show window of the said Hirsh, or to any other persons, that the store of said Hirsh is a part and portion of said Gilly's shop, and enjoining the said Gilly from in any manner interfering with the employees and customers of the said Hirsh, . . . dismissing the said Gilly's demand for a moneyed judgment, and also dismissing the said Hirsh's reconventional demand for a moneyed judgment; plaintiff to pay all costs incurred by him, and defendant, in a like manner, all the costs incurred by him, including the testimony of witnesses called in his behalf."

From the judgment so rendered, defendant has appealed, but plaintiff has not appealed, nor has he answered the appeal of defendant, or prayed, for any amendment of the judgment.

Defendant's counsel insist:

- (1) That plaintiff is entitled to no injunction.
- (2) That he is not entitled to an injunction restraining defendant from interfering with his customers, picketing his place, etc.
- (3) That defendant is entitled to an injunction as prayed for by him.
- (4) That defendant is entitled to damages.
- (5) That there is error in the judgment appealed from in the matter of the costs.

The evidence shows that plaintiff has a license as an auctioneer, and is engaged in that business next door to the premises occupied by defendant; that he and defendant both sell notions and jewelry; that the jewelry sold by plaintiff is generally inferior in quality and value to that sold by defendant; that plaintiff employs men, who stand about his place, outside and inside, some of whom have interfered with persons who were looking into defendant's show window, and have represented to them that it was part of plaintiff's auction establishment; that defendant himself has, on one occasion, or perhaps oftener, been rudely treated by them, or by plaintiff; and that, on several occasions plaintiff, or those acting for him, have grossly misrepresented to purchasers the quality and value of the goods in his store.

The evidence does not show that plaintiff makes more noise than is usual in that kind of business, or that the noise made by him is such as to constitute his place a nuisance, public or private; nor, on the other hand, does it show that defendant has been interfering with plaintiff's customers in the manner alleged in the petition.

There can be no doubt that plaintiff has the right to conduct an auction business, free from interference on the part of the defendant, so long as he does not conduct it in 20 L.R.A. (N.S.)

such a manner as unlawfully to interfere with the business conducted by defendant.

"The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury." Wood, Nuisances, § 33. A lawful business, located in a proper place, and conducted in a proper manner, cannot be treated as a nuisance *per se*, although it may be so conducted, or the surrounding circumstances may be such, as to make it a nuisance. Joyce, Nuisances, § 99.

So far as we can see, the point at which plaintiff's business, by reason of the manner in which it has been conducted, has amounted to an unlawful interference with that of defendant was when plaintiff or his employees molested defendant's customers, actual or prospective, whilst enjoying the privilege of looking into his show window, and undertook to "hustle" or coax them into plaintiff's place, representing that it, and the show window, were parts of the same establishment, and such interference has been enjoined. Whether plaintiff sells goods that are inferior or superior to those of defendant, or whether he deals fairly or unfairly with his own customers, are matters with which defendant has no such concern as would entitle him to shut up plaintiff's place by the writ of injunction.

"The carrying on of banking operations contrary to the statute has been held not to be such a mischief or public nuisance that a court of equity would grant an injunction to restrain the same, even though it had jurisdiction over public nuisances." Joyce, Nuisances, § 85, citing *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Atty. Gen. v. Bank of Niagara*, 1 Hopk. Ch. 354.

Where a merchant undersells or oversells his neighbor, though the latter may suffer damages thereby, it is *damnum absque injuria*. And if he deals unfairly with his own customers, it is a matter between him and them, or between him and the state.

If an auctioneer should be convicted, in a criminal prosecution, of having sold jewelry not of the quality represented by him, and of having refused to return the price, on demand made within twenty hours, or of having offered an article for sale, setting forth its value, and through the aid of mock bidders induced its purchase by a real bidder, and of then having substituted another article in lieu of that offered and sold, his license would be forfeited, and he would be liable to a fine of \$500. Rev. Stat. §§ 155, 156. But we know of no authority for imposing any such penalty in a civil suit, and what defendant cannot do legally through the courts he cannot do illegally by means of publications or signs, such as that exhibited by him, though he, no doubt, has the right to maintain a sign in his win-

dow notifying the public that the window is his, and has no connection with the business carried on next door.

2. We find no evidence going to show that defendant has been obstructing, interfering with, accosting, and buttonholing plaintiff's customers.

3. For the reasons which have been stated, we are of opinion that the injunction, issued in favor of defendant, goes as far as it should.

4. The proof is insufficient to warrant a judgment for damages claimed by defendant.

5. The party cast should bear the costs, and the judgment appealed from must be amended in that respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, by annulling and avoiding so much thereof as enjoins the defendant "from obstructing, interfering with, accosting, and buttonholing plaintiff's customers, at or near the door of plaintiff's place of business, for the purpose of preventing their entrance therein, and there transacting business with plaintiff," and by annulling and avoiding that portion of it which condemns each of the litigants to pay his own costs; and, it is further adjudged and decreed that said judgment be, in other respects, affirmed, the defendant to pay the costs incurred in the lower court upon the main demand, and the plaintiff to pay the costs so incurred upon the demand in reconvention. It is further decreed that plaintiff pay the costs of the appeal.

Petition for rehearing denied February 15, 1909.

MAINE SUPREME JUDICIAL COURT.

NORTHPORT WESLEYAN GROVE CAMPMEETING ASSOCIATION

v.

HENRY H. ANDREWS.

(— Me. —, 71 Atl. 1027.)

Dedication — park.

1. A dedication of land for a park is effected by the exhibition of a plat on which the space is designated as a park when selling lots bordering thereon, followed by permitting the public to use the tract generally as it pleases.

Park — grass — right to cut.

2. Persons who have bought lots bordering on a tract of land dedicated for park purposes may, as against the owner of the fee, cut the grass thereon if the authorities have not assumed jurisdiction over the park, and the removal of the grass will render the park 20 L.R.A. (N.S.)

more suitable for the use for which it was intended.

(September 10, 1908.)

REPORT by the Supreme Judicial Court for Waldo County for the opinion of the full bench of an action brought to recover damages for cutting and tramping down grass on certain lands. Judgment for defendant.

The facts are stated in the opinion.

Mr. William P. Thompson for plaintiff.
Messrs. Dunton & Morse, for defendant:

The lot of land was irrevocably dedicated to the use of the public, and particularly to the use of the adjacent lot owners, as a public park, and when the defendant purchased his adjoining lots; with reference to the plan on which said land was represented as a park, he acquired an easement in that land for the use designated.

13 Cyc. Law & Proc. pp. 448, 453, 455; 14 Cyc. Law & Proc. p. 1183; Clark v. Providence, 10 R. I. 437; Abbott v. Cottage City, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325; Atty. Gen. v. Abbott, 154 Mass. 323, 13 L.R.A. 251, 28 N. E. 346; Bartlett v. Bangor, 67 Me. 460; Heselton v. Harmon, 80 Me. 326, 14 Atl. 286.

The defendant owning an easement in the land for the purposes of a public park, had a legal right to enter upon the land and do whatever was reasonably necessary to prepare it and keep it in proper condition for the purpose to which it had been dedicated.

Heselton v. Harmon, supra; Hammond v. Woodman, 41 Me. 203, 66 Am. Dec. 219; 14 Cyc. Law & Proc. pp. 1210, 1211, 1214; Dickinson v. Whiting, 141 Mass. 414, 6 N. E. 92.

King, J., delivered the opinion of the court:

On report. Action of trespass *quare clau-*

Note. — An examination of the authorities appears to indicate that the case reported is one of first impression as to the right of the owner of property bordering on land dedicated as a park, to improve the same for park purposes, as against the owners of the fee. Reference may, however, be made to the case of Heselton v. Harmon, 80 Me. 326, 14 Atl. 286, where it was held that an action of trespass would not lie against the owner of a parcel of real estate which was bounded by the original grantor on a strip of land owned by him and reserved for a street, for entering upon such strip and preparing it for use as a street.

As to the effect of a conveyance of lots laid down on plats, to prevent a change in the use or form of the property, see case note to Herold v. Columbia Invest. & Real Estate Co. 14 L.R.A. (N.S.) 1067.

sum to recover damages for cutting and trampling down the grass on a lot of land in Northport, Me. The defendant justifies under a claim that the locus had been dedicated by the plaintiff to the use of the public and the adjoining lot owners as a park, and that the acts complained of were done by him as one of the public and an adjoining lot owner, and at the request of other adjoining lot owners, for the purpose only of beautifying and improving said park, and rendering it more suitable for the use for which it was dedicated.

In 1876 the plaintiff purchased a tract of land for an addition to its camp ground at Northport, and caused the same to be laid out into lots for lease or sale, with an open space of about 1 acre for a park.

A plan of the tract and the laying out was made, on which the lots were designated by numbers, and the open space or park marked "Bay View Park." Lots were at first leased *in perpetuum*, and later others conveyed in fee, by express reference to said plan. The defendant is the owner of $4\frac{1}{2}$ lots adjoining said Bay View Park. The only instrument put in evidence, showing title of any of the lots in defendant, is dated May 18, 1881, wherein the plaintiff leases to the defendant "*in perpetuum* . . . " a certain lot on their camp ground numbered according to the plan made by R. B. Miller of said lots, and bounded as follows: Beginning on the easterly side of Bay View Park at the northerly corner of lot No. 314; thence, southerly by said lot and on Bay View Park 25 feet to a vacant lot; thence easterly on said vacant lot 50 feet to a stake and stones; thence northerly, by lot 314, 25 feet to a vacant lot; thence westerly on said vacant lot 50 feet to the place of beginning. Intending hereby to convey to said Andrews lot No. 314 as per said plan.

There is no material conflict of testimony as to the original laying out of the space for a park and its subsequent use as such by the lot owners and the public generally, from which testimony it satisfactorily appears: That at the time of the conveyance of lot 314 to defendant, the treasurer of the plaintiff, Mr. Ruggles, who was authorized to make the conveyance, exhibited to him said plan and promised that the park designated thereon was to be graded and kept open as a park; that after several years, nothing material having been done to improve the park, the defendant raised among the lot owners \$100 or more, to which the plaintiff added \$25, and this money was expended by the defendant in grading, fertilizing, and seeding to grass the park; that the lot owners, and the public generally, have used the park since it was

laid out for crossing and recrossing it, and as they pleased. The circumstances leading up to the alleged acts of trespass, and explanatory of those acts, are thus stated by defendant: "I seeded it down and kept seeding it down, as I say, on the clay, and putting on year after year a good deal of fertilizer. But Mr. Dickey (the superintendent at time of acts complained of) claimed the grass. He didn't put anything on, as I say, for several years, but claimed the grass, and I was away from home a good deal, and when I would get home the first of July, sometimes away along into July, perhaps the 8th or 10th, that grass wouldn't be cut. And when it was cut, growing so stout, especially on that clay, it left it nothing but stubble, and it would take me all the season to mow it and trim it and work on it to bring it in to make a decent grass plot of it. I worked upon it the rest of the season every year to try to make it look decent; but I urged him, and the others in authority, to have it cut early, but I couldn't get that cut. They did come over on Ruggles's part earlier, but our part it was almost impossible to get it cut before July, and, as I say before, it always looked rough and coarse. He kept cutting it, and I urged him, or tried to reason with him, to let us have it to beautify and fertilize at our own expense and cut frequently; and the rest of the lot owners went to the association, went to the officers, and urged them to let us have it to care for at our own expense; but he was determined not to give it up to us, and I couldn't do anything with him. At last I made up my mind that I would cut it and see what they could do with me."

Mr. Dickey testified that he had made an arrangement with the association whereby he was to have the hay on the park in consideration for certain work he did on the rest of the grounds and trucking, and that there was an understanding that it should be cut twice each year.

The defendant cut the grass on the 18th day of June, 1907, and notified Mr. Dickey that he had done so. "And I told him that I didn't care for the grass, that was not what I was after, and that he might take it off, and that if he didn't take it off I would." This action was immediately commenced.

Was there a dedication by the plaintiff of the locus to the use of the public and the lot owners as a park? We think there was.

"Dedication" is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention

to dedicate is the essential principle, and whenever that intention on the part of the owner of the soil exists in fact and is clearly manifest, either by his words or acts, the dedication, so far as he is concerned, is made. If accepted and used by the public for the purpose intended, it becomes complete; and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated.

Judicial decisions explanatory of the principles upon which the doctrine of dedication rests have so multiplied, and are so uniform in reasoning, that but few citations need here be made. Prof. Dillon says (Dill. Mun. Corp. 4th ed. 630): "The subject may be advantageously presented by referring to the leading case of *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452, decided by the Supreme Court of the United States, which has been extensively followed by the state tribunals, and is everywhere recognized as a sound exposition of the peculiar doctrines of the law respecting the rights which may be parted with by the owner and acquired by the public under the doctrine of dedication. . . . In its opinion in the case just mentioned, the Supreme Court asserts or assents to the following principles: (1) That it is not essential to a dedication that the legal title should pass from the owner. (2) Nor is it essential that there should be any grantee of the use or easement *in esse*, to take the fee, such cases being exceptions to the general rule requiring a grantee. (3) Nor is a deed or writing necessary to constitute a valid dedication. It may be by parol. (4) No specific length of possession is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment."

In that case (*Cincinnati v. White*) the question discussed was the dedication of a public park. It is there said: "And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted."

The following are a few of the cases in which the same principles have been clearly announced: *Hunter v. Sandy Hill*, 6 20 L.R.A. (N.S.)

Hill, 411; *Mankato v. Willard*, 13 Minn. 13, Gil. 1, 97 Am. Dec. 208; *People v. Marin County*, 103 Cal. 223, 26 L.R.A. 659, 37 Pac. 203; *Bates v. Beloit*, 103 Wis. 90, 78 N. W. 1102; *Palen v. Ocean City*, 64 N. J. L. 669, 46 Atl. 774; *Wood v. Hurd*, 34 N. J. L. 87-88; *Abbott v. Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325; *Atty. Gen. v. Abbott*, 154 Mass. 323, 328, 13 L.R.A. 251, 28 N. E. 346; 2 Dill. Mun. Corp. 4th ed. 630 et seq.; 13 Cyc. Law & Proc. pp. 448, 453, 455; *Bartlett v. Bangor*, 67 Me. 460; *Heseltin v. Harmon*, 80 Me. 326, 14 Atl. 286; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

The doctrine of dedication is applicable to public parks and squares, and the fact of dedication may be established in the same manner as in the case of streets and highways. Dill. Mun. Corp. 4th ed. 644, and notes; *Rhodes v. Brightwood*, 145 Ind. 21, 43 N. E. 942; *Abbott v. Cottage City*, 143 Mass. 521, 523, 58 Am. Rep. 143, 10 N. E. 325, and cases there collected.

"Where the words 'public square' are used on a plat, this is an unrestricted dedication to public use." Dill. Mun. Corp. 4th ed. 645. And the same author adds: "The word 'park,' written upon a block on a map of city property, indicates a public use; and conveyances made by the owners of the plotted land by reference to such map operate conclusively as a dedication of the block."

In *Abbott v. Mills*, 3 Vt. 526, 23 Am. Dec. 222, it is said: "Whenever a public square or common is marked out and set apart . . . by the owners or proprietors and individuals are induced to purchase lots or lands bordering thereon in the expectation held out by the proprietors . . . that it should so remain, or even if there are no marks on the ground, but a map or plan is made, and village lots marked thereon and sold as such, it is not competent for the proprietors . . . to disappoint the expectations of the purchasers by resuming the lands thus set apart and appropriating them to any other use."

Our own court has adopted and applied the same principles. In *Bartlett v. Bangor*, 67 Me. 460, 464, *Walton, J.*, delivering the opinion of the court, said: "When the owner of land within or near to a growing village or city divides it into streets and building lots, and makes a plan of the land thus divided, and then sells one or more of the lots by reference to the plan, he thereby annexes to each lot sold a right of way in the streets, which neither he nor his successors in title can afterwards interrupt or destroy."

Applying these principles in the case now

under consideration, we find all the essential elements of a complete dedication of the locus by the plaintiff to the use of the public and the adjoining lot owners for a park established by the evidence. Here was a dividing of a tract of land bordering on the seashore into small^o lots for sale, the setting apart of a portion of the tract for a park, the representation of the platting by a plan showing the lots by numbers and the locus as "Bay View Park," the exhibition of the plan to purchasers, the selling of lots by express reference to the plan, the promise that the park should be graded and kept open as such, and its use by the lot owners and the public generally at their pleasure continuously for a long period of years, during which they have improved and beautified it at their own expense.

An intention on the part of the plaintiff to dedicate the locus to the public use as a park was thus clearly manifested by its acts and statements explanatory of those acts. Upon that intention so expressed, the public and individual citizens had a right to act, and did act, purchasing lots with the assurance that they were to have the full benefit and enjoyment of the locus as a public park, and entering upon and using the same for such purpose. The conclusion, therefore, must be that a complete dedication has resulted.

We think such dedication affords the defendant a justification of his acts complained of.

It is true that the fee of the soil remains in the plaintiff, for a common-law dedication does not pass the fee; but, by the dedication the plaintiff is estopped from exercising any use and control of the locus inconsistent with the full use, benefit, and enjoyment of it by the public as a park. The plaintiff's limitations as to its use and control of the locus must, therefore, be considered and determined with reference to the use for which it was dedicated—a park. In order to carry into effect such intended use, a more enlarged right of control in the public may be required, with a consequently diminished right in the plaintiff, than in the case of some other public uses, such as highways and streets.

A "park" may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure, amusement, and enjoyment. See cases collected under Words and Phrases, vol. 6, p. 5176, title "Park." The full use and benefit of a park is not realized by the enjoyment only of an open view and the right of passage upon it. The right to enjoy the pleasures and advantages that beauty and ornamentation may afford is al-

so included in the uses and purposes of a public park.

Accordingly, by its dedication of the locus as a park the plaintiff gave up and surrendered its right to exercise any acts of control or possession of it that would hinder the public in the full enjoyment of it as a place of rest, of recreation, of amusement and enjoyment, or that would prevent the public from increasing those enjoyments by its adornment and ornamentation.

To maintain this action of trespass *quare clausum*, the plaintiff must show that, notwithstanding the dedication, it still retained the possession and control of the locus sufficiently to have the grass growing thereon remain uncut until it ripened into hay, or at least until it saw fit to cut it. If such possession and control by the plaintiff would interfere with the full enjoyment by the public of the use of the locus as a park, then it follows that the plaintiff had not such right of possession and control. Whether or not the grass growing upon this park, if left uncut until it ripened into hay, or late in the season, would lessen the benefits and enjoyments which the public could derive from the park, is a question of fact. We think it would, and that the park would be made more suitable for use, and afford more pleasure and enjoyment to those entitled to its use, if the grass were cut earlier and oftener. It must afford less pleasure to travel through tall grass, especially when wet by dews and fogs, than to walk over a closely cut surface; so, too, the coarse and seared stubble of a late cutting is less attractive to the eye than the green of a well-kept lawn.

The municipal authorities might have exercised control over the park and improved it, but they did not. The individual citizens interested in it and entitled to its enjoyment had the right to do that which was reasonably necessary to improve the park and render it more suitable for the uses for which it was intended. *Atty. Gen. v. Abbott*, 154 Mass. 327, 328, 13 L.R.A. 251, 28 N. E. 346, *Heselton v. Harmon*, 80 Me. 326, 14 Atl. 286.

The acts of defendant in cutting the grass were done only for the purpose of improving the park, and, in the opinion of the court, so resulted.

It would hardly be contended that defendant could be held in trespass for raking dangerous rocks from footpaths over the park, or removing unsightly underbrush, or even cutting and destroying weeds and thistles growing thereon. Wherein is there a distinction in principle between such cases and the one at bar? We think the defendant, as one of the public, and an adjoining lot owner, had a right to cut the

grass as he did, for the sole purpose of improving the park, and that he was not a trespasser in so doing.

It is suggested that inconveniences may result by reason of some possible conflict in the ideas of those interested in the park as to what acts would improve and benefit it. That is possible, but not probable. As before mentioned, the municipal authorities may take charge of it under authority to make by-laws and ordinances "for the proper protection and care of public parks and squares." Rev. Stat. chap. 4, § 93, ¶ 6. If any one does that which will render the locus less suitable or useful as a park, or unlawfully interrupts the rightful enjoyment of it by others, he may be restrained; and it is not probable that rivalry for its improvement in fact will exist to the extent of inconvenience.

It follows that this action is not maintained, and the entry will be:

Judgment for defendant.

MASSACHUSETTS SUPREME JUDICIAL COURT.

DANIEL SHEA

v.

TOWN OF WHITMAN.

(197 Mass. 374, 83 N. E. 1096.)

Pleading — defective highway — absence of rail.

1. A declaration in an action against a town for injuries caused by a defective highway, which alleges that the highway was negligently permitted to become out of repair to the injury of plaintiff, is sufficient to cover a defect consisting of want of suitable rail or barrier to protect travelers from perils which would be encountered immediately adjacent to the limits of the highway.

Highway — safety — barrier — obstruction adjoining.

2. A town is not bound as matter of law to place a barrier in every case between a highway and a stone lying immediately adjacent thereto, which, if within the limits of the highway, would constitute an obstruction, falling over which might injure a traveler; and it is immaterial that there is nothing to mark the line of the highway.

(February 27, 1908.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Plymouth County made during trial of an action brought to hold defendant liable for personal injuries alleged to have been caused by its negligence. Overruled.

The action was in tort to recover damages for an injury caused by tripping over a stone alleged to be in a highway. The declaration alleged that the street where the accident occurred was a public highway, which defendant was bound to keep in repair so as to be safe and convenient for travel; but that the same was negligently suffered to become out of repair; and that plaintiff while traveling thereon, and in the exercise of due care, was injured. The stone over which plaintiff tripped was outside the limits of the street, and it was suggested that the declaration should be amended so as to allege a failure to erect a suitable barrier to protect travelers from the stone. The suggestion was not adopted.

Further facts appear in the opinion. Mr. C. B. Snow for plaintiff. Messrs. Charles H. Edson and E. O. Achorn for defendant.

Hammond, J., delivered the opinion of the court:

The plaintiff was right in his contention that the declaration was broad enough to cover the case of a defect in a highway.

Case Note. — Duty of town or municipality to provide barriers to protect traveler from obstructions outside the highway.

This note is confined to cases in which the obstruction complained of was within the immediate vicinity of the highway, and does not include cases which treat of the duty of towns or municipal corporations to fence the highways to protect travelers from dangers outside the highway generally. Cases in which the highway has been built up so that it is higher than the abutting land, or where the highway extends to the edge of a declivity which is left unguarded, have not been included, as such obstructions and defects are generally held to be defects in the highway itself, and consequently are not within the scope of this note.

As to what injuries may be deemed to be proximately caused by the absence of a guardrail in a highway, see case note to Lyons v. Watt, 18 L.R.A. (N.S.) 1135.

As to duty to trespasser with respect to excavations maintained on uninclosed land near highway, see case note to Johnson v. Paducah Laundry Co. 5 L.R.A. (N.S.) 733.

Upon the general subject, "Liability of townships for defects in highway," see subject note to James v. Wellston Twp. 13 L.R.A. (N.S.) 1219.

There is but little conflict among the decisions as to the general rules of law which govern cases involving this question, although, of course, the courts frequently disagree upon the application of the rules to a particular state of facts. The rule sustained by the majority of the cases is that

consisting of a want of a suitable rail or barrier. Pub. Stat. 1882, chap. 167, § 94, form, "Negligence of Town;" Rev. Laws, chap. 173, § 130; *Alger v. Lowell*, 3 Allen, 402. It was therefore unnecessary for him to amend.

The order directing a verdict for the defendant, however, was general and must stand, unless the plaintiff shows that the case should have been submitted to a jury. The plaintiff was injured by tripping over a stone. It was admitted that the stone was not within the limits of the highway. It is stated that the evidence tended to show that "it would have constituted a defect if within the limits of the way," but there is no evidence as to its size or shape. The plaintiff evidently proceeds upon the theory that where a stone which, if in the way, would constitute a defect, is so near the highway that travelers by tripping over it may get hurt, a barrier or railing should, as matter of course, be erected to protect travelers. But that is not the law. It cannot

be said as a matter of law that, in every such case, a barrier should be erected. As stated by Allen, J., in *Damon v. Boston*, 149 Mass. 147, 151, 21 N. E. 235, "the danger which requires a railing must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets, and sidewalks, and unsuitable for travel, are often left open in both country and city; and a town or city is not bound to fence against them unless their condition is such as to expose travelers to unusual hazard." See also *Hayden v. Attleborough*, 7 Gray, 338; *Scannal v. Cambridge*, 163 Mass. 91, 39 N. E. 790, and cases there cited; *Logan v. New Bedford*, 157 Mass. 535, 32 N. E. 910; *Richardson v. Boston*, 156 Mass. 145, 30 N. E. 478, and cases cited. The fact that there was nothing to mark the line of the highway is immaterial. *Damon v. Boston*, *ubi supra*.

Under the doctrine thus laid down, the plaintiff failed to show a case for the jury. Exceptions overruled.

where an obstruction or defect, although outside of the line of the highway, is so close thereto as to render the highway dangerous to a person traveling thereon in the exercise of due care, the township or municipality is liable for any injuries received therefrom; but a city or town is under no obligation to render such defect or obstruction safe for those who may wander or stray, though unintentionally, from the highway. If a person voluntarily leaves the highway for purposes of his own, a different question is presented, and cases of this character are not included in this note; nor are cases which turn wholly upon the question of the contributory negligence of the person injured.

The general rule as stated above is asserted in language very similar in a large number of cases.

Thus, in *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446, the court said: "All of the evidence in the present case shows most clearly that the excavation was either extended into the highway a few feet, or came up to the edge of the highway. In such cases, if it renders travel dangerous, it is as much the duty of the city to protect the public against the danger in the one case, as in the other; and it makes no difference in such case, whether the excavation was made by the city, or made by another, except, when not made by the authorities of the city, they would not be liable until after they had notice of the dangerous condition of the street." And to the same effect were the decisions in *Halpin v. Kansas City*, 76 Mo. 335, and *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528.

So in *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98, it was held that the duty resting upon the municipality was not fully discharged by making the traveled part of

the highway safe, but such measures as ordinary prudence required must be taken to prevent persons using ordinary care from falling into dangerous places along the side or in close proximity to the lines of the highway. And to the same general effect are several other decisions in Indiana: *Higert v. Greencastle*, 43 Ind. 574; *Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277; *Newcastle v. Grubbs* (Ind.) 86 N. E. 757.

And in *Spencer v. Mayfield* (Ind. App.) 85 N. E. 23, the court said: "The want of a sufficient railing and protection to prevent travelers passing upon a highway from running into some dangerous excavation, or pond, or against a wall, stone, and other dangerous obstruction, without the limits of a road, but in the general direction of travel thereon, may properly be alleged as a defect in the highway itself."

And in *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718, it was held that any object in, upon, or near the traveled path which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result, will, as a general rule, constitute a defect in the highway.

Where the insufficiency complained of was the lack of a railing or other muniment to guard against a steep bank that came within about 6 inches of the westerly limit of the highway, the surface of the ground at this point being smooth and level to the very brink, not affording even the obstruction of a ditch or a rough margin to warn the traveler that he is out of the road, it was held in *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644, that it made no difference that this defect was without the limits of the highway, but in dangerous proximity to the way. The court said that the essen-

tial question was, Does the safety of the traveler require a railing?

And in *Niblett v. Nashville*, 12 Heisk. 684, 27 Am. Rep. 755, the city was held liable for injuries caused by an excavation immediately adjoining a sidewalk. The court said: "We think the true rule may be stated to be that, if an obstruction or excavation be permitted which renders the alley, street, or highway unsafe or dangerous to persons or vehicles,—whether it lie immediately in or on the alley, street, or highway, or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway,—it is such a nuisance as renders the corporation liable."

So, in *Stricker v. Reedsburg*, 101 Wis. 457, 77 N. W. 897, it was held that it did not necessarily follow that a stump does not constitute an actionable defect, because it was outside of the way established by user, since, if it was so close to the traveled way that a traveler on such traveled way exercising ordinary care is still liable to suffer injury therefrom, then it will be an actionable defect. To the same effect was the decision in *Slivitski v. Wien*, 93 Wis. 460, 67 N. W. 730.

So also there are numerous other cases which sustain the general rule that it is incumbent upon a town or municipality to keep the street or sidewalk reasonably safe for travel, and that, when such street or sidewalk is so near to an excavation, steep embankment, or other dangerous place as to render it unsafe, it is the duty of the municipality to guard against such danger by railings or barriers in such a manner as to prevent accidents, or, at least, to warn passers-by of the danger. *Chicago v. Baker*, 95 Ill. App. 413, affirmed in 195 Ill. 54, 62 N. E. 892; *Hayden v. Attleborough*, 7 Gray, 338; *Alger v. Lowell*, 3 Allen, 402; *Woods v. Groton*, 111 Mass. 357; *Willey v. Portsmouth*, 35 N. H. 303; *Davis v. Hill*, 41 N. H. 329; *Ivory v. Deerpark*, 116 N. Y. 476, 22 N. E. 1080; *Bunch v. Edenton*, 90 N. C. 431; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369.

In *Hayden v. Attleborough*, supra, where an abutting owner excavated a cellar close to a sidewalk, the court upheld the charge to the jury that, if the line of the highway was not indicated by any visible objects, such as fences, banks of earth, etc., and if there was nothing to show the plaintiff in the evening that the route she was pursuing was not within the way intended for public travel, and if the cellar was situated without the limits of the located way, but so near as to render the travel there dangerous, then, after proper notice, the town would be liable. To the same effect was the decision in *Cogswell v. Lexington*, 4 Cush. 307, where the injury was caused by a post standing just outside of the highway, and there was nothing visible to indicate the line of the highway.

And in *Jewhurst v. Syracuse*, 108 N. Y. 20 L.R.A. (N.S.)

303, 15 N. E. 409, where the injury was caused by a defective sidewalk laid by third persons outside the line of the street, there being no visible dividing line between the street and the sidewalk, a recovery was sustained upon the principles enunciated in *Hayden v. Attleborough*, supra. The court said, however, that there could be no recovery founded upon any duty to repair such sidewalk; for as the city never laid it, never assumed control over it, did not own it, and had no legal right to go upon the land where the plank lay, such duty to repair, or liability for neglect to repair, does not exist.

A few other cases following the general rule, present somewhat unusual features.

Thus, in *Ray v. St. Paul*, 40 Minn. 458, 42 N. W. 297, where a city deposited and permitted others to deposit refuse material in a city at the foot of a graded street, so that the deposit appeared to be a prolongation of the street, it was held that the city might be guilty of such negligence in the premises as to render it liable to anyone injured by stepping on the deposit.

And in *Knowlton v. Pittsfield*, 62 N. H. 535, it was held that a town was not liable for an injury caused by a fall on ice which had accumulated upon a private walk which was close to and parallel with the sidewalk.

Where a sidewalk was extended by private persons in front of their store to the edge of a deep creek, so that a stranger, in passing along such sidewalk and continuation thereof in the dark, was, while using due care and caution, precipitated down the bank and injured, it was held in *Kinney v. Tekamah*, 30 Neb. 605, 46 N. W. 835, that it was the duty of the city to cause a barrier or obstruction to be erected to apprise travelers of the termination of the walk.

In *Seidel v. Woodbury*, 81 Conn. 65, 70 Atl. 58, it was held that the statutes of Connecticut did not impose the duty generally upon the towns to so fence the highways as to protect travelers lawfully using the highway from dangers arising from conditions outside of the highway.

In *Schimberg v. Cutler*, 74 C. C. A. 33, 142 Fed. 701, a recovery was denied the plaintiff on the ground that he voluntarily and knowingly left the highway for his own purposes; but the court said that, if there was a way appropriated to the use of, or actually used by, the public along the margin of the highway upon the embankment in question, and the plaintiff while traveling on it had missed his footing, or, by any other accidental cause, without negligence on his part, had fallen off the side of the way and been injured, the county board would have been liable for his damages.

A city is under no obligation to erect barriers to protect entrances to basement stores which are situated a few feet outside of the street line. *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677.

But, in *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717, it was held that a city was guilty of negligence in allowing an

open space leading to a cellar or basement 2 feet from the line of the sidewalk to remain unguarded.

Many cases hold that the duty of towns and municipalities to guard travelers from defects and obstructions lying immediately outside the lines of the highway does not extend so as to require them to protect travelers from dangers met while straying from the highway. This rule is not necessarily opposed to the former rule but, rather, is applicable to a different state of facts.

Thus, in *Chapman v. Cook*, 10 R. I. 304, 14 Am. Rep. 686, it was held that a township was not liable for defects in a private way about 150 feet from where it branched off from the public way, although there was nothing to indicate that the way was private. The court, however, enunciated the same doctrine as presented in the foregoing cases: "Towns are required to keep their highways in such condition that people exercising ordinary care, reasonably prudent men, may pass along them with their horses, teams, and carriages, with safety and convenience, and may, with such care, be enabled to keep within the line of the highway, without being in danger of falling off, or going off, without the limit of the highway, into danger that may be contiguous to it, as ponds, sloughs, cellars, or excavations, down precipices, against their will, when they would keep within the way as laid. The pit or the cellar or the excavation, outside the way, is not, properly speaking, a defect in the way. The defect in such case, if there be any, is that no provision is made in the construction or reparation to enable the traveler to avoid such danger by keeping in the way, in other words, to continue in the use of the way as a traveler thereon."

So, in *Hannibal v. Campbell*, 30 C. C. A. 63, 57 U. S. App. 484, 86 Fed. 297, it was held that a city was not liable for failure to erect barriers where the plaintiff drove off the usual traveled portion of the highway and fell over a dangerous precipice about 30 feet away.

And in *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5, it was held that a city was not ordinarily liable for an injury to a traveler while straying outside of an unfenced street, when the whole street was safe and convenient to travel upon.

And in *Ammerman v. Coal Twp.* 187 Pa. 326, 40 Atl. 1005, it was held that a city was not liable for injuries received by a traveler who had strayed away from the highway.

So, in *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887, the city was held not liable for injuries caused by an excavation 50 or 60 feet away from the highway and separated therefrom by an embankment.

Numerous Massachusetts cases have followed the general rule that towns or municipal corporations are not liable for failure to maintain railings merely to prevent travelers from straying from the highway, where there are no dangerous places immediately contiguous to the highway, although there 20 L.R.A. (N.S.)

may be such dangerous places in the vicinity which may be reached by straying: *Palmer v. Andover*, 2 Cush. 600; *Sparhawk v. Salem*, 1 Allen, 30, 79 Am. Dec. 700; *Stevens v. Boxford*, 10 Allen, 25, 87 Am. Dec. 616; *Adams v. Natick*, 13 Allen, 429; *Marshall v. Ipswich*, 110 Mass. 522; *Warner v. Holyoke*, 112 Mass. 362; *Puffer v. Orange*, 122 Mass. 389, 23 Am. Rep. 368; *Daily v. Worcester*, 131 Mass. 452; *Barnes v. Chicopee*, 138 Mass. 67, 52 Am. Rep. 259; *Damon v. Boston*, 149 Mass. 147, 21 N. E. 235; *Hudson v. Marlborough*, 154 Mass. 218, 28 N. E. 147; *Richardson v. Boston*, 156 Mass. 145, 30 N. E. 478; *Logan v. New Bedford*, 157 Mass. 534, 32 N. E. 910; *Scannal v. Cambridge*, 163 Mass. 91, 39 N. E. 790; *Doherty v. Ayer*, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677.

So, in *Murphy v. Gloucester*, 105 Mass. 470, it was held that a town was not liable for failure to erect barriers of any kind to prevent or warn travelers from straying off the highway and falling into a dock 25 feet distant therefrom, although the land between the highway and the dock was on a level therewith and open.

In a few cases it has been held that the general rule as to the liability of towns or municipalities for defects outside, but close to the limits, of the highway, does not apply to mere unevenness of the ground or small obstacles.

Thus, in *Marshall v. Ipswich*, supra, a town was held not liable in failing to put a railing around a pile of broken brick a few inches in height just outside the highway. The court said: "The purpose of such railings is to make the way itself safe and proper for use. They are required in the case of bridges, embankments, or causeways, and generally where excavations, deep water, etc., are so near to the line of public travel as to expose travelers to unusual hazards. . . . But we do not understand that the fact that land 'immediately contiguous to the highway,' is uneven, or rocky, in a condition unsuited to be traveled upon, or encumbered with objects which, if in the highway, would be impediments or defects, is sufficient of itself to make it the duty of a town to set up a railing by the roadside."

And in *Tilton v. Wenham*, 172 Mass. 407, 52 N. E. 514, it was held, following *Marshall v. Ipswich*, supra, that a town was under no obligation to fence a stump about 10 inches high which stood, concealed by grass, within an inch of the traveled portion of the way, if the stump was outside the line of the highway.

The fact that the state permitted the public to use a bridge over a canal and its approaches, which were within the limits of the city, was held in *Carpenter v. Cohoes*, 81 N. Y. 21, 37 Am. Rep. 468, not to impose upon the city the duty to render the approaches safe. To the same effect was the decision in *Veeder v. Little Falls*, 100 N. Y. 343, 3 N. E. 306. However, cases of this

character in which a portion of the highway is under the control of some other authority are not strictly within the scope of this note.

MICHIGAN SUPREME COURT.

EDGAR O. WHITMAN

v.

MUSKEGON LOG LIFTING & OPERATING COMPANY, Appt.

(152 Mich. 645, 116 N. W. 614.)

Logs — mark — failure to record — effect.

1. Failure of the owner of logs to record, as required by statute, the mark which he places upon them does not deprive him of his property in the logs or the privilege of proving property by the mark.

Same — abandonment.

2. The mere fact that logs placed in a river, to be floated to market, sink to the bottom and cease to float, is not sufficient to show abandonment of them.

Same — obliteration of marks — loss of property.

3. The mere fact that the marks upon the logs placed in a river, to be floated to market, and which sink and become embedded in the soil, have become obliterated, does not destroy the title of their original owners or prevent an assignment of the property to a salvage company.

Riparian rights — removal of logs.

4. The rights of the riparian owner are not unlawfully interfered with by the reclamation, from the bed of the stream, of logs placed in it to be floated to market, which sink and become partly embedded in the soil, so long as there is no injury to the banks or unlawful trespass thereon.

Logs — trespass — loss of property.

5. The title of logs taken from the bed of a stream is not changed by the unlawful trespass of the owner in piling them on the property of the riparian owner.

(May 26, 1908.)

APPPEAL by defendant from a decree in Chancery of the Circuit Court for Ionia County enjoining defendant from removing logs from complainant's land. Reversed.

The facts are stated in the opinion.

Messrs. Nims, Hoyt, Erwin, & Vanderwerp, for appellant:

Note. — The specific question involved in *WHITMAN v. MUSKEGON LOG LIFTING & OPERATING CO.* as to property rights in sunken logs is one which is apparently here presented to the courts for the first time, as a careful search has disclosed no other cases in point. As to treasure trove generally, see case note to *Ferguson v. Ray*, 1 L.R.A. (N.S.) 477. And see subsequent case, *Kuykendall v. Fisher*, 8 L.R.A. (N.S.) 94. 20 L.R.A. (N.S.)

The marked logs at the bottom of the river have not been abandoned by the owners of the marks, but are still the property of such owners, who can identify them by such marks.

St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259; *Weiler v. Coleman*, 71 Pa. 346; *Long v. Davidson*, 77 Wis. 509, 46 N. W. 805; *Goff v. Brainerd*, 58 Vt. 468, 5 Atl. 393; *Log-Owners' Boom Co. v. Hubbell*, 135 Mich. 69, 4 L.R.A. (N.S.) 573, 97 N. W. 157.

The unmarked logs in the bottom of the river belong to the defendant company.

Kennebec Log Driving Co. v. Burrill, 18 Me. 314; *Domat, Civil Law (Cushing)* 856, No. 2155; *Pothier, Droit de Domaine de Propriété*, Nos. 20, 21, 58, 60, 261; *Code Napoleon*, art. 2279; *La. Civ. Code*, art. 3383; 19 Am. & Eng. Enc. Law, p. 580; 2 Kent, Com. *356; *Eads v. Brazelton*, 22 Ark. 490, 79 Am. Dec. 88; *Bridges v. Hawkesworth*, 21 L. J. Q. B. N. S. 75, 15 Jur. 1079; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Bowen v. Sullivan*, 62 Ind. 288, 30 Am. Rep. 172; *Russell v. Forty Bales Cotton*, Fed. Cas. No. 12,154; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *McAvoy v. Medina*, 11 Allen, 548, 87 Am. Dec. 733; *Deaderick v. Oulds*, 86 Tenn. 14, 6 Am. St. Rep. 812, 5 S. W. 487; *McLaughlin v. Waite*, 5 Wend. 404, 21 Am. Dec. 232; *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878; *Williams v. State*, 165 Ind. 472, 2 L.R.A. (N.S.) 248, 75 N. E. 875; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L.R.A. (N.S.) 94, 56 S. E. 48, 11 A. & E. Ann. Cas. 700; *Wyman v. Hurlburt*, 12 Ohio, 81, 40 Am. Dec. 461; *Goddard v. Winchell*, 86 Iowa, 71, 17 L.R.A. 788, 41 Am. St. Rep. 481, 52 N. W. 1124; *Danielson v. Roberts*, 44 Or. 108, 65 L.R.A. 526, 102 Am. St. Rep. 627, 74 Pac. 913; *Ferguson v. Ray*, 44 Or. 557, 1 L.R.A. (N.S.) 477, 102 Am. St. Rep. 648, 77 Pac. 600, 1 A. & E. Ann. Cas. 1.

Defendant has a right to go upon the river to recover both marked and unmarked logs.

Carter v. Thurston, 58 N. H. 104, 42 Am. Dec. 584; *Gould, Waters*, § 102; *Forster v. Juniata Bridge Co.* 16 Pa. 393, 55 Am. Dec. 509; *Brown v. Chadbourne*, 31 Me. 24, 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298.

Mr. Edwin H. Lyon, with Messrs. John G. Anderson and William A. Norton, for appellee:

Chattel property embedded in the soil belongs to the owner of the land.

South Staffordshire Water Co. v. Sharman [1896] 2 Q. B. 44; *Elwes v. Brigg Gas Co.* L. R. 33 Ch. Div. 562; *Ferguson v. Ray*, 44 Or. 557, 1 L.R.A. (N.S.) 477, 102 Am. St.

Rep. 648, 77 Pac. 600, 1 A. & E. Ann. Cas. 1; *Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13; 19 Am. & Eng. Enc. Law, p. 582; *Hooper v. Hobson*, 57 Me. 273, 99 Am. Dec. 770; *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 500; *R. v. Rowe*, Bell, C. C. 93; *Barker v. Bates*, 13 Pick. 255, 23 Am. Dec. 678.

One floating his property down a stream has no right, without license, to use the banks of the stream.

Pearsall v. Post, 20 Wend. 111; *Olson v. Merrill*, 42 Wis. 213; *Compton v. Hankins*, 90 Ala. 411, 9 L.R.A. 387, 24 Am. St. Rep. 823, 8 So. 76; *Haines v. Hall*, 17 Or. 165, 3 L.R.A. 615, 20 Pac. 831; *Smith v. Atkins*, 110 Ky. 119, 53 L.R.A. 790, 96 Am. St. Rep. 425, 60 S. W. 930; *Harrington v. Edwards*, 17 Wis. 586, 84 Am. Dec. 768; *Wetmore v. Atlantic White Lead Co.* 37 Barb. 94; *Ledyard v. Ten Eyck*, 36 Barb. 127; *The Magnolia v. Marshall*, 39 Miss. 109; *Pursell v. Stover*, 110 Pa. 43, 20 Atl. 403; *Barker v. Bates*, 13 Pick. 261, 23 Am. Dec. 678; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298.

McAlvay, J., delivered the opinion of the court:

Complainant, a riparian owner along the Muskegon river, a stream used for many years for the navigation, floating, and driving of saw logs, and other forest products, filed his bill of complaint against defendant company, seeking to restrain it from digging up and removing from the bed of said stream all saw logs and other forest products, and from taking away from the premises of complainant all such logs and products already taken from the bed of said stream and piled upon said premises by defendant, claiming to be the owner of all such property by reason of his riparian proprietorship, and praying the court to so decree and determine. From a decree granting complainant full relief as prayed, defendant has appealed.

The Muskegon river has been used for the navigation of forest products to as great an extent as any river in Michigan. Many hundreds of millions of feet of saw logs and other forest products have been lumbered and put afloat in the waters of this river to be floated to the places where they were to be manufactured. That it is and always has been a navigable stream for such purposes is not in dispute in this case. This record shows that in navigating forest products along a stream, certain logs from various causes sink to the bottom, and by the action of the water some of them become more or less embedded in the soil. These are called "sunken logs" and "deadheads." Defendant is a Michigan corporation operating on Muskegon river, engaged in raising

these sunken and deadhead logs from their bed, under contract with the original owners of a large number of these logs to raise from the bed of the river logs bearing their log marks, and float them to their mills at Muskegon for an agreed consideration. Owners of logs put in the water to be run down stream, for purposes of identification, put their log mark upon each log. By statute logs put into the water must be marked with log marks duly recorded, and logs having marks impressed thereon are presumed to belong to the person owning the recorded mark. On some of the logs raised by defendant the marks have become obliterated. Upon these logs defendant has placed its own mark, as soon as they were raised. All the logs when raised are water soaked and heavy. They are placed upon the banks of the river at different points in rollways to dry, so that they will float when put into the water. There are now piled upon the banks of the river upon complainant's land, logs which have been raised from the river bed by defendant company.

The facts in the case are practically undisputed. The court granted complainant relief upon the ground that the marked logs had been abandoned by their original owners, and, if not abandoned, were in the same situation as the unmarked logs because the marks were not properly recorded, and that all logs, both marked and unmarked, belonged to the riparian proprietor by virtue of his ownership of the soil to the middle thread of the stream, and defendant had no right to recover or remove any of them.

Appellant alleges that the case presents the following questions: (1) As to the title to logs still in the bottom of the river and upon which the original log marks are distinguishable; (2) as to the title to logs still in the bottom of the river and upon which the marks have become obliterated; (3) as to the right of defendant to go upon the river to recover both marked and unmarked logs; (4) as to the title to logs which defendant company has already removed from the bed of the river, and which are now piled on complainant's land.

1. The court held in effect that the log marks in question were not recorded according to law, and were no evidence of identification of the logs of the owners of the marks. In this case it is not necessary to consider the construction given by the court to § 5083, 2 Comp. Laws 1897, relative to recording log marks, nor do we intimate that such construction was correct, for the reason that the failure to record the log marks could only deprive the owners of the statutory presumption of ownership. The fact that the statute makes the recorded mark *prima facie* evidence of ownership of

logs upon which it is impressed is no warrant for the inference that the owner is deprived of his property, title to which could be established by other means, one of which might be the fact that his logs were stamped with the mark in dispute, which he in fact used and put upon his logs. *St. Paul Boom Co. v. Kemp*, 125 Wis. 138, 103 N. W. 259; *Weiler v. Coleman*, 71 Pa. 346.

The court held that the marked logs had been abandoned, and therefore belonged to complainant as riparian proprietor. We do not find from this record any evidence upon which to base such a finding. Complainant introduced no testimony on the question of abandonment, and the fact that the marked logs were in the river bottom is of itself not sufficient to support such finding. There is abundant proof to show that these logs were not abandoned. The testimony of complainant and his witnesses and the witnesses for defendant shows without contradiction that efforts were made by the owners each year for many years to recover sunken logs, and many were in fact recovered each year. The authorities are harmonious in holding that there must be an intention to abandon, without which there can be no abandonment. "The intention is the first and paramount object of inquiry." 1 Cyc. Law & Proc. p. 5, and cases cited. "The mere failure to exercise the act of removal would not operate as an abandonment or proof of an intention to abandon." *Log Owners' Boom. Co. v. Hubbell*, 135 Mich. 65, 4 L.R.A. (N.S.) 573, 97 N. W. 157. In the case at bar an abandonment of property of great value is claimed upon the bare fact that the act of removal has not yet been exercised. In addition to the evidence as to the steps taken each year by the owners of the log marks to recover their sunken logs, the proofs show that they have not yet abandoned logging upon the Muskegon river. There was no abandonment, and the title to the marked logs already removed from the water and those still remaining in the bottom of the river is in the owners of the marks and those lawfully claiming under them.

2. It appears undisputed in the record that, for more than thirty years, a custom known and acquiesced in by all log owners and operators upon Muskegon river has prevailed that sunken and deadhead logs raised from the bottom of the river upon which log marks are no longer distinguishable were retained by the booming company engaged in such work as its property, and were stamped with its log mark. In raising these logs defendant is the successor of the Log Owners' Booming Company, which is still operating on Muskegon river as a booming company, but not engaged in 20 L.R.A. (N.S.)

the work of raising sunken and deadhead logs; that work being carried on by defendant under contracts with the owners of nearly all the log marks originally used on the river for a consideration to raise their logs and bring them to Muskegon. The testimony of complainant and his principal witness shows that they had knowledge of such custom, and that complainant as late as 1903 had entered into a contract with the booming company to raise logs sunken and embedded in the stream along his property, and did do so, and delivered all such logs, marked and unmarked, to the company, without questioning its right or title. Defendant urges that such custom has the force of law, and cannot be questioned by complainant.

Complainant's claim in this case is that logs sunken in the river and partly or entirely covered with the soil of the action of the current, and upon which the marks are no longer distinguishable, belong to the riparian proprietor by virtue of his ownership of the soil to the middle thread of the stream. The distinction is made by complainant between personal property lost and found upon the surface and the same kind of property found embedded in the soil; it being admitted that the former may belong to the finder. Can it be said that any of this property may be treated as lost property? If it is not to be so considered, then a discussion of the rights of the finder and the rights of the proprietor, upon whose land the property is found, whether on the surface or embedded in the soil, would be foreign to the issue and fruitless.

We have already arrived at the conclusion in this opinion that the proof shows that the marked logs had not been abandoned. The title to that class of logs, then, continues in the original owners of their representatives and assigns. The law requires that all logs put into these waters must be marked. The presumption follows that the great share of these logs were originally marked for the purpose of identification, and that the abrasions of transportation have obliterated the marks upon the unidentified logs. Can we say on that account that the logs upon which the marks have become obliterated have been abandoned or lost? The efforts made every year by all of the log owners to recover their sunken logs were directed to the whole mass of logs put into the waters to be navigated to market, and all kinds were recovered each year. The obliteration of the marks was necessarily gradual, so that a log readily identified at one date might within a short time lose its identity as far as the mark was concerned. The proof which supports the finding that there had been no abandon-

ment of marked logs will apply with equal force to those logs from which the marks have been obliterated by the abrasions of navigation. The loss of its mark does not divest the owner of his title to the log. The mark simply makes identification certain. We find no evidence in the case to show that these unmarked logs have been either abandoned or lost. The title, therefore, to such property, is also in the original owners and their representatives and assigns. And the fact that they cannot say to which owner the unmarked logs respectively belong does not divest them of the ownership, nor of the right to make any contract or arrangement they see fit with defendant to raise their property, and, according to a custom long established, to allow it to take such of the logs as are without marks. It is taking no property from complainant which by purchase or gift has come to him. His only claim to it can be by reason of the riparian ownership, which we will next consider.

3. An immense commerce in the navigation of logs and forest products upon this stream has been carried on for many years by those engaged in lumbering. All the logs now in the stream were put into its waters by the owners for the sole purpose of navigation, and for that purpose this stream is a public highway, as this court has frequently decided. This court will take judicial notice that, when the specific gravity of a saw log becomes greater than that of water, it will sink to the bottom, and that in streams of any considerable current such sunken logs will become embedded in the soil to a greater or less extent. This we assert is one of the incidents of the use of the stream for the lawful purpose of navigating logs and forest products. It is not necessary to cite authorities to show that, in navigating a stream for any lawful purpose, the navigator for that purpose may make all such reasonable use of such stream as may be necessary, and which does not deprive the riparian proprietor of his rights or the enjoyment thereof. We hold that to recover property, marked or unmarked, not abandoned or lost, from the bed of a stream, without injury to its banks or unlawful trespass thereon, is no unlawful interference with the rights or enjoyment of the riparian owner. Such recovery would be a proper and lawful use of the stream, and would be a right incident to the business of navigation. As we understand the argument of complainant, this right is conceded to an owner recovering his property about the title and the identification of which there is no dispute.

4. From the views herein expressed we hold that the logs now remaining upon com-

plainants premises, which have been raised from the bed of the river and placed there by defendant, are not the property of complainant. Upon complainant's own theory they could not be held to be his property, for the reason that there is no evidence in the case identifying these particular logs as having come from the bed of the stream on complainant's land. The claimed admission in the answer does not so state. Defendant very properly disclaims in the oral argument any right to put these logs on complainant's land. Its agents and servants in so doing were unlawfully trespassing upon complainant's premises. Such trespass, however, did not operate to give complainant any title to the property. For all of which trespasses complainant has an adequate and complete remedy at law.

Our conclusion is that the circuit judge was in error in granting relief to complainant. The decree is reversed, and a decree will be entered in this court dismissing the bill of complainant, with costs of both courts.

Ostrander, Hooker, Moore, and Carpenter, JJ., concurred.

MISSOURI SUPREME COURT. (Division No. 1.)

MINNIE TRIGG, Resp.,
v.

WATER, LIGHT, & TRANSIT COMPANY
OF CARROLLTON, Appt.

(215 Mo. 521, 114 S. W. 972.)

Street railway — person on track — duty.

1. The one in charge of an electric car is not bound to stop the car or slacken its speed upon discovering an object beside the track, which he takes to be a clump of dirt, although it proves in fact to be a man,

Case Note. — Duty of person in charge of street car upon perceiving an object the character of which is unknown, but which is in fact a person helpless on or near the track.

An examination of the case note appended to Louisville, H. & St. L. R. Co. v. Hathaway, 2 L.R.A.(N.S.) 498, will disclose that the duty of persons in charge of a train upon a steam railroad, upon perceiving an object the character of which is unknown, but which is in fact a trespasser on or near the track, has been frequently considered by the courts. There appear, however, to be only two other cases where, as in TRIGG v. WATER, LIGHT, & TRANSIT Co., the question is treated in its relation to the duty of persons in charge of a street car.

One of those cases, Werner v. Citizens' R.

whom he strikes before he can stop the car, after he discovers that it is a man.

Same — duty to look out.

2. Those in charge of a street car are not bound to look out for persons lying on the embankment of the right of way, although it is within the limits of a public street, if there is nothing to show that anyone ever used that portion of the embankment for any purpose whatever.

Same — speed — negligence.

3. Running a street car from 12 to 20 miles an hour at night, in a sparsely settled community, upon a track elevated on an embankment 3 feet high, is not *per se* negligence.

Same — contributory negligence.

4. The mere fact that a street car was running at a negligent rate of speed when it struck a person beside the track will not entitle him to recover for the injury if he was negligent in being where he was when struck.

(Lamm, J., dissents from proposition 2.)

(December 23, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Carroll County granting a new trial after verdict in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. Reversed.

Co. 81 Mo. 368, is sufficiently set out in the foregoing opinion.

The other case, *Stelk v. McNulta*, 40 C. A. 357, 99 Fed. 138, draws a distinction between cases like *Missouri P. R. Co. v. Prewitt*, 59 Kan. 734, 54 Pac. 1067, and other cases considered in the note above referred to, involving the injuring or killing of a trespasser upon a railroad company's right of way, and a case where the person is killed or injured under such circumstances while on a public street. In this connection the court said: "The locomotive driver has the right to assume that the object, if animate, will leave the track upon hearing the coming train. It is quite a different matter, however, where railway trains, whether propelled by steam or electricity, pass along the crowded thoroughfares of a populous city. The care to be exercised is relative, and must be proportionate to the dangers reasonably to be apprehended." The court, however, under the facts of the case, held that there was no liability on the part of the company, it appearing from the findings of facts and stipulation of facts that the motorman of an electric car, in the evening, in the outskirts of Chicago, a district sparsely populated and unlighted, upon reaching the crest of an incline, saw, at a distance of about 65 feet, an object upon the track which both he and a messenger boy standing with him upon the platform took to be a dog; that he thereupon rang the gong and applied the brakes, and, when

Statement by Woodson, J.:

The plaintiff instituted this suit in the circuit court of Carroll county against the defendant to recover the sum of \$5,000 damages sustained by her for the alleged negligence in killing her husband, Charles Trigg. There was a trial had before the court and jury, which resulted in a verdict and judgment for defendant, and in due time plaintiff filed her motion for a new trial, which was by the court sustained. From this order of the court sustaining said motion, the defendant duly appealed the cause to this court.

The petition, in substance, charges: That the accident which resulted in the death of Charles Trigg, respondent's husband, occurred on South Main street, in the town of Carrollton, where the track of appellant was practically straight, and the view unobstructed for a long distance; that pedestrians and footmen had, for a long time prior thereto, used said track traveling between the city of Carrollton and the town of South Carrollton; that appellant had knowledge of such user; that, at the time of the accident, the said Charles Trigg was upon appellant's railway track in a sitting or reclining position; that appellant's servants and employees saw, or, by the exercise of reasonable care and diligence, could have seen, him in such dangerous position in time

the car had gone a little farther, seeing that the object did not move, applied the reverse, which, in consequence of the car being on the down grade, did not act; it further appearing that, until the real nature of the object was perceived, the motorman had no thought that it was a human being, and it being expressly stipulated that he had no reason to expect a human being to be upon the track at the point in question. The court said that it was not the duty of the motorman, upon perceiving the object, to bring the car to a stop to discover its nature: that he did no less than his duty required of him when he checked the speed of the car and sounded his gong, and, as soon as he perceived that the object did not respond to his signal, reversed the power.

Two cases reported since the note above referred to have considered the question therein discussed, as to the liability of a railroad company for killing or injuring a trespasser under such circumstances. Thus, in *San Antonio & A. P. R. Co. v. McMillen*, 100 Tex. 562, 102 S. W. 103, it was held error to submit to the jury the issue of discovered peril, upon evidence that, while a train was running at about 35 miles an hour, the fireman discovered an object upon the track 400 feet distant, and at once began to ring the bell, and continued to ring it until the object, which proved to be a man, was struck; that, at a distance of 300 feet, the engineer discovered the object,

to have averted the injury and accident which resulted in his death, but negligently conducting themselves in the premises, and unskillfully managing and operating said car, and failing to sound the usual and ordinary danger signals, and running and propelling said car at a reckless and unusual rate of speed, ran its car against the said Charles Trigg, and wounded, cut, and bruised him, from the effects of which he died. The answer contained, first, a general denial of the allegations of the petition. Then, after admitting the incorporation of defendant, specially pleaded contributory negligence as a defense to the action alleged in plaintiff's petition in this: First, that respondent's husband, Charles Trigg, at a late hour of the night, voluntarily went upon appellant's railway track and assumed a place of danger by lying down upon the dump or embankment upon which the tracks of the railway were laid, in dangerous proximity to cars passing on said track, and neglected to look and listen for the approach of cars on said track, when, by looking, he could have seen, or, listening, could have heard, the approach of cars in time to have gotten to a place of safety; and, second, that said Charles Trigg was in such a state of intoxication that he did not exercise ordinary care, prudence, and caution to prevent and avoid danger to him-

but that neither recognized it as a human being, until a point 200 feet distant, whereupon the engineer resorted to every means at his hand to stop the train, except reversing the engine, it appearing that, even if the engine had been reversed, the train could not have been stopped in time to avoid the injury. The court said that, admitting the contention of counsel for the plaintiff that the deceased was standing upon the track when discovered by the trainman, the engineer would not have been required to stop the train or to make any effort to slow it up until he discovered that the man would not leave the track; and, upon that assumption, the doctrine of discovered peril was not in the case.

So, in *Cincinnati, N. O. & T. P. R. Co. v. Reynolds*, 31 Ky. L. Rep. 529, 102 S. W. 888, it was held that, the employees having done everything possible to stop the train after discovering that an object on the track was a human being, no liability could be based upon their failure to discover or know that the object on the track was a man at the time they first discovered it, at a distance of half a mile, it appearing that they were not then able to tell what it was, but rang the bell and blew the whistle for quite a distance before reaching the point at which they discovered its real nature. This case is decided upon the authority of prior Kentucky decisions discussed in the note already referred to. As a matter of fact, the deceased in this case was an employee of the 20 L.R.A. (N.S.)

self. It appears that the parties went to trial without a reply having been filed.

The facts of the case, as disclosed by the record, are substantially as follows:

At the time of the injury and death of Charles Trigg, he was the lawful husband of the plaintiff. That the defendant was a street railway corporation, owning and operating a street railway with electric power in the town of Carrollton, a city of about 4,000 inhabitants. The track was a single one, extending from the public square in said city south to the Wabash Railway Company's depot, located in South Carrollton, about 1 mile from the public square. The depots of the Burlington Railway and Santa Fé are situated on the line of said street railway. The principal, if not the only, traffic defendant is engaged in, was in carrying passengers to and from Carrollton to said depots. From the intersection of the track of the street railway with those of the Santa Fé for a distance of some 450 feet south, the former runs along the west side of South Main street, and is located on an embankment which is about 3 feet in height and is about the same distance above the grade of the traveled portion of the street. About 400 feet south of the Santa Fé crossing, the street railway track has a slight curve, about three degrees, to the south-

road; but, for the purposes of the principle involved, the case was treated the same as if he had been a trespasser, since, at the time of the accident, he was not engaged in any duty that he owed to the railroad company.

It will be observed that the question discussed in this note and in the earlier note presupposes that the person killed or injured was not guilty of contributory negligence in getting into a position of peril, or, if so, that the doctrine of last clear chance, or humanitarian doctrine, so-called, or the principle that contributory negligence is not a defense against a wanton or wilful injury, would obviate the effect of such antecedent negligence, assuming that there had been a breach of duty on the part of the employees after discovering the object on the track. It is also to be noted that a distinctive feature of the question here discussed is that the person killed or injured was in fact helpless on the track. The duty of employees upon discovering a person upon the track who, so far as appears, is not helpless, so as to prevent him from stepping from the track in time to avert an injury, presents another question. One aspect of that question is treated in the case note to *Southern R. Co. v. Chatman*, 6 L.R.A. (N.S.) 283, as to the right of persons in charge of a train to presume that a child will get out of danger.

west, leaving the street, and crossing the Wakenda creek bottom west of the Wabash depot. The Santa Fé depot is about $\frac{1}{2}$ mile from South Carrollton, and the ground between the two is a low bottom, and the street railway track is located upon trestles much of that distance. There are but three houses located in this bottom along said street and track. The traveled portion of Main street lies east of the street railway track, and runs almost parallel with it, and due south across the Wabash tracks a short distance east of the Wabash depot. Pedestrians, with the knowledge and acquiescence of defendant, had, for years prior to the time of the injury, used said street car track as a path or pass way between Carrollton and South Carrollton.

The injury to Charles Trigg occurred at night on September 10, 1904, about 12 o'clock, at a point on the east side of the track, about 450 feet south of the intersection of the street railway track with those of the Santa Fé. The car which struck deceased had been to the Wabash depot to meet passengers who got off the Wabash train due there between 11 and 12 o'clock. There were many passengers who got off that train and took passage on the street car for Carrollton. Between the time the street car passed over the Santa Fé tracks going south to the Wabash depot, and the time it returned with said passengers, a train from the west came into Carrollton on the Santa Fé road. Deceased resided in Carrollton, and had been at Norborne that day, and had returned home on the Santa Fé train before mentioned. When Trigg left the train at Carrollton, he was in a state of intoxication. He staggered about the platform, and then went east in the direction of Main street, and turned south on Main street in the direction of the place where the injury occurred. He was seen no more until the injury occurred. Mr. Trigg laid down on the east side of the embankment at the point where the street car track begins to curve to the southwest, and where it is laid along and upon the embankment before mentioned. He was lying on his back, with his head toward the top of the embankment between or near the east end of two cross-ties, with his feet projecting down the slope of the embankment towards the traveled portion of Main street. The ends of the ties extended beyond the east rail some 16 inches. The space between the two ties was not well filled with ballast, thereby leaving a depression, the exact depth of which is not clearly shown. No portion of his body extended much, if any, above the top surface of the east end of the ties. Weeds had grown up along the east slope of the embankment, but had been cut for a

distance of some 12 inches east of the east end of the ties; but the evidence fails to show just how high the weeds were at the time of the accident, except that they obstructed the view of his body, which was lying east of the strip from which the weeds had been cut.

As the car was returning from the Wabash depot in South Carrollton with its load of passengers, it was running from 12 to 20 miles an hour; and, when it reached a point about 25 feet from where Trigg was lying, the motorman saw him in the position before stated. The plaintiff introduced evidence tending to show: That the motorman in charge of said car said, immediately after the accident occurred, that he saw deceased when the car was about 175 or 200 feet from where he was lying, but that he thought he was a clump of dirt lying by the side of the track; that, immediately upon discovering Trigg, the motorman applied the brakes and other appliances which were at his command and exerted every effort within his power to stop the car and avert the injury. The efforts put forth by him were so effective that the speed of the car was so greatly and suddenly slackened that it was perceptibly noticed by all the passengers, and caused the car to jump and bound as if running over the ties, and so alarmed some of them that they left their seats with a view of leaving the car. As the car approached Trigg, no portion of his body was in a position that could have been struck by the car, had he remained still, for the reason that his head was several inches below the portions of the car which projected beyond the rail, and nearer the outer line of the east side of the car. No one saw him move, but, after the injury, he was found lying with his face almost down, with a deep wound upon the top part of the back of the head, and some slight bruises on his right shoulder. The injury on the back of the head fractured his skull and killed him almost instantly. The motorman was at all times at his place of duty and was keeping a vigilant outlook along the track in front of him, which was illuminated by an electric headlight attached to the front end of the car. While all of the witnesses testified that the car was running from 12 to 20 miles an hour when the motorman discovered Trigg, yet all of them testified that said speed was the usual and ordinary speed the car generally ran at the place of the accident, and that there was nothing in the rate of speed which indicated to any of them that the car was recklessly run or operated. After the motorman discovered the dangerous position in which Trigg was lying, it was impossible for him to stop or so slacken the car as to prevent the injury. The injury occurred at the point where

the street railway track curves to the south-west. The east rail at that point was one or two inches higher than the west rail. The evidence tended to show that the height of the east rail, and the shadow cast thereby, and the curve in the track prevented the rays of the headlight falling full upon Trigg, and that, in consequence thereof, he was more or less obscured from the sight of the motorman, as the car approached him from the south. The car, in passing over the trestles, made a great deal of noise, and could have been heard for half a mile or more, and there was nothing to have prevented deceased from hearing the same or from having seen the headlight of the car had he been looking and listening. Where counsel for plaintiff contends that any of the facts before stated are not supported by the evidence, we will consider same later in the opinion.

At the close of plaintiff's case, defendant tendered a demurrer to the evidence, which was by the court overruled, and again, at the close of all the evidence in the case, defendant requested a peremptory instruction requiring the jury to find and return a verdict for the defendant, which was also by the court refused. The court refused to give the third instruction requested by plaintiff which is as follows: "(3) The court instructs the jury that, if they believe from the evidence that the track of the defendant at the place where Charles Trigg was struck and killed was laid along and upon a public street in the city of Carrollton, and that defendant's track at such point was, on the 10th day of September, 1904, and for a long time prior thereto had been, frequented by persons and used by pedestrians as a pass way or footpath with the knowledge of defendant and its employees in charge of its cars, and that the car that struck and killed Charles Trigg, in approaching such point upon the track, was being run at unusual and reckless rate of speed, and that no warning of the approach of said car was given by the sounding of the gong or bell thereon,—then the jury may take into consideration all such facts, as tending to show and prove negligence on the part of defendant in the operation of said car." On behalf of the defendant, the court instructed the jury as follows. "(2) The court instructs the jury that there is no evidence in this case that the car, at the time deceased was killed, was being run at an improper or reckless rate of speed, and they will conclusively presume that the car was being run at a safe rate of speed at the time the accident occurred." Because of the refusal of the court to give plaintiff's third instruction, above quoted, and because of the giving of the second instruction for defendant, plaintiff's motion

for a new trial was by the court sustained, and a new trial ordered, from which order and ruling appellant prosecutes this appeal.

The errors assigned are as follows: (1) The court erred in overruling defendant's demurrer to the evidence. (2) The court erred in not giving defendant's peremptory instruction tendered by defendant at the close of all the evidence in the case. (3) The court committed error in sustaining plaintiff's motion for a new trial.

Messrs. Lozier, Morris, & Atwood and Jones & Conkling, for appellant:

It was not the duty of the railroad company to anticipate the presence of such footmen as were using the track or the side thereof as a bed to sleep upon.

Ayers v. Wabash R. Co. 190 Mo. 228, 88 S. W. 608; Yarnall v. St. Louis, K. C. & N. R. Co. 75 Mo. 575; Thomp. Neg. §§ 1789-1792; Vizacchero v. Rhode Island Co. 26 R. I. 392, 69 L.R.A. 188, 59 Atl. 105; McGauley v. St. Louis Transit Co. 179 Mo. 583, 79 S. W. 461; Coatney v. St. Louis & S. F. R. Co. 151 Mo. 35; 51 S. W. 1036; Lyons v. Illinois C. R. Co. 22 Ky. L. Rep. 1032, 59 S. W. 507; Hall v. Western & A. R. Co. 123 Ga. 213, 51 S. E. 311; Beach, Neg. §§ 391, 392; Parish v. Western & A. R. Co. 102 Ga. 285, 40 L.R.A. 264, 29 S. E. 715.

The deceased was guilty of negligence which was the sole and proximate cause of the injury.

Davies v. People's R. Co. 159 Mo. 6, 59 S. W. 982; Mockowik v. Kansas City, St. J. & C. B. R. Co. 196 Mo. 550, 94 S. W. 256; Moore v. Lindell R. Co. 176 Mo. 547, 75 S. W. 672; Petty v. St. Louis & M. River R. Co. 179 Mo. 666, 78 S. W. 1003; Reno v. St. Louis & Suburban R. Co. 180 Mo. 489, 79 S. W. 464; Aldrich v. St. Louis Transit Co. 101 Mo. App. 77, 74 S. W. 141; Markowitz v. Metropolitan Street R. Co. 186 Mo. 350, 69 L.R.A. 389, 85 S. W. 351; Roenfeldt v. St. Louis & Suburban R. Co. 180 Mo. 554, 79 S. W. 706; Ries v. St. Louis Transit Co. 179 Mo. 7, 77 S. W. 734; Shanks v. Springfield Traction Co. 101 Mo. App. 707, 74 S. W. 386; Zumault v. Kansas City Suburban Belt R. Co. 175 Mo. 290, 74 S. W. 1015; Abbott v. Kansas City Elev. R. Co. 121 Mo. App. 582, 97 S. W. 198; Cole v. Metropolitan Street R. Co. 121 Mo. App. 605, 97 S. W. 555; Bennett v. Metropolitan Street R. Co. 122 Mo. App. 704, 99 S. W. 480; Ayers v. Wabash R. Co. and McGauley v. St. Louis Transit Co. supra; Thomp. Neg. §§ 1789, 1790, 1792; Clegg v. Southern R. Co. 133 N. C. 303, 45 S. E. 657; Upton v. South Carolina & G. Extension R. Co. 128 N. C. 173, 38 S. E. 736; Carter v. Southern R. Co. 135 N. C. 498, 47 S. E. 614; Gulf,

C. & S. F. R. Co. v. Matthews, 32 Tex. Civ. App. 137. 73 S. W. 413, 74 S. W. 803; Hall v. Western & A. R. Co. and Lyons v. Illinois C. R. Co. supra; Hughes v. Louisville & N. R. Co. 23 Ky. L. Rep. 2288, 67 S. W. 984; Kendall v. Louisville & N. R. Co. 25 Ky. L. Rep. 793, 76 S. W. 376; Beach, Neg. §§ 391, 392.

Messrs. Russell Knelsley and Busby & Busby, for respondent:

It was the duty of the motorman, who actually saw deceased, to slacken speed.

Werner v. Citizens' R. Co. 81 Mo. 373; Isabel v. Hannibal & St. J. R. Co. 60 Mo. 482.

Although railway servants use every effort to avoid injury after discovering the peril of persons injured, and find it impossible to do so, still, that will not excuse them in cases where they have been guilty of negligence before, which created the impossibility.

Murrell v. Missouri P. R. Co. 105 Mo. App. 94, 79 S. W. 505; Payne v. Missouri P. R. Co. 105 Mo. App. 160, 79 S. W. 719.

Woodson, J., delivered the opinion of the court:

1. The first insistence of counsel for appellant challenges the correctness of the action of the trial court in refusing to give the demurrer to the evidence, asked at the close of respondent's case. It is the contention of appellant that the record discloses beyond question that the deceased was guilty of negligence which contributed directly to his injury and death, and for that reason respondent failed to make out a prima facie case, and, consequently, the case should have been taken from the jury. Counsel for respondent do not dispute the fact that deceased was guilty of contributory negligence, but, upon the contrary, he was guilty thereof; and seek to escape the effect of that concession by interposing the "humanitarian doctrine." In fact, the petition is bottomed upon that doctrine. It is earnestly insisted by counsel for respondent that the testimony introduced in her behalf tended to prove that the motorman who was in charge of the car which collided with her deceased husband saw him lying in the dangerous position in which he was struck about the time the car left the north trestle, which was about 200 feet south of the point where deceased was struck, and that, by the use of ordinary care, he could have stopped the car in time to have prevented the injury, or could have given him timely warning of its approach, which would have caused him to have moved to a place of safety before the car reached him. The substance of that evidence was as follows: That, a few seconds

after the accident occurred, and while the motorman and the passengers were standing there discussing the matter, the motorman stated, in the presence of some of them, that about the time the car left the north end of the trestle he said, in substance, that he saw an object ahead, and thought it was a clump of dirt, and, as soon as he got close enough to distinguish what it was, he reversed his car, but that he was then too close to deceased to stop it in time to avoid striking him. Upon objections made by counsel for appellant, other testimony of similar import was by the court excluded; but, as that admitted was sufficient to properly present the legal proposition involved, we will not discuss the action of the court in so excluding it.

There is other evidence in the record which tends to show that, had the motorman attempted to stop the car when he first discovered the object lying up against the embankment, he could have done so in time to have averted the injury, and, having failed to do so, he was guilty of such negligence as authorizes a recovery for respondent. Her counsel insists that the evidence of this case brings it within the spirit of the cases of Werner v. Citizens' R. Co. 81 Mo. 368, and Isabel v. Hannibal & St. J. R. Co. 60 Mo. 475. In the former case, the evidence showed that the deceased was lying between the rails of a street car track on Olive street, in the city of St. Louis, and that the driver of the car saw him lying there in time to have stopped the car before it struck him; but, in the darkness of the night, he mistook him for a sack of oats, and made no attempt to stop the car until it was too late to do so. In discussing that case, this court, on pages 373, 374, and 375, of 81 Mo., used the following language: "If the darkness of the night had prevented the driver from seeing the object on the track, it may be conceded that no negligence would be imputed to him; but the fallacy of the argument lies in the deduction from the fact that a total obscuration of his sight would release him from the charge of negligence, that a partial obscuration, to the extent it went and the effect it produced, would relieve him of the charge. This is a *non sequitur*. There would have been nothing to call into activity more care and prudence on the part of the driver than was necessary to guide the horses when no danger was apparent, or reasonably apprehended; but, when he could see an object on the track as large as a sack of oats, he had reason to apprehend danger, not only to his passengers and the property in his care, but to strangers or their property, and to hold that he might drive on with the same indifference as if he

had seen nothing on the track, because he could not discern what it was, would be to sanction recklessness, and ignore the duty of carriers to avoid injuring persons and property when aware of the danger to which they are exposed, or when they have reasonable grounds for an apprehension that, by proceeding as usual with their vehicles, injury will be inflicted upon persons or property. Counsel indulges in a criticism of the cases in which this court has held that, if the negligence of a defendant, which contributed directly to cause the injury, occurred after the danger in which the injured party had placed himself by his own negligence was, or, by the exercise of reasonable care, might have been, discovered by the defendant in time to have averted the injury, then defendant is liable, however gross the negligence of the injured party may have been in placing himself in such position of danger. Such is the well-established doctrine of this court. *Isabel v. Hannibal & St. J. R. Co.* supra; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 26; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 484; *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 611; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 140. And the case at bar is an apt illustration of the wisdom of the rule. In a populous city, on one of its public thoroughfares which pedestrians are crossing at all hours of the day and night, the driver of a street car on a dark night discovers an object 15 feet ahead of his horses, which he supposes to be a bundle of hay or a sack of oats, with but little reason to suppose, and which he could have ascertained, to be a human being if he had checked his horses and driven slowly up to the object, instead of recklessly driving ahead, looking, not at the object, but over his horses' heads, not endeavoring to determine what the object was, but indifferent to its character, not stopping the car or checking its speed until he had run over and killed a human being, when the exercise of ordinary care and prudence, involving a delay of only 10 or 15 seconds, would have disclosed that it was a human being, and saved a human life. It is contended by the defendant's counsel that the discovery of the danger in which Werner had placed himself, and the infliction of the injury, were simultaneous, and that therefore this doctrine has no application. The facts of the case, as testified to by defendant's witness, do not sustain that theory. The driver testified that he saw the object 15 feet ahead of the horses. That he could have stopped the car in 2 feet; so that he had ample time, after seeing the object on the track, to stop the car before the horses reached it."

In the latter case, a child twenty-one months old escaped from its keeper and had strayed upon a railroad track, and sat down between the rails. The agents in charge of the train saw the child in time to have avoided the injury, had they exercised ordinary care in doing so, but they mistook the child for a dog, and made no attempt to stop the train until it was too late to prevent the injury. In discussing that case, this court, on pages 482 and 483 of 60 Mo., said: "Moreover, it is clearly shown that the engineer and fireman discovered the infant, and had abundance of time to have stopped the train and saved its life; but they debated as to what it really was until it was too late. Might they not, by a close scrutiny and a proper observance, which it was their duty to give when they discovered an object on the track, have discovered that it was a child? The testimony is conclusive that the child was dressed in red, and that would have very easily distinguished it from a hog or a dog. The instruction, if it was intended to convey the idea that the employees, by using ordinary skill and caution after they observed the object on the track, could have distinguished that it was a child, was entirely proper. . . . The case presented, then, is that the persons running the train saw something on the track in time to avoid collision or injury; and if, after they observed it, they could, by the exercise of that care and caution which the law imposes upon them, have perceived that it was a child in time to stop the train, and they were negligent, the company is liable."

The facts of those two cases are so radically different from those of this case that the law as there enunciated is inapplicable to the facts of this one. In each of those cases the injured person was lying between the rails of the track, where obstructions of no kind had a right to be, neither man nor beast nor inanimate objects of any kind; and the mere fact that he or it was in a position where the train necessarily had to pass over imposed an imperative duty upon those in charge of the train, after observing their position, or, by the exercise of ordinary care, could have discovered it, to have used proper care to have avoided the injury. A railroad company has no right to run its cars over man or beast, nor over any species of personal property; and, when those in charge of a train saw those persons on the track, it was their duty to stop the train; or to use such other appliances as were at their disposal to prevent an injury; and it was no excuse for their failure to do so to say they thought the one was a sack of oats and the other was a dog, for the reason they had no

more right to kill the dog or destroy the oats than they had to injure a person; the difference being the degree of care to be exercised, and not a difference in the principle applicable to each. But, in the case at bar, Mr. Trigg was not lying between the rails of defendant's track, where the car must, of necessity, have passed over him, nor did the motorman believe in this case, as the employees did in those cases, that the object he saw lying by the side of the track was a person or, property of any kind; but, upon the contrary, all the evidence upon that point shows conclusively that he thought it was a clump of dirt. That being true, clearly, he was under no legal duty to stop the car or slacken the speed thereof before reaching it. If he had done either, or had he sounded the gong, when he really believed the object was a clump of dirt, his act would have been indicative of a flighty mind, rather than the act of a prudent person. We are therefore clearly of the opinion that the rule announced in those cases is not controlling in the case at bar.

2. It is next contended by counsel for respondent that, since the evidence discloses the fact that pedestrians had, with the knowledge and acquiescence of appellant, used its track as a footpath for years in going to and returning from South Carrollton, those who were in charge of the car which struck Mr. Trigg should have apprehended persons were likely to have been upon the track, and that it was their duty to have kept a constant outlook for those who might have been upon the track, and to have used all reasonable care and caution to have prevented injury to them; and that, having failed to do so, the company is liable for said injury. Counsel for appellant concede the law to be as contended for by counsel for respondent, but insist that it has no application to the facts of this case, for the reason that the evidence totally fails to show Mr. Trigg was using the footpath at the time the accident occurred, and that he was several feet east of it, lying down on his back against the embankment upon which the street car track and path were located, with his head resting in a depression of several inches in depth, near to or between the ends of two cross-ties, and that his feet extended downward and eastward from the track, with weeds obstructing the view of his body, excepting portions of his head.

1. We have carefully read this voluminous record of more than 500 pages of printed matter, and have failed to find any evidence whatever therein which tends, in the slightest degree, to disprove appellant's contention as to how the injury occurred, without it can be said that the physical facts of 20 L.R.A. (N.S.)

the case as they existed immediately after the accident occurred tend to disprove it; that is, the position the body was in at the time, the location of the wound upon the head, the place where deceased's hat was found, and the blood and hair found upon the roadway and rails. If these physical facts were viewed alone, they would indicate that Mr. Trigg was sitting up or was leaning against the east rail when struck and killed by the car, and that, if the servants in charge of the car had exercised ordinary care in keeping an outlook for him, they could have discovered his dangerous position in ample time in which to have stopped the car and thereby averted the injury; but, when viewed in the light of the testimony of all of the eyewitnesses as to the position Mr. Trigg was in just before he was struck, and the fact that he had been struck by the car and killed before all other witnesses saw his body, deprives their testimony of all weight it otherwise would have been entitled to, for the reason that both propositions may have been true, and doubtless were, due to the fact that when the car struck deceased, going at the rate of speed at which the evidence showed it was running, it must have thrown the body in the position in which it was found immediately after the accident, and all the other facts mentioned were incidents to the blow and of the injury which followed. In that view of the evidence there is no conflict between the testimony of any of the witnesses, but it harmonizes all the testimony in the case. We must therefore hold that the uncontradicted evidence shows that deceased was not using the path mentioned in the evidence when struck, and that there is no evidence that pedestrians or anyone else ever used the embankment upon which Mr. Trigg was killed for any purpose whatever.

The case at bar is on all fours with the case of *Ayers v. Wabash R. Co.* 190 Mo. 228, 88 S. W. 608, with the exception that, in that case, the accident occurred on a bright, clear day, while this one occurred at night, and that there was no evidence in that case which tended to show the injured party was obscured from the view of the engineer by weeds or other obstruction, as was the fact in this case. These facts, however, are only additional reasons why the respondent should not be entitled to recover. In discussing that case, this court, on pages 237 and 238 of 190 Mo., through Valliant, J., said: "There is no statute requiring the defendant to give a signal by bell or whistle on approaching a private crossing; its duty to do so depends on the circumstances of the case. There was therefore no negligence *per se* in failing to sound the

bell or whistle. The plaintiff was guilty of negligence in placing himself in the position of danger; and, taking the plaintiff's own account of his condition, it leaves little room to infer that the sound of the bell or whistle would have had any effect on him. This reduces the case to a question of whether the engineer, after seeing the plaintiff in the position of danger, or after he could have seen him if he had been looking, could, by the exercise of ordinary care, with the means at hand, have avoided the accident. The evidence showed that, although this occurred on defendant's right of way, and where there was no public crossing, yet it was where the defendant knew that the public was in the habit of using the railroad track for a footpath, and therefore it was the duty of the engineer to be on the lookout for persons so using the track. If this man had been walking or standing on the track, he could have been seen by the engineer in time at least for a danger signal to have been given; but lying, as he was, on the west side of the track, he was not as conspicuous as a person walking or standing would have been. The engineer was not chargeable with notice that a man was liable to be found lying on the track, and therefore the fact that the engine struck the plaintiff in that position is not in itself sufficient to justify the inference either that the engineer saw him, or that he failed to use ordinary care to discover him in time. The plaintiff's testimony, aside from that of the engineer, does not undertake to expressly show his attitude. He sat down on the west end of a cross-tie, and there the stupefaction of intoxication overcame him, and there the plaintiff's evidence leaves the result to inference. The natural inference is that he fell into a recumbent position."

Technically speaking, the deceased had the legal right to be at the point where he was struck and killed, because it was a portion of a public street, which, of itself carries with it the legal right to use all portions of the street consistent with the legal uses to which it was at the time devoted; and for that reason, technically, it was the duty of the servants in charge of the car to have been careful in looking out for all persons who might have been occupying that portion of the street; but, when we come to look at the situation from a practical and common-sense standpoint, which is the essence of all law, then the duty to have looked was only commensurate with the amount of travel shown to have existed upon that portion of the street at the time the injury occurred. In this case there is not a scintilla of evidence which tends to prove anyone ever used that

portion of the embankment for any purposes whatever. Defendant therefore owed him no actual duty to look out for deceased at the place where lying.

3. Counsel for respondent finally insist that the car, at the time it collided with deceased, was running at a dangerous and reckless rate of speed, and, for that reason, the trial court erred in refusing her third instruction asked, and in giving appellant's second, which, in effect, told the jury that there was no evidence in the case tending to show the car was running at a dangerous or reckless rate of speed at the time it struck and killed Mr. Trigg. The evidence shows that the track upon which the car was running was elevated upon an embankment, some 3 feet high, and that at the point where the accident occurred there were but few residences, practically in the country; and where there was but little, if any, travel at the hour of night when the accident occurred, and that the car was running from 12 to 20 miles per hour. In the absence of an ordinance of the city regulating the speed of the cars, we are asked to hold that the foregoing facts are sufficient evidence of the fact that the car was being run at a dangerous and reckless rate of speed at the time it struck deceased, and would warrant a jury in finding for respondent upon that ground. We are unable to grant that request, or to hold that such evidence would be sufficient to sustain a verdict if found in favor of respondent. It is common knowledge that, in our great cities, ordinances are enacted permitting street cars in the outskirts thereof and in the sparsely settled districts to run from 15 to 20 miles per hour, and no one, to our knowledge, has ever questioned their reasonableness. It is also generally known that steam railways are constantly running their trains at as high a rate of speed as the car in question was running at the time this unfortunate accident occurred, and that, too, through districts which are as thickly populated as is South Carrollton, yet we have never seen or heard of a case where it was contended that the speed of a car running 15 or 20 miles an hour, under the circumstances surrounding this one, was of itself sufficient evidence of negligence to sustain a verdict. In our judgment no such case exists; and, even if it did, we would be reluctant in following it. Such speed, under different circumstances, such as running through a populous city, or when connected with other facts and circumstances, doubtless would be sufficient evidence of negligence to support a verdict. But, for the sake of the argument, suppose we concede we are in error in the foregoing observations, still we are unable

to see in what manner respondent could recover, even though it was negligence in appellant to run the car from 15 to 20 miles per hour at the place where deceased was struck, for the reason that the law is well settled that where the plaintiff is guilty of negligence which contributes to his injury, before he is entitled to a recovery he must first show that, after the defendant saw his dangerous position, or, by the exercise of ordinary care, could have discovered it, defendant could, by the exercise of reasonable care, have avoided injuring him. *Harlan v. St. Louis, K. C. & N. R. Co.* 64 Mo., loc. cit. 483; *Prewitt v. Eddy*, 115 Mo. 283, 21 S. W. 742.

As shown in the previous paragraph of this opinion, there is no evidence contained in this record which tends to show defendant could have prevented the injury after discovering the dangerous position in which the deceased had placed himself.

We must therefore hold that, under no view of the case, was the respondent entitled to a recovery, and that the verdict of the jury was for the right party; and we therefore reverse the judgment of the trial court, and remand the cause, with directions to reinstate the verdict of the jury, and to enter judgment thereon in favor of the appellant.

All concur, except etaoiiu;2.o tETAOIN
sents as to what is said in the last two lines of paragraph 2.

NEBRASKA SUPREME COURT.

FRANK J. EVERITT, Appt.,
v.

FARMERS & MERCHANTS' BANK OF
ELM CREEK et al.

(— Neb. —, 117 N. W. 401.)

Corporate stock — sale — rights — recording transfer.

1. In the absence of controlling statutes, a purchaser of the capital stock of a corporation for a valuable consideration, in the absence of fraud, is protected against subsequent attachment or execution issued against his grantor although he failed to have his assignment recorded upon the books of the corporation.

Sale — purchase price — payment — bona fides.

2. The rule that a vendee is not a bona fide purchaser for value until he has actually paid the purchase price, or become irrevocably bound for its payment, cannot be invoked against one who has promised to give a consideration for the transfer as-

sailed, unless it appears that the transfer will hinder or delay the vendor's creditors.
Fraudulent conveyance — consideration — burden of proof.

3. Where a transfer of property between persons not related is assailed as fraudulent, the fact that the consideration was paid to the grantor's near relative, upon assignment thereof, does not change the rule imposing upon the party assailing the transaction the burden of proving it fraudulent.

Corporate stock — assignment — new certificate — compelling transfer.

4. A bona fide purchaser of the capital stock for a corporation may sue in equity to compel the corporation to enter the assignment upon its books, and to issue a new certificate therefor, and to restrain the sheriff from selling said stock upon an execution against the vendor, the corporation and sheriff being parties to the action

(July 17, 1908.)

Case Note. — Validity of pledge or other transfer of stock of corporation when not made in the books of company, as against attachments, executions, or subsequent transfers.

The earlier cases on this subject are covered in the note to *Mapleton Bank v. Standrod*, 87 L.R.A. 656, referred to in the foregoing opinion. A few decisions in point have been rendered since the publication of that note.

In *Reilly v. Absecon Land Co.* (N. J. Ch.) 71 Atl. 248, the court, while recognizing that there is a conflict of authority upon the point, declared that the courts of New Jersey have uniformly held that a sale of corporate stock, accompanied by a delivery of the certificate and usual power of attorney, without further steps towards completing the transaction by notice of the transfer to the company, or by causing an actual transfer to be made on the books of the company, is valid as against the creditors of the assignor, and gives the assignee precedence over subsequent judgments, executions, and attachments procured by creditors of the assignor. The court added that the provisions touching transfers on the books of the company are intended for the protection of the company; it being manifest that such provisions cannot be easily considered as intending to have the effect of recording the transfers for the protection of creditors of stockholders, since the public at large is not entitled to access to the stock books of corporations.

In *Equitable Securities Co. v. Johnson*, 36 Colo. 377, 85 Pac. 840, an action by an assignee of stock as collateral security, to foreclose his lien, in which the corporation contended that the lien was lost because the transfer had not been entered on the books of the company, and the original certificates had, in the meantime, been canceled and reissued to a third person, it was held that the lien was not lost, as the assignee had done all that could be reasonably

A PPEAL by plaintiff from a judgment of the District Court for Buffalo County in defendants' favor in an action brought to confirm plaintiff's title to and enjoin the sale of certain shares of stock. Reversed.

The facts are stated in the commissioner's opinion.

Messrs. N. P. McDonald and George W. Wertz for appellant.

Messrs. H. M. Sinclair and C. A. Robinson for appellees.

Epperson, C., filed the following opinion:

The plaintiff, claiming to be the owner of certain shares of the capital stock of the Farmers & Merchants' Bank of Elm Creek, instituted this action in equity to confirm his title thereto, and to procure possession of the certificates representing the same, to enjoin a threatened sale of said stock upon an execution issued against his grantor, and to compel the bank to enter the transfer of said stock upon its books, and issue to him a new certificate therefor. The sheriff, who held the execution, and the judgment creditor, Beecroft, and the bank, were made defendants. The sheriff filed an answer, alleging that he levied upon the shares of stock as the property of Spencer; and he further alleged, as did Beecroft, in a separate answer filed by him, that the pretended sale and transfer of stock by Spencer to the plaintiff was made by Spencer for the purpose of hindering, delaying, and defrauding his creditors, of which the

plaintiff had full knowledge; and, further, that the plaintiff paid no consideration for the stock. The bank filed a disclaimer. There is little or no dispute as to the facts. On July 16, 1906, the plaintiff herein negotiated with T. G. Spencer, for six and three-fourths shares of the capital stock of said bank, and received therefor an assignment in form as follows:

Kearney, Neb., July 16, 1906.

For value received, I hereby assign and transfer to F. J. Everitt all my interest in six and three-fourths shares of the capital stock of the Farmers and Merchants' Bank of Elm Creek, Nebraska, standing in my name on the books of the bank, and the proper officers of said bank are authorized and directed to transfer said shares to said F. J. Everitt on the books of the bank, and issue to him a certificate therefor.

T. G. Spencer.

This stock was represented by two certificates, each of which provided that the stock it represented was transferable only on the books of the bank on the surrender of the certificate, properly indorsed. Spencer did not have possession of, and was unable to deliver, said certificates to the plaintiff, for the reason that the same were in the possession of the bank, where they had remained from the time they were issued, although they had been demanded by Spencer. At the time of the purchase

required of him to secure the transfer, having presented a written assignment to the proper officer of the corporation, although such assignment was not upon the certificates of stock, the latter not having been surrendered to the transferee, but remaining in the hands of the transferor. It appeared that the secretary made no objection to the absence of the certificate, but certified in writing upon the assignment, and under the corporate seal that he had made the proper transfer on the books of the corporation.

Where a transfer of stock as collateral security is entered upon the books of the corporation, the title to the shares of one claiming through foreclosure of the pledgee's lien is good as against an intervening purchaser from the pledgee, although the transfers subsequent to the foreclosure were not entered on the books. *Richardson v. Longmont Supply Ditch Co.* 19 Colo. App. 483, 76 Pac. 546.

The Arkansas supreme court, in *Hudson v. Bank of Pine Bluff*, 75 Ark. 493, 87 S. W. 1177, adheres to the position previously taken in *Batesville Teleph. Co. v. Myer-Schmidt Grocery Co.* 68 Ark. 115, 56 S. W. 784, to the effect that the statutory provisions that no transfer of stock in a corpo-

ration shall be valid as against the creditors of the transferor until a certificate of such transfer shall have been deposited with the county clerk do not apply to transfers by way of pledges, but only to absolute sales.

In *Loeb v. German Nat. Bank* (Ark.) 113 S. W. 1017, a pledgee of stock as collateral security for a note, who had, in turn, transferred the same to a bank as collateral security for his own indebtedness, sought to charge the bank with the loss of the stock, which was sold by the original pledgees to third persons, because it failed to have the transfers recorded in the books of the county clerk or of the corporation, although it knew that the original pledgees were insolvent. The court, however, said that both assignments of the stock as collateral were good without being recorded in the books of the county clerk or of the company; and further, that, if it were necessary to protect either the original pledgee or the bank by having the assignments recorded, that duty rested primarily upon the former, and he could not accuse the bank of neglect of such duty.

The respective rights of the parties to the transfer, or the rights of the transferee as against the corporation itself, are not within the scope of this note.

by plaintiff, he was preparing to go on a business or pleasure trip, and did not have the time to present his assignment to the bank, nor did he take the time to give Spencer his note for \$675, the consideration agreed upon. It was the understanding that he would give the same upon his return home. When he returned, he further delayed because of a restraining order procured by Spencer's judgment creditor, Beecroft. By the same restraining order the bank was enjoined from transferring said bank stock on its books, or from disposing of or delivering the same from its possession. Beecroft had a judgment against Spencer for \$1,348, dated September 14, 1901. On September 4, 1906, an execution was sued out by Beecroft, and levied by the sheriff upon the said shares of stock. It also appears that some sort of a notice was served by plaintiff upon the officers of the bank on the day the execution was levied, notifying the bank formally of his assignment, and demanding a transfer of said stock to him. Although the record is not clear as to the notice, it is evident that the bank and the other defendants were fully conversant with the plaintiff's claim and his alleged right to have an assignment of said shares of stock indorsed upon the books of the bank. Later, plaintiff presented his assignment to the bank, and requested that a certificate therefor be issued to him. This request was refused by the officer in charge, who said he could not issue the same, because Spencer owned the stock, and a new certificate could not be issued until the old certificates had been surrendered. The evidence shows that the original certificates had been negligently, or otherwise wrongfully, withheld from Spencer by the bank, but that, upon the levy of the execution, had been delivered to the sheriff. Four and one-half shares of this stock had belonged to Spencer since 1898, and two and one-fourth shares since 1904. After the levy of the execution, plaintiff executed and delivered his non-negotiable promissory note for \$675 to Spencer's mother, to whom Spencer had assigned his claim against plaintiff for the consideration agreed upon.

The general rule seems to be that, in the absence of a controlling statute, a purchaser for a valuable consideration is protected against subsequent attachment or execution against his grantor, although he failed to have his assignment recorded upon the books of the corporation. There is a vast difference between the decisions of the different courts, which is attributed in part to the various statutory provisions, and the constructions placed thereon. But, where there is no express statutory provision requiring that an assignment be entered upon

the books of the company to effect a sale, it is held that the purchaser, in the absence of fraud, takes the legal title upon an assignment of the stock. Our own statutes failing to provide the manner of bringing about a transfer of capital stock, and failing to prescribe the rights of the parties when there is a failure to indorse the assignment upon the books of the company, we need only to consider those decisions treating of similar cases, and to determine the priority of the parties as it exists in the absence of legislation. In *Herrick v. Humphrey Hardware Co.* 73 Neb. 809-815, 119 Am. St. Rep. 917, 103 N. W. 685, 687, 11 A. & E. Ann. Cas. 201, it is said: "The object of having transfers of stock recorded upon the books of the company is to give the company notice of whom its stockholders are." In *Farmers' & M. Nat. Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552, it was held: "The real, and not the apparent, interest of a stockholder in the property of the corporation, represented by shares of stock, registered in his name, may be reached by garnishee process served on the corporation." The same rule, of course, would necessarily apply to the levy of an execution. It is the consensus of opinion, and apparently the universal rule, that a transfer by an assignment of the certificates leaves nothing in the assignor which can be reached by subsequent attachment or levy of execution, although the stock remains in his name upon the books of the corporation; and that it is immaterial that the by-laws or rules of the corporation require the transfer to be made upon its books. *Finney's Appeal*, 59 Pa. 398; *Beckwith v. Burroughs*, 13 R. I. 294; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *Prince Invest. Co. v. St. Paul & S. C. Land Co.* 63 Minn. 121, 70 N. W. 1079; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *Gilbert v. Manchester Iron Mfg. Co.* 11 Wend. 628; *Goyer Cold Storage Co. v. Wildberger*, 71 Miss. 438, 15 So. 235; *Blouin v. Hart*, 30 La. Ann. 714; *Sargent v. Essex Marine R. Corp.* 9 Pick. 202; *Bushnell v. Hall*, 9 Ky. L. Rep. 684; *Lipscomb v. Condon*, 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392; *Mapleton Bank v. Standrod*, 8 Idaho, 740, 67 L.R.A. 656, 71 Pac. 119. In *Lipscomb v. Condon*, supra, and the notes of the publisher in the book cited, there is a review of many cases dealing with this subject. That case holds: "An unregistered transfer of shares of corporation stock, for which no certificate has been issued, if made for a valuable consideration and without fraud, vests in the transferee a title to the shares superior to the claim of a subsequent attaching creditor of the transferor." This rule is well supported by the

cases reviewed in the notes, some of which are above cited.

The supreme court of Minnesota, in *Lund v. Wheatland Roller Mill Co.* 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268, held that a sale and transfer of corporate stock, although not entered on the books of the corporation, is effectual as between the parties, and takes precedence of a subsequent attachment in behalf of a creditor of the vendor. The statutes considered by the court in that case provided: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company; . . ." and "the stock of any such corporation shall be deemed personal property, and be transferable only on the books of such corporation in such form as the directors prescribe. . . ." The reason for the decision was, as we understand it, that the provisions of the statutes were held as intended solely for the protection and benefit of the corporation, and do not incapacitate a shareholder from transferring his stock. Because of the fact that the bank whose capital stock is in controversy herein had the actual possession of the certificates of stock, a delivery thereof by Spencer to the plaintiff was impossible. The assignment made by him, of date July 16, 1906, in the absence of fraud, was sufficient to convey the stock to the plaintiff. Defendants seek to invoke the rule of *Hedrick v. Strauss*, 42 Neb. 485, 60 N. W. 928, and *Nebraska Moline Plow Co. v. Blackburn*, 74 Neb. 246, 104 N. W. 178, which, in the case last cited, is given as follows: "One is not a bona fide purchaser for value unless he has actually paid the purchase price, or become irrevocably bound for its payment." It is true that, in the case at bar, the plaintiff had not become irrevocably bound to the extent that he would have been required to give the promised note upon a failure of the consideration; but the rule invoked is not applicable to this case, for the reason that it is not shown that Spencer was insolvent, or that the transfer of the stock to the plaintiff herein and the giving of the note to Spencer's mother will operate to deprive Beecroft from the collection of his judgment. This brings us to the consideration of another and the controlling issue.

Each party contends that the burden of proof is upon the other. There is no contention that there was any fraudulent intention on the part of the plaintiff, but that, before he gave the note to Spencer's mother, he had notice of such facts as would put a man of ordinary prudence on inquiry. There is nothing in the record to indicate that an inquiry made by a prudent man would lead him to the conclusion that Spencer's trans-

fer of the stock in controversy was made fraudulently. It does not appear that the consideration was inadequate, nor that Spencer was insolvent. It does not appear that he owed any other person than Beecroft and his own mother. His property may be sufficient to meet all of his obligations. Plaintiff is not related to Spencer, but defendants contend that, as Spencer's mother received the consideration for the shares of stock, the rule as to alleged fraudulent conveyances between relatives, casting the burden of proof upon the grantor, should be followed here. Spencer's mother's connection with this litigation is not directly involved. The real question to determine is, Where was the title to the shares of stock at the time of the levy? Had the transaction with Spencer's mother never entered into this case, defendants could not then recover. It is apparent that defendants have no greater rights than they would, had the promissory note never been given. In such case the plaintiff would be entitled to the fruits of his contract unless defendants could establish that such transaction was fraudulent. The burden of proof was upon the defendants. They introduced no evidence to prove that the transfer was fraudulent, nor that it hindered or delayed the collection of their judgment.

It is contended by the defendants that different causes of action are improperly joined in the petition, and that an injunction will not lie to restrain the sale of the stock. It cannot be successfully contended but that the assignee of the shares of stock of a corporation is entitled to maintain an action in equity to require an obstinate corporation to enter his assignment upon the books of the corporation, and issue to him a new certificate representing the same. 10 Cyc. Law & Proc. p. 605. The officers of the defendant bank refuse to recognize plaintiff's assignment, and apparently co-operate with Beecroft to defeat the plaintiff's title. Beecroft is a nonresident of the state. Plaintiff is entitled to have his stock preserved to him, and to prevent its encumbrance by execution sale. For these purposes he has no adequate remedy at law.

We recommend that the judgment of the district court be reversed, and the case remanded, with instructions to the lower court to enter a judgment for plaintiff consistent with this opinion.

Duffie and Good, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion the judgment of the District Court is reversed, and this case remanded, with instructions to the lower court to enter judg-

ment for plaintiff consistent with the opinion.

A petition for rehearing having been heard, Good, C., on December 5, 1908, filed the following additional opinion:

This cause is now before us upon an application for a rehearing, and has been orally argued. The opinion is reported in 117 N. W. 401. In the body of the opinion it was stated, "It does not appear that Spencer was insolvent;" and the cause was reversed and remanded, with instructions to enter a judgment for plaintiff consistent with the opinion.

The principles of law announced in the case are not seriously assailed upon this application; but it is urged that there was sufficient evidence in the record to show the insolvency of Spencer. We have re-examined the record, and find that there is some evidence tending to show Spencer's insolvency. The trial court evidently considered this evidence sufficient to warrant such a finding. We do not consider it necessary to discuss the sufficiency of the evidence to support such a finding. In view of the fact that the trial court deemed the evidence sufficient, and the fact of the insolvency of Spencer, if proved, would materially affect the ultimate disposition of the case, we think the cause should be remanded generally, so that appellee may have an opportunity to introduce further evidence, if they so desire.

We recommend that the opinion be modified, so as to direct a reversal and remanding of the case for further proceedings according to law, and that, as so modified, the opinion be adhered to.

Duffie and Epperson, CC., concur.

Per Curiam:

For the reasons given, the opinion is modified as above recommended, and, as modified, is adhered to, and the case is reversed and remanded for further proceedings according to law.

NEBRASKA SUPREME COURT.

HENRY B. GATES

v.

CHARLES E. TEBBETTS, Appt.

(— Neb. —, 119 N. W. 1120.)

Process — constructive service — res judicata.

1. A court has no jurisdiction to enter a

Headnotes by DUFFIE, C.

20 L.R.A. (N.S.)

personal judgment against a nonresident constructively served, who has made no appearance in the action, nor can any finding made in the case touching his personal liability operate as an estoppel so as to prevent him from showing to the contrary in a personal action subsequently brought against him.

Surety — release.

2. A surety upon a contract is not released because the plaintiff, in an action thereon, fails to inform the court that another party to the contract is the principal debtor.

Same — married woman — effect.

3. While it is a general rule that a discharge of the principal releases the surety, an exception to the rule exists when one becomes surety for a married woman, minor, or other person incapable of contracting.

(February 20, 1909.)

Case Note. — Effect upon liability of surety of principal's incapacity to contract.

This note is intended to include only those cases where it appeared that the person sought to be held liable was a surety, and does not include those cases where the indorser or assignor of a note made by a person incapable of contracting was sought to be held liable.

Although the general rule prevails that the liability of a surety is conditional upon the liability of the principal, in accordance with *GATES v. TEBBETTS*, it is almost universally recognized that an exception is found in case one becomes surety for a person who himself is relieved from liability because of the wholly personal defense of incapacity to contract, since, in many instances, the very fact that the principal cannot be held liable may be the reason for requiring a surety.

That a surety is not relieved from liability because the principal is a married woman has been held in the following cases in addition to *GATES v. TEBBETTS*: *Stillwell v. Bertrand*, 22 Ark. 375; *Gardner v. Barnett*, 36 Ark. 479; *Jones v. Crosthwaite*, 17 Iowa, 393; *Davis v. Statts*, 43 Ind. 103, 13 Am. Rep. 382; *Nabb v. Koontz*, 17 Md. 283; *Winn v. Sanford*, 145 Mass. 302, 1 Am. St. Rep. 461, 14 N. E. 119; *Whitworth v. Carter*, 43 Miss. 61; *McGavock v. Whitfield*, 45 Miss. 452; *Weed Sewing Mach. Co. v. Maxwell*, 63 Mo. 486; *Lobaugh v. Thompson*, 74 Mo. 600; *State, Wagoner, Prosecutor, v. Watts*, 44 N. J. L. 126; *Kimball v. Newell*, 7 Hill, 116; *Wiggin's Appeal*, 100 Pa. 155; *Smyley v. Head*, 2 Rich. L. 590, 45 Am. Dec. 750; *Hicks v. Randolph*, 3 Baxt. 352, 27 Am. Rep. 760; *Willingham v. Leake*, 7 Baxt. 453; *St. Albans Bank v. Dillon*, 30 Vt. 122, 73 Am. Dec. 295.

The same rule prevails where the principal is an infant (*Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627); or insane person (*Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Lee v. Yandell*, 69 Tex. 34, 6 S. W. 665).

In *Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac.

APPEAL by defendant from a judgment of the District Court for Gage County in plaintiff's favor in an action brought to recover a deficiency arising in a certain mortgage foreclosure proceeding. Reversed.

The facts are stated in the opinion.

Messrs. Hazlett & Jack, for appellant:

The failure of the plaintiff to inform the court of the relation of principal and surety existing between the defendants in the foreclosure proceedings releases the surety.

Thomas v. Wilson, 6 Blackf. 203; Gill v. Morris, 1 Heisk. 614; 27 Am. Rep. 744; United States v. Mattoon, 5 Mackey, 565; Michener v. Springfield Engine & Thresher Co. 142 Ind. 130, 31 L.R.A. 59, 40 N. E. 679; Ames v. Maclay, 14 Iowa, 281; Wright v. Hake, 38 Mich. 525.

Mr. E. O. Kretsinger, for appellee:

Where a wife is not liable, by reason of

her coverture, this fact constitutes no defense on the part of the husband, who had become his wife's surety.

24 Am. & Eng. Enc. Law, pp. 846, 847.

The judgment of foreclosure was a judgment *in rem*, or quasi *in rem*.

2 Black, Judgm. 1st ed. § 810; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; 23 Cyc. Law & Proc. pp. 1408-1412.

Duffie, C., filed the following opinion:

In 1900 the plaintiff commenced an action to foreclose a mortgage made by Ella F. Tebbetts and C. E. Tebbetts at that time wife and husband. The mortgage secured a note made by the parties for \$1,300, and covered certain lots in the city of Beatrice, Gage county, Nebraska. C. E. Tebbetts, the defendant in this action, was residing at Kansas

339, it was held that a surety to a promissory note is deemed in law to contract that the principal maker is in every way competent to contract in the manner he has, and that the instrument is a binding obligation upon such maker; and therefore a surety to a note made by an insane person cannot escape liability.

The same rule was applied in Weare v. Sawyer, 44 N. H. 198, holding the sureties liable on a note which purported to be given by a school district as principal, but was in fact signed without authority. The court said: "It is said, also that the liability of the surety is coextensive only with that of the principal, and that the school district must be regarded as the principal here. As a general proposition it may be true that, in the contract of guaranty, there must be a principal who is also liable. It would be true in all cases where the guarantor stipulated to guarantee the performance of the principal's engagement. But, in that large class of cases where the contract is to pay a specific sum of money, there, we apprehend, the guarantor or surety is, in the absence of fraud, bound by the terms of his contract, although his principal, by reason of coverture, infancy, or want of authority in the person assuming to act for him, is not bound. So it is laid down (Chitty, Contr. 9th Am. ed. 441) in respect to infants, married women, and other persons incompetent to contract; and we see no reason why the same doctrine does not apply to the case of a want of authority."

It was recognized in Davis v. Stokes County, 72 N. C. 441, that where a county did not have the power to borrow money or to give a bond, although not liable itself, a surety thereon was liable.

In Stewart v. Behm, 2 Watts, 356, it was held that the fact that a member of a firm signed a note without authority, thus not binding the firm, as was intended, did not relieve the surety from liability thereon.

So, a surety on a note is not relieved 20 L.R.A. (N.S.)

from liability thereon by the fact that it was executed by a corporate principal without proper authority. Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102.

In Mason v. Nichols, 22 Wis. 376, where persons, for a valuable consideration, guaranteed the performance of contract on the part of a railroad company, it was held that the fact that it was not binding on the company did not release the guarantors from liability.

In Yorkshire Railway Wagon Co. v. MacLure, L. R. 19 Ch. Div. 478, it was held that sureties who, in effect, guaranteed the repayment of money illegally borrowed by a railroad company, could be held liable therefor.

But where an infant, upon attaining his majority, disaffirms the contract, and returns the property for which his note has been given, the sureties thereon cannot be held liable. Keokuk County State Bank v. Hall, 106 Iowa, 540, 76 N. W. 832; Baker v. Kennett, 54 Mo. 82; Patterson v. Cave, 61 Mo. 439.

In Fuller v. Davis, 1 Gray, 612, it was held that sureties on a bond for the liberty of the prison limits are not liable for a failure to surrender their principal, occasioned by his commitment to a lunatic asylum after the execution of the bond.

In Grove v. Johnston, Ir. L. R. 24 C. L. 352, it was held that the lunacy of a collector before he could enter upon his duties relieved his sureties from liability on his bond.

In Levy v. Wise, 15 La. Ann. 38, it was held that the fact that a surety in a contract of lease acknowledged that the lessee was a free woman of color did not estop him from afterwards alleging and proving that she was a slave,—a contract of lease to a slave being absolutely null and void.

In McCormick v. Hubbell, 4 Mont. 87, 5 Pac. 314, it was held that sureties for a married woman on an appeal bond cannot raise the defense of coverture of the defendant in the principal action.

City, and substituted service of summons was had on him in the state of Missouri. Ella F. Tebbetts, the wife, was personally served in this state, and she filed an answer, alleging that at the time of making the mortgage she was a married woman, residing with her husband, and that at no time did she ever bind her separate estate, trade, or business, and signed the note secured by the mortgage as surety for her husband, and had received no money for which the note was given. C. E. Tebbetts made no appearance in the action, except to object to the jurisdiction of the court over his person, upon the service first made on him. This motion was sustained, after which a second service was had upon the defendant, and, no appearance being made by or for him, he was then defaulted. In February, 1901, the case was tried. The court found that there was due upon the note to secure which the mortgage was given the sum of \$1,455.98; that Ella F. Tebbetts was a married woman at the time of the execution of the note and mortgage, and that she was not liable thereon except to the extent of the mortgaged property described in the petition; that, after the mortgaged property had been exhausted and the proceeds applied in payment of the note and mortgage, "the said Ella F. Tebbetts will not be liable to the plaintiff for any deficiency judgment." There was a further finding that the decree draw interest at the rate of 10 per cent per annum. A foreclosure of the mortgage was decreed, an order of sale issued, the mortgaged property duly advertised and sold to the plaintiff herein for \$740. December 17, 1901, the sale was duly confirmed by the court, and a finding made that there was a deficiency of \$884.23. May 2, 1902, the plaintiff applied for and obtained leave of court to bring an action at law against C. E. Tebbetts for the deficiency arising in the foreclosure proceedings, and this action for that purpose was commenced in October, 1903. To a petition reciting the above facts the defendant filed an answer which is too lengthy to be incorporated in this opinion. From a judgment in favor of the plaintiff, the defendant has appealed.

The principal defenses urged upon this hearing are that Ella F. Tebbetts was the owner of the mortgaged property, which was encumbered by mortgage liens when she purchased the same; that the plaintiff's mortgage was given in renewal of one of such mortgage liens; that defendant had no interest in the property, the same being the separate property of his wife, and that he signed the note secured by the mortgage as surety for his wife, and was bound thereon as surety only; that these facts were known

to the plaintiff, who failed to present them to the court when the mortgage was foreclosed, and permitted and connived at the entry of a judgment in said foreclosure action, relieving said Ella F. Tebbetts from all personal liability upon said note, for which reason he alleges that he is released from liability.

The second objection urged to the judgment is that it is excessive. It is familiar law that a court has no jurisdiction to enter a personal judgment against a nonresident of this state who has not appeared in the action, and where substituted service of the summons has been had. In the foreclosure case the court had no jurisdiction to enter a personal judgment against Chas. E. Tebbetts, and did not attempt to do so. On confirming the sale made under the foreclosure decree, the court found the amount of the deficiency existing to be \$884.23, and, on the trial of this case, the district court apparently took view that this finding was conclusive upon the defendant, and would not allow him to show that, in the foreclosure proceedings, an erroneous computation of the amount due upon the notes secured by the mortgage was made, and that the deficiency was not so great as found by the court. In the foreclosure proceeding the court had undoubted jurisdiction to ascertain the amount due upon the mortgage, to declare it a lien upon the mortgaged premises, and to order a sale for the satisfaction of the amount due. It is conceded that, in that action, the court was without power or jurisdiction to enter a personal judgment against the defendant, and the question now before us is: Did the court have jurisdiction to find any fact going to establish the defendant's liability to a personal judgment, and the amount thereof, which the defendant is estopped from disputing in this action? We think not. On principle the law must be that, in a case where the court has no jurisdiction to enter a personal judgment against a defendant, it cannot conclude him by a finding of material facts necessary to establish his liability or the amount thereof in a subsequent action brought in a court having jurisdiction over his person. If, by an erroneous computation of interest or otherwise, the court in the foreclosure proceeding fixed the amount of the deficiency at too large a sum, the defendant in this action is not bound by such finding, but may have the benefit of any evidence in his possession tending to show the amount of the deficiency which actually exists, and for which he is personally liable. The district court erred in refusing him this privilege.

Relating to the claim that plaintiff in the foreclosure proceedings should have used diligence to establish the primary liability of Mrs. Tebbetts for the mortgage debt, there is no evidence in the record that the plaintiff fraudulently confederated with Mrs. Tebbetts to obtain a decree relieving her of personal liability, and it is well settled that, while the general rule prevails that a discharge of a principal releases the surety, an exception to the rule is found where a person guarantees the obligation or becomes surety for a married woman, minor, or other person incapable of contracting. In such case, while the principal is discharged on account of his incapacity, the debt remains, and its burden must be assumed by the surety. *Jones v. Crosthwaite*, 17 Iowa, 393; *Winn v. Sanford*, 145 Mass. 302, 1 Am. St. Rep. 461, 14 N. E. 119. In the case last cited it is said: "Where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee. *Yale v. Wheelock*, 109 Mass. 502." The district court in the foreclosure proceeding believed and held that Mrs. Tebbetts was not liable upon the note which the mortgage secured, and it may well be that the plaintiff held the same view, and for this very reason requested the defendant to sign the note as surety for his wife. In any view of the case which can be assumed, we are not prepared to hold that a party bringing an action upon a contract signed by two parties, one of whom is surety for the other, releases the surety by a mere failure to inform the court of the relation of principal and surety which the parties defendant sustained to each other. The case is very different from *Wright v. Hake*, 38 Mich. 525, where the creditor secretly and fraudulently released the principal debtor from payment of the principal amount of the debt, and then sought to hold the surety for the whole claim.

For the error in holding that the defendant was estopped from questioning the amount of the deficiency in the foreclosure proceeding, and refusing to allow him to show that the amount claimed was an excess of that owing by him, we recommend a rever-

sal of the judgment and remanding the case for a second trial.

Good, Epperson, and Calkins, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the case remanded for a second trial.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

D. DUDLEY CAPRON, Resp't.,

v.

J. WALLACE DOUGLASS, Appt.

(193 N. Y. 11, 85 N. E. 827.)

Evidence — cumulative.

1. The exclusion of evidence of an assistant surgeon at an operation, tending to corroborate the evidence of the one who performed the operation, as to conditions found which bear upon the liability of another physician for malpractice, cannot, where the verdict was against defendant, be held nonprejudicial, if it was properly admissible, on the theory that it was merely cumulative.

Same — physician — privilege — waiver.

2. The plaintiff in a suit for malpractice who fully describes his injury and the operation to which he was compelled to submit because of the defendant's alleged failure properly to care for it, waives the statutory privilege of excluding from evidence the testimony of the surgeon performing the operation.

(October 6, 1908.)

Case Note. — Right of plaintiff in action for malpractice to avail himself of privilege as against testimony of defendant or other physicians.

The general doctrine governing the subject under discussion, as gathered from the decisions hereinafter set forth, may be summarized as follows: Testimony on behalf of the patient, in an action brought by himself against his physician, operates as a waiver of his privilege, both as to the physician himself and others called in consultation with him; but not as to physicians independently employed, unless, it may be, the patient testifies as to his communications to the latter. But the bringing of a suit by a husband for malpractice upon his wife, or the giving of testimony by the wife in such suit, will not of itself so operate. Nevertheless, the physician may be permitted to testify in such an action if the necessities of justice require.

In *Lane v. Boicourt*, 128 Ind. 420, 25 Am.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department affirming a judgment of a Trial Term for Oneida County in plaintiff's favor in an action brought to recover damages for malpractice. Reversed.

The facts are stated in the opinion.

Mr. James Taylor Lewis, for appellant:

The law of negligence relating to physicians and surgeons, applied to the facts in this case, establishes freedom from liability; and the court erred in declining to dismiss the complaint and grant a nonsuit.

Carpenter v. Blake, 10 Hun, 359, affirmed in 75 N. Y. 15; *Pike v. Honsinger*, 155 N. Y. 202, 63 Am. St. Rep. 655, 49 N. E. 760; *Shearm. & Redf. Neg.* § 608.

The testimony of the assistant surgeon was erroneously excluded.

Morris v. New York, O. & W. R. Co. 148 N. Y. 92, 51 Am. St. Rep. 675, 42 N. E. 410; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578, 30 N. E. 52; *Haack v. Weickman*, 118 N. Y. 77, 23 N. E. 133; *Schlotterer v. Brooklyn & N. Y. Ferry Co.* 89 App. Div.

St. Rep. 442, 27 N. E. 1111, it was held that where, in an action brought by a husband for alleged malpractice upon his wife, the plaintiff, his wife, and his wife's mother testified as to all that was done by the defendant at the time the surgical operation which caused the injury was performed, a physician who was in attendance as a consulting surgeon might testify as to what occurred, the court saying: "The testimony given by the witnesses of the appellee broke the seal of privacy, and gave publicity to the whole matter. The patient waived the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since all was published. The statute was not meant to apply to such a case as this, nor it is within the letter or the spirit of the law. If a patient makes public in a court of justice the occurrences of the sick room for the purpose of obtaining a judgment for damages against his physician, he cannot shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he cannot be heard to assert that the confidence which the statute was intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician, or is the defendant. The opening of the matter to investigation removed the obligation of secrecy as to all, not merely as to one. When 20 L.R.A. (N.S.)

508, 85 N. Y. Supp. 847; *McKinney v. Grand Street, P. P. & F. R. Co.* 104 N. Y. 353, 10 N. E. 544; *Powers v. Metropolitan Street R. Co.* 105 App. Div. 358, 94 N. Y. Supp. 184; *Clifford v. Denver & R. G. R. Co.* 188 N. Y. 350, 80 N. E. 1094; *Griffiths v. Metropolitan Street R. Co.* 171 N. Y. 110, 63 N. E. 808.

Messrs. Smith M. Lindsley and William S. Mackie for respondent.

Haight, J., delivered the opinion of the court:

This action was brought to recover damages against the defendant, a physician and surgeon, upon the ground that he was chargeable with malpractice in treating a fracture of the tibia and fibula of the plaintiff's leg. Upon the trial evidence was submitted by the plaintiff and his witnesses tending to show that, after the plaintiff received the fracture of the bones of his leg, the defendant was called as a surgeon to attend the same, and that he was negligent in reducing the fracture and in his subsequent care of the patient. After a lapse of several weeks it was discovered that there had been no union of the fractured bones, and the

the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff. As to all witnesses of the transaction it is fully opened to investigation, if opened at all, by the party having a right to keep it closed. A patient cannot elect what witnesses shall be heard, and what shall not; for, if once investigation legitimately begins, it continues to the end. A patient may enforce secrecy if he chooses, but, where he himself removes the obligation, he cannot avail himself of the statute to exclude witnesses to the occurrence."

In *Becknell v. Hosier*, 10 Ind. App. 5, 37 N. E. 580, it was held that, where a patient sues his physician for alleged malpractice in the treatment of an injury, the privilege is waived as to all matters connected with the treatment of this injury in which the physician participated; and that, therefore, the physician was entitled to prove, by himself and a consulting surgeon, what occurred at an examination made after about two months' treatment, and the condition and nature of plaintiff's injury at that time, even though this particular transaction was disconnected with the remainder of his treatment, and though plaintiff had not gone into it himself.

In *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462, it was held that the testimony of physicians and surgeons upon whom the plaintiff called for examination and treatment after the service of defendant was at an end was properly excluded as privileged within the statute.

While a physician sued for malpractice may himself testify concerning communications between himself and his patient, a

plaintiff was then removed to a hospital in the city of Utica, where an operation was performed by Dr. Glass, of that city, aided by Dr. Fred Douglass, one of the hospital's staff of surgeons, after which there was a union of the fractured bones, and a recovery had by the plaintiff, but with the usefulness of the leg somewhat impaired. The contention of the defendant was to the effect that he had properly reduced the fracture, placing the broken bones in apposition, but that he was disappointed in their failure to unite, and that the cause of such failure was one that could not be determined by an external examination of the limb, and was only discovered after the plaintiff had been removed to the hospital and an incision made at the place of the fracture, when it was discovered that some of the muscles of the leg had intervened between the broken ends of the bones, preventing their coming together and forming a union. This condition of the fractured bones was discovered by Dr. Glass at the hospital, who performed the operation, and was testified to by him as a witness for the defendant, without objection by the plaintiff. The defendant then called as a witness Dr. Fred J. Douglass,

who assisted Dr. Glass in the operation, but his evidence was excluded upon the objection of the plaintiff's counsel, under § 834 of the Code, and an exception was taken to such exclusion. The trial court charged the jury: "If you find that the leg was properly set, the bones placed in apposition at the time of the first operation by the defendant, and you find that muscular fibres prevented union of the tibia, and that the loose fragment found at the place of the fracture of the fibula prevented union of the bone, and that such condition could not have been discovered except by the operation at the hospital, requiring extraordinary skill, and find the defendant was not guilty of negligence in failing to discover the condition of non-union prior to the time when he did discover it, then there is no liability, and the verdict must be for the defendant." In this connection the jury was further charged, at the request of the defendant, "that if the jury finds from the evidence that the fractured ends of the tibia were separated by tendon, muscle, or tissue, and for that reason could not have been made to unite without incision, and without the removal of the interposed substance, the plaintiff cannot re-

physician in no way connected with defendant's attendance upon the patient, and who subsequently examined him with a view to seeing what could be done for him, cannot testify, as the bringing of the action of itself does not destroy the privilege of the statute to anything more than those things which the action itself makes it necessary to disclose, *viz.*, the ailment and its treatment by the physician or physicians therein named. *Hartley v. Calbreath*, 127 Mo. App. 559, 106 S. W. 570.

Where, in an action brought by a physician for compensation, a counterclaim is set up demanding an affirmative judgment for damages for alleged malpractice, the physician is not entitled to prove by another physician, calling on an occasion on which the former was not present, that the patient had not disclosed all of his symptoms, and the reason given by him therefor, although the patient and his witnesses had testified on the trial as to his physical condition during his whole sickness, where no evidence with reference to such occasion had been given. But the evidence of a third physician is admissible, where the patient has given evidence as to the occasion when he was present. *Hennessey v. Kelley*, 55 App. Div. 449, 66 N. Y. Supp. 871, reversing 30 Misc. 703, 64 N. Y. Supp. 562.

The privilege of a wife against the testimony of her physician is not waived by her husband calling her as witness in a suit brought by him alone. *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752, 55 S. W. 258.

The institution of a suit by a husband 20 L.R.A. (N.S.)

for malpractice upon his wife has no tendency to show that he has any authority to waive the wife's statutory protection and privilege against the physician's testimony; although, if the suit was by the wife, or by the husband and the wife, against the defendant, for physical injury occasioned by his want of knowledge or negligence in her treatment, then the privilege of secrecy on the part of the defendant would thereby be waived as to all matters connected with the case and his treatment thereof. *Ibid.*

While it must be understood that such evidence cannot be admitted merely because other evidence of the facts cannot be obtained, yet, in a suit against a physician by a husband for damages, where it is clear that no other person, besides the physician and the wife, knows anything personally about the facts, and the proof of such facts are necessary for sustenance of his defense, it is not error to permit the physician to testify to such facts in order to prevent injustice being done. *Ibid.*

In an analogous case, where a claim was made against an attorney at law for alleged negligence in managing a cause, it has been held that while, as a general proposition, an attorney cannot, as a witness against his client, disclose communications made to him in his professional capacity, the rule does not apply where the client sues the attorney for disobeying instructions alleged to have been given in such consultations, and for unskillfully managing a cause upon the instruction given to him by his client in them. *Nave v. Baird*, 12 Ind. 318.

cover for loss or damage resulting from delayed or non-union of such fragments by reason of the presence of such foreign substance, upon the undisputed facts in this case." The jury found a verdict for the plaintiff. It will therefore be observed that, under the charge of the court, the chief question of fact involved was as to whether there were muscular fibres, which intervened between the broken ends of the tibia, which prevented its union, and as to whether such a condition could have been discovered except by the operation, which was made at the hospital, requiring extraordinary skill. It is thus apparent that upon this issue the sustaining of the testimony of Dr. Glass was of importance to the defendant, and had he been permitted to avail himself of the testimony of Dr. Douglass, who assisted Dr. Glass in the operation, the result might have been different. We consequently, cannot approve of the ruling made upon the ground that the evidence was merely cumulative; for, it being offered upon the trial of the case to sustain the defendant's defense, he had the right to have it considered by the jury.

The serious question presented upon this review calls for a construction of §§ 834 and 836 of the Code of Civil Procedure. Section 834 is, so far as material, as follows: "A person duly authorized to practice physic or surgery, . . . shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." Section 836, among other things provides that the provisions of the section apply to a surgeon, "unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient, or the client. . . . The waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such waiver. But the attorneys for the respective parties may, prior to the trial, stipulate for such waiver, and the same shall be sufficient therefor." There can be no question with reference to the discovery made by Dr. Glass and Dr. Douglass, in their operation upon the plaintiff at the hospital, coming within the express language of the provisions of § 834 of the Code, and the testimony, therefore, under ordinary circumstances would be privileged. But the question here presented is as to whether such privilege has been waived by the plaintiff upon the trial. He and his counsel sat by, and permitted the testimony of Dr. Glass to be given without interposing any objection thereto, thereby waiving the privilege 20 L.R.A. (N.S.)

which the plaintiff might have availed himself of had he seen fit. He has thus permitted the condition of his broken limb to be given to the public in an open trial, thereby forever preventing it and its condition from being a secret between himself and his physician. The intent of the legislature in enacting the statute making such information privileged was, doubtless, to inspire confidence between the patient and his physician, so that the former could fully disclose to the latter all the particulars of his ailment without fear that he may be exposed to civil or criminal prosecution, or shame and disgrace, by the disclosure thus made, and thus enable the latter to prescribe for and advise the former most advantageously. As was said by Ruger, Ch. J., in *McKinney v. Grand Street, P. P. & F. R. Co.* 104 N. Y. 352, 10 N. E. 544: "After its publication no further injury can be inflicted upon the rights and interests, which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that, when it is once divulged in legal proceedings, it cannot be again hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the statute. The consent, having been once given and acted upon, cannot be recalled, and the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect."

In the case of *Morris v. New York, O. & W. R. Co.* 148 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410, it was held that when a party who has been attended by two physicians in their professional capacity at the same examination or consultation, both holding professional relations to him, calls one of them as a witness in his own behalf, in an action in which the party's condition, as it appeared at such consultation, is the important question, to prove what took place, or what the witness then learned, he thereby waives the privilege conferred by the section of the Code in question, and loses his right to object to the testimony of the other physician, if called by the opposite party to testify as to the same transaction. And in the case of *People v. Bloom*, 193 N. Y. 1, 18 L.R.A. (N.S.) 898, 85 N. E. 824, which we have considered and determined in connection with this case at this present term, we have held that, where the waiver of the privilege is by admitting the testimony of the physicians without objection in a civil action, he cannot thereafter invoke the privilege by objecting to their testimony in a criminal action against him, in which he is charged with having committed perjury upon the former trial. It would thus seem

that under the authorities alluded to, the plaintiff, by admitting the evidence of Dr. Glass to be given with reference to the discovery made at the operation, thereby also is deemed to have waived the privilege as to Dr. Douglass, who was there assisting Dr. Glass in the operation. But we prefer to place our decision in this case upon broader grounds.

This action, as we have seen, was for malpractice. The plaintiff, both in his complaint and in his testimony, has fully disclosed all of the details of his affliction as it existed both at his home and at the hospital. He has given in much detail how the fractures occurred, how they were treated, his pain and suffering, and, so far as he was able to comprehend when not under the influence of anesthetics, the particulars of the operation at the hospital. He himself has therefore given to the public the full details of his case, thereby disclosing the secrets which the statute was designed to protect, thus removing it from the operation of the statute. In other words, he has waived in open court upon the trial all information which he might have kept secret, by disclosing it himself. The character of the action necessarily calls for a disclosure of his condition and the treatment that was adopted by the defendant and those assisting him. To hold that the plaintiff may waive the privilege as to himself and his own physicians, and then invoke it as to the defendant and his physicians, would have the effect of converting the statute into both a sword and a shield. It would permit him to prosecute with the sword, and then shield himself from the defense by the exclusion of the defendant's testimony. It would enable the plaintiff to testify to whatever he pleased with reference to his condition and the treatment adopted by the defendant, without fear of contradiction. The plaintiff could thus establish his cause of action, and the defendant would be deprived of the power to interpose his defense, by reason of the closing of the mouth of his witnesses by the provisions of the Code referred to. Such a construction of its provisions, we think, was never contemplated by the legislature. It would lead to unreasonable and unjust results. Instead thereof, a construction of the provisions of the Code, to the effect that when the privilege of the plaintiff has been once waived by him in court, either by his own testimony or by that of others given with his knowledge and consent, and his physical condition has been given to the public, the door is then thrown open for his opponent to give the facts as he understands them. This, to our minds, affords a more just and equitable rule, and is the one that was evidently contemplated by the legislature. 20 L.R.A. (N.S.)

Edington v. Aetna L. Ins. Co. 77 N. Y. 564; Clifford v. Denver & R. G. R. Co. 188 N. Y. 349, 80 N. E. 1094; Rauh v. Deutscher Verein, 29 App. Div. 483, 51 N. Y. Supp. 985; Wigmore, Ev. § 2389; Becknell v. Hosier, 10 Ind. App. 5, 37 N. E. 580; Nave v. Baird, 12 Ind. 318; Hennessy v. Kelley, 30 Misc. 703, 64 N. Y. Supp. 566.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Cullen, Ch. J., and Gray, Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur.

OKLAHOMA SUPREME COURT.

EX PARTE RICHARD THOMAS.

(— Okla. —, 97 Pac. 260.)

Concealed weapons — statutory regulation.

The provisions of the statutes of Oklahoma (§§ 2502, 2503, Wilson's Rev. & Anno. Stat. [Okla.] 1903), prohibiting the carrying of the weapons therein set out, are not repugnant to each other, or violative of § 26 of article 2 of the Bill of Rights of the Constitution of Oklahoma, but are valid provisions of such statutes extended to and put in force in the state by the provisions of § 21 of the enabling act (act June 16, 1906, chap. 3335, 34 Stat. 277) and § 2 of the schedule of the Constitution.

(August 29, 1908.)

Headnote by DUNN, J.

Case Note. — Constitutional right to bear arms.

The earlier cases upon this question are collected in the note to Salina v. Blaksley, 3 L.R.A. (N.S.) 168, and only cases since decided are cited herein.

The constitutional right to bear arms is not violated by a statute conferring authority upon the council of a municipality to "prohibit and punish the carrying of firearms or other deadly weapons concealed or otherwise carried." Salina v. Blaksley, 72 Kan. 230, 3 L.R.A. (N.S.) 168, 115 Am. St. Rep. 196, 83 Pac. 619, 7 A. & E. Ann. Cas. 925.

Nor is such constitutional privilege infringed by a municipal ordinance prohibiting the firing of any gun, pistol, or other firearm within the city limits except upon the occasion of a military parade, and then only by order of some officer having command, such regulation being a valid exercise of the police power. State v. Johnson, 76 S. C. 39, 56 S. E. 544, 11 A. & E. Ann. Cas. 721.

So, a statute prohibiting the organization, maintenance, or employment by one of an armed body of men is not a violation of

APPPLICATION for a writ of habeas corpus to secure the release of petitioner from custody to which he had been committed for alleged violation of a statute regulating the carrying of concealed weapons. Denied.

The facts are stated in the opinion.

Messrs. John H. Burford, A. J. Jennings, and T. J. McMurry for petitioner.

Messrs. C. J. West, Attorney General, and S. M. Cunningham for the State.

Dunn, J., delivered the opinion of the court:

Richard Thomas was charged by information filed in the county court of Payne county, Oklahoma, with the offense of wilfully and unlawfully carrying on or about his person a pistol, concealed, contrary to the statute, etc. He was sentenced to pay a fine of \$25 and to be incarcerated in the county jail for thirty days, and, on being taken in charge by the sheriff under this sentence, brought this original action of habeas corpus in the supreme court, praying a discharge. The agreed statement of facts and the briefs of counsel submit to this court for its consideration and decision the question as to the status of the law in reference to carrying weapons in this state. Counsel for petitioner makes a very ingenious argument on the subject, but, in our judgment, it is more ingenious than sound. He contends that there is no law in the state of Oklahoma to prevent or regulate the carrying of arms or weapons, and his line of reasoning is as follows: Section 583, chap. 25 (§ 2502), Wilson's Rev. & Anno. Stat. (Okla.) 1903, is as follows: "It shall be unlawful for any person in the territory of Oklahoma to carry concealed on or about his person, saddle, or saddle bags any pistol, revolver, bowie knife, dirk, dagger, slung shot, sword, cane, spear, metal knuckles, or any other kind of knife or instrument manufactured or sold for the purpose of defense except as in this article provided." This section, counsel contends, is repealed by the one which follows it, which reads as follows: "It shall be unlawful for any person in the

territory of Oklahoma to carry upon or about his person, any pistol, revolver, bowie knife, dirk, knife, loaded cane, billy, metal knuckles, or any other offensive or defensive weapon, except as in this article provided." The contention on these two sections is that, if a person is prohibited from carrying weapons at all, he is certainly prohibited from carrying them concealed, and as the first paragraph and the evil intended is fully included in the second paragraph, the first is rendered inoperative, void, and of no force and effect. He admits that his client carried the pistol mentioned, and he seeks to avoid the force of the second paragraph which prohibits the carrying of any weapons whatever by the provision of the Constitution of the state (§ 26, art. 2; § 35, Bunn's Constitution), which reads as follows: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing therein contained shall prevent the legislature from regulating the carrying of weapons." Under this section he conceives the idea that his client had the absolute right to carry the pistol for which he is now being punished; that § 2503 is in conflict with this section of the Constitution, and must fall; that § 2502, which prohibits the carrying of weapons concealed, and hence a regulation thereof, and not a prohibition, is in conflict and repealed by § 2503, and hence was not carried into force and effect by § 2 of the schedule to the Constitution, which provides that "all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law." There are certain other provisions of the statute regulating the carrying of weapons and granting permission to public officers to carry arms, and for other persons to carry shotguns and rifles for hunting or for having them repaired, or for the purpose of

a constitutional declaration that "the right of the individual citizen to bear arms in defense of himself or the state shall not be impaired," where it is further declared that such provision shall not be "construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." State v. Gohl, 46 Wash. 448, 90 Pac. 259.

Under the general police power provided for in a municipal charter, the carrying of concealed weapons within the municipality may be prohibited. Orrick v. Akers, 109 Mo. App. 662, 83 S. W. 549. 20 L.R.A. (N.S.)

A county ordinance declaring it a misdemeanor to carry a concealed weapon, and conferring authority on the sheriff to grant permits to carry such weapons, to officers and other persons as he may deem fit, is a valid exercise of the police power. Ex parte Luening, 3 Cal. App. 76, 84 Pac. 445. The court said that "whatever may be the source of the right to bear arms in the general acceptance of such term, it does not follow as a natural consequence that such right extends to every conceivable manner in which arms may be borne."

using the same in public muster or military drills, etc.; also a provision against any one except a peace officer carrying into any church or religious assembly, or to an election or place where intoxicating liquors are sold, and certain other assemblies, any weapons designated in the first and second section above set out. These particular sections are not of moment here, and hence will not be set out at length.

We agree with counsel that the statutes in question cover practically the same subject, with the exception that the first one provides that the instruments mentioned therein shall not be carried concealed, while the second provides that the weapons mentioned therein shall not be carried at all, and the things which are mentioned cover practically the same articles. A loaded cane and a billy are mentioned in the second, and are not mentioned in the first; and a dagger, slung shot, and sword are mentioned in the first, and not in the latter. With this exception and with the difference first noted, the statutes are practically identical, and why the legislature incorporated them both in the act we are not able to say, but there is no room for holding that one of these repeals the other. They may both stand, and a party may be prosecuted under either. The second paragraph contains no repeal of the first. They are both contained in the same chapter, and in the same article, were passed on the same day; and the rule in such cases is stated in Lewis's *Sutherland on Statutory Construction*, § 268, to be as follows: "The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case it would manifestly be an inadvertence, for it is not supposable that the legislature would deliberately pass an act with conflicting intentions. In the other case, the presumption rests on the improbability of a change of intention, or, if such change had occurred, that the legislature would express it in a different act without an express repeal of the first. 'Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session.' The presumption is that different acts passed at the same session of the legislature are imbued by the same spirit and actuated by the same policy, and that one was not intended to repeal or destroy an-

20 L.R.A. (N.S.)

other, unless so expressed." To the same effect is the holding in the case of *State v. Rackley*, from the supreme court of the state of Indiana, 2 Blackf. 249: "Statutes enacted at the same session of the legislature are to be taken *in pari materia*, and should receive a construction which will give effect to each if possible. But if each of them cannot have the same entire effect when taken in connection with the others that it would have if taken singly, they must be so construed as to give effect to what appears to have been the main intention of the legislature." In the case at bar these statutes must have been passed as is said by Mr. Sutherland "through inadvertence;" but construing them so as to give effect to what appears to have been the main intention of the legislature, in our judgment, will give effect to both, and a prosecutor may proceed under either as the facts require. They are for the greater part cumulative, but not conflicting.

Now, the question arises: Were these sections of the territorial statutes extended to, and did they remain in force in, the state of Oklahoma, or are they repugnant to that section of the Constitution above cited, relating to the right of citizens to bear arms. The question now presenting itself is whether or not the pistol, for the carrying of which defendant is restrained of his liberty, is among the arms which he could be prohibited from carrying or bearing. Practically all of the states under constitutional provisions similar to ours have held that acts of the legislatures against the carrying of weapons concealed did not conflict with such constitutional provision denying infringement of the right to bear arms, but were a valid exercise of the police power of the state. A few of the states which have so held are indicated as follows: *Nunn v. State*, 1 Ga. 243; *State v. Mitchell*, 3 Blackf. 229; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *State v. Jumel*, 13 La. Ann. 399; *State v. Wilburn*, 7 Baxt. 57, 32 Am. Rep. 551; *Cockrum v. State*, 24 Tex. 394; *State v. Buzzard*, 4 Ark. 18. The foregoing authorities could be multiplied, but they are deemed to be sufficient.

The question now arises: Is a pistol the character of arms in contemplation of the constitutional convention and of the people of the state when they declared that the right of a citizen "to carry and bear arms," etc., "shall never be prohibited." We hold that it is not, and most of the states where it has been passed upon support us in this conclusion. *Bishop, Statutory Crimes*, § 793; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8; *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556; *English v. State*, 35 Tex. 473, 14 Am. Rep. 374; *Aymette v. State*, 2 Humph. 154; *Hill v. State*, 53 Ga. 472; *Salina v. Black-*

ley, 72 Kan. 230, 3 L.R.A.(N.S.) 168, 115 Am. St. Rep. 196, 83 Pac. 619, 7 A. & E. Ann. Cas. 925. Many of the state Constitutions on this subject contain a reiteration of article 2 of the Amendments to the Constitution of the United States, that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Some of the courts have held that this section applied to the states, as well as the general government; but the ultimate conclusion to which practically all of the courts of the Union have finally arrived, including the United States Supreme Court, is that this Amendment is a limitation on the Federal government only. *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Fife v. State*, supra; *Andrews v. State*, 3 Heisk. 166, 8 Am. Rep. 8. We have found no Constitution containing a provision exactly the same as the one in ours, but the reasons which brought about its adoption and the 2d Amendment to the Federal Constitution, and the reasons underlying the motives which have caused it to be written into the different state Constitutions are identically the same. Some of the state courts in cases of this character have examined the history of this provision at length, and, while we do not deem it necessary to go into this, those who are interested in the subject will find an excellent review of the entire matter in the case of *Aymette v. State*, supra, wherein Justice Green, who delivered the opinion of the court, has, in a well-written opinion, reviewed the same from its earliest appearance in England, and has marked its growth until it appears in the Constitution of the United States, and finally in the Constitution of the state of Tennessee. While the language of the Constitutions of the different states may vary in terms, yet, as they have sprung from the same source, and the purposes, aims, and objects to be accomplished by those provisions are identical, the same rule of construction will be applicable. The Constitution of the state of Tennessee in force at the time of the opinion last mentioned was "that the free white men of this state have a right to carry and bear arms for their common defense." The statute under which the defendant in that case was prosecuted read: "That if any person shall wear any bowie knife, or Arkansas toothpick, or other knife or weapon, that shall in form, shape, or size resemble a bowie knife or Arkansas toothpick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor." The defendant contended that

the statute was unconstitutional, and that every man had a right to arm himself in the manner which he chose. The defendant, it appears, had a bowie knife, of which the court, in dealing with the question of whether or not such an instrument came within the meaning of the constitutional provision, said: "The words 'bear arms,' too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defense, so the arms, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defense of the citizens. The right to keep and bear them is not, therefore, secured by the Constitution." In a latter case (*Andrews v. State*, supra) the supreme court of Tennessee, again dealing with this same subject and speaking through Justice Freeman, said: "In order to arrive at what is meant by this clause of the state Constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is 'arms,' that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country and such as are adapted to the ends indicated above; that is, the efficiency of the citizen as a soldier, when called on to make good 'the defense of a free people;' and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country. What, then, is he protected in the right to keep and thus use? Not everything that may be useful for offense or defense; but what may properly be included or understood under the title of 'arms,' taken in connection with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the state. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold that the rifle of all

descriptions,—the shotgun, the musket, and repeater, are such arms; and that under the Constitution the right to keep such arms cannot be infringed or forbidden by the legislature, their use, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right." The court in this case considered three cases together, in one of which there was involved, as in the case at bar, the carrying of a pistol. The case of *Hill v. State*, supra, was one wherein the defendant was indicted for carrying a pistol. The provision of the Constitution of Georgia reads: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe the manner in which arms may be borne." In considering the question as to whether or not the statute which provided that "no person in said state shall be permitted or allowed to carry about his or her person any dirk, bowie knife, pistol, or revolver, or any kind of deadly weapon, to any court of justice or any election ground or precinct," etc., was in violation of the terms of the Constitution, the supreme court said: "The language of the Constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the 'arms' necessary for a militiaman. It is to secure the existence of a well-regulated militia, that, by the express words of the clause, was the object of it, and I have always been at a loss to follow the line of thought that extends the guarantee to the right to carry pistols, dirks, bowie knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day. It is in my judgment a perversion of the meaning of the word 'arms,' as used in the phrase 'the right to keep and bear arms,' to treat it as including weapons of this character. The preamble to the clause is the key to the meaning of it. The word 'arms,' evidently means the arms of a militiaman, the weapons ordinarily used in battle, to wit, guns of every kind, swords, bayonets, horseman's pistols, etc. The very words 'bear arms' had then, and now have, a technical meaning. The 'arms bearing' part of a people were its men fit for service on the field of battle. That country was 'armed' that had an army ready for fight. The call 'to arms' was a call to put on the habiliments of battle; and I greatly doubt, if in any good author of those days a use of the word 'arms' when applied to a people can be found, which includes

pocket pistols, dirks, sword canes, tooth-picks, bowie knives, and a host of other relics of past barbarism, or inventions of modern savagery of like character. In what manner the right to keep and bear these pests of society can encourage or secure the existence of a militia, and especially of a well-regulated militia, I am not able to divine."

The same weapon was involved in the case of *English v. State*, 35 Tex. 473, 14 Am. Rep. 374. The arms-bearing section of the Constitution of the state of Texas reads: "Every person shall have the right to keep and bear arms in the lawful defense of himself or the state, under such regulations as the legislature may prescribe." On this the supreme court of that state, speaking through Justice Walker, said: "We understand the word 'arms,' when used in this connection, as having the same import and meaning which it has when used in the Amendment of the Federal Constitution." It will thus be seen that the court held contrary to the general rule, that the 2d article to the Amendment of the Constitution of the United States is of a nature to bind both the state and national legislatures, but its construction of the word "arms" is none the less valuable. "To refer to deadly devices and instruments, called in the statute 'deadly weapons,' to the proper or necessary arms of a 'well-regulated militia,' is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the Constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit. The word 'arms' in the connection we find it in the Constitution of the United States refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols, and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms. The terms 'dirks,' 'daggers,' 'slung shots,' 'sword canes,' 'brass knuckles,' and 'bowie knives,' belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline." The Constitution of the state of Arkansas on this subject is: "The citizens of this state shall have the right to keep and bear arms for their common defense." The legislature passed a prohibitory act providing "that any person who shall wear or carry any pistol of any kind whatever, or any dirk, butcher

or bowie knife, or sword or spear in a cane, brass or metal knucks, or razor, as a weapon, shall be adjudged guilty of a misdemeanor," etc. The construction of this provision of the laws of that state arose in the case of *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556, and the supreme court held: "The provisions of article 2, § 5 of the Constitution of this state, securing to the citizens the right to keep and bear arms for their common defense, relate to such arms as are used for purposes of war; and does not prevent the legislature from prohibiting the wearing of such weapons as are not used in civilized warfare, and would not contribute to the common defense. . . . The act of February 16, 1875, which prohibits the carrying of any pistol whatever as a weapon, refers to such pistols as are usually carried in the pocket, and of a size to be concealed about the person, and used in private quarrels; and not to such as are within the provisions of the Constitution." That was a case, as is the one at bar, wherein the carrying of a pistol was involved; the defendant taking the position that the act of the legislature, which prohibited absolutely the carrying of the articles mentioned therein, was in violation of the Constitution, and void. The remarks of the court are peculiarly applicable to our own statute: "From the company in which the pistol is placed, and the known public mischief which the legislature intended by the act to prevent, it is manifest that the pistol intended to be proscribed is such as is usually carried in the pocket, or of a size to be concealed about the person, and used in private quarrels and brawls, and not such as is in ordinary use and effective as a weapon of war, and useful and necessary for 'the common defense.' The indications in the evidence are that the plaintiff in error was carrying a pistol of that class or character intended to be prohibited by the legislature, and which, we think, may be prohibited in the exercise of the police power of the state, without any infringement of the constitutional right of the citizens of the state to keep and bear arms for their common defense." The case of *Salina v. Blaksley*, 72 Kan. 230, 3 L.R.A.(N.S.) 168, 115 Am. St. Rep. 196, 83 Pac. 619, 7 A. & E. Ann. Cas. 925, was another one wherein the question of the right of the defendant to carry a pistol was before the supreme court of the state of Kansas for determination. Section 4 of the Bill of Rights of that state is as follows: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordina-

tion to the civil power." The statute of the state of Kansas provided that a city council may prohibit and punish the carrying of fire arms or other deadly weapons, concealed or otherwise. The defendant was arrested for carrying a pistol, and his contention was that this section of the Bill of Rights was a constitutional inhibition upon the power of the legislature to prohibit an individual from bearing arms, and that the section of the statute mentioned was in conflict with this constitutional provision, and therefore void. The court held the provision of the Kansas Constitution (Bill of Rights, § 4), "that 'the people have the right to bear arms for their defense and security,' is a limitation on legislative power to enact laws, prohibiting the bearing of arms in the militia or any other military organization provided for by law, but is not a limitation on legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons." Mr. Bishop in his work on Statutory Crimes, § 793, has this to say on this subject: "The same guaranty to the people of the right 'to keep and bear arms' is largely found in our state Constitutions; in some of them in these words alone, and in others more or less qualified. In reason the keeping and bearing of arms has reference only to war, and possibly also to insurrections, wherein the forms of war are as far as practicable observed; yet certainly not to broils, bravado, and tumult, disturbing the public repose, or to private assassination and secret revenge. Nor are these, in the language of the constitutional provision now under consideration, 'necessary to the security of a free state.' Nor yet are dirks, bludgeons, revolvers, and other weapons which are not used in war 'arms.'"

While not contained in the same paragraph with the provision securing the right to bear arms, as in many of the other Constitutions, § 40 of article 3—§ 113 of Bunn's Constitution of Oklahoma—provides: "The legislature shall provide for organizing, disciplining, arming, maintaining, and equipping the militia of the state." Herein is shown clearly that the Constitution contemplates the maintenance of an armed militia, and, taking this in connection with the other provision and the views expressed by the courts from whose decisions we have quoted, and the history of, and ends to be attained by, the arms-bearing provision, we believe there is no room for doubt that the arms defendant had a right to bear, and which right could never be prohibited to him, relates solely to such arms as are recognized in civilized warfare, and not those used by the ruffian, bravler, or the assas-

sin; and we are further convinced that the act of the legislature under which the defendant in this case was arrested, tried, and convicted was not repealed or in conflict with the terms of the Constitution, but was among the valid enactments in force in the territory of Oklahoma at the time of its admission; was neither repugnant to the Constitution nor locally inapplicable; was extended in force in the state of Oklahoma. Hence the application of petitioner herein should be denied.

All the Justices concur except Williams, Ch. J., who concurs in conclusion.

OKLAHOMA CRIMINAL COURT OF APPEALS.

UNITED STATES OF AMERICA

v.

WILLIE HARGO, Appt.

(— Okla. —, 98 Pac. 1021.)

Contempt — summoning jurors — officer's misconduct.

1. If any officer whose duty it shall be to summon a jury, or to select and summon talesmen when the regular panel of jurors has been exhausted, shall be guilty of unlawful, partial, or improper conduct in selecting or summoning such jurors or talesmen, he commits an act of gross contempt of court, and should be severely punished for such conduct.

Summoning jurors — officers — duties — impartiality.

2. It is the duty of the officer who summons jurors, or who selects and summons talesmen, to use his best efforts to secure men of intelligence, courage, and good moral character; but, in doing this, he should act with entire impartiality between the prosecution and the defendant.

Trial — withdrawal of jury — officer's misconduct.

3. When a motion is made, supported by

Headnotes by FURMAN, P. J.

Case Note. — Summoning biased or otherwise improper jurors or talesmen as a contempt.

A search has disclosed but one other reported case upon this subject,—namely, *Richards v. United States*, 61 C. C. A. 161, 126 Fed. 105,—in which it was held that the fact that the marshal knew that one of the talesmen whom he caused to be subpoenaed was a friend of the defendant was not in itself evidence sufficient to establish the charge of wilful contempt of court. The court said: "The most that can be said of the evidence against the marshal is that, conceding it all to be true, it presents some circumstances calculated to arouse

affidavit, to withdraw a case from the consideration of, and to discharge, a jury, on account of improper action of the officer who selected and summoned the jury or the talesmen, and such motion is made as soon as the facts stated therein come to the knowledge of the defendant or his counsel, and the matters of fact therein stated are not denied under oath, they will be taken as confessed, and will be construed most strongly against the prosecution, and in favor of the defendant.

Jury — challenge to panel — grounds.

4. A challenge to the array or panel will lie for bias, partiality, or irregular action of the summoning officer.

Appeal — technical errors — unfair trial.

5. When the record shows that a conviction has been fairly obtained, this court will not consider technical errors which do not affect the substantial rights of the defendant. But we will not allow any judgment of conviction to stand when the record shows that unfair means were resorted to in order to obtain it.

(January 13, 1909.)

A PPEAL by defendant from a judgment of the United States Court for the Western District of the Indian Territory convicting him of murder. Reversed.

Statement by Furman, P. J.:

On the 14th day of April, 1905, Willie Hargo, hereinafter called defendant, was indicted in the United States court for the western district of Indian territory, sitting at Wewoka, for the offense of murder. The defendant was arraigned and pleaded not guilty. The defendant was placed upon trial on said indictment, and on the 11th day of April, 1906, was, by the jury, found guilty of murder without capital punishment. Defendant filed a motion for a new trial, which, being overruled, defendant excepted. This case was carried by appeal to the United States court of appeals of the Indian territory. Upon the admission of the state of Oklahoma into the Union under the enabling

suspicion, but not sufficient to sustain a judgment of conviction of so grave an offense as that with which he is charged."

It will be noted that this decision is opposed to *UNITED STATES v. HARGO*, and there is no apparent distinction between the acts of the summoning officers. Although the precise question before the court in the latter case was whether the defendant in the original suit had had a fair trial, the express and unequivocal language of the court, both in the opinion and in the first headnote, by the judge who wrote the opinion, leaves little, if any, doubt as to what its decision would have been had the summoning officer been before the court on the charge of contempt.

act (act June 16, 1906, chap. 3335, 34 Stat. at L. 267) and the Constitution, the case was transferred to the supreme court of Oklahoma. Upon the creation of the criminal court of appeals, the case was transferred to this court, as directed by statute.

Messrs. Crump & Rogers and W. J. Crump for appellant.

Mr. William M. Mellette for the United States.

Furman, P. J., delivered the opinion of the court:

After two witnesses had been introduced on behalf of the prosecution, the defendant filed a motion, supported by affidavit, to withdraw the case from the jury, and that the jury be discharged from the further consideration of the case, upon the ground that, after the regular panel of jurors had been exhausted, the deputy marshal, who was ordered to summon talesmen to complete the panel, was guilty of improper conduct in summoning said talesmen, by discriminating against the defendant in refusing to summon men to serve as jurors who were acquainted with George Crump, one of the attorneys for the defendant. It appears from the record that, before summoning a talesman, the deputy marshal would ask him if he was acquainted with George Crump, and then press the inquiry as to the extent of the acquaintance; and, if it appeared that the party interrogated was well acquainted with the said Crump, the deputy marshal would say, "That is all," and would pass on to other persons, without summoning such person as a talesman. It further appears that this motion was filed as soon as the information upon which it was based came to the knowledge of defendant and his counsel. There was no reply to, or denial of, the statements of fact contained in the motion and in the affidavit filed in support thereof. Here is a direct charge of improper conduct and discrimination against the defendant, on the part of an officer of the court. This charge is supported by affidavit. If the charge was untrue, it was the duty of the prosecution to reply to it. Failing to do this, we are bound to consider the facts stated as confessed. This case originated in that section of the state which then constituted Indian territory. Section 1057, Carter's Ind. Terr. Anno. Stat. 1899, which was placed in force in that territory by act of Congress, is as follows: "Every person whose duty it shall be to select or summon jurors, in any court, or before any officer, who shall be guilty of any unlawful, partial, or improper conduct in selecting or summoning any juror, shall be deemed guilty of a misdemeanor, and, on 20 L.R.A. (N.S.)

conviction, shall be fined in any sum not less than \$100." It will not be denied that it was improper, and clearly indicated partiality, for the officer who was charged with the duty of selecting and summoning the talesmen to attempt to exclude from the jury those who were acquainted with counsel for the defense. To tolerate such conduct would be to permit such an officer, charged with the duty of selecting and summoning talesmen, to amend the statute, and create a new ground for challenge for actual bias; viz., that of being acquainted with counsel for the defendant, while acquaintance with the prosecuting attorney would not be a disqualification. It is the duty of an officer selecting and summoning talesmen to use his best judgment in securing men of intelligence, courage, and good moral character. But, in doing this, he should act with entire impartiality. It was to secure this result that the statute above quoted was enacted. There being no denial of the motion and affidavit filed by the defendant, we are required to construe the statements there made most strongly against the officer, and in favor of the defendant. From this standpoint the officer was guilty of a gross contempt of court, as well as a violation of a penal statute; and should have been dequied to make a satisfactory explanation, or have been severely dealt with. Courts cannot be too careful in rigidly suppressing everything which indicates the least bias or partiality in the selection, summoning, or taking care of jurors. Anything which gives the least odor of unfairness in the selection, summoning, or control of a jury will taint their verdict, and constitute a ground for reversal. Trial by jury means much more than a trial by twelve men. It not only means that the twelve men must possess the qualifications prescribed by law, but it also means that they must have been selected and summoned by impartial and disinterested officers.

The justice of this position is so manifest that it is not deemed necessary to cite many authorities in its support, but we will give a few. "A challenge to the array or panel will also lie for the bias, partiality, or irregular action of the summoning officer." 12 Enc. Pl. & Pr. p. 421, and authorities there cited. "It is essential to the fair and impartial administration of justice that the jury shall be selected and summoned by officers having no interest in the matters to be decided by them. An officer is not qualified to act in summoning a jury . . . if he is interested in the event of the action, although not a party of record. . . . Where a jury is summoned by an officer who is disqualified for such reasons as [are] above stated, it is ground for challenge to

the array." 24 Cyc. Law & Proc. p. 226, and authorities there cited. The weight of authority goes even further than is stated in the above quotations, and holds that, if the officer who selects and summons the jury allows one who is interested in the case pending to suggest names or point out persons to be summoned, although the officer himself may not be otherwise objectionable, yet such conduct is ground for challenge to the array.

The motion to withdraw this case from the consideration of the jury, and discharge the jury, was made at the earliest possible moment after the facts came to the knowledge of defendant and his counsel. It was therefore in time. It is the supreme purpose of this court to see that every person charged with crime shall receive, as near as possible, a fair trial. No trial which is not fair comes within the definition of "due process of law." When the record shows that a conviction has been fairly had, then this court will not consider technical errors which do not affect the substantial rights of the defendant. But we will not allow any judgment of conviction to stand when the record shows that unfair means were resorted to in order to obtain it. It is true that the defendant in this case is an ignorant Indian, who cannot speak or understand the English language. So much the greater reason why the trial court should have been vigilant in guarding his right to a fair trial. There are other questions presented in this record, but we will confine our decision to the question presented alone, in order that we may emphasize the idea that trials must be fair, or convictions will not be sustained by this court. We are determined that every person in Oklahoma, regardless of race or nationality or social position or poverty, can rely upon the absolute fairness of the courts of the state.

For the error in overruling defendant's motion to withdraw this case from the consideration of, and to discharge, the jury, the judgment is reversed.

Baker and Doyle, JJ., concur.

OREGON SUPREME COURT.

STATE OF OREGON EX REL. J. H. McNARY, Resp't.,
v.

F. I. DUNBAR, Appt.

(— Or. —, 98 Pac. 878.)

Officer — illegal fee — duty.

1. A public official who has collected fees under statutory authority, in violation of 20 L.R.A. (N.S.)

the Constitution, cannot be compelled to turn them over to the state, where the legislature has made no provision therefor.

Same — copies — cost.

2. A constitutional provision that the secretary of state shall be paid a salary, and receive no fees or perquisites whatever for the performance of any duties, does not prevent the allowance to him of the necessary cost of procuring copies of laws and resolutions, which he is required to deliver to the state printer.

(December 29, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County compelling him to turn over to the state the amount of fees alleged to have been illegally collected by him. Reversed.

Statement by Eakin, J.:

This is a suit originally commenced by J. K. Sears, a taxpayer, on behalf of the state, alleging that between January 14, 1899, and January 14, 1907, defendant, as secretary of state, had received for the use and benefit of the state a large amount of money as fees for filing various papers, issuing commissions and licenses, recording documents, and copying public records, which money he had converted to his own use, and asks that an accounting be taken of the sums of money so received, and for a decree requiring defendant to pay such sums to the state. A demurrer to the complaint was sustained by the court for the reason that Sears has not capacity to maintain the suit, and thereupon, by amended complaint, the state, at the relation of J. H. McNary, district attorney for the third judicial district, was substituted as plaintiff therein. The answer of

Case Note. — Right of public to fees unlawfully collected by officer for his own benefit.

While cases are not lacking upon the question as to the right of the state, county, municipality, or other public body to recover from a public officer moneys unlawfully collected by him from third persons, where he assumed to make the collection for the benefit of the public body, a search has disclosed but three other cases which, like *STATE EX REL. McNARY v. DUNBAR*, involved the right of the public to fees unlawfully collected by an officer who assumed to collect them for his own benefit, and not for the benefit of the public.

One of these cases *Re Benton*, 66 Vt. 507, 29 Atl. 805, appears to support the position taken in the *DUNBAR CASE* on this point, as it held that the state could not have maintained an action against a clerk and judge of the probate court in his lifetime for fees received by him from private individuals for making records which he in fact failed to make; and, further, that the state

the defendant admits that he was secretary of state, as alleged, and that the relator, J. H. McNary, is district attorney for the third judicial district, as alleged, but denies all other allegations of the complaint.

Upon the trial, the lower court found that defendant, as such secretary of state, received the following sums:

For filing articles of incorporation	\$ 9,144 50
" issuing notarial commissions	17,186 00
" recording trademarks	1,285 00
" copying laws and journals	11,684 75
" issuing appointments of commissioners of deeds	148 00
" issuing other commissions	814 00
" issuing agents' certificates to fire ins. companies	35,060 00
" issuing licenses to life insurance agents	3,759 00
" issuing annual licenses to life insurance companies	21,488 16
" issuing requisitions and warrants of arrest	912 00
" registering titles in insurance matters	380 00
" issuing powers of attorney	970 00
" issuing certificates of authority to ins. companies	105 00
" filing statements of mutual fire ins. associations	390 00
Total	\$103,926 41

Judgment was rendered for the above to-

could not create a claim against his estate for such fees by a legislative enactment that such records should be made at the expense of the state, which should be reimbursed by the estate. The court said: "The fees were paid him, and, as against the state, were his absolute property. He was under no liability, either express or implied, to account for them to the state. What right the parties who paid for making the records had against the deceased is a question not before us, and we express no opinion upon it."

In apparent opposition to the decision in the last case, and also to the DUNBAR CASE, is *Anderson v. Lewis*, 6 Idaho, 51, 52 Pac. 163, holding that where the secretary of state, under a contract with the printer of the Session Laws, received fees from the latter for preparing copies of the laws and journal for him, that being a duty which the secretary was bound by law to perform without compensation other than his salary, he may be required to pay the amount into the state treasury. This case, however, is perhaps distinguishable for the reason that the payment by the printer seems to have been voluntary, so that he probably would have had no right of action against the secretary of state to recover back the same.

The third case is *Bliss v. United States*, 38 Fed. 230, in which Brewer, J., held that where a United States district attorney, by arrangement with defendants in certain suits for the collection of internal revenue taxes, was paid more than the fees to which he was entitled by statute, public policy required that the excess should belong to the government, although the good faith of the transaction was beyond question. This case is perhaps distinguishable from *STATE* 20 L.R.A. (N.S.)

tal in favor of the state, from which the defendant appeals.

Messrs. George G. Bingham and G. C. Fulton, for appellant:

Contemporaneous legislative interpretation of the Constitution, long followed and universally adopted, is entitled to the force of judicial exposition, and these acts have been recognized as constitutional for over fifty years by every legislative assembly.

Moog v. Randolph, 77 Ala. 597; *Ex parte Hardy*, 68 Ala. 303; *Re Warfield*, 22 Cal. 51, 83 Am. Dec. 49; *People ex rel. Badger v. Leventhal*, 93 Ill. 191; *State ex rel. Horne v. Holcomb*, 46 Neb. 88, 64 N. W. 437; *Endlich*, Interpretation of Statutes, § 357; 2 *Lewis's Sutherland*, Stat. Constr. § 376; *Sedgw. Stat. & Const. Law*, § 552; *Cline v. Greenwood*, 10 Or. 230.

The fees were voluntarily paid under legislative sanction, and no part thereof belongs to the state.

Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836.

The acts of the legislature authorizing the secretary of state to collect the fees, as well as the resolutions of the legislative assembly

EX REL. McNARY v. DUNBAR, for the reason that the payment seems to have been entirely voluntary on the part of the defendants in the actions, so that they probably could not have maintained an action for its recovery. In other respects, however, the case is a strong one for this side of the question, since the transaction was open and above suspicion, and approved by the court in which the judgment was rendered, and there was nothing excessive in the allowance, considering the importance of the litigation and the labor necessarily performed in the prosecution of the suits, and Judge Brewer said that, were it not for the imperative and important rule of law and public policy, he should feel constrained to sustain the right of the district attorney to the entire amount of fees. Thayer, J., wrote an opinion in this case, reported in 37 Fed. 191, taking the same position. His judgment, however, was, for some reason not disclosed, set aside on his own motion, and the case set down for hearing before Brewer, J.

Cases like *People v. Van Ness*, 79 Cal. 84, 12 Am. St. Rep. 134, 21 Pac. 554; *Philipsburg v. Degenhart*, 30 Mont. 299, 76 Pac. 694; *Yamhill County v. Foster* (Or.) 99 Pac. 286; *Custer County v. Tunley*, 13 S. D. 7, 79 Am. St. Rep. 870, 82 N. W. 84, holding that a public officer may be required to pay to the public body moneys unlawfully collected from third persons, where he assumed to collect the money for the benefit of the public, and not for his own benefit, are not in point on this note. So, of course, cases involving the right of the public body to recover amounts unlawfully or improperly allowed or paid by it to the officer are beyond the scope of the note.

blies, authorizing the payment to him for copying laws, senate and house journals, are clearly constitutional.

State ex rel. Tzschuck v. Weston, 4 Neb. 234; State v. Kelsey, 44 N. J. L. 1; People ex rel. Follett v. Fitch, 145 N. Y. 261, 39 N. E. 972; State v. Braddish, 34 Vt. 419; Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1180; San Luis Obispo County v. Felts, 104 Cal. 60, 37 Pac. 780; Shiffert v. Montgomery County, 12 Montg. Co. L. Rep. 100.

A general understanding of a law, and constant practice under it for so long a period by all the officers of government whose duty it has been to execute it, unquestioned by any suit or public or private action to test or settle the construction in the courts, is very strong, if not conclusive, evidence of its true meaning and application, and that they are such as it has thus received.

Scanlan v. Childs, 33 Wis. 663; Harrington v. Smith, 28 Wis. 43; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; Sedgw. Stat. & Const. Law, 255; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Prigg v. Pennsylvania, 16 Pet. 621, 10 L. ed. 1091.

The constitutional provision that state officers shall receive no fees or perquisites whatever for the performance of any duty connected with their respective offices other than a salary is not self-executing, and requires further legislation for its enforcement.

Acme Dairy Co. v. Astoria, 49 Or. 520, 90 Pac. 154; Griffin v. Rhoton, 85 Ark. 89, 107 S. W. 380; Groves v. Slaughter, 15 Pet. 496, 10 L. ed. 817.

Messrs. L. H. McMahan and John H. McNary for respondent:

A salaried officer cannot rightfully claim compensations as his salary for performing a new duty or one imposed by the legislature since his salary was provided.

Palmer v. New York, 2 Sandf. 318; Dill. Mun. Corp. 3d ed. §§ 233, 234; People ex rel. Phoenix v. New York, 1 Hill, 367.

Eakin, J., delivered the opinion of the court:

At the trial, the defendant, by motion and demurrer, questioned the power of the court to permit by an amended complaint a substitution of the state as plaintiff in place of Sears, and also the power of a district attorney of his own motion to institute a proceeding on behalf of the state to recover a debt due to it. The trial court denied the motion and overruled the demurrer, and the defendant presses these contentions here; but we find it unnecessary to consider them, 20 L.R.A. (N.S.)

as the case is disposed of in his favor on the merits.

The foundation of plaintiff's right of recovery, as disclosed by the complaint, is that these sums of money were collected by the secretary of state for the use and benefit of the state; the contention of plaintiff being that the Constitution prescribes a salary for the secretary of state, and fixes that as his whole compensation; and that therefore the statute which allows to him certain fees and perquisites for work done is unconstitutional and void. Article 13 of the Constitution provides, among other things, that: ". . . The secretary of state shall receive an annual salary of \$1,500 . . . [and] shall receive no fees or perquisites whatever for the performance of any duties. . . ."

It is conceded that the fees received for filing articles of incorporation, issuing commissions to notaries, appointments of commissioners of deeds, miscellaneous commissions, and requisitions and warrants of arrest, were authorized by, and all collected under, § 2923, Bellinger & C. Anno. Codes & Statutes, which is § 11 of an act of the legislative assembly entitled, "An Act to Prescribe the Fees of Certain Officers and Persons," passed October 24, 1864 (see Deady's Gen. Laws 1845-64, p. 732, chap. 18), § 1 of which provides: "The following fees shall be allowed to the officers and persons hereinafter named for the services herein specified." Section 11 (Bellinger & C. Anno. Codes & Statutes, § 2923) provides: "The fees of the secretary of state shall be as follows: For certifying and affixing the seal of the state to any document or paper, \$2; for making copies of any record or file, each folio, 25 cents; for filing articles of incorporation, \$2.50; for recording any paper or document by law required to be recorded by him, for each folio, 25 cents." Also, the fees received by him as insurance commissioner were exacted under a legislative act entitled, "An Act to License and Regulate Insurance Business in the State of Oregon," adopted February 25, 1887 (Laws 1887, p. 118), which, with amendments and additions thereto, constitutes §§ 3706-3756, inclusive, Bellinger & C. Anno. Codes & Statutes. Section 1 of the act provides that "the secretary of state shall be *ex officio* insurance commissioner of this state, and shall receive for his services as such commissioner the compensation hereinafter provided therefor." The fees received for filing trademarks were exacted under Bellinger & C. Anno. Codes & Statutes, § 4615, which provides: "A fee of \$2.50 shall be paid to the secretary of state by the owner of said trademark, as pay for recording."

Assuming, without deciding, that the compensation provided for in these statutes is

fees and perquisites, and within the inhibition of the Constitution, then the legislative acts authorizing them are clearly void, to that extent, and cannot be construed as authorizing the collection of them for the use and benefit of the state. No such intention on the part of the legislature is apparent. The right to exact such fees for the benefit of the state, or its title to the money so collected, must be established by legislative authority. If the fees cannot be exacted for the purpose prescribed in the statute, then they cannot be exacted at all; and, if collected without authority, may be recovered by the person from whom exacted, if he is not otherwise barred. *Mechem*, Pub. Off. § 884, and cases cited. In cases in which the manner of compensating officers has been changed from fees to a salary, it has been held that the collection for the use and benefit of the state, under legislative authority, of the fees theretofore provided as compensation to the officer, is not objectionable, as being a special tax, but that it is competent for the legislature, if it sees proper, to exact from persons especially benefited by the performance of an official service a reasonable compensation therefor, to be paid into the public treasury, to reimburse the public for the expense incurred in providing for and maintaining such office. *Conner v. New York*, 2 Sandf. 355; *State ex rel. Atty. Gen. v. First Judicial Dist. Judges*, 21 Ohio St. 1. Both of these cases recognize that fees allowed by law to an officer as compensation for services rendered are the property of the officer, but that the legislature may compensate the officer by a salary, and require him to collect the fees for the use and benefit of the public. To the same effect is 23 Am. & Eng. Enc. Law, p. 387, and cases cited. But the state's right to such fees depends upon some legislative provision exacting the same as compensation to the state. This is the provision of the act of our legislature, placing county officers upon salaries (*Laws 1893*, p. 163), and the act fixing the salary of state officers (*Laws 1905*, p. 133); but the unauthorized exaction of fees by an officer cannot operate to give the state or the county title to the money so received. This was expressly decided by this court in *Howard v. Clatsop County*, 41 Or. 149, 68 Pac. 425, construing § 2927, *Bellinger & C. Anno. Codes & Statutes*, which was enacted by the legislative assembly in 1899, and provides that the district attorneys of the several judicial districts shall receive salaries as full compensation for their services. Section 2928, *ibid.*, provides that they shall receive no other fees or compensation of any kind.

By § 1098, *Bellinger & C. Anno. Codes & Statutes* (N.S.)

& Statutes, enacted in 1878, it is made the duty of the county clerk to collect from the plaintiff in every divorce suit the sum of \$10, which sum shall be paid to the district attorney as his fee in such suit. In *Howard v. Clatsop County*, *supra*, which is an action to recover from the county a \$10 district attorney fee exacted in a divorce suit and paid over to the county, the court, in construing §§ 2927 and 2928, held that they operate to repeal § 1098, so far as it authorizes the collection of \$10 as a district attorney fee in divorce cases. Mr. Justice Wolverton says: "The \$10 fee required to be collected from a private party, under § 1074 [*Bellinger & C. Anno. Codes & Statutes*, § 1098], being one to which the district attorney was entitled as a perquisite for a duty performed by him, the act of 1899, putting him upon a salary, and expressly denying to him any further salary, fees, etc., must be held to supersede, and thereby to repeal, § 1074 [*Bellinger & C. Anno. Codes & Statutes*, § 1098] as to such fee in judicial districts other than the fourth, as the two provisions are utterly inconsistent, one with the other, and both cannot stand." And it was held that, upon the face of the complaint, plaintiff was entitled to recover such fee. The act of 1898 (*Laws 1898*, p. 8, § 3), which fixes a salary for the district attorney of the fourth judicial district, and which applied only to Multnomah county, provides, by § 8 thereof, which is § 3030, *Bellinger & C. Anno. Codes & Statutes*, that the fees now established by law shall continue to be the established fees, and shall be collected for the use of Multnomah county. In *State ex rel. Fitzgerald v. Moore*, 37 Or. 536, 62 Pac. 26, it is held, in effect, that the right to the \$10 district attorney fee in divorce cases in Multnomah county, by virtue of the above provisions inured to the benefit of the county. The effect of these two decisions is that the clerk had no authority to exact the fee for the benefit of the county unless it had been expressly authorized; and, when wrongfully collected, the county acquired no right or title to it; but that it was the property of the person from whom it had been exacted. And this principle applies equally to the statute authorizing the exaction of fees by the secretary of state. If the fees are illegally exacted, they are the property of the person from whom collected, and the state has no right thereto.

The only other item of fees sued for relates to the compensation allowed to the secretary of state for copying laws and resolutions for the use of the state printer. The legislature, at each session, by resolution, directed the secretary of state to furnish to the state printer, within thirty days

after its adjournment, true and correct copies of the laws and resolutions adopted at that session; and that the compensation for making such transcripts should be as prescribed by law for like services in other cases. There is nothing in this record indicating that the amounts allowed by the resolutions were not expended in the preparation of the laws and resolutions as required. *Bellinger & C. Anno. Codes & Statutes*, § 2390, provides: "The secretary of state shall be empowered to employ and appoint clerks to aid in the performance of the duties of his office: Provided, that the expenditure of moneys for the pay of such clerks shall not exceed the appropriation of the legislative assembly therefor, and that such clerks shall be paid out of the state treasury as other officers are paid." The allowance provided by the resolution above referred to is not as personal compensation to the secretary of state for personal services, to be rendered by him, but is to pay the expense of having such records transcribed. A "salary" is personal compensation provided to be paid to the officer for his own services, and does not prevent an allowance for clerk hire. *People use of Lawrence County v. Adams*, 65 Ill. App. 283; *Briscoe v. Clark County*, 95 Ill. 309. A similar provision was made by the last legislature to meet the expense of like work by the present secretary of state, who is serving under a salary law which took effect January 1, 1907.

We conclude that the state has no right or title to the fees and perquisites exacted by the defendant under the statutes herein referred to, nor is the defendant accountable to the state therefor in this suit.

Therefore the decree is reversed, and the suit dismissed.

PENNSYLVANIA SUPREME COURT.

ELIZABETH H. POWELL

v.

PHILADELPHIA & READING RAILWAY COMPANY, Appt.

(220 Pa. 638, 70 Atl. 268.)

Carrier — passenger — termination of relation.

1. The mere use, by a passenger who has alighted from a train, of a public crossing, in getting to a station on the opposite side of the track, which is nearest his destination, does not *per se* terminate his relation to the carrier.

Trial — jury — relation of passenger.

2. The jury must determine, as a question of fact, whether or not a passenger injured after arriving at his station, while 20 L.R.A. (N.S.)

awaiting the arrival of the friends who were to meet him, had, prior to the injury, been offered a reasonable opportunity to make arrangements to depart, so as to terminate his relation of passenger to the carrier.

Carrier — passenger — termination of relation.

3. A passenger who, upon alighting from a train, goes to the station, which is some distance from the place where he left the train, simply to await the arrival of a street car upon which he intends to become a passenger, and which could have been boarded from points less distant, cannot claim the rights of a passenger if injured by the negligence of the railroad company.

Same — awaiting friends.

4. A passenger alighting from a railroad train has a right to remain in the railroad waiting room a reasonable time, awaiting the arrival of friends who are to meet him, without losing his rights as a passenger.

Same — negligence — liability.

5. A railroad company is liable to a passenger who, because of obstructions on the path providing egress from its station, is compelled to walk so close to tracks used by trains that, without negligence on his part, he is struck by a train passing along the track.

Same — absence of light.

6. A railroad company is liable for injury to a passenger through failure to light the path providing egress from its station sufficiently to enable the passenger to avoid collision with a train on an adjoining track.

(April 20, 1908.)

Case Note — Termination of passenger's relation as such upon reaching destination.

The cases upon this question prior to those cited in this note are collated in the subject note to *Glenn v. Lake Erie & W. R. Co.* 2 L.R.A. (N.S.) 873. And prior cases upon the narrower question of what time must or should be allowed passengers to alight are to be found in the case note to *Chicago, R. I. & P. R. Co. v. Wimmer*, 4 L.R.A. (N.S.) 140.

The relation of carrier and passenger ceases only after the train (*Hill v. St. Louis, I. M. & S. R. Co.* 85 Ark. 529, 109 S. W. 523) or street car (*Melton v. Birmingham R. Light & P. Co.* 153 Ala. 95, 16 L.R.A. (N.S.) 467, 45 So. 151) has reached the passenger's destination, and he has had a reasonable time and opportunity to safely alight and leave the carrier's premises.

In *Southern R. Co. v. Wright* (Ga. App.) 64 S. E. 703, it was held that the duty of extraordinary diligence for the safety of passengers, devolving upon a carrier, continues until the passenger has safely alighted from the train, and it is not error to so instruct the jury.

In *Bass v. Cleveland, C. C. & St. L. R.*

APPEAL by defendant from a judgment of the Court of Common Pleas for Bucks County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

In the opinion of the trial court by Stout, J., the facts were stated as follows:

At about 6:40 o'clock on the evening of November 29, 1905, the plaintiff, Elizabeth H. Powell, accompanied by her friend Miss Gaunt (now Mrs. Engle), arrived at Langhorne station on a train from Philadelphia. They both alighted in safety on the temporary cinder walk or platform, on the south side of the railroad, then operated as a double-track road, running at that point from west to east from Philadelphia to New York City. They were on their way to visit at the house of Edward Palmer, who lived at Langhorne, north of the railroad, and who was to meet them at the station with a carriage. The passenger station-house was on the north side of the railroad. It had been located for many years at the foot of Station avenue, a street running in a northerly direction to Langhorne borough. About three weeks prior to this date, the station had been moved about 125 feet to the east, towards Bellevue avenue, the main street crossing the railroad at about right angles, and running in a northerly direction into Langhorne borough. On the north

side of the railroad the Langhorne and Bristol street railway ran from Bellevue avenue in a westerly direction along or near the defendant's land, and parallel with its tracks, for several squares to the west of the passenger station, where it crosses the railroad tracks to the south by an overhead bridge. The street railway stopped its cars at the foot of Station avenue, opposite the railroad station, to let off and take on passengers. The street railway maintained a small platform at this place for the accommodation of its passengers, but no waiting room. Street car passengers intending to take the railroad trains used the railroad's waiting rooms until the departure of their trains, and railroad passengers who desired to reach their destination by means of the street railway likewise used and remained in the defendant company's waiting rooms until the arrival of the next street car. There was no agreement between the defendant company and the street railway as to such use. The waiting rooms were so used by the passengers of both companies for the purposes aforesaid by the permission of the defendant company, at least it does not appear that any objection was made by the defendant company to such use since the street railway was in operation, about ten years. As said before, Miss Powell and her friend, Miss Gaunt, alighted on the platform in safety. It was a dark, rainy, stormy night. There was no shelter for

Co. 142 Mich. 177, 2 L.R.A. (N.S.) 875, 105 N. W. 151, 7 A. & E. Ann. Cas. 718, it was held that the failure of a passenger, who was asleep when the train reached his destination, to awaken and leave the train immediately upon its coming to a stop, did not terminate his relation as a passenger and the carrier's duty of protection, where those in charge of the train, knowing the facts, failed to awaken him and acquaint him with the fact that he should alight.

In *Forbes v. Chicago, R. I. & P. R. Co.* 135 Iowa, 679, 113 N. W. 477, it was held that where a passenger saw fit to remain upon the train, at the destination to which he had purchased a ticket, although the train had been stopped at the station for a reasonable length of time for the passengers to alight, it was to be presumed that he intended to pay the additional proper fare, and, until this presumption was overcome by some evidence that he intended to be carried without payment of fare, he was entitled to the same protection as any other passenger.

In *Legge v. New York, N. H. & H. R. Co.* 197 Mass. 88, 83 N. E. 367, it was held that a carrier is bound to use proper care to see that a passenger who alights from one of its cars at a station provided for that purpose, has a safe way of exit from its grounds; and the relation of passenger

and carrier continues until such exit is completed.

In *Chicago Union Traction Co. v. Rosenthal*, 217 Ill. 458, 75 N. E. 578, it was conceded that a passenger alighting from a street car is still a passenger while he has one foot on the ground and the other on the footboard of the car.

In *Tompkins v. Boston Elev. R. Co.* 201 Mass. 114, 87 N. E. 488, it was held that one riding on the platform of a crowded street car did not cease to be a passenger by temporarily alighting for the purpose of permitting some lady passengers to get off the car conveniently.

In *Legge v. New York, N. H. & H. R. Co.* supra, it was held that, if a passenger knowingly fails to make use of the proper exit provided by the carrier from its station grounds, and, without any invitation, either express or fairly to be implied from the situation and arrangements of the station and grounds, leaves the way marked out by the carrier and proceeds to make his exit in some other way, he ceases to be a passenger from that moment and becomes, at most, a mere licensee; nor does it make any difference that he goes where others, with the knowledge of the carrier, have gone before him, since the knowledge of such use, where a proper way has been provided, does not of itself amount to an invitation.

In *Payne v. Illinois C. R. Co.* 83 C. C. A.

passengers on the south platform, except a small open shed. Miss Powell had been at Langhorne several times before and had used the waiting rooms, but she had not been at Langhorne since the passenger station had been moved. Miss Gaunt had been a frequent visitor at Langhorne, and was well acquainted with the use of the waiting rooms, but had not been there since the station had been removed. They could not reach Mr. Palmer, who lived north of the railroad, without crossing the tracks. They could not cross from the point where they were on the platform to the waiting rooms on the north side, because of an iron picket fence between the east and west bound tracks, extending from a point west of the station to the line of Bellevue avenue, a public street crossing, the gates in front of the station being closed. They walked on the cinder walk to Bellevue avenue, over the public street crossing, to the north side of the railroad, at the end of the cinder walk, which led to the station and waiting rooms, about 190 feet west of Bellevue avenue. At this point they were as near to the street car line as they were at the station waiting rooms. They could have proceeded directly to Mr. Palmer's by the public streets, or they could have gone to the public licensed hotel opposite the street to wait for a car. They, however, did not do so. They took the newly laid cinder walk or platform to the railroad station. They entered the

waiting room and at once passed through it to the back door to see whether Mr. Palmer was there with a carriage. It was through the back door that passengers usually took their carriages before the station was moved. They found the door was locked. They looked through the windows, and found Mr. Palmer was not there. They then went to the booth and telephoned to Mr. Palmer to know what to do. He told them to sit down and wait. In a short time Mr. Palmer arrived to take them home in the street car. Their purpose of using the waiting room was to meet Mr. Palmer in the first place, and afterwards to await his arrival to take them home, and to secure shelter from the storm in the meantime. They then waited for the arrival of the next car, which was due at 7:40. On the arrival of the street car Mr. Palmer, the plaintiff, and Miss Gaunt, with a number of others, were waiting there for the same purpose. They all passed down a little bridge from the elevated temporary platform in front of the waiting room to the temporary cinder walk laid along the tracks where the old platform had been taken up the day before. It was while they were passing along this walk to meet the street car that Miss Powell was struck by a passing express train from the east and was injured. During this period the waiting rooms were open for the use of the defendant's passengers. Miss Powell held a return ticket to Philadelphia.

589, 155 Fed. 73, it was held that the deceased had ceased to be a passenger prior to his death, and the carrier at that time owed no duty to him as such, where it appeared that he alighted from a train in the night at the town where he resided; that the station, the town, and his home were all on the west side of the track, and the doors of the coaches, which were vestibuled, were opened on that side; and, that after his train had departed, he was killed by another train on a track to the eastward.

In *Hodges v. Southern P. Co.* 3 Cal. App. 307, 86 Pac. 620, the court refused to say, as a matter of law, that the relation of carrier and passenger would cease upon the expiration of four minutes after the arrival of the train at the point of destination.

In *Kaase v. Gulf. C. & S. F. R. Co.* 41 Tex. Civ. App. 370, 92 S. W. 444, it was held that the evidence supported a finding that plaintiff was not a passenger at the time of his injury, where defendant's testimony showed that the station—the terminus of the road—was announced in a distinct voice, and plaintiff remained on the car for more than five minutes after the train stopped at the depot.

In *Poland v. United Traction Co.* 107 App. Div. 561, 95 N. Y. Supp. 498, it was held that the trial court properly charged the jury that the street car company's duty to plaintiff as a passenger had ceased at the

time of the accident, where it appeared that she was the last of a number of passengers to leave the car at the terminus of its route; that she passed along the car to its front, turned sharply to cross in front of the car to the sidewalk, caught her foot in the fender of the car and was thrown down and injured; and that the time elapsing from the stopping of the car to the time she fell was from one to two minutes.

In *Green v. Baltimore & O. R. Co.* 214 Pa. 240, 63 Atl. 603, it was held that plaintiff was not a passenger at the time of her injury, where it appeared that she had left the train, passed from the train shed to the waiting room of the station, and, while proceeding along one of several passageways, in the direction indicated by a signboard, towards steps which led to the street, stumbled and fell over a large cuspidor.

In *Hall v. Bessemer & L. E. R. Co.* 36 Pa. Super. Ct. 556, where plaintiff, while making his way from the train over the station platform to the street, was injured by falling over a suit case belonging to another passenger and deposited on the platform by a hotel porter, the court said: "When a passenger has alighted from a train the relation of carrier and passenger remains until he has left the premises of the carrier." But as will be seen from the preceding cases, this statement of the law is too broad.

Messrs. Henry D. Paxson and William C. Ryan, for appellant:

The plaintiff, at the time of the accident, had ceased to be a passenger, and became a mere licensee, to whom the defendant company owed only the duty of not inflicting wilful injury upon her or being so grossly negligent toward her as would amount to wilful injury.

Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317; Baltimore & O. R. Co. v. Schwindling, 101 Pa. 261, 47 Am. Rep. 706; Davis v. Houston & T. C. R. Co. 25 Tex. Civ. App. 8, 59 S. W. 844; Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698.

Messrs. Henry A. James and Howard Cooper Johnson for appellee.

Elkin, J., delivered the opinion of the court:

After careful consideration, we have concluded that the first assignment of error must be sustained. Whether the plaintiff remained in the waiting room for an unreasonable length of time, so as to become a loiterer or mere licensee, was, under the circumstances of this case, a question of fact, to be determined by the jury. The learned trial judge, in his opinion overruling the motion for a new trial and for judgment *non obstante veredicto*, states that this was a question for the jury and that it was so submitted, but, upon an examination of the charge, it is clear that this question was not submitted to the jury, with instructions for them to determine this fact. On the other hand, the jury were instructed that, "according to the view which the court takes of that situation, the court will instruct you that her rights as a passenger had not ceased." This had reference to the exact question whether she had remained at the station an unreasonable length of time, and it can only be construed as a binding instruction to the jury. This binding instruction was followed by a general discussion of the facts relating to this particular question, but nowhere does it appear that any direction was given to the jury to determine this exact question. The effect of the charge in this respect can only be considered as binding instructions upon the question of reasonable length of time, and therefore the jury were not left to determine whether, under the circumstances, she had remained an unreasonable time at the station. We do not agree with the contention of the learned counsel for appellant that the relation of carrier and passenger had ceased as soon as plaintiff had been discharged from the train on the south side, and had proceeded from that point to the station-house on the north side, of the railroad tracks, 20 L.R.A. (N.S.)

being the point nearest her destination. This position is predicated on the thought that, in passing from the station-house on one side to the station-house on the other, the passenger passed over the tracks at a public crossing. If the railroad company had chosen to make a public crossing a convenience for its passengers in going from the station on one side of its tracks to that on the other, it cannot be excused for an act of negligence, on the ground that the relation of carrier and passenger had ceased the moment the passenger placed his foot upon the public highway. The general rule is that the relation of carrier and passenger begins as soon as one intending, in good faith, to become a passenger, enters in a lawful manner upon the carrier's premises to engage passage, and that relation continues to exist until the passenger has been made aware of his arrival at the place of destination, and has had a reasonable time to alight from the car and to leave the premises of the carrier. The duty of the defendant company, under this general rule in the present case, did not cease the moment plaintiff alighted from the train on the south side of the tracks, nor when she proceeded in the direction ordinarily taken by passengers to reach the station on the north side of the tracks, nor did it cease then until she had a reasonable opportunity to make her arrangements to depart. And right here is the pinch of the case on the question raised by the first assignment of error.

Clearly the plaintiff had the right, after alighting from the train, to proceed to the station on the opposite side of the tracks to await the arrival of a friend who was to meet her there. She was delayed a considerable length of time, and, for the reason stated in the testimony, she remained in the waiting room until the friend, whom she intended to visit, called for her. In this connection we quite agree with the suggestion made by the learned counsel for appellant, that it was no part of the duty of the railroad company to furnish a waiting room for the intending passengers of a street railway company with which the railroad company had no connection, and, if it clearly appeared that the only purpose of the plaintiff, after alighting from the train at the south side of the tracks, was to go to the station on the north side for the purpose of awaiting the arrival of a street railway car on which she intended to become a passenger, there could be no recovery, because the relation of carrier and passenger would, under these circumstances, have ceased to exist before the injury occurred. But we do not so understand the testimony on this branch of the case. The plaintiff went to the station by the ordinary route, either to meet her friend

or await his arrival in order to accompany her to her place of destination. The friend who was to meet her at the station might have walked, or even driven in a carriage, or come as a passenger on the street railway, and the manner of his coming would in no way affect her rights as a passenger of the railroad company. Under these circumstances the plaintiff had a right to make use of the waiting room of the defendant company for a reasonable length of time, and what was a reasonable length of time was a question of fact, to be determined by the jury. It was the duty of the court to instruct the jury to first determine this question before proceeding to inquire into the alleged negligence of the defendant company, because the right to recover at all depended upon the determination of this question by the jury. If it should be determined that plaintiff had remained at the station an unreasonable length of time before her departure, it would necessarily follow that the relation of carrier and passenger had ceased, and there could be no recovery for an injury subsequently sustained. As we view the testimony, the question of negligence was too broadly submitted to the jury. It was not negligence on the part of the defendant company to run the train which caused the injury on its own tracks and at the usual rate of speed for that train. The question of signals, headlights, and other incidental matters connected with the running of the train, about which some testimony was furnished at the trial, has no connection with this case. The negligence, if any, of the defendant company is in no manner connected with the running of the train which caused the injury. It was the duty of the defendant company to provide safe means of access to, and departure from, its station for the use of passengers, and the plaintiff in the present case had a right to assume that the means of ingress and egress were reasonably safe. It was the duty of the defendant company to make and maintain the walk in a reasonably safe condition, and if, on the night of the accident, the walk was torn up or covered with obstructions which interfered with its proper use, or which caused the plaintiff to walk too close to the railroad tracks in order to avoid the obstructions, and if this condition of the walk was the proximate cause of the injury, there can be a recovery of damages for the injuries thus sustained. Again, it was the duty of the defendant company to keep the walks and approaches to the station properly lighted at night, or when required. This duty was more imperatively demanded of the defendant company in the present case because of the close proximity of the walk to the railroad tracks, which

20 L.R.A. (N.S.)

necessarily made it somewhat dangerous. As we view it, there are only two questions of negligence to be submitted to the jury; that is, was the walk reasonably safe for the use intended and was it sufficiently lighted, and, if not, was failure to perform these duties the proximate cause of the accident?

It was the duty of plaintiff to use reasonable care in order to avoid danger. She was charged with notice that the defendant company had a right to run its trains on its own tracks at any time it suited its purpose to do so, and that a train might pass along while she was on the walk, and the duty rested on her to use reasonable care in order to avoid danger to her person. If she walked too close to the railroad tracks, without looking ahead and without exercising such reasonable care as a prudent person should exercise under the circumstances, and was injured by reason of her own neglect, clearly there could be no recovery. Under the circumstances, however, we have concluded that this question was also for the jury.

Judgment reversed, and a venire facias de novo awarded.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT
OF APPEALS, THIRD CIRCUIT.

CHARLES GILPIN, Bankrupt, Petitioner,
v.
MERCHANTS' NATIONAL BANK.

(— C. C. A. —, 165 Fed. 607.)

Bankruptcy — false statement — mistake.

The materially false statement the use of which in obtaining credit will prevent one's receiving his discharge in bankruptcy must be intentionally or knowingly untrue; and therefore a statement by the bookkeeper of the applicant for discharge, prepared from books not fully posted, which is believed to be approximately true, but which the actual state of the business proved to be untrue, will not prevent a discharge.

(November 21, 1908.)

Case Note. — *Bankruptcy; character of false statement which will prevent a discharge.*

The position taken in the foregoing case, that a statement, to be false within the meaning of the provision of the bankruptcy act under consideration, must involve something more than the mere element of untruth, is supported by the opinion of Trieber, D. J., in *Re Collins*, 157 Fed. 120, where

PETITION by Charles Gilpin, bankrupt, to review in matter of law the ruling of the District Court of the United States for the Eastern District of Pennsylvania sustaining an exception to his application for discharge, to the effect that the bankrupt had obtained money on credit upon a materially false statement in writing. Reversed.

The facts are stated in the opinion.

Argued before Gray and Buffington, Circuit Judges, and Archbald, District Judge.

Mr. James Wilson Bayard, for petitioner:

In the use of the word "false" in § 14b of the bankruptcy act, something knowingly wrongful on the part of the person charged is implied.

Cooper v. Schlesinger, 111 U. S. 148, 28

he said that, while the court was not prepared to say that, in order to prevent a discharge, the proofs must be sufficient to warrant a conviction in a criminal case, it does hold that, to justify such an action, it must appear that the bankrupt was guilty of such acts as would sustain a civil action for fraud or deceit, and that the statements were either knowingly false, or fraudulent, or made so recklessly as to warrant a finding that he acted fraudulently. Applying this criterion, it was held that a statement made by a merchant from his books, which was in fact erroneous, because his book-keeper, owing to illness, had neglected to enter certain liabilities, would not prevent a discharge.

Upon the other hand, it has been held that it makes no difference whether a false statement made to obtain credit was knowingly false or not. *Re Shaffer*, 169 Fed. 724.

The opinion of McPherson, D. J., in *Re Gilpin*, 160 Fed. 171, which is reversed in *GILPIN v. MERCHANTS' NAT. BANK*, contains an able argument in support of the proposition that the word "false" in clause 3 means no more than "not true." The argument, however, evidently failed to convince the circuit court of appeals.

Re Brenner, 166 Fed. 930, merely declares that the intentional omission of indebtedness to relatives from a financial statement constitutes an intent to deceive which will bar a discharge.

The decision of the circuit court of appeals of the fifth circuit, in *Hardie v. Swafford Bros. Dry Goods Co.* 165 Fed. 588 (Reversing 143 Fed. 607), that a false statement of the financial condition of the firm by one partner will not bar a discharge of another partner, who did not participate therein, lends some indirect support to the position of the circuit court of appeals of the third circuit in *GILPIN v. MERCHANTS' NAT. BANK*, to the effect that the word

L. ed. 382, 4 Sup. Ct. Rep. 360; *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664; *Hatcher v. Dunn*, 102 Iowa, 411. 36 L.R.A. 689, 71 N. W. 343; *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168; *United States v. One Silk Rug*, 86 C. C. A. 178, 158 Fed. 974.

Messrs. William T. Wheeler, Henry T. Dechert, and Potter, Dechert, & Norris, for appellee:

The word "false" means merely "untrue."

Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Newell v. People*, 7 N. Y. 97; *Hills v. Chicago*, 60 Ill. 86; *Denn ex dem. Scott v. Reid*, 10 Pet. 524, 9 L. ed. 519; *Leonard v. Wiseman*, 31 Md. 204; *People ex rel. Jackson v. Potter*, 47 N. Y. 375; *Cooley, Const. Lim.* 57; *Story, Const.* 400; *Beardstown v. Virginia*, 76 Ill. 34; *McGowan v. Larsen*, 14 C. C. A. 178, 29

"false" imports a statement which is knowingly and intentionally untrue.

The decisions above cited seem to be the only ones directly in point as to the character of the statement which will bar a discharge under clause 3 of § 14 of the bankruptcy act, as amended by the act of Feb. 5, 1903.

The question considered in *Re Dresser*, 76 C. C. A. 655, 146 Fed. 383, is therefore not within the scope of this note. The following remark, quoted from the opinion, however, has some bearing on the subject under discussion: "The provisions of the section are not to receive the strict construction given to criminal statutes, but should receive a reasonable one, to effectuate the intention of Congress so far as it can be ascertained by the language employed."

The opinion in *Re Greenberg*, 8 Am. Bankr. Rep. 94, is merely to the effect that a written statement made by the bankrupt for the purpose of obtaining credit should be discredited only upon the clearest evidence.

The decision in *Re Allendorf*, 129 Fed. 981, that the statement there relied on would not bar a discharge, was upon the ground that the bill of goods which were first shipped in reliance upon the statement were paid for, and that there were no further dealings between the parties for several months: there being nothing in the statement or in the letter accompanying it importing that it was a continuing statement or representation.

The decision in *Re Kaplan*, 141 Fed. 463, overruling the objection to the discharge upon the ground of a false statement, was upon the ground that the evidence did not show that the creditor relied upon the statement in furnishing the goods.

The question as to what constitutes property within the meaning of the clause, or as to when the bankrupt may be regarded as having obtained property, and other questions not turning upon the character of the false statement, do not fall within the scope of this note.

U. S. App. 554, 66 Fed. 910; Torbett v. Eaton, 49 Hun, 209, 1 N. Y. Supp. 614, 113 N. Y. 623, 20 N. E. 876; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Foot v. Ætna L. Ins. Co. 61 N. Y. 571; Gerardo v. Brush, 120 Mich. 405, 79 N. W. 646.

Discharge should be refused because of the untruthful statements.

Re Petersen, 10 Am. Bankr. Rep. 355; Re Goodhile, 12 Am. Bankr. Rep. 383; Re Harr, 143 Fed. 423; Re Hardie, 143 Fed. 607; Re Collins, 157 Fed. 120.

Gray, Circuit Judge, delivered the opinion of the court:

This is a petition by a bankrupt to revise, for error of law, the decree of the United States district court for the eastern district of Pennsylvania, reversing the referee's report and sustaining one of the creditor-appellee's exceptions to his application for discharge. The sole exception thus sustained was to the effect that the referee had erroneously held that the "materially false statement" in writing, mentioned in clause (3) of § 14b of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3427, amended by act Feb. 5, 1903, chap. 487, § 4, 32 Stat. at L. 797, U. S. Comp. Stat. Supp. 1907, p. 1026), must, in order to constitute a bar to the discharge of the bankrupt, be intentionally or knowingly untrue. The facts of the case as summarized from the findings made by the referee, and elsewhere disclosed in the record are as follows:

The bankrupt was engaged in the construction of buildings, at Baltimore, in places near New York city, and Philadelphia. His main office was in Philadelphia, where his books were kept by his bookkeeper. The bankrupt was chiefly engaged in the actual supervision of the building work he had in hand, and paid little or no attention to his books. He collected money, paid notes; and, in a general way, knew the condition and progress of each of his building contracts. He intrusted the keeping of his books to his bookkeeper, and in September, 1905, the posting of his books was some months behind. During that month, the bankrupt went to the Merchants' National Bank, at Philadelphia (the excepting creditor and appellee), and stated that he wished to open an account, and would require accommodations not to exceed \$10,000. The bank informed him that they would like to have a statement, and gave him one of their blank forms to be filled out and signed by him. This form the bankrupt took to his office, and there signed the same in blank, instructing his bookkeeper to fill it out and send it to the bank. He signed it in blank before it was filled out for the reason that

he was obliged to return to Baltimore without delay. He says he instructed the bookkeeper to make an exact statement for the bank, to which the bookkeeper replied that he could not, but that he would make an approximate statement and send it to the bank. The statement was made by the bookkeeper, and upon it was written the word "approximate," and it was sent by the bookkeeper to the bank. Upon this statement, and upon a note which the bankrupt was to obtain from one Stokes, of Baltimore, as collateral, the bank extended the accommodation desired. This note was never obtained for the bank from Stokes. About October 3, 1905, and after the said statement of September 28th had been filed by the bank, the note of the bankrupt for \$7,500, due thirty days after date, was discounted. After two renewals and a payment of \$1,000 on account, and the further discount of a ten days' note of \$2,500, the bank, on the 9th of February, 1906, renewed the entire amount then due, *viz.*, \$9,000, for thirty days, which is still unpaid.

The adjudication of bankruptcy was entered February 26, 1906. The approximate statement sent by the bookkeeper to the bank was materially inconsistent with the bankrupt's books as they stood at the time the bankruptcy occurred. There is nothing in the referee's report to show how the books actually stood at the time the statement was prepared by the bookkeeper. There is no evidence that the bankrupt ever saw this statement after it was filled out, that the bank ever showed it to him, or interrogated him in regard to it, or that he ever asked to see it. This statement showed a net worth of \$43,569.27. The bankrupt himself made up from his books, during the course of his examination, a statement showing that his net worth at that time was \$45,698.09. This statement, however, in all its items fails to coincide with the statement made up by the bookkeeper and delivered to the bank.

The referee finds that, although the falsity of the statement sent to the bank has been proved, the fact that the bankrupt knew it to be false, or did not know it to be true, was not proved, and says: "There is no evidence to support the contention that the bankrupt knew, or had any reason to believe, that the statement sent to the bank by the bookkeeper was false, or that the bankrupt intended in any way to deceive the bank."

The referee, therefore, reported that a decree of discharge of the bankrupt should be entered. To the finding of the referee, as stated, the appellee filed its exception, and the court below, after considering the same, reversed the finding of the referee, and di-

rected that an order be entered sustaining the said objection to the bankrupt's discharge.

Section 14 of the bankrupt act prescribed the conditions upon which a discharge may be granted to the bankrupt by the court of bankruptcy in which the proceedings are depending, and provides that the court shall hear and investigate the merit of the application, and discharge the bankrupt unless he has "(1) committed an offense punishable by imprisonment, as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings, been granted a discharge in bankruptcy within six years or (6) in the course of the proceedings in bankruptcy, refused to obey any lawful order of, or to answer any material question approved by, the court." [32 Stat. at L. 797, chap. 487, § 4.]

The single question of law presented for our consideration is clearly defined in the following extracts from the opinion of the court below: "I accept and shall act upon the finding of the referee that the bankrupt either did not actually know what the statement contained, or did not know that it was materially false, and that he did not have a conscious intention to deceive the bank."

In concluding, the court said as follows: "The other matter that may properly need a moment's consideration is the effect that should be given to the word 'false' in clause 3. In my opinion the argument for the bankrupt must rest wholly upon the construction that this word should bear. It is unquestionably a flexible word. Sometimes it means incorrect, or not true. Sometimes it includes the idea of wickedness or fraud, as in § 29, where a false oath is evidently a corruptly false oath, such as would subject the affiant to a prosecution for perjury. That 'false' means no more in clause 3 than 'not true.' I have tried to establish in the preceding pages of this opinion; and, if I have failed hitherto to give good reasons to my belief, I am sure that I shall not strengthen the argument by stating them again in somewhat different words.

20 L.R.A. (N.S.)

"The decision of the referee is reversed, and the clerk is directed to enter an order sustaining the first objection of the Merchants' National Bank to the bankrupt's discharge."

Addressing ourselves to the question thus distinctly raised, it is to be remarked that, of the six reasons for refusing a discharge to the bankrupt, as set forth in § 14b of the bankrupt act, the five that relate to the conduct of the bankrupt, unless we exclude the third, with which we are here concerned, all imply a wilful and fraudulent act on the part of the bankrupt, or, as in the case of the sixth, a wilful and intentional defiance of a lawful order of the court. And they all imply conduct that is immoral, or at least unworthy in one seeking the reward of honesty that is intended to be conferred by a discharge. In the recent case, *Re Carton* (D. C.) 148 Fed. 63, 66, Judge Hough, in the district court for the southern district of New York, adopts as a terse statement of his views the following language: "The policy of the bankruptcy act is founded on equal right and privileges to all creditors; it is not intended as a means to punish the bankrupt at the option of the defrauded creditor only. Discharge from debts is a matter of favor, and not a matter of right. Honesty on the part of a bankrupt is rewarded by a discharge. Fraud and dishonesty are stamped with disapproval of a discharge. Contumacy on the witness stand, a previous discharge within six years, obtaining money upon false statements, and the commission of an offense punishable by imprisonment under the act, are all valid objections to a discharge, and are not limited to the defrauded creditors alone, but may be urged by any and all creditors. It is the fraudulent conduct that is aimed at, and not retaliation for the individual loss."

We fail to perceive any sufficient ground for denying to the third reason for refusing a discharge to the bankrupt the general characteristic of personal misconduct that attaches to all the others, as set forth in the said section of the bankrupt act. It would indeed be a harsh construction, and at variance with the general policy of the bankruptcy act, that would make the conduct described in clause 3 an exception in this respect to the whole category of acts which may severally deprive the bankrupt of his privilege of discharge. It is a construction which should not unnecessarily be made.

But, apart from the incongruity imported into this section of the bankruptcy act by such construction, it seems to us clear that the plain language of this third clause of § 14b requires that the written statement made by the bankrupt for the purpose of obtaining credit, etc., should be knowingly

and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, "false statement" connotes a guilty *scienter* on the part of the bankrupt. This primary and ordinary meaning of the word "false" cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives as its primary meaning: "Uttering falsehood; untruthful; given to deceit; dishonest." As an adjective, it is correlative with the noun "falsehood." To charge a person with making a false statement is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged. It is true that the word may have a secondary meaning in certain collocations, and be merely equivalent to "untrue" or "incorrect." But this is not the ordinary or usual significance attached to the word. To charge a person with making false entries in books of account means something more than that incorrect or untrue entries have been made, and it has been so held by the courts in the consideration of offenses of that character. The last edition of Bouvier's Law Dictionary says of the word "false," that when "applied to the intentional act of a responsible being it implies a purpose to deceive." In Black's Law Dictionary, under the title "false," it is said: "In law, this word means something more than untrue; it means something designedly untrue and deceitful; and implies an intention to perpetrate some treachery or fraud." In a recent and well accepted publication called "Words and Phrases," the word "false" is thus defined: "False means that which is not true coupled with a lying intent." *Wood v. State*, 48 Ga. 192, 297, 15 Am. Rep. 664. "'False,' in jurisprudence, usually imports something more than the vernacular sense of 'erroneous' or 'untrue.'"

This and other citations in the petitioner's brief establish a jurisprudential meaning to the word "false" at variance with that adopted by the learned judge of the court below.

No good reason has been suggested why Congress should have made such an exception to the character of the acts enumerated as severally barring the discharge of the bankrupt, by using the word "false" in some other than its primary and obvious meaning.

But it is not without significance to inquire why an incorrect statement, innocently made to one creditor, should bar the discharge of the bankrupt as to all his other debts, whatever be its effect as to the debt of that particular creditor. In *Re Carton*, supra, the court says: "It is the act of issuing a materially false statement, and the

fraudulent intent of the man who issues it, that the statute seeks to punish by refusing a discharge. It should not depend upon the whim or good nature of any particular creditor to whom the false statement was made, whether the offending bankrupt should be given or refused his discharge. Any 'party in interest' who chooses to bring the wrongful act to the attention of the court, and proves that it was wrong within the meaning of the statute, is entitled so to do."

We fully concur in the meaning thus attributed to the clause in question. The bankrupt who has made to a creditor, for the purpose of obtaining credit, a false statement,—that is, one intentionally and knowingly untrue,—is unworthy of the privilege of a discharge under the act, and the court will act upon information brought to it of such an act by any party in interest. It will be at once conceded on all hands that such a bankrupt is unworthy, and should not receive the favor accorded by the law to the honest but unfortunate debtor. Some of the cases cited by the appellee conflict with the view here stated, but the weight of authority, as of reason, supports it.

We think that the court below erred in finding that the word "false" means no more in clause 3 than "not true," and the order of the said court is hereby revised in matter of law by directing that the first specification of grounds of opposition to the discharge of the bankrupt, filed by the Merchants' National Bank, be dismissed, and that the bankrupt receive his discharge in accordance with the recommendation of the referee in that behalf.

PENNSYLVANIA SUPREME COURT.

A. C. LYTTLE, Appt.,

v.

J. B. DENNY.

(222 Pa. 395, 71 Atl. 841.)

Innkeeper — negligence — defective bed.

1. An innkeeper has the burden of absolving himself from negligence when a guest shows a personal injury by the fall

Case Note. — Presumption of negligence of innkeeper from injury to guest or his property.

The ancient rule of the common law, still adhered to in England and in many of the states of the United States, that an innkeeper is the insurer of the safety of the property of his guests, has been so far modified in some states as to require negligence upon the part of the innkeeper to be shown before he can be held liable. In such jurisdictions the rule is almost universal that the mere

upon him of the upper portion of a folding bed which he is occupying.

Evidence — depositions.

2. Depositions, the taking of which is not authorized by any rule of court, are not admissible in evidence.

(January 4, 1909.)

APPEAL by plaintiff from an order of the Court of Common Pleas for Cambria County refusing to strike off a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Thomas H. Greevy, J. C. Davies, and E. G. Brotherlin for appellant.

Messrs. M. D. Kittell and H. H. Myers for appellee.

fact of the loss will raise a presumption of negligence on the part of the innkeeper, or, as it is phrased in many of the decisions, will make an innkeeper *prima facie* liable to the guest. Such was the conclusion reached in the following cases: *Sasseen v. Clark*, 37 Ga. 242; *Coskery v. Nagle*, 83 Ga. 696, 6 L.R.A. 483, 20 Am. St. Rep. 333, 10 S. E. 491; *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82; *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Sheffer v. Willoughby*, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; *Rockhill v. Congress Hotel Co.* 237 Ill. 98, 86 N. E. 740; *Eden v. Drey*, 75 Ill. App. 102; *Hulbert v. Hartman*, 79 Ill. App. 289; *Hill v. Owen*, 5 Blackf. 323, 35 Am. Dec. 124; *Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323; *Baker v. Dessauer*, 49 Ind. 28; *Bowell v. DeWald*, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430; *Fowler v. Dorlon*, 24 Barb. 384; *Murray v. Clarke*, 2 Daly, 102; *Van Wyck v. Howard*, 12 How. Pr. 147; *Hoyt v. Clinton Hotel Co.* 35 Pa. Super. Ct. 297; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Howe Mach. Co. v. Pease*, 49 Vt. 477; *Watt v. Kilbury* (Wash.) 102 Pac. 403; *Jalie v. Cardinal*, 35 Wis. 118; *Dawson v. Chamney*, 5 Q. B. 164.

To avoid a misapprehension, it should here be noted that while some cases have been cited from England, New York, and Pennsylvania in support of the presumption-of-negligence rule, the prevailing rule in those jurisdictions, as evidenced by other cases, is that the innkeeper is liable as an insurer.

The only case that throws any doubt upon this proposition of law, that the loss of the guest's goods raises a presumption of negligence on the part of the innkeeper, is *Burnham v. Young*, 72 Me. 273, in which the innkeeper was held not to be liable for the loss of the guest's goods by a fire which also destroyed the inn, where no want of 20 L.R.A. (N.S.)

Potter, J., delivered the opinion of the court:

From the history of this case it appears that, in May, 1903, the plaintiff was a guest at the hotel of the defendant in Johnstown, Pennsylvania. In the room which was assigned to him there was an old-style folding bed, with a wardrobe in the back, and so arranged that the bed portion would fold up so as to leave the bed in an upright position when not in use. The top of the bed was heavy, weighing about 300 pounds. The plaintiff occupied the bed during the night, and, early the next morning, as he was about to rise, the top or upright portion of the bed fell forward upon him, crushing his head down upon his breast and inflicting severe injury. To recover damages for the injury thus caused, the plaintiff brought this suit against the proprietor of the hotel. Upon

ordinary or reasonable care was shown. In this connection it is pertinent to say, however, that none of the other cases heretofore cited in support of the prevailing rule as to presumption of negligence involved the loss of the goods by a fire which also destroyed the inn, and it would seem reasonable that such a source of loss ought to be an exception to that rule.

And the case last cited finds support also in *Weeks v. McNulty*, 101 Tenn. 495, 43 L.R.A. 185, 70 Am. St. Rep. 693, 48 S. W. 809,—the only case other than *LYTLE v. DENNY* that could be found which involved the question of the presumption of negligence arising from an injury to the guest, rather than to his goods,—in which *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 659, 14 S. W. 314, a case not otherwise in point here, was cited to support the proposition that there was no natural presumption that a fire, the origin of which was unknown, was the result of the want of care of the owner or occupant of the premises of its origin. And it was held that, to recover for the death of a guest, due to the burning of the hotel where he was stopping, it must be shown that the negligence of the innkeeper was the proximate cause of the fire and its consequences.

In *Johnson v. Chadbourn Finance Co.* 89 Minn. 310, 99 Am. St. Rep. 571, 94 N. W. 874, it was held that all losses of property incurred by guests at a public inn by fire were *prima facie* due to the negligence of the proprietor, though he might discharge himself from liability by showing that the loss happened by irresistible force or unavoidable accident. But this may be only another way of stating the rule that an innkeeper is ordinarily an insurer of his guests' goods; since, in an earlier case (*Lusk v. Belote*, 22 Minn. 468), an innkeeper was held responsible as an insurer, and that decision was approved in the *Johnson Case*.

the trial, at the conclusion of plaintiff's testimony, the court entered judgment of compulsory nonsuit, and from the refusal to strike it off the plaintiff has appealed.

The main question raised is as to the liability of an innkeeper to his guests. We find the general rule of law in this respect is thus stated in *Beale on Innkeepers & Hotels*, §§ 162, 163: "The innkeeper is bound to provide reasonably safe premises.

Both in original safety of construction and in maintenance the premises must be such as reasonably to secure the safety of the guest. So the innkeeper has been held liable for injury to the guest by the ceiling falling upon him, owing to its defective condition; by the elevator falling with him, after having been negligently inspected, although the innkeeper himself had employed a proper inspector, and was not personally negligent; by the breaking of a defective railing, by reason of which the guest fell into an area; and by the guest falling off an unguarded stairway." The authorities are in substantial agreement that while the duty of an innkeeper requires him to take reasonable care of the persons of his guests, he is not to be regarded as an insurer of their safety. His liability has sometimes been declared to be similar to that of a common carrier, but the better opinion seems to be that the degree of care required of an innkeeper is not so great as that which is imposed upon those who carry passengers for hire. In discussing this question in *Clancy v. Barker*, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161, Judge Sanborn says: "While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar, and while that proposition may be conceded, it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because of the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation, fraught with no extraordinary danger." It may be assumed, then, that the duty imposed by law upon an innkeeper requires him to furnish safe premises to his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger. Did the de-

fendant, then, in this case, use such reasonable care in the discharge of this duty to the plaintiff, who was his guest? The testimony introduced showed the fact and manner of the accident, but stopped short of pointing out the exact defect in the bed which caused it to fall down upon and entrap the plaintiff. The trial judge thought it was incumbent upon the plaintiff to show in detail just what was wrong with the bed, and the reason for its falling; and, because this did not appear from the testimony offered by the plaintiff, judgment of nonsuit was entered. We do not agree with his view in this respect. Bearing in mind the duty of the innkeeper to guard with reasonable care the safety of his guests, proof of the happening of such an extraordinary accident casts the burden of explanation at once upon the defendant. The accident was so far out of the usual course that no fair inference can arise that it could have resulted from anything less than negligence upon the part of the management of the hotel. Beds do not usually operate as spring traps, to close upon and catch the confiding guest. Yet the bed furnished by the defendant to the plaintiff in this case proved to be just such a dangerous trap. Without any apparent cause, the heavy head fell forward and down over the plaintiff, while he was quietly lying upon the bed, and injured him severely. This could not have occurred had the bed been in proper condition for use. We think the facts bring the case within the rule laid down in *Scott v. London Dock Co.* 3 Hurlst. & C. 596, and often applied by this court, as in *DeLahunt v. United Teleph. & Teleg. Co.* 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515, where the principle is stated as follows (page 248 of 215 Pa.): "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanations by the defendants, that the accident arose from want of care." The circumstances under which this accident occurred were certainly such as to call for full explanation by the defendant. The facts indicate a lack of reasonable care upon his part, and it is for him to show why he should be relieved from liability.

Counsel for appellant also complain of the exclusion of certain depositions which were offered in evidence. But it appears that no rule of the lower court authorized the taking of the depositions of the witnesses in question, and they were therefore properly excluded. The rules of the court

bria county court provide for taking the depositions of ancient, infirm, and going witnesses, but it was not shown that these witnesses were within this classification, or that their presence in court might not be obtained.

The first, second, and third assignments are overruled; but, as we deem the facts shown sufficient to take the case to the jury upon the question of the defendant's negligence, the fourth assignment of error is sustained, and the judgment is reversed with a procedendo.

VERMONT SUPREME COURT.

HAROLD RANN, by Next Friend,

v.

M. C. TWITCHELL et al.

(— Vt. —, 71 Atl. 1045.)

Physician — specialist — measure of duty.

1. A physician who, for twelve years, specializes his practice to treatment of diseases of the eye, and is placed in charge of the eye, ear, and throat department of a hospital of high standing, and is advertised by its literature as its ophthalmatist, will be held responsible as a specialist for treatment of the eye.

Same — measure of duty.

2. One who holds himself out as a specialist in the treatment of a certain organ, injury, or disease is bound to bring to the aid of one employing him as such that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury, or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time.

Case Note. — Physicians and surgeons; degree of skill and care required of specialist.

The decisions accord in imposing upon one who holds himself out to the public as a specialist the duty to exercise a higher degree of skill and care than is required of the ordinary practitioner.

Thus, in *Baker v. Hancock*, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38, it was held that one holding himself out as a specialist in the treatment of cancer was bound to bring to the discharge of his duty to patients employing him, as such specialist, that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the disease, its diagnosis and treatment, having regard to the present state of scientific knowledge, — this being the degree of skill which, by holding himself out as a specialist, he represents himself to have. The court said: 20 L.R.A. (N.S.)

Same — negligence.

3. The question of the negligence of a specialist in the treatment of disease in making a diagnosis is to be determined by reference to the pertinent facts existing at the time of his examination, of which he knew, or, in the exercise of due care, should have known, his negligence depending upon the fact that, with an opportunity for examination, he failed to discover conditions which should have been discovered in the exercise of a reasonable degree of care and skill.

Same — question for jury.

4. Whether or not a specialist in the treatment of eye diseases exercises due care is for the jury, where, upon examination of a wound beneath an eye, he fails to discover therein a foreign substance of the presence of which he has been notified by other physicians, and which the evidence tends to show a probe would readily have disclosed.

(February 18, 1909.)

EXCEPTIONS by plaintiff to the direction by the Orleans County Court of a verdict in defendants' favor in an action brought to recover damages for malpractice. Reversed.

The facts are stated in the opinion.

Messrs. Cook & Williams, for plaintiff:

One who attempts to treat an eye as a specialist must have that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the treatment of the eye; and he must exercise his best judgment in the application of his skill, and use ordinary care in the performance of the operation.

Feeney v. Spalding, 89 Me. 111, 35 Atl. 1027; *McMurdock v. Kimberlin*, 23 Mo. App. 523; *Whitesell v. Hill*, 101 Iowa, 629, 37

"Scientific investigation and research have been extended and prosecuted so persistently and learnedly that the person affected by many forms of disease is, of necessity, compelled to seek the aid of a specialist in order to secure the results thereof. The local doctor, in many instances, himself suggests and selects the specialist whose learning and industry have given him a knowledge in the particular line which the general practitioner, in rural communities, especially, has neither time nor opportunity to acquire. . . . Being employed because of his peculiar learning and skill in the specialty practised by him, it follows that his duty to the patient cannot be measured by the average skill of general practitioners. If he possessed no greater skill in the line of his specialty than the average physician, there would be no reason for his employment; possessing such additional skill, it becomes his duty to give his patient the benefit of it."

L.R.A. 838, 70 N. W. 750; Landon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 333; Lewis v. Dwinell, 84 Me. 497, 24 Atl. 945; Moratzky v. Wirth, 67 Minn. 46, 69 N. W. 480.

It is for the jury to say whether a physician, in making a diagnosis, uses ordinary care and skill; whether the omission of certain treatment was or was not negligence; whether or not there was such negligence or unskillfulness as to entitle the plaintiff to damages; whether the physician has exercised reasonable care in the case; whether or not the treatment was negligent and unskillful; and it is for the jury to decide, upon all the evidence, what treatment amounts to negligence under the rule of skill required.

Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; Carpenter v. Blake, 60 Barb. 488; Barton v. Govan, 4 N. Y. S. R. 876; Rowe v. Lent, 42 N. Y. S. R. 483, 17 N. Y. Supp. 131; Olmsted v. Gere, 100 Pa. 127; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252.

Messrs. Young & Young and A. G. Whittemore, for defendant:

A physician and surgeon is only responsible for reasonable or ordinary care and skill and for the exercise of his best judgment.

Wilmot v. Howard, 39 Vt. 447, 94 Am. Dec. 338; Hathorn v. Richmond, 48 Vt. 557; Mullin v. Flanders, 73 Vt. 99, 50 Atl. 813; Cayford v. Wilbur, 86 Me. 414, 29 Atl. 1117; Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Landon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 333; Hallam v. Means, 82 Ill. 379, 25 Am. Rep. 328; Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478; Patten v. Wiggin, 51 Me. 594, 81 Am. Dec. 593; State use of Janney v. Housekeeper, 70 Md. 162, 2 L.R.A. 587, 14 Am. St. Rep. 340, 16 Atl. 382; Williams v. Poppleton, 3 Or.

139; Tefft v. Wilcox, 6 Kan. 46; Sims v. Parker, 41 Ill. App. 284; Pettigrew v. Lewis, 46 Kan. 78, 26 Pac. 458; Getchell v. Hill, 21 Minn. 464; Wurdemann v. Barnes, 92 Wis. 206, 66 N. W. 111; Wood v. Barker, 49 Mich. 295, 13 N. W. 597; Cooley, Torts, 777.

Mere failure on the part of the physician to effect a cure does not establish or raise a presumption of a want of care on his part; nor does the imperfect or only partial success of a surgical operation.

3 Wharton & S. Med. Jur. § 517, p. 521; Long v. Delaney, 206 Pa. 226, 55 Atl. 965; Barker v. Lane, 23 R. I. 224, 49 Atl. 963; Ewing v. Goode, 78 Fed. 442; Richards v. Willard, 176 Pa. 181, 35 Atl. 114.

Powers, J., delivered the opinion of the court:

The plaintiff, a robust boy of thirteen years, found a railroad torpedo near his house in Derby. He laid it on a plank and threw a stone upon it and exploded it, whereupon a flying fragment struck him under the inner corner of the right eye, causing the injury concerned in this action. This was April 19, 1905. The cut made in the lower lid of the eye was approximately an inch long, and, at the upper end, next to the inner corner of the eye, the lid was cut off so that it hung down over the cheek, disclosing a wound under the eyeball into the socket of the eye. The boy was at once taken to Dr. Gaines, of Newport, who took medical charge of the case, and treated the injury for about a week. In the meantime Dr. Gaines became convinced that there was a foreign substance lodged in the eye or socket, and being uncertain whether or not or how far the eye itself might be involved, and not feeling competent to operate on the eye in these circumstances, he advised the

An oculist who treats a patient must exercise in that regard the care and skill usually exercised by oculists in good standing. Stern v. Lanng, 106 La. 738, 31 So. 303.

One who undertakes to treat an eye as a specialist must have that degree of care and skill which is ordinarily possessed by physicians who devote special attention and study to the treatment of the eye. Feeney v. Spalding, 89 Me. 111, 35 Atl. 1027.

In McMurdock v. Kimberlin, 23 Mo. App. 523, an instruction that, if the defendant held himself out to the public as a specialist in the treatment of the eye, and as possessing a degree of skill and diligence in the treatment of the human eye as high as that possessed by other good surgeons of the specialty to which defendant belonged, he would be liable for failure to exercise such a degree of care, skill, and diligence as would ordinarily be exercised and exhibited 20 L.R.A. (N.S.)

by good and careful surgeons and oculists when treating and operating in a similar case,—was held not to impose too high a degree of care and skill.

In Beadle v. Paine, 46 Or. 424, 80 Pac. 903, an instruction that specialists in the practice of surgery are bound to bring to the discharge of their duty as such specialists that degree of care, skill, and knowledge which is ordinarily possessed by practitioners devoting special attention and skill to the same branch in similar localities, having regard to the present state of medical science, seems to have been regarded by the supreme court as correct, although, no objection having been saved thereto, the question was not properly before it.

For discussion of the general question as to the degree of care and skill which a physician or surgeon must exercise, see note to Whitesell v. Hill, 37 L.R.A. 830, on that subject.

employment of an eye specialist. The boy was taken to Sherbrooke for the purpose of consulting an expert, but the latter was away, so he could not be seen. After his return to Derby, and on April 25th, Dr. Gaines and Dr. Lund, who had been called in to assist, and who agreed with Dr. Gaines that there was a foreign substance in the eye, made preparations to operate for its removal. When it came to the point of beginning the operation, Dr. Gaines telephoned the defendant that the plaintiff had been injured by an explosion, and that some foreign substance had entered the orbit of the eye, and that he did not feel competent to remove it, and he arranged with the defendant to send the plaintiff to him for treatment. The plaintiff was thereupon taken to the Mary Fletcher Hospital at Burlington, where the defendant undertook the treatment of the case. He made no effort to learn anything further of the history of the case or its prior treatment. He did not attempt to determine, by probe or otherwise, whether or not there was in fact a foreign body lodged in the eye or its orbit, beyond an external examination more or less cursory in character, according to the evidence, though it is plain that the use of a probe would have easily and safely discovered the presence of the piece of tin which was afterwards removed. He gave the eye attention for a few days, and then sent the plaintiff home, assuring him that there was nothing in the eye, and with instructions to Dr. Gaines as to its subsequent treatment. The eye grew steadily worse until July 18th, when Dr. Gaines operated upon it and removed from the orbit a piece of tin nearly an inch long and about one-half inch wide, which was buried in the tissue to such a depth that its nearest point was about a quarter of an inch from the surface. The action is case for malpractice. It was originally brought against the defendant and the Mary Fletcher Hospital jointly, but, during the progress of the trial, at the plaintiff's request, the court ordered a verdict for the hospital, and the trial proceeded against the defendant alone. At the close of the plaintiff's evidence the court ordered a verdict for the defendant. The propriety of this action of the court is the only question presented.

At the outset of the discussion the parties disagree as to the rule which is to be applied to this defendant to test the sufficiency of his diagnosis and treatment of this injury. The plaintiff claims that the evidence is such that the defendant must be judged as a specialist, while the defendant insists that there is no evidence to warrant the application of anything but the rule governing general practitioners. We quite

agree with the court below that this defendant must be judged in this case by the more exacting rule which applies to specialists. Most of the evidence on this subject comes from the defendant himself. From him we learn that he is a physician and surgeon, and for the twelve years preceding the trial he has been a specialist in the medical and surgical treatment of the eye, practising at Burlington. As early as 1902 he was regularly appointed ophthalmatist of the Mary Fletcher Hospital, and then presumed that he would be, and later knew that he was, so named in a certain pamphlet issued by the hospital that year. At the time here involved, he had charge of the eye, ear, and throat department of that institution. He says that the term "ophthalmatist" means an eye specialist,—one who does everything that is required for the eye, medical or surgical. True, he says the term does not imply any special skill in such matters, but in this statement Dr. Twitchell is too modest. His twelve years of specialized practice, his selection by an institution of the high standing of the Mary Fletcher Hospital to take charge of the very important department named, imply special skill in the lines specified. Moreover, the very circumstances in which he was employed in this case unmistakably show that it was the special skill that he was understood to have in the surgical treatment of the eye which alone induced the plaintiff to seek his aid; and it is perfectly plain that the defendant so understood it when Dr. Gaines made the arrangement with him to treat this injury. So we must test his professional conduct in this matter, not by the standard applicable to general practitioners,—the oft-cited and recently approved rule of *Hathorn v. Richmond*, 48 Vt. 557,—but by the stricter rule applicable to specialists. Whether or not this is determinative of the case we do not say.

One who holds himself out as a specialist in the treatment of a certain organ, injury, or disease is bound to bring to the aid of one so employing him that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury, or disease, its diagnosis, and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time. 5 *Thomp. Neg.* § 6714; *Feeney v. Spalding*, 89 Me. 111, 35 Atl. 1027; *Baker v. Hancock*, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38; note to *Gillette v. Tucker*, 93 Am. St. Rep. at page 664. The duty of exercising this degree of skill attached to this defendant at the time of his employment, and is the measure of his responsibility in the diagnosis of the case

to determine the nature and condition of the injury, as well as the proper treatment to be applied. *Thomp. Neg.* § 6717; *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668, 10 Atl. 358, 441. He is not to be judged by the result, nor is he to be held liable for an error of judgment. His negligence is to be determined by reference to the pertinent facts existing at the time of his examination and treatment, of which he knew, or, in the exercise of due care, should have known. It may consist in a failure to apply the proper remedy upon a correct determination of existing physical conditions, or it may precede that, and result from a failure properly to inform himself of these conditions. If the latter, then it must appear that he had a reasonable opportunity for examination, and that the true physical conditions were so apparent that they could have been ascertained by the exercise of the required degree of care and skill; for, if a determination of these physical facts resolves itself into a question of judgment merely, he cannot be held liable for his error. *Manser v. Collins*, 69 Kan. 290, 76 Pac. 851; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A. (N.S.) 712, 111 N. W. 264.

Tested by this rule, the evidence tended to show that the defendant's conduct did not measure up to its requirements. He had a fair chance to examine the eye, and, with the indications of the presence of the piece of tin so strong as the testimony of Dr. Gaines tends to show, it cannot be said, as a matter of law, that the defendant, in his preliminary examination to ascertain the essential data upon which to predicate a professional opinion, met the requirements of the rule above stated. The testimony tended to show that he did not, and the question should have been submitted to the jury; for the evidence shows that the tin ought to have been removed at the earliest possible moment.

Judgment reversed, and cause remanded.

WASHINGTON SUPREME COURT.

SCHOOL DISTRICT NUMBER 20, SPOKANE COUNTY, Resp.,
v.

R. B. BRYAN, Superintendent of Public Instruction, et al., Appts.

(— Wash. —, 99 Pac. 28.)

School — model training school — public funds.

1. Model training schools, to be conducted in connection with various normal schools, 20 L.R.A. (N.S.)

the pupils of which are to be selected from the school districts within which the normal schools are located, by requisition of the authorities of the normal schools, are not common schools within a constitutional provision that the school moneys shall be applied exclusively to the support of common schools. Same — common school — definition.

2. A common school, within the meaning of a constitutional provision requiring the school funds to be applied exclusively to such schools, is one which is common to all children of proper age and capacity, free and subject to, and under the control of, the qualified voters of the district.

(January 16, 1909.)

APPEAL by defendants from a judgment of the Superior Court for Thurston County in plaintiff's favor in an action brought to restrain the apportioning of any

Case Note. — Use of common school funds for normal school or teachers' training school.

A thorough search has brought to light no cases upon this question other than those cited in the above opinion. *State Female Normal School v. Auditors*, 79 Va. 233, presented for decision the constitutionality of that part of an act providing for establishing a normal school, which appropriated an annual sum for salaries and incidental expenses, payable out of the public free school fund. The power of the legislature to appropriate from any fund for the purposes of the school in question was conceded by the court, with the proviso that the state Constitution contained nothing prohibitory thereof. The constitutional provisions applicable set apart the public free school fund for the equal benefit of all the people, to be distributed on the basis of the number of children in each free school district, and placed the fund under the management of the board of education. In view of these provisions in the Constitution, the court held that the public school fund was not subject to appropriation by the legislature for the support of normal schools, because they were not a part of the public free school system, and because the fund could not be withdrawn from the management provided for it by the Constitution.

The same point arose in *Gordon v. Cornes*, 47 N. Y. 608, where a statute establishing certain normal schools provided for their support an annual appropriation from the income of the common school fund. The Constitution of New York provided that the capital of the common school fund should be kept inviolate, and that its revenues should be applied to the support of common schools; and the court took the view that the application of these revenues to the support of any but common schools was thus impliedly prohibited, and held that normal schools differed so materially from common schools as to fall within the prohibition.

common school funds to the model training department of the State Normal School at Cheney. Affirmed.

The facts are stated in the opinion.

Messrs. John D. Atkinson, Attorney General, and William W. Manier, for appellants:

The model training school is a common school within the proper definition of that term.

Jenkins v. Andover, 103 Mass. 94; Merri-
rick v. Amherst, 12 Allen, 509; Roach v.
St. Louis Public Schools, 77 Mo. 484; Col-
lins v. Henderson, 11 Bush, 74; Irvin v.
Gregory, 86 Ga. 605, 13 S. E. 120; Roach
v. St. Louis Public Schools, 7 Mo. App. 567,
Appx.; People ex rel. Roman Catholic Or-
phan Asylum Soc. v. Board of Education,
13 Barb. 400; 25 Am. & Eng. Enc. Law,
p. 8.

Mr. W. H. Winfree, for respondent:

The common school fund cannot be used
either directly or indirectly for normal
schools.

State Female Normal School v. Auditors,
79 Va. 233; Gordon v. Cornes, 47 N. Y. 616;
State ex rel. Keith v. Westerfield, 23 Nev.
468, 49 Pac. 119; People ex rel. Roman
Catholic Orphan Asylum Soc. v. Board of
Education, 13 Barb. 410; Underwood v.
Wood, 93 Ky. 177, 15 L.R.A. 825, 19 S. W.
405; Hall's Free School v. Horne, 80 Va.
470; Halbert v. Sparks, 9 Bush, 259; Col-
lins v. Henderson, 11 Bush, 74; Los Angeles
County v. Kirk, 148 Cal. 385, 83 Pac. 250.

The act violates the constitutional provi-
sion prohibiting a special law authorizing
the apportionment of any part of the school
fund.

Terry v. King County, 43 Wash. 61, 86
Pac. 210, 9 A. & E. Ann. Cas. 1170; Louis-
ville School Board v. Louisville, 103 Ky.
421, 45 S. W. 1047; Plummer v. Borsheim,
8 N. D. 565, 80 N. W. 690; Ellis v. Greaves,
82 Miss. 36, 34 So. 81; Sellers v. Cox, 127
Ga. 246, 56 S. E. 284.

Chadwick, J., delivered the opinion of
the court:

In order to make effectual § 2550, Ballin-
ger's Anno. Codes & Statutes (Pierce's Code,
§ 7463), the legislature of this state, at its
1907 session, passed a law (Laws 1907,
chap. 97, p. 181) providing for a model
training school department to be established
in the state normal schools. Its purpose
is manifest. It is to provide material for
the particular training of teachers, and to
this end the boards of the several normal
schools are authorized, and it is made their
duty, to file, on or before the first Monday
in September in each year, with the board
20 L.R.A. (N.S.)

of the school district in which the normal
school is situate, a requisition for the es-
timated number of public school pupils nec-
essary to make up a model training school.
It is thereupon made the duty of the local
board to apportion a sufficient number of
pupils to meet the requisition. It is also
provided that the principal of the normal
school may refuse to accept such pupils as,
in his judgment, by reason of incorrigibil-
ity or mental defects, would tend to reduce
the efficiency of the training department.
It is made the duty of the school clerk to
keep a segregated list of those attending
the model school, and, further, "that it shall
be the duty of the superintendent of public
instruction to apportion to the support of
such normal training school, out of the
funds available for the support of the com-
mon schools of the district in which each
normal school is situated, such proportion of
the funds to which such school district shall
be entitled as the number of pupils in at-
tendance upon each such model training
school bears to the whole number of pupils
upon which the apportionment was made
for the common schools in the school dis-
trict in which such normal school is situat-
ed, and the funds so apportioned shall be
distributed by the board of trustees for the
maintenance of such model training school."
Section 4. Plaintiff brought an action in the
superior court of Thurston county to re-
strain the defendant, as superintendent of
public instruction, from apportioning to the
model training department of the state nor-
mal school located at Cheney, Washington,
any of the funds available for the support of
the common schools. From an order direct-
ing an injunction, and also holding "that
so much of chapter 97, p. 180, Laws 1907,
entitled 'An Act Relating to the Model Train-
ing School Department of Normal Schools,
Authorized by § 7463 of Pierce's Code §
2550 of Ballinger's Annotated Codes and
Statutes of Washington, and Providing for
Apportionment of Funds Therefor,' approved
March 11, 1907, which seeks to apportion or
appropriate any part of the common school
fund or revenue therefrom or state tax for
the support of the common schools is un-
constitutional and void," the defendants
have appealed.

The assignments of error, four in number,
all go to the question, Does the act provide
for a diversion of the common school fund
in contravention of the following constitu-
tional provisions: "The legislature shall
provide for a general and uniform system
of public schools. The public school system
shall include common schools and such
high schools, normal schools, and tech-
nical schools as may hereafter be estab-

lished. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools." Article 9, § 2.

"... The interest accruing on said fund, together with all rentals and other revenues derived therefrom and from lands and other property devoted to the common school fund, shall be exclusively applied to the current use of the common schools." Article 9, § 3.

Counsel for appellants have made an elaborate research of the authorities in order to arrive at a proper definition of the words "common school," and from them deduced the following: "The essential characteristics, therefore, of a common school are: (1) They must be maintained at public expense; (2) they must provide a course of elementary education for children of all classes and people." He concludes that the model training school comes within this definition, and is therefore a common school within the meaning of the Constitution. The word "definition" is in itself difficult to define. What would be proper under a given state of facts may be impossible under another. The word must be accepted with reference to its relation to other words and terms. The words "common school" cannot be arbitrarily defined, but must be considered in connection with the general scheme of education outlined in the Constitution of the state. When so considered, they have no uncertain meaning. In adopting a Constitution, the people of this state saw fit to devote a chapter to the subject of education. In it they were careful to emphasize the importance, as well as the distinct character, of the common school. They endeavored to protect and preserve the funds set apart by law for the support of the common school from invasion, so that they might be applied exclusively to the current uses of such schools. An ample provision for the education of children was made paramount, and the duty was imposed upon the legislature of providing a general and uniform system of public schools. The system provided differentiates between the common school and the normal school, as does the Constitution; and, when adopted, such system has the force of the constitutional provision which it elaborates. The system must be uniform, in that every child shall have the same advantages and be subject to the same discipline as every other child. A system of control through school boards and county superintendents is provided for, their duties defined, and a method supplied to secure, in theory, at least, efficient teachers and instructors. When considered in this way, it would seem that the definition arrived at by counsel is 20 L.R.A. (N.S.)

too narrow. The words "common school," must measure up to every requirement of the Constitution and code of public instruction; and whenever, by any subterfuge, it is sought to qualify or enlarge their meaning beyond the intent and spirit of the Constitution, the attempt must fail.

The propriety and benefit of the scheme are urged by counsel. They say: "Here we have a model training school, which is a portion of a state normal, which has as principal a person chosen for that position because of his experience as an educator, who gives personal supervision to the instruction of a certain number of pupils who would otherwise be attending other graded schools of the district. This principal has under his charge a corps of teachers who are making a study, a science, of the art of schoolteaching. Experience will show the benefits to the pupils attending this department. The pupils are chosen in some way, mayhap by lot by the directors of the district; mayhap as being residents within a certain portion of the district in the vicinity of the normal school; mayhap as being pupils in a certain grade or grades. They are residents of the same district. They pursue the same studies; in all probability, receive better and more careful instruction than do the others who attend the other common schools within the district. Why is that not a common school within the meaning of the men who framed the Constitution? There are no essentials lacking." With these considerations we can have no concern. But, if it were otherwise, the argument meets itself, and furnishes abundant reason why the act in question cannot be sustained. The principal of the normal school, however accomplished, is not an officer recognized by the law creating the common school system, and is in no way answerable to those who are charged with the duty of executing it. The teachers under his charge may be devoted in their pursuit of the art of teaching, but they are not teachers within the meaning of the law, which has undertaken to insure that public school children shall be taught only by those who have met (not, seeking to attain) a certain standard of proficiency. In other words, the argument of counsel emphasizes the fact that, in its operation, the act of 1907 would break the uniformity of the common school system. To summarize: A common school, within the meaning of our Constitution, is one that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select quali-

fied teachers, with power to discharge them if they are incompetent. Under the system proposed, instead of the voter employing a teacher with proper vouchers of worthiness, they are made recruiting officers to meet a draft for material that the apprentice may be employed. A normal school has been defined as a school, "not intended for the education of the children of the inhabitants of the districts where they are to be located, but for the training of teachers for all the common schools. They are not open to all, but only to such as may be selected at times and in a manner to be prescribed by the superintendent of public instruction. . . .

Applicants for admission are required to possess certain qualifications, which must be tested by preliminary examinations, and, on the completion of their studies, the pupils are to receive diplomas, which shall be evidence of their qualification to teach in common schools; but they are under no obligation to become teachers, and there is nothing to prevent their engaging in other pursuits." *Gordon v. Cornes*, 47 N. Y. 608. Nor can the legislature by any contrivance, designation, or definition make a common school a normal school, or a normal school a common school, within the meaning of the Constitution. "To say that the legislature can determine what institutions shall receive the proceeds of the school fund, and that whatever they determine to be entitled thereto becomes *ipso facto* a common school, is begging the whole question, and annulling the constitutional restriction." *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education*, 13 Barb. 400.

Admitting, for the sake of argument, that the act would result in benefit to the schools as a complete system, the benefit would be only incidental. The main purpose is to benefit the normal pupil, and would result in a diversion of the fund from the exclusive use proposed in the Constitution. That the common school and the normal school are distinct is further made certain by reference to the enabling act creating this state. The people have spoken this difference in the Constitution, and the legislature has maintained it in the code of public instruction. To take from the one and give to the other by indirect methods that which was designed for a special purpose would defeat the whole scheme of the law, and open a way for the ultimate transposition of funds held under a most sacred trust. Courts have been zealous in protecting the money set apart for the maintenance of the free schools of the country. They have turned a deaf ear to every enticement, and frowned upon every attempt, however subtle, to evade the Constitution. Promised benefit and greater gain have been alike

urged as reasons, but without avail. They have endeavored to say in unmistakable terms that the common school fund is just what it purports to be,—a fund to be used for the sole purpose of supporting the graded schools of the commonwealth under the sanction of fixed and uniform laws. It follows that all experiments in education must be indulged, if at all, at the expense of the general fund. An attempt to divert a part of the common school fund to the education of children in certain orphanages was met by the supreme court of New York with the suggestion that, if it were accomplished, the legislature "might, by a simple enactment, convert all our colleges and academies and all our seminaries into common schools. This cannot be tolerated." *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education*, supra. The supreme court of Virginia, in defining the extent of legislative authority over these funds, said: "We think the Constitution has dedicated this fund to the public free schools of the state, and, intrenched behind its bulwarks, it is beyond the reach of the legislature for any other purposes whatever." *State Female Normal School v. Auditors*, 79 Va. 233. The supreme court of Kentucky, in several cases, has refused to countenance any diversion of the moneys set apart for the common schools, meeting a positive showing of economy to the public school system with the following: "The position that the school building is not sufficient in dimensions to accommodate all the children, and for that reason the legislature had the power to divide the fund, cannot be sustained. If not sufficient, those in charge of the common school should make it so; and to allow the legislative department of the government to divide the fund in such a mode when, in the opinion of those interested, the school buildings were insufficient, would be subversive of the whole school system. If a case could exist where such legislative action would be sanctioned, it is found in the case before us; but, when ample remedies are afforded by the law regulating common schools to prevent such results as is now attempted to justify this character of legislation, there is no reason for establishing a precedent that must, if followed, destroy the very existence of common schools." *Underwood v. Wood*, 93 Ky. 177, 15 L.R.A. 825, 19 S. W. 405. And the same court, in expressing its unwillingness to conjure and excuse for such legislation, said: "If the general assembly may appropriate the revenues of the school fund for any purpose which cannot be clearly shown to be in aid of common schools in any sense or in any degree, the whole fund may be dissipated and lost to the children of the

state whenever the legislature [of the state] so wills it." *Collins v. Henderson*, 11 Bush, 74. Other cases having a direct bearing on the issue are *Hull's Free School v. Horne*, 80 Va. 470, and *Halbert v. Sparks*, 9 Bush, 259.

It is not that the legislature cannot make provision for the support of a model training school, but, in its attempt to do so, it has made provision for it out of the wrong fund. This conclusion makes it unnecessary to discuss the other questions raised by counsel for respondent as to the sufficiency of the title of the act.

The judgment of the lower court is affirmed.

Rudkin, Ch. J., and Fullerton, Crow, and Mount, JJ., concur.

WISCONSIN SUPREME COURT.

ANNIE KNOEBEL, Respt.,

v.

NORTH AMERICAN ACCIDENT INSURANCE COMPANY, Appt.

(135 Wis. 424, 115 N. W. 1094.)

Insurance — premium — nonpayment — waiver.

Although a contract for accident insurance, the premiums on which are to be paid monthly, expressly provides that they must be paid on the first day of each month, without notice, yet, if for ten months the insured is sent notice of the maturity of the

premium, with a request that it be sent in a self-addressed envelop, the insurer cannot suddenly, without warning, cease to send the notice, and forfeit the policy for nonpayment, which occurs because the assured has, in good faith, waited for the usual notice; especially where the payments were to be entered in a book which must always be presented with the payment, so that assured might well assume that the only safe way of preserving the book was in sending it as directed by the insurer, to a post-office address designated by it.

(April 17, 1908.)

APPEAL by defendant from a judgment of the Waukesha County Court in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

Statement by Winslow, Ch. J.:

This is an action by the beneficiary in an accident insurance policy issued by the defendant October 26, 1905, to recover the death indemnity provided thereby. The plaintiff is the widow of Frank Knoebel, the assured, who was, at the time of the issuance of the policy, superintendent of a stone quarry near Waukesha, Wisconsin, and met with an accident resulting in his death within a few hours, on October 5, 1906. The policy was issued upon a written application, and provided for the payment of a premium of \$1 on the first day of each month, and that the insurance should only continue in force so long as the monthly premiums were paid in advance

Case Note. — Effect of custom to give insured notice of maturity of premium where insured is not otherwise entitled to notice.

There is an irreconcilable conflict of authority upon this question, though the greater number of the decisions support the proposition that, even if the contract of insurance is silent as to the duty of giving the assured notice when the premiums fall due, yet, if the insurer has followed the custom of giving such notice, it cannot; by failing to give the customary notice, insist upon a forfeiture of the policy for the nonpayment of a premium promptly when due, if the assured was, in good faith, waiting for the usual notice and this was the sole reason for the nonpayment of the premium.

Thus, in *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841, in which it appeared that the insurer had been in the habit of giving the assured notice by mail from time to time as the premiums became due, where and to whom to pay the premiums.—sometimes to one agent at one place, and sometimes to another agent at another place.—it was held that no forfeiture was incurred because of the failure to pay a

premium at maturity, which was solely due to want of such customary notice, the premium being ready and being tendered as soon as notice was given.

And in *Mayer v. Mutual L. Ins. Co. 38 Iowa, 304*, 8 Am. Rep. 34, it was said that the majority of ordinarily prudent persons who had been customarily notified of the time when the premiums upon their insurance policies became due, and who had received no notice of an intention on the part of the insurer to abandon the customary course, would, in a particular case, expect and await a like notice; and, if such was a reasonable and natural result of the former dealings of the insurer, the latter must govern its future conduct so as to accord with the reasonable expectation so created. In other words, having given the policy holder reasonable ground for expecting that he was to be notified when his premium fell due, the insurer must continue to give such notice until it informs the assured that he must no longer expect it. "Any other construction would make the law a trap to ensnare the unwary." But see *Mandego v. Centennial Mut. Life Assc. infra*, a case from the same jurisdiction.

And in *Gunther v. New Orleans Cotton*

on the first day of each month without notice. It further provided that, in case of payment of a renewal premium after expiration, there could be no recovery for accidental injury happening between the date of the expiration and 12 o'clock noon of the day following such payment, and that the acceptance of any renewal premium should be optional with the company. The defense pleaded was that Knoebel did not pay the monthly premium falling due October 1, 1906, and that the policy had thereby lapsed and expired prior to and at the time of Knoebel's injury and death. The action was tried before a jury, and the facts were essentially undisputed. Knoebel paid an advance policy fee of \$5 on October 25, 1905, at the time of making his application. The first monthly payment was due December 1, 1905. The policy provided that the monthly payments should be made to the company at its home office in Chicago, or to the person designated in writing by the company to receive them. The company gave the assured a small book, or folded card, containing a notice that, in or-

der to keep the policy in force, all premiums must be paid in advance, without notice, to Geo. L. Forrest, collector, 88 La Salle street, Chicago; or, if he could not be reached, to A. E. Forrest, secretary, 217 La Salle street, Chicago, and that "this book must always be presented to the collector when paying premiums and receive his signature, which is a receipt for the same; if the collector cannot be found, send postoffice or express order or check with this book to A. E. Forrest, secretary, 217 La Salle street, Chicago." The book or card contained an appropriate space with blank lines in which the collector was to note the date and amount of each monthly payment.

At or about the close of each month, beginning with the close of November, 1905, and continuing until the close of August, 1906, the company caused to be mailed at Chicago from the collector's office, 88 La Salle street, a notice directed to the insured at Waukesha, stating that "the payment of your insurance is due the first day of the month. Please use the inclosed stamped en-

Exch. Mut. Aid Asso. 40 La. Ann. 776, 2 L.R.A. 118, 8 Am. St. Rep. 554, 5 So. 65, the rule was said to be established that, however positive the terms of the contract of insurance might be in requiring payment, unconditionally, of the premiums when due, yet, if the insurer pursued the practice of notifying its policy holder before the maturity of his premiums, the latter would have the right to expect and to rely on receiving such notice; and that, if the insurer failed to send it in a particular case, it would be estopped from claiming a forfeiture for nonpayment at the exact time.

So, in *Kavanaugh v. Security Trust & L. Ins. Co.* 117 Tenn. 33, 7 L.R.A. (N.S.) 253, 96 S. W. 499, 10 A. & E. Ann. Cas. 680, it was held that, where, for eight years an insurance company had always permitted an assignee of one of its policies to pay the annual premiums by notes falling due quarterly, and always notified him when a note was to be due, the policy could not be forfeited for the nonpayment of a note unless the customary notice reached him.

This rule of law finds support in the following cases also: *Equitable Acci. Ins. Co. v. Van Etten*, 40 Ill. App. 232; *Supreme Council C. K. A. v. Winters*, 108 Ky. 141, 55 S. W. 908; *Elgutter v. Mutual Reserve Fund Life Asso.* 52 La. Ann. 1733, 28 So. 289; *Atty. Gen. v. Continental L. Ins. Co.* 33 Hun, 138; *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459, 31 Am. Rep. 555; *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107, 100 Am. Dec. 621; *Hartford L. Ins. Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968.

But the insured will not, it seems, be allowed to sleep upon his rights, but must act with reasonable diligence to bestir himself to ascertain why the customary notice has not come. Thus, it was held in *Grant* 20 L.R.A. (N.S.)

v. Alabama Gold L. Ins. Co. 76 Ga. 575, that, if the assured waited more than six months after a premium became due before taking any steps to inquire into the matter or to pay the premium, a custom on the part of the insurer to give notice of the maturity of the premiums could not be relied upon to avoid the forfeiture of the policy.

A similar rule has been applied to the custom of sending collectors to the residence of the assured to collect the premiums upon his policy; and, therefore, where the insurer is accustomed to send such collector, its failure so to do, which results in the nonpayment of a premium when due, will estop it from claiming a forfeiture for the nonpayment of the premium upon the date of its maturity (*Stirling L. Ins. Co. v. Rapps*, 130 Ill. App. 121; *Carey v. John Hancock Mut. L. Ins. Co.* 114 App. Div. 760, 100 N. Y. Supp. 289); or will be deemed to be a waiver of the forfeiture (*Goedecke v. Metropolitan L. Ins. Co.* 30 Mo. App. 601).

On the other hand, in *Meyer v. Metropolitan L. Ins. Co.* 6 Ohio N. P. 34, it was held, in an action upon a policy of life insurance which provided that the neglect of a collector to call would not be deemed an excuse for nonpayment of a premium, that the custom of the insurer of sending a collector did not constitute a waiver of such provision in the policy.

Opposed to the rule of law enunciated in *KNOEBEL v. NORTH AMERICAN ACCI. INS. CO.* is *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765, in which it was held that a usage on the part of an insurer of giving notice of the day of payment of notes given for premiums, and the reliance of the assured upon having such notice, was no excuse for the nonpayment of a premium under a policy which was to be

velop in sending the same, and put your receipt book with your money. The book will be returned promptly." The inclosed stamped envelop was addressed to the collector's office, 88 La Salle street. In response to this notice, the assured each month at once mailed the monthly payment of \$1 inclosed with the book in the stamped and addressed envelop, and the book was regularly returned duly receipted. The book was offered in evidence, and shows the payments to have been received as follows: December 1, 1905; January 2, February 1, March 1, April 2, April 30, May 31, July 3, July 31, and September 1, 1906. The remittances were uniformly mailed by Lena Knoebel, the daughter of the assured, who went to the postoffice a day or two before the close of each month with the necessary dollar, and received the notice, and immediately mailed the premium and the book in the stamped envelope. No notice was sent for the October premium. Lena went to the postoffice as usual with the premium money, as directed by her father, about October 1st, but found no notice.

avoided if the premium was not paid upon a designated date. This decision was distinguished from *New York L. Ins. Co. v. Eggleston*, supra, in that the customary notice, upon which the assured relied in that case, was a notice which designated the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready; and, as soon as he ascertained the particular person to whom it was payable, he tendered this payment in due form; while, in the *Thompson Case*, the notice could contain nothing that the assured did not already know. For a criticism of this distinction, see *Grant v. Alabama Gold L. Ins. Co.* supra.

And in *Mandego v. Centennial Mut. Life Assn.* 64 Iowa, 134, 17 N. W. 656, 19 N. W. 877, it was held, under a policy which did not require the insurer to give notice to the assured of time of payment of his annual dues, that the fact that the company was accustomed to give such notice voluntarily did not bind it to continue to do so, and that its failure to do so was not a waiver of its right to declare the policy forfeited for the nonpayment of the annual dues.

And in *Mutual F. Ins. Co. v. Miller Lodge*, I. O. O. F. 58 Md. 463, and in *Webb v. Mutual F. Ins. Co.* 63 Md. 213, it was held that, though an insurer was accustomed to give notice to its members of the amount of the annual interest upon their premium notes, and of the time of payment, yet, if no obligation to give such notice was created by the insurer's charter or by-laws, such custom would not impose an obligation upon the insurer to give such notice, so as to render a failure to give it an excuse for the nonpayment of the interest.

And in *Gateman v. American L. Ins. Co.* 20 L.R.A. (N.S.)

She went two or three times from the 1st to the 4th of October, prepared to send the money, but still received no notice. She and her father relied on receiving the notice, and did not send the dollar on account of not receiving it. The injury and death of the assured occurred October 5th, and on October 8th the company was notified of the assured's accidental death, but, on October 10th, denied all liability on account of failure to pay the October premium. The beneficiary tendered the premium by mail to the company October 20th, but it was returned with a denial of all liability. On these facts the trial court directed a verdict for the plaintiff for the amount of the death indemnity, with interest and costs, and the defendant appeals.

Messrs. Frame & Blackstone, for appellant:

A life insurance company is not bound to give notice to the insured when the annual premium is about to fall due, in the absence of an agreement, though it has

1 Mo. App. 300, evidence of the custom of an insurer to give notice of the premium becoming due was held to be immaterial, the court saying that such notice was always a mere voluntary courtesy, and that the omission to do it entailed no consequences. But see *Goedecke v. Metropolitan L. Ins. Co.* supra.

And *Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co.* 97 Pa. 15, would also seem to be opposed to the proposition that the practice of an insurer of giving notice makes it incumbent upon it to continue to do so, since it was there held that evidence was properly excluded that it had been the custom of the insurer to send notices of the falling due of premiums, and that the assured received no notice of the maturity of the premium the nonpayment of which was relied upon to avoid the policy, where it was not shown that the notice was purposely omitted with the design of forfeiting the policy. But see *Helme v. Philadelphia L. Ins. Co.* supra.

This note does not include cases where the assured is entitled by his contract of insurance to have the dividends or profits earned by his policy applied to the reduction of his premiums, since, as he cannot know without notice the amount that may be due, he cannot be in default until he has notice, though the policy is silent in regard thereto; and therefore his right to receive such notice depends upon an implied term of his contract of insurance, rather than upon any custom of the insurer in sending it.

In many jurisdictions notice as condition of forfeiture for nonpayment of premiums is expressly required by statute, and in those jurisdictions the question herein considered does not arise.

been the practice of the company to give such notice.

Morey v. New York L. Ins. Co. 2 Woods, 663, Fed. Cas. No. 9,795; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 766; *Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co.* 97 Pa. 15; *Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213; *Gateman v. American L. Ins. Co.* 1 Mo. App. 300; *Mandego v. Centennial Mut. Life Asso.* 64 Iowa, 134, 17 N. W. 656, 19 N. W. 877.

Where the policy provides that the insurance shall be suspended during the default in payment of any premium, the provision is good, and liability is suspended during such time.

Jefferson Mut. Ins. Co. v. Murry, 74 Ark. 507, 86 S. W. 813; *Hayden v. Franklin L. Ins. Co.* 69 C. C. A. 423, 136 Fed. 285; *Spencer v. Travelers' Ins. Co.* 112 Mo. App. 86, 86 S. W. 899; *Letzler v. Pacific Mut. L. Ins. Co.* 119 Ky. 924, 85 S. W. 177; *National L. Ins. Co. v. Reppond* (Tex. Civ. App.) 81 S. W. 1012; *Union Cent. L. Ins. Co. v. Hughes* (Tex. Civ. App.) 70 S. W. 1010; *Hagins v. Aetna L. Ins. Co.* 72 S. C. 216, 51 S. E. 683; *Behling v. Northwestern Nat. L. Ins. Co.* 117 Wis. 24, 93 N. W. 800; *Thompson v. Knickerbocker L. Ins. Co.* supra.

Messrs. Ryan, Merton, & Newbury for respondent.

Winslow, Ch. J., delivered the opinion of the court:

The conditions of the policy in question were very specific to the effect that the monthly payment must be made on the first day of the month, without notice; and, if not so made, then, that there should be no liability for an accident happening after the default took place, and before the premium was actually paid and accepted by the company. Unless there has been some material change made in these provisions by a subsequent agreement, or unless the company has in some way estopped itself from insisting upon them, there can be no recovery. It is not claimed that the parties made any formal change in their contract relations, but it is claimed that the company, by its uniform practice, for ten consecutive months, of sending a notice of the maturity of the monthly premium, with a request that it be sent in a self-addressed envelop, induced the assured to rely on the continuance of the custom, and to believe that the company desired that premiums be forwarded in response to the notice, and, hence, that the company could not suddenly and without warning discontinue the practice, and insist on a default occurring while the assured was, in good

faith, waiting for the usual notice. It is claimed that there are present here all the elements of an estoppel resulting from reliance upon the continuance of an established course of action. The trial court so held as matter of law; and the question presented is whether this ruling is correct.

The general question has been frequently before the courts, and the decisions cannot be said to be entirely harmonious. The following proposition, taken from the opinion in the case of *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841, is believed to be an accurate and comprehensive expression of the fundamental principle involved: "Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." The difficulty, if any there be, lies manifestly in attempting to apply the general principle to a particular case. That the assurance company had established a course of action by voluntarily sending the monthly notices for ten consecutive months cannot be doubted; and that this custom was relied on by the assured, and that he delayed sending his premiums on account of his daily expectation that the notice with its accompanying stamped and addressed envelop would be received according to the custom, is made certain by the evidence. There can be no difference of opinion upon these questions. The method of payment was hedged about with rather unusual conditions. It could not be made at Waukesha, but must be sent by mail to Chicago. The small book or card furnished to the assured provided that the payment "must be made only" to the collector, Forrest, at 88 La Salle street, Chicago; but it further provided that the book itself "must always" be presented with the payment and receive the collector's signature, and it contained a provision that, if the collector could not be found, the assured must send the payment "with the book" to the secretary, Forrest, at 217 La Salle street, Chicago. So the assured was informed that he must at all hazards preserve the book, although the book must be sent monthly to Chicago to the collector, and there was a further intimation that the collector might not be always found. These directions, coupled with the repeated declaration that the presence of the book at the time of payment was an essential to effective payment, were certainly well calculated to induce a man unaccustomed

to financial transactions to believe that considerable care must be exercised in committing his money and his book to the mails. If, by reason of removal of the collector's office, or by reason of misdirection, or for any other cause, the book went astray, there was apparently danger that the company would not receive his premium afterwards on account of the absence of the book. In this situation the practice of the company in sending a notice, with a request to send the premium in the addressed and stamped envelop inclosed, was undoubtedly peculiarly acceptable. It doubtless appealed to him at once as the only perfectly safe way to insure the safety of his remittances; and, when the practice was continued regularly from month to month, the premium in one instance being accepted on the third of the month without demur, the conclusion on his part would seem entirely justifiable, if not almost irresistible, that the company also appreciated the possibility of error or mistake, and desired that the assured should uniformly make his remittance and send his book in a properly addressed envelop furnished by it, and not attempt to send them forward himself without certain knowledge that the collector's postoffice address remained unchanged. A course better calculated to convince the assured that the company preferred that he wait for the notice could hardly be imagined.

This court has not yet met the exact question here presented, although the general principle that the insurance company may, by a course of conduct, waive exact performance of the conditions of the policy, or, to express it more exactly, be estopped from insisting on a forfeiture, has been frequently asserted. *Reisz v. Supreme Council A. L. H. 103 Wis. 427, 79 N. W. 430*, and cases cited. In *2 Joyce on Insurance, § 1332*, the following principle is stated, which we regard as a substantially correct statement of the law: "If a life insurance company has been in the practice of notifying the insured of the time when the premium will fall due and of the amount, and the custom has been so uniform and so reasonably long in continuance as to induce the insured to believe that a clause for forfeiture for nonpayment will not be insisted on, but that the notice will precede the insistence upon the forfeiture, and the insured is, in consequence, put off his guard, such notice must be given; and, if not given, no advantage can be taken of any default in payment which it has thus encouraged, for the insured is entitled to expect the customary notification; and to mislead the insured by not giving such notice, and then insist upon a strict compliance with the conditions of forfeiture, constitutes, under such circum-

20 L.R.A. (N.S.)

stances, a fraud upon the assured which the courts have refused in numerous cases to countenance." See also *2 May, Ins. § 356a*. All the elements necessary to constitute estoppel by a long-continued course of conduct under the principles just stated seem to be shown by the evidence here, and they seem to us also to be shown beyond dispute. If there were any conflicting evidence as to the facts, or any room for different inferences of fact from the circumstances proven, the question would be one for the jury, and not for the court; but, in our opinion, there is no such room. The continued and uniform custom, its persuasive character, the reliance of the assured thereon, its sudden cessation without notice, and the default by reason of reliance upon the continuance of the custom, are all proven without dispute; and there are no circumstances in evidence even throwing doubt upon these essential facts, or justifying any inference to the contrary.

There are no other contentions raised which merit discussion.

Judgment affirmed.

INDIANA SUPREME COURT.

PERE MARQUETTE RAILROAD COMPANY,
Appt.,
v.

JETER G. STRANGE.

(— Ind. —, 84 N. E. 819.)

Carrier — intending passenger — rights.

1. One who is upon the premises of a railroad company for the purpose of boarding a train in due course, and has purchased a ticket entitling him to transportation, is, while approaching the train upon which he is to be carried, a passenger.

Same — care.

2. A railroad company owes to a passenger, approaching a train which he intends

Case Note. — Duty to guide or conduct passenger to or from train.

Cases involving the general duty of carriers to assist passengers in boarding or alighting from cars, or the general duty to keep the station premises safe by lighting and otherwise, have not been included in this note.

But few reported cases pass directly upon the question of the duty of a railroad company to guide or conduct a passenger between the waiting room and its trains. In some cases the court seems to require a higher degree of care than that suggested in *PERE MARQUETTE R. CO. v. STRANGE*, or at least do not make prominent the distinction between the degree of care owed to passengers being transported and those not being transported. The general rule appears to

to board, the duty of exercising only reasonable care for his protection.

Same — train in station.

3. The negligence of a railroad company in the management of a train approaching a station at night is disproved, where the headlight is burning, the bell ringing, the train running slowly and under control, while the person complaining of the negligence was discovered the moment he stepped on the track, and the emergency brakes applied.

Carrier — guiding passenger.

4. A railroad company is not bound to guide a passenger from the waiting room to his train, even at night, where he is a mature, normal man of experience, and the platform is in good condition, lying between the waiting room and the train, and he discloses no circumstances requiring guidance.

Same — negligence.

5. An attempted guidance of passengers to a train by a station master, who, with a

be that the carrier must use reasonable care to make the passageway to and from the train and the station safe, and must furnish guides to conduct the passengers back and forth if the passengers would not otherwise be safe.

Thus, in *Peniston v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 777, 44 Am. Rep. 444, it was held that the defendant company was legally bound to furnish to its passengers an easy and safe mode of getting to and from its trains and such eating stations as it may have provided for the wants and conveniences of its passengers; and this obligation imposed upon the railroad company the duty of having ample and sufficient light, to safely guide their passengers to or from hotel or eating station, and, in case trains are removed from one track to another during the meal, to inform, by employees, the passengers on their egress from the eating or dining room of the exact location of their respective trains. And this decision was cited with approval and followed in *Moses v. Louisville, N. O. & T. R. Co.* 39 La. Ann. 649, 4 Am. St. Rep. 231, 2 So. 567, where it was held that the company's omission to instruct, by servants or other employees, its passengers as to the safest course to pursue in order to reach the sleeping car of the train, was a violation of its duty to its passengers.

So, in *Dieckmann v. Chicago & N. W. R. Co.* (Iowa) 121 N. W. 676, it was held that a carrier was bound to exercise the highest degree of care to protect passengers in making the passage from the depot to the train, and, if due care required the use of a light to illuminate the path, or the services of a guide or escort to conduct the passengers to the proper platform or train, the failure to provide these safeguards would be negligence.

So, in *New York, C. & St. L. R. Co. v. Doane*, 115 Ind. 435, 1 L.R.A. 157, 7 Am. St. Rep. 451, 17 N. E. 913, it was held that 20 L.R.A. (N.S.)

light in his hand, takes a proper place on the platform and calls to the passengers to come to him, is not rendered negligent by the fact that one of the passengers thinks that the call comes from the other side of the track, and is injured in attempting to cross it.

Same — contributory negligence.

6. A passenger cannot hold the railroad company liable for his injury, because of its failure properly to light its platform, if, being a stranger and going from the waiting room onto a safe platform, he approaches the track, half facing the approaching train, and, with the headlight in full view, needlessly attempts to cross the track directly in front of the engine under the erroneous impression that it had stopped.

On petition for rehearing.

New trial — amendment of motion.

7. Memoranda of the trial judge showing that appellant was given ninety days for bill of exceptions, made at the time of over-

where passengers are discharged away from the platform, or where it is impracticable to reach it, the passengers must receive such care and attention as will enable them to reach the station in safety.

And where the station was a place of great activity, and incoming trains were being broken up, and new trains made up to go out, and two trains were leaving for the plaintiff's destination within five minutes of each other, on tracks side by side in the same station, and both under the defendant's control, it was held in *Newcomb v. New York C. & H. R. R. Co.* 182 Mo. 687, 81 S. W. 1069, that under such conditions the duty devolved upon the defendant to direct passengers to their proper trains.

In *Laub v. Chicago, B. & Q. R. Co.* 118 Mo. App. 488, 94 S. W. 550, there is an implication that, where a passenger is discharged in a dark and unsafe place, it is the duty of the railroad company to have a guide present to direct the passengers in safety.

In *Detroit & M. R. Co. v. Curtis*, 23 Wis. 152, 99 Am. Dec. 141, instructions were held erroneous which told the jury that, if they believed, from the evidence, that, if the company had had an agent wearing its badge, whose special duty it was to warn passengers not to go on board until the cars stopped, and to inform them what cars to enter, and to tell them there was room for all, etc., such agent would have prevented the injury; and if there was no such agent there, then the defendant was guilty of negligence and liable in the action. It will be seen that this instruction was much broader than the scope of this note.

As to duty of railroad company to assist infirm passenger, see case note to *Illinois C. R. Co. v. Cruse*, 8 L.R.A. (N.S.) 299.

As to liability of carrier for assistance negligently rendered passenger by employee, see case note to *Hanlon v. Central R. Co.* 10 L.R.A. (N.S.) 411.

ruling a motion for new trial, are sufficient upon which to amend *nunc pro tunc* an order overruling the motion, so as to show the allowance of ninety days in which to present a general bill of exceptions.

Appeal — transcript of record — motion for new trial.

8. A motion for new trial is a part of the record without a bill of exceptions, and is covered by a *præcipe* for a complete transcript of record.

Same — *præcipe*.

9. Compliance with a statute directing the *præcipe* for a transcript of record to be copied in the transcript is sufficient to present the record to the reviewing court, although a former statute requires the *præcipe* to be appended to the transcript.

(May 26, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for La Porte County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. John B. Elam, James W. Fessler, and Harvey J. Elam, for appellant:

Failure to direct did not cause the injury.

Indianapolis & V. R. Co. v. McClaren, 62 Ind. 566; Aufdenberg v. St. Louis, I. M. & S. R. Co. 132 Mo. 565, 34 S. W. 485.

Passengers are bound to exercise ordinary care for their own safety; and, since the railroad company had done nothing to indicate that it was safe to cross, appellee was required to use the same amount of care that is required of anyone else approaching a track.

Pennsylvania R. Co. v. Bell, 122 Pa. 58, 15 Atl. 561; St. Louis, I. M. & S. R. Co. v. Whittle, 20 C. C. A. 196, 40 U. S. App. 23, 74 Fed. 296; Holmes v. South Pacific Coast R. Co. 97 Cal. 161, 31 Pac. 834; Gonzales v. New York & H. R. Co. 38 N. Y. 440, 98 Am. Dec. 58; Sanchez v. San Antonio & A. P. R. Co. (Tex. Civ. App.) 27 S. W. 922; Roberts v. New York, N. H. & H. R. Co. 175 Mass. 296, 56 N. E. 559; Flanagan v. Philadelphia W. & B. R. Co. 181 Pa. 237, 37 Atl. 341; Dotson v. Erie R. Co. 68 N. J. L. 679, 54 Atl. 827; Chicago, B. & Q. R. Co. v. Mahara, 47 Ill. App. 208; Baltimore & O. S. W. R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Matthews v. Pennsylvania R. Co. 148 Pa. 491, 24 Atl. 67; Bradley v. Grand Trunk R. Co. 107 Mich. 243, 65 N. W. 102.

It was, as matter of law, contributory negligence for the plaintiff to fail, as he did, to look at and watch the train while walking toward it, until he was just stepping onto the track.

20 L.R.A. (N.S.)

Rich v. Evansville & T. H. R. Co. 31 Ind. App. 10, 66 N. E. 1028; Baltimore & O. S. W. R. Co. v. Reynolds, supra; Smith v. Wabash R. Co. 141 Ind. 92, 40 N. E. 270; Lake Erie & W. R. Co. v. Pence, 24 Ind. App. 12, 55 N. E. 1036; Cadwallader v. Louisville, N. A. & C. R. Co. 128 Ind. 518, 27 N. E. 161; Sutherland v. Cleveland, C. C. & St. L. R. Co. 148 Ind. 308, 47 N. E. 624; Cincinnati, I. St. L. & C. R. Co. v. Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; Indiana, B. & W. R. Co. v. Greene, 106 Ind. 279, 55 Am. Rep. 736, 6 N. E. 603; Lake Erie & W. R. Co. v. Graver, 23 Ind. App. 678, 55 N. E. 968; Hancock v. Lake Erie & W. R. Co. 21 Ind. App. 10, 51 N. E. 369; Chicago & E. I. R. Co. v. Hedges, 118 Ind. 5, 20 N. E. 530; Ohio & M. R. Co. v. Hill, 117 Ind. 56, 18 N. E. 461.

And for him to walk on the track, as he did, without listening for the train.

Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554; Smith v. Wabash R. Co. supra; Southern R. Co. v. Davis, 34 Ind. App. 377, 72 N. E. 1053; Louisville, N. A. & C. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892; Terre Haute & I. R. Co. v. Clark, 73 Ind. 168; Bellefontaine R. Co. v. Hunter, 33 Ind. 335, 5 Am. Rep. 201.

And, if his vision was so impaired that he could not see the engine, to step from his place of safety on the platform onto the track.

Quinn v. Chicago & E. R. Co. 162 Ind. 442, 70 N. E. 526; Oleson v. Lake Shore & M. S. R. Co. 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736; Debbins v. Old Colony R. Co. 154 Mass. 402, 28 N. E. 274; Bradley v. Grand Trunk R. Co. supra; Keller v. Erie R. Co. 183 N. Y. 67, 75 N. E. 965.

And for him to disregard the instructions given him, and to attempt to cross the track as he did.

Louisville & N. R. Co. v. Bisch, 120 Ind. 549, 22 N. E. 662; Pennsylvania R. Co. v. Zebe, 37 Pa. 420; Tillett v. Lynchburg & D. R. Co. 115 N. C. 662, 20 S. E. 480; Aufdenberg v. St. Louis, I. M. & S. R. Co. supra; Baltimore & O. R. Co. v. State, 63 Md. 135.

Any failure of the railroad company to provide lights or guides for the plaintiff was known to him before he undertook to go to the train, and hence, when, with full knowledge of these omissions, he undertook to go, he assumed any risk arising therefrom; and, if those risks were greater than a reasonable man would take, he was also guilty of contributory negligence.

Lake Erie & W. R. Co. v. Pence, supra.

Korrady v. Lake Shore & M. S. R. Co. 131 Ind. 261, 29 N. E. 1069; Chicago, I. & L. R. Co. v. Reed, 29 Ind. App. 94, 63 N. E. 878; Louisville & N. R. Co. v. Bisch, supra.

Messrs. Frank E. Osborn, W. A. McVey, and Theron F. Miller, for appellee:

The railroad company as under the obligation of exercising a very high degree of care to avoid injury to plaintiff.

Illinois C. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290; Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; Gaynor v. Old Colony & N. R. Co. 100 Mass. 215, 97 Am. Dec. 96; Jordan v. New York, N. H. & H. R. Co. 165 Mass. 346, 32 L.R.A. 101, 52 Am. St. Rep. 522, 43 N. E. 111; 6 Cyc. Law & Proc. p. 611; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 377; Redhing v. Central R. Co. 68 N. J. L. 641, 54 Atl. 431.

The plaintiff, having purchased his ticket and started from the station for his train, was a passenger.

Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 206, 33 N. E. 219; Illinois C. R. Co. v. Treat, supra; Brien v. Bennett, 8 Car. & P. 724; Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 482, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; Caswell v. Boston & W. R. Corp. 98 Mass. 200, 93 Am. Dec. 151; Shannon v. Boston & A. R. Co. 78 Me. 52, 2 Atl. 678; Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; Carpenter v. Boston & A. R. Co. 97 N. Y. 497, 49 Am. Rep. 540; Stoner v. Pennsylvania Co. 98 Ind. 388, 49 Am. Rep. 764; Young v. New York, N. H. & H. R. Co. 171 Mass. 33, 41 L.R.A. 193, 50 N. E. 455.

It is the duty of a railway carrier of passengers to keep its platforms and approaches connected therewith sufficiently lighted, or otherwise to provide lights to afford its passengers a safe ingress to, and egress from, its trains.

Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 481, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 358, 4 So. 359; Moses v. Louisville, N. O. & T. R. Co. 39 La. Ann. 649, 4 Am. St. Rep. 233, 2 So. 567; Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 590, 6 L.R.A. 193, 21 N. E. 968; Lucas v. Pennsylvania Co. 120 Ind. 206, 16 Am. St. Rep. 323, 21 N. E. 972; Pennsylvania Co. v. Marion, 123 Ind. 418, 7 L.R.A. 687, 18 Am. St. Rep. 330, 23 N. E. 973; Buenemann v. St. Paul, M. & M. R. Co. 32 Minn. 390, 20 N. W. 379; Wallace v. Wilmington & N. R. Co. 8 Houst. (Del.) 529, 18 Atl. 818; Fox v. 20 L.R.A. (N.S.)

New York, 5 App. Div. 349, 39 N. Y. Supp. 309.

The railway carrier owes to passengers the duty to point out to them the trains they should take, to warn them of special dangers, and otherwise, when needful, to direct their movements.

Bishop, Non-Contract Law, § 1089; 3 Thomp. Neg. §§ 2702, 2706; Ranney v. St. Johnsbury & L. C. R. Co. 67 Vt. 594, 32 Atl. 810; Hutchinson, Carr. § 637; Romine v. Evansville & T. H. R. Co. 24 Ind. App. 235, 56 N. E. 245; Terre Haute & I. R. Co. v. Buck, 96 Ind. 357, 49 Am. Rep. 168; 6 Cyc. Law & Proc. p. 600.

Where the law will not exact of the carrier's servants the duty of guidance and assistance, yet, if the same is attempted, the carrier will be held liable for any negligence of its servants in connection therewith.

6 Cyc. Law & Proc. p. 611.

The jury must determine the standard of care required, and then determine whether the passenger has lived up to that standard.

Warren v. Fitchburg R. Co. 8 Allen, 231, 85 Am. Dec. 700; Terry v. Jewett, 78 N. Y. 344; Alabama G. S. R. Co. v. Coggin, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455; Graven v. MacLeod, 35 C. C. A. 51, 92 Fed. 846; Brassell v. New York C. & H. R. R. Co. 84 N. Y. 241; St. Louis & S. W. R. Co. v. Johnson, 59 Ark. 122, 26 S. W. 593; Pennsylvania R. Co. v. White, 88 Pa. 333; Union P. R. Co. v. Sue, 25 Neb. 772, 41 N. W. 801; Buenemann v. St. Paul, M. & M. R. Co. supra; Gaynor v. Old Colony & N. R. Co. 100 Mass. 214, 97 Am. Dec. 96; Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68, 71; Mayo v. Boston & M. R. Co. 104 Mass. 142; Louisville, E. & St. L. Consol. R. Co. v. Bean, 9 Ind. App. 240, 36 N. E. 443; Parsons v. New York C. & H. R. R. Co. 113 N. Y. 355, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145; Archer v. New York, N. H. & H. R. Co. 106 N. Y. 589, 13 N. E. 318; Ohio & M. R. Co. v. Stansberry, 132 Ind. 533, 32 N. E. 218; Wheelock v. Boston & A. R. Co. 105 Mass. 203; Redhing v. Central R. Co. supra; Shutt v. Cumberland Valley R. Co. 149 Pa. 266, 24 Atl. 305; Jones v. East Tennessee, V. & G. R. Co. 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118.

The mere fact that one situated, as was plaintiff, did not look or listen for an approaching train, is not conclusive of a want of due care on his part.

Sonier v. Boston & A. R. Co. 141 Mass. 14, 6 N. E. 84; Brassell v. New York C. & H. R. R. Co.; Terry v. Jewett; and Warner v. Baltimore & O. R. Co.,—supra; Beech-

er v. Long Island R. Co. 161 N. Y. 222, 55 N. E. 900; Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713; Baltimore & O. S. W. R. Co. v. Peterson, 156 Ind. 373, 59 N. E. 1044; Shoner v. Pennsylvania Co. 130 Ind. 178, 28 N. E. 616, 29 N. E. 775; Cincinnati, I. St. L. & C. R. Co. v. Long, 112 Ind. 171, 13 N. E. 659; Grand Rapids & I. R. Co. v. Cox, 8 Ind. App. 34, 35 N. E. 183; Chicago & E. I. R. Co. v. Hedges, 105 Ind. 406, 7 N. E. 801; Palmer v. New York C. & H. R. Co. 112 N. Y. 234, 19 N. E. 678; Oldenburg v. New York C. & H. R. Co. 124 N. Y. 414, 26 N. E. 1021; Indianapolis Union R. Co. v. Neubacher, 16 Ind. App. 41, 43 N. E. 576, 44 N. E. 669; Pennsylvania Co. v. Stegemeier, 118 Ind. 311, 10 Am. St. Rep. 136, 20 N. E. 843; Louisville & N. R. Co. v. Williams, 20 Ind. App. 579, 51 N. E. 128.

A passenger has a right to assume that the company would not expose him to unnecessary danger; and, while he must himself exercise reasonable care, his watchfulness would be naturally diminished by his reliance upon the discharge, by the company, of its duty to provide a safe passage to and from the trains.

Palmer v. New York C. & H. R. R. Co.; Ohio & M. R. Co. v. Stanaberry; Brassell v. New York C. & H. R. R. Co.,—supra.

One who does not act under an impulse, or upon a belief created by a sudden danger attributable to another's negligence, is not to be regarded as guilty of contributory fault, even though the act would be regarded as a negligent one if performed under circumstances not indicating sudden peril.

Indiana R. Co. v. Maurer, 160 Ind. 28, 66 N. E. 156; Chicago & A. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 740.

If it were a fact that plaintiff saw the identical train that injured him, but honestly believed it to be standing still, the fact that he saw it would not be conclusive of his contributory negligence.

Doyle v. Pennsylvania & N. Y. Canal & R. Co. 139 N. Y. 637, 34 N. E. 1063; Maginnis v. New York C. & H. R. R. Co. 52 N. Y. 215; Gratiot v. Missouri P. R. Co. 116 Mo. 450, 21 S. W. 1094; Henavie v. New York C. & H. R. R. Co. 166 N. Y. 280, 59 N. E. 903; Blaiser v. New York, L. E. & W. R. Co. 110 N. Y. 638, 17 N. E. 692; Sherry v. New York C. & H. R. R. Co. 104 N. Y. 652, 10 N. E. 128.

The fact that a person about to cross a railroad track does not stop is not negligence *per se*.

Malott v. Haukins, 159 Ind. 134, 63 N. E. 308; Judson v. Central Vermont R. Co. 158 N. Y. 597, 53 N. E. 514.
20 L.R.A. (N.S.)

Plaintiff was not guilty of negligence contributing to his injury.

Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Warner v. Baltimore & O. R. Co. and Jones v. East Tennessee, V. & G. R. Co. supra; Texas & P. R. Co. v. Gentry, 163 U. S. 353-368, 41 L. ed. 186-193, 16 Sup. Ct. Rep. 1104; Grand Trunk R. Co. v. Ives, 144 U. S. 408-417, 36 L. ed. 485-489, 12 Sup. Ct. Rep. 679; Baltimore & O. R. Co. v. Griffith, 159 U. S. 603-611, 40 L. ed. 274-278, 16 Sup. Ct. Rep. 105.

Montgomery, J., delivered the opinion of the court:

Appellee recovered a judgment of \$10,000 against appellant for personal injuries inflicted through an alleged breach of its duty as a common carrier of passengers. The complaint is in a single paragraph, and the negligence charged against appellant was: (1) In failing to light its station grounds properly; (2) in carelessly running its train of cars; and (3) in negligently failing to guide and direct appellee. Appellant answered by general denial. Errors are properly assigned upon the overruling of appellant's motion for judgment upon the answer of the jury to special interrogatories, and in overruling appellant's motion for a new trial.

The facts shown by the evidence are substantially as follows: That appellee was a carpenter, twenty-eight years of age, and came from Nashville, Tennessee, to Michigan City, Indiana, on May 13, 1904. He had traveled considerably in his life, both by day and by nighttime, but had never been in Michigan City before. He reached appellant's station by means of an electric car about 11 o'clock p. m., and had with him two trunks, one tool chest, and two grips. The electric car stopped on the north side of appellant's tracks, and appellee's baggage was unloaded there. The night was windy, cloudy, and dark. The railroad station consisted of a combination passenger and baggage car, placed south of the tracks, and, between the station and main track, there was a switch track. The station agent used the west end of the car as an office, and the east end, separated by a partition, was used as a waiting room for passengers. The car was lighted on the inside by two lamps, and there was a signal light on the outside and on the south side of the car, which cast its rays east and west. Appellee was informed by the street car conductor that the railroad and depot grounds were new, the station unfinished, and that this car was used as a waiting room. A stranger pointed out the station car, and leaving his baggage on the

north side of the tracks, he crossed over and entered at the east end of the car. Appellee was accompanied by a companion, and their train would not be due until 1:50 A. M. He bought two tickets for St. Joseph, Michigan. The agent agreed to look after the checking of the baggage, and promised to awaken appellee when his train arrived. Appellee had been traveling since noon of May 12th, and rode the night before in a day coach from Louisville, Kentucky, to Mono, Indiana, and slept some on the way, but was tired when he reached Michigan City. The agent having promised to wake him when the train arrived, he lay down on a bench and went to sleep. When the train was approaching, the agent woke him up. He spoke to his companion about the grips, and left the station car at the east end. The agent, with a white lantern in his hand, went out at the west end of the station car and went upon the platform. A stranger went out of the waiting room first, and appellee's companion next, and appellee last. Appellee knew the night was dark, and that there might be danger, but had asked no one for instructions or directions. The platform was on the south side of the main track, and between the main and side tracks, and was 110 feet long and 12 feet wide, made of planks fitted closely together and against the rails, and stood about flush with the top of the rails. The main track and the side track were ballasted with gravel and sand level with the ties. When appellee got outside the station car he stopped to button his coat, and thus dropped somewhat behind the other two men. He then saw the headlight upon the approaching engine, and started in a northwesterly direction toward the track. He did not see the agent's lantern, but heard a voice say: "Come up this way." The wind was blowing, and he thought the sound of the voice came from the north side of the track. He continued in the direction in which he was traveling. The engine bell was ringing, but he did not hear it or the noise of the train as it approached, or notice whether the engine had slowed up, stopped, or was moving. He saw the side track when he passed over it, and when he reached the main track he did not stop, because he heard the voice of the agent say, "Come on," and it sounded as though he was on the opposite side of the track. The train made no noise, and he thought it had stopped, and, as he started to cross the track, he thought the engine was no more than 7 feet distant, but perhaps it was 10 or 12 feet away. He looked at the engine before he started to cross, but did not while crossing. He was watching where

he stepped, and could see the ground and rails, and, when about half way across the main track, he was struck by the engine and injured. The engine was equipped with an Edward's electric headlight of 2,000-candle power placed in front of a powerful reflector, and the light was burning brightly, and was such as to enable one upon the engine to see and distinguish objects from 2,000 feet to 3,000 feet away. The track west of the station was straight for 900 or 1,000 feet, and the rays of the headlight struck the track about 9 or 10 feet in front of the pilot. The engine was shut off about a mile west of the station, and was running of its own momentum, and at the rate of 5 or 6 miles an hour, when appellee was struck. The engineer saw appellee step upon the track, and immediately applied the emergency brake, and stopped the train within 50 or 60 feet. The station agent was at no time on north side of the track, but when he said, "Come up this way," he was on the platform, on the south side of the main track.

Appellant's motion for a new trial alleged that the verdict was not sustained by sufficient evidence, and was contrary to law, and that the court erred in denying appellant's request for a peremptory instruction.

Appellee's action is founded upon an alleged breach of duty owing to him in the character of a passenger, from appellant as a common carrier. The relation of carrier and passenger commences when a person, with the good-faith intention of taking passage, with the consent of the carrier, express or implied, assumes a situation to avail himself of the facilities for transportation which the carrier offers. Appellee having entered upon appellant's premises for the purpose of taking a train in due course, and purchased a ticket entitling him to transportation between designated points, was, while approaching the train upon which he was to be carried, and by which he was injured, clearly a passenger. 6 Cyc. Law & Proc. p. 536; *Citizens' Street R. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935; *Fremont, E. & M. Valley R. Co. v. Hagblad*, 72 Neb. 773, 4 L.R.A. (N.S.) 254, 101 N. W. 1033, 106 N. W. 1041, 9 A. & E. Ann. Cas. 1096; *Exton v. Central R. Co.* 63 N. J. L. 356, 56 L.R.A. 508, 46 Atl. 1099; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 296; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; *Illinois C. R. Co. v. Treat*, 75 Ill. App. 340; *Young v. New York, N. H. & H. R. Co.* 171 Mass. 33, 41 L.R.A. 193, 50 N. E. 455; *Barth v. Kansas City Elev. R. Co.* 142 Mo. 535, 44

S. W. 778; Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; Atchison, T. & S. F. R. Co. v. Holloway, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31; St. Louis Southwestern R. Co. v. Wainwright, 82 C. C. A. 16, 152 Fed. 624; Lake Street Elev. R. Co. v. Burgess, 200 Ill. 628, 66 N. E. 215; Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520; Haselton v. Portsmouth, K. & Y. Street R. Co. 71 N. H. 589, 53 Atl. 1016; McBride v. Georgia R. & Electric Co. 125 Ga. 515, 54 S. E. 674; Shannon v. Boston & A. R. Co. 78 Me. 52, 2 Atl. 678; Gordon v. Grand Street & N. R. Co. 40 Barb. 550; Louisville & N. R. Co. v. Reynolds, 24 Ky. L. Rep. 1402, 71 S. W. 516; Birmingham R. Light & P. Co. v. Wise, 149 Ala. 492, 42 So. 821.

Appellant does not deny that the relation of passenger had been established before, and existed at the time of, the accident in which appellee was injured; but a sharp conflict is waged as to the measure of appellant's duty to him as such passenger while approaching one of its trains. The common law, for the purpose of determining questions of liability for injury, divided passengers into two classes,—(1) those being transported, and (2) those not being transported. The highest practical care and diligence were exacted of the carrier for the safety of passengers of the first class, and, in case of injury resulting from defective roadbed, equipment, or management, a presumption of the carrier's negligence was indulged by law in favor of the injured person. The carrier was bound only for the exercise of ordinary care with respect to passengers of the second class, and, in case of accidental injury, no presumption as to negligence existed in favor of either party. The common-law rule has not been rescinded or modified by statute in this state. The propriety and justice of the requirement that a high degree of care be exercised for the security of passengers of the first class, and the sound public policy upon which the presumption of negligence in case of accidental injury to one of that class from defective roadway or equipment is founded, are manifest. A passenger, being transported at a high rate of speed by powerful engines, is helplessly in charge of the carrier, required to obey its regulations, and to rely for his safety wholly upon the foresight, care, and prudence of its agents. All of its ways, instrumentalities, and methods of operation are exclusively within its control, and the slightest omission or neglect with respect to any of these things is likely to be followed by frightful consequences. This court, appreciating the grounds upon which

the rule was founded, has consistently held that, when an injury is sustained by a passenger in transportation upon a railroad on account of the defective condition of roadbed, equipment, or management, the happening of the accident constitutes prima facie evidence of negligence on the part of the operating company, and devolves upon it the duty of establishing such facts as will exempt it from the imputation of negligence. Cleveland, C. C. & St. L. R. Co. v. Hadley, 170 Ind. 204, 16 L.R.A.(N.S.) 527, 82 N. E. 1025, 84 N. E. 13; Pittsburgh, C. C. & St. L. R. Co. v. Higgs, 165 Ind. 694, 4 L.R.A.(N.S.) 1081, 76 N. E. 299; Terre Haute & I. R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836.

The special circumstances and risks attending the actual transportation of passengers do not exist with respect to passengers before entering, or after leaving, the coaches of such carriers. The perils surrounding a passenger while about the waiting room, platform, and station grounds of a railroad company are not different in kind from those to be encountered by persons while upon the premises of numerous manufacturing and mercantile establishments, and to which they have come by invitation or inducement for the transaction of business. That high degree of diligence and care exacted, out of considerations of public policy, for the benefit of passengers in the actual progress of their journey, is accordingly relaxed in the case of passengers who are about the stations, platforms, and approaches of a railway company. The obligation resting upon the company in supplying and maintaining these accommodations, and, with respect to passengers using the same, is to exercise only ordinary care or care in proportion to the danger likely to be encountered. It is our holding, therefore, that appellant performed the full measure of its duty to appellee as a passenger in the circumstances shown, if, having regard to the nature of its business, it exercised ordinary and reasonable care for his safety and protection. Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Cincinnati, W. & M. R. Co. v. Peters, 80 Ind. 168; Pittsburgh, C. C. & St. L. R. Co. v. Harris, 38 Ind. App. 77, 77 N. E. 1051; Maxfield v. Maine C. R. Co. 100 Me. 79, 60 Atl. 710; Pendleton Street R. Co. v. Shires, 18 Ohio St. 255; McCormick v. Detroit, G. H. & M. R. Co. 141 Mich. 17, 104 N. W. 390; Crowe v. Michigan C. R. Co. 142 Mich. 692, 106 N. W. 395; St. Louis, I. M. & S. R. Co. v. Barnett, 65 Ark. 255, 45 S. W. 550; Moreland v. Boston & P. R. Corp. 141 Mass. 31, 6 N. E. 225; Fremont, E. & M.

Valley R. Co. v. Hagblad, *supra*; Kelly v. Manhattan R. Co. 112 N. Y. 443; 3 L.R.A. 74, 20 N. E. 383; Laffin v. Buffalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; Falls v. San Francisco & N. P. R. Co. 97 Cal. 114, 31 Pac. 901; Conroy v. Chicago, St. P. M. & O. R. Co. 96 Wis. 243, 38 L.R.A. 419, 70 N. W. 486; Exton v. Central R. Co. *supra*; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587; Batton v. South & North Ala. R. Co. 77 Ala. 591, 54 Am. Rep. 80; Southern R. Co. v. Reeves, 116 Ga. 743, 42 S. E. 1015; Robertson v. Wabash R. Co. 152 Mo. 382, 53 S. W. 1082; Cincinnati, N. O. & T. P. R. Co. v. Giboney, 124 Ky. 806, 100 S. W. 216; Christie v. Chicago, M. & St. P. R. Co. 61 Minn. 161, 63 N. W. 482; Hayman v. Pennsylvania R. Co. 118 Pa. 508, 11 Atl. 815; Taylor v. Pennsylvania Co. (C. C.) 50 Fed. 755; Elliott, Railroads, § 1590; 6 Cyc. Law & Proc. p. 608. The case of Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968, involved an accident to a passenger on account of a defect in the station platform, and this court, speaking of the duty of the company, at page 590, said: "It is bound to use the highest degree of practical care to provide against accidents to passengers, that may be foreseen and prevented." This statement of the law is erroneous and disapproved in so far as it purports to define the duty of a railway company to provide and maintain instrumentalities and accommodations not directly employed in the transportation of passengers, such as platforms, waiting rooms, and appurtenances.

The complaint charged appellant with negligence in the management of its train. It was conclusively shown that the train approached the station with the headlight burning, the bell ringing, the steam shut off, running at a slow rate of speed and under control; that appellee was at once discovered on attempting to cross in front of the engine, the emergency brake applied, and the train stopped in the shortest possible distance. This charge of negligence was wholly disproved, and must be disregarded in the further consideration of the case.

It was further alleged that appellant negligently failed to guide appellee properly to his train. No facts were alleged or shown in evidence making it the duty of appellant to guide or assist appellee in reaching his train. He was a man of mature years, in good health, and in the full enjoyment of all his faculties, and had had considerable experience in traveling. The platform was situate between the waiting room and the track upon which his train would pass, and was a suitable structure for the purpose intended, and in good condition, so that no 20 L.R.A. (N.S.)

danger would be encountered in passing from the waiting room to the place provided for entering upon trains. Appellee did not disclose the fact that he was a stranger and ignorant of his surroundings, or ask for any information or guidance. In such circumstances appellant was under no obligation to exercise special supervision and guidance over appellee while traveling from the station to his train. Appellee's counsel invoke the principle that, although no assistance be exacted under the law, if any be tendered, it must not be negligently rendered. Appellant's agent, with a white light in his hand, went out upon the platform and took a position at the proper point for receiving passengers upon the train, and, as appellee approached, called out, "Come up this way," or "Come on, boys; we will get on up here," or "Come up this way, boys; here's where you will get on your train." This guidance cannot be regarded as in any wise negligent, nor can it be made so by the circumstance that appellee erroneously thought the call to him came from the north side of the track, and was thereby induced to make an attempt to cross in front of the engine.

The most serious charge of negligence preferred against appellant is in failing to light adequately its station grounds. The duty imposed upon railway companies to exercise ordinary and reasonable care for the safety of their passengers includes an obligation to keep their stations, platforms, walks, and other approaches reasonably lighted at night for a sufficient time before the arrival and after the departure of trains, to enable passengers to avoid danger. Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; Louisville, N. A. & C. R. Co. v. Lucas, *supra*; Abbot v. Oregon R. Co. 46 Or. 549, 1 L.R.A. (N.S.) 851, 114 Am. St. Rep. 885, 80 Pac. 1012, 7 A. & E. Ann. Cas. 961; Gerhart v. Wabash R. Co. 110 Mo. App. 105, 84 S. W. 100; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; Ellis v. Chicago, M. & St. P. R. Co. 120 Wis. 645, 98 N. W. 942; Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; Missouri P. R. Co. v. Neiswanger, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582; Illinois C. R. Co. v. Cruise, 123 Ky. 463, 8 L.R.A. (N.S.) 299, 96 S. W. 821; Atchison, T. & S. F. R. Co. v. Calhoun, 18 Okla. 75, 89 Pac. 207, 11 A. & E. Ann. Cas. 681; Elliott, Railroads, 2d ed. § 1590a; Thomp. Neg. § 2391; Hutchinson, Carr. 2d ed. § 516; 6 Cyc. Law & Proc. p. 609. The extent of lighting required under the law at any particular station must depend upon the amount and nature of the business to be

transacted, and the character, situation, and surroundings of the station with reference to tracks and other physical conditions reasonably calculated to affect the security of persons in the proper use of the premises, and in the exercise of ordinary care. The adequacy of the lighting is ordinarily a question for the jury under proper instructions; and, if appellee's injury was the result of a fall from the unguarded edge of an elevated platform, or over an obstruction in his path, or on account of a hole into which he stepped because of the darkness, the general verdict of the jury finding, in effect, that appellant's premises were insufficiently lighted, and that appellee had used ordinary care for his own safety, would doubtless be conclusive. But the manner and circumstances of this accident are so unusual that, accepting as true the statement of facts most favorable to appellee, but one conclusion can be reasonably drawn therefrom by impartial minds, and that is that he was not in the exercise of ordinary care for his own safety when injured.

Conceding that appellant did not perform the full measure of its duty to the traveling public in the matter of supplying lights for its premises, and, taking conditions as they were, we are clearly of opinion that appellee's injury must be attributed, in part at least, to his lack of attention and indifference to his surroundings. He was a stranger, and unacquainted with the station grounds, but he did not disclose that fact or seek information. The station platform was low, 12 feet wide and 110 feet long, situated between the waiting room and the main track, in such a position as to require appellee to pass over it in going to his train, and to expose him to no danger. The agent walked ahead with a white lantern, and called out, "Come up this way," in a tone of voice which all heard. Appellee, falling behind the other passengers, says that he did not see the lantern and misunderstood the direction whence the voice came, but this mistake was his, and he must bear the consequence. He was told that his train was coming, and, going outside, he saw the headlight when probably 200 or 300 feet away. He traveled 25 or 30 feet in a northwesterly direction half facing the approaching train, and looked at the light again when it was 10 or 12 feet distant. He erroneously thought the train had stopped, and attempted to cross the main track directly in front of the engine. His ignorance of the premises, the absence of general lighting, and the attendant darkness, imposed upon him the duty of exercising greater vigil for his own safety. The absence of platform lights was not the sole cause of the accident, since the instrument with

which he collided was distinctly visible at all times. He knew where the engine was, and its powerful headlight so lighted up his path as to enable him to know when he stepped upon the main track, and to see and distinguish the rails and ties, and to enable the engineer to see him. Appellee was a man of mature years and in full possession of his faculties, and it could hardly be anticipated that such a person, either in the daytime or at night, would pass over the platform and walk immediately in front of the train which he desired to board. An affirmance of a recovery upon these facts would relieve and excuse passengers of any concern and care for their own safety, and would exact of the carrier, not only the highest possible care, but an absolute insurance of the security, of persons rightfully upon its premises. Our conclusion is that appellee is shown by the evidence to have been guilty of contributory negligence, which precludes a recovery. *Wabash R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521; *Smith v. Wabash R. Co.* 141 Ind. 92, 40 N. E. 270; *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Ohio & M. R. Co. v. Hill*, 117 Ind. 56, 18 N. E. 461; *Indiana, B. & W. R. Co. v. Greene*, 106 Ind. 279, 55 Am. Rep. 736, 6 N. E. 603; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801; *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335, 5 Am. Rep. 201; *Bancroft v. Boston & W. R. Corp.* 97 Mass. 275; *Young v. Old Colony R. Co.* 156 Mass. 178, 30 N. E. 560; *Judge v. Elkins*, 183 Mass. 230, 66 N. E. 708; *Adams v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 105 S. W. 526; *Weeks v. New Orleans, S. F. & L. R. Co.* 40 La. Ann. 800, 8 Am. St. Rep. 560, 5 So. 72.

We have considered appellant's motion for judgment upon the answers of the jury to special interrogatories, notwithstanding the general verdict, but are of opinion that such answers are not sufficiently full and conclusive to overthrow the general verdict, and therefore have determined the appeal upon the evidence.

The judgment is reversed, with directions to sustain appellant's motion for a new trial.

A petition for rehearing having been filed *Montgomery, J.*, on November 18, 1908, handed down the following response:

In the original opinion appellant's bill of exceptions, containing the evidence, and motion for a new trial, were treated as properly in the record, without any discussion

of the questions relating thereto made by appellee's counsel. On petition for a rehearing it is alleged that the court erred in holding such bill of exceptions and motion for a new trial to be in the record, and in holding that, upon the evidence, as a matter of law, appellee was guilty of contributory negligence.

Appellee assigned as cross-error that the circuit court erred in its order of November 6, 1905, amending and correcting *nunc pro tunc* its order of July 25, 1905, so as to show that appellant was given ninety days in which to prepare and present its general bill of exceptions. The memoranda of the trial judge, upon which the amendment *nunc pro tunc* was made, were as follows: "Mo. filed for N. T. Mo. for N. T. ov. and ex. Pray ap. to Sup. Ct. and granted. Bond sum \$15,000.00 by Sept. 11, '05, Aetna Indemnity Co. as surety. Ninety days for bill of ex. Pltff obj. to surety, ov. and ex." These notes were clearly sufficient to justify the court in making the requested correction showing, in accordance with the fact, that appellant was given ninety days in which to prepare a bill of exceptions upon the overruling of its motion for a new trial.

On October 3, 1905, appellant filed a præcipe with the clerk of the circuit court, calling for a complete transcript of the entire record in the cause, except that the original bill of exceptions containing the evidence be certified, instead of a copy thereof; and on November 8, 1905, a further præcipe was filed, requesting a transcript of the proceedings relating to the *nunc pro tunc* entry. The argument of appellee's counsel is that time beyond the term for filing the bill of exceptions being given only by the *nunc pro tunc* order of court, and that action not being sustained by sufficient evidence, therefore the bill of exceptions is not properly a part of the record. We have already seen that the *nunc pro tunc* entry was fully justified by the notes of the judge introduced in evidence, and this ruling disposes of the objection under immediate consideration.

It is insisted that the motion for a new trial was not a part of the record on October 3, 1905, and could not be transcribed in obedience to the præcipe of that date: that it was not called for by the subsequent præcipe, and is accordingly no part of the record. The motion for a new trial was a part of the record without a bill of exceptions, and should have been transcribed as requested by the præcipe of October 3. But, if it were conceded that it was only brought into the record by the *nunc pro tunc* entry, it would still relate back to July 25, 1905, and become a part of the 20 L.R.A. (N.S.)

record as of that date, and be covered by the præcipe for a complete transcript.

It is further contended that the record is not sufficient to present any question, because the original præcipes have not been appended to the transcript, but only copied therein. Section 690, Burns's Anno. Stat. 1908, requires the præcipe to be appended to the transcript. Section 667, Burns's Anno. Stat. 1908, being § 7 of the act of 1903 (Acts 1903, p. 340), declares that the written præcipe shall constitute a part of the record and be copied in the transcript immediately before the certificate of the clerk. This transcript was prepared in compliance with the latter act, and is clearly sufficient; and we are not required to decide whether the former statute upon this point is in force or repealed.

We have again considered the merits of the case upon the evidence, and adhere to the holding that it appears, as a matter of law, that appellee failed to exercise that ordinary care for his safety which the law exacts of a mature person in the circumstances shown.

The petition for a rehearing is accordingly overruled.

KANSAS SUPREME COURT.

STATE OF KANSAS, Plff. in Err.,

v.

CITY OF CONCORDIA.

(— Kan. —, 96 Pac. 487.)

Municipal corporation — sewers — nuisance.

1. The power granted to cities of the second class to build and maintain sewers does not warrant the commission of a public nuisance through their agency.

Same — eminent domain.

2. The statute of 1887 (Sess. Laws 1887, p. 151, chap. 102), providing that cities of the second class may exercise the right of

Headnotes by BURCH, J.

Case Note. — Right of municipality to create nuisance by pollution at the point where its sewers discharge.

The earlier cases on this subject will be found in the notes to Platt Bros. & Co. v. Waterbury, 48 L.R.A. 691, and Georgetown v. Com. 61 L.R.A. 694. The present note is concerned only with the fundamental question whether a municipality may, in the absence of negligence in the construction or maintenance of its sewers, create either a public or private nuisance by pollution incident to the discharge of its sewers into a stream or elsewhere, with immunity from the liability or responsibility which would attach to a private individual under such

eminent domain in order to connect sewers with creeks, rivers, and ravines, does not warrant the commission of a public nuisance as the result of such connection.

Same — plans.

3. In planning and in maintaining systems of sewerage, cities of the second class must make due provision against public nuisances resulting from occurrences naturally and reasonably to be anticipated.

(June 6, 1908.)

ERROR to the District Court for Cloud County to review a judgment in defendant's favor in an action brought to restrain the defendant from committing a public nuisance by discharging sewage into an abandoned river channel. Reversed.

The facts are stated in the opinion.

circumstances. The many subsidiary questions which arise in connection with actions to enjoin or abate such a nuisance, or to recover damages caused thereby, *e. g.*, whether the nuisance is a permanent or a continuing one, the amount of damages, the effect of the fact that others contribute to the pollution of the stream, prescriptive rights, the propriety of an injunction assuming that the nuisance is wrongful, and the like, are not considered, as they are common to actions against private individuals who maintain such nuisances as well as to actions against municipal corporations.

As shown in the earlier notes, a large majority of the cases unite in holding that a municipal corporation may not, with immunity from the liability which attaches to private individuals under such circumstances, discharge sewage into a stream to the material damage of riparian proprietors, even though the municipality is free from negligence, and the damages are necessarily incident to the discharge of the sewage at the point in question. To the same effect are the following cases, decided since those notes: *Birmingham v. Land*, 137 Ala. 538, 34 So. 613; *Waterbury v. Platt Bros. & Co.* 76 Conn. 435, 56 Atl. 856; *Dudley v. New Britain*, 77 Conn. 322, 59 Atl. 89; *Platt Bros. & Co. v. Waterbury*, 80 Conn. 179, 125 Am. St. Rep. 111, 67 Atl. 508; *Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 388; *Vogt v. Grinnell*, 133 Iowa, 363, 110 N. W. 603; *Harrington v. Worcester*, 186 Mass. 594, 72 N. E. 326; *Bennett v. Marion*, 119 Iowa, 473, 93 N. W. 558; *Kevil v. Princeton* (Ky.) 118 S. W. 363; *Smith v. Sedalia*, 182 Mo. 1, 81 S. W. 105; *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622; *Sammons v. Gloversville*, 81 App. Div. 332, 81 N. Y. Supp. 466; *Markwardt v. Guthrie*, 18 Okla. 32, 9 L.R.A. (N.S.) 1150, 90 Pac. 26, 11 A. & E. Ann. Cas. 581; *Hobart v. Southend-on-Sea Corp.* 94 L. T. N. S. 337; *Gorham v. New Haven*, 79 Conn. 670, 66 Atl. 505.

In some of the foregoing cases, the principle of municipal liability is announced and applied in express terms; in others, it is 20 L.R.A. (N.S.)

Messrs. Fred S. Jackson, Attorney General, Fred W. Sturges, Jr., and Homer Kennett, for plaintiff in error:

A city which has once condemned or obtained the right to discharge its sewage at a certain place cannot ever after, without reference to changed conditions, so continue, even where, by so doing, it endangers the health and lives of its citizens, and renders a large portion of the city uninhabitable.

Board of Health v. Copcutt, 140 N. Y. 12, 23 L.R.A. 485, 35 N. E. 443; *Campbell v. Seaman*, 2 Thomp. & C. 231; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Mulligan v. Elias*, 12 Abb. Pr. (N. S.) 259; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988; *School Dist. No. 1 v. Neil*, 36 Kan. 617, 59 Am. Rep. 575, 14

clearly assumed or presupposed, the opinions being devoted to the discussion of subsidiary questions.

The same principle is assumed in *Augusta v. Marks*, 124 Ga. 365, 52 S. E. 539, where the city sewer discharged at a point near the plaintiff's residence, but not into a stream.

Where a drain laid by property owners in a public street, under permission from the city, empties into a natural stream, and thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream, to the injury of a lower riparian owner, the drain is a nuisance, and the city is liable for negligence in not abating it. *Mansfield v. Bristol*, 76 Ohio St. 270, 10 L.R.A. (N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 A. & E. Ann. Cas. 767.

A city is liable to a riparian owner where it negligently manages its sewers so that large quantities of filth and excrement are emptied into a stream, and allowed to become deposited on its bed and banks, rendering the plaintiff's premises unhealthful. *Lockwood v. Dover*, 73 N. H. 209, 61 Atl. 32.

A municipality which adopts a natural water course as an open sewer is bound to keep the channel of the stream open, and to prevent the accumulation of filth; and is liable to respond in damages for any injury which may be done to riparian owners in consequence of its failure in this respect. *Glasgow v. Altoona*, 27 Pa. Super. Ct. 55.

As shown in the note in 48 L.R.A. 691, the New Jersey court of errors and appeals, in the case of *Grey ex rel. Simmons v. Paterson*, 48 L.R.A. 717, held that the pollution of the Passaic river above the ebb and flow of the tide, by sewage discharged from the sewers of the city of Paterson, constituted the taking of the property of riparian owners, which the legislature could not authorize except upon just compensation. This principle was recognized and assumed in the various stages of the case of *Doremus v. Paterson* (63 N. J. Eq. 605, 52 Atl. 1107, 65 N. J. Eq. 711, 55 Atl. 304, 69 N. J. Eq. 188, 57 Atl. 548, 69 N. J. Eq. 775, 61 Atl.

Pac. 253; Jones v. Chanute, 63 Kan. 243, 65 Pac. 243.

Mr. Theodore Laing, for defendant in error:

The discretion vested in the mayor and council of a city of the second class in the matter of a sewer cannot be abrogated, abridged, or controlled by the decree of a court.

Soden v. Emporia, 7 Kan. App. 583, 52 Pac. 461; King v. Kansas City, 58 Kan. 334, 49 Pac. 88; Wood, Nuisances, § 758; Gould v. Topeka, 32 Kan. 486, 49 Am. Rep. 496, 4 Pac. 822.

For the injury done to private rights the statute requires compensation to be made.

Long v. Emporia, 59 Kan. 46, 51 Pac. 897; Wood, Nuisances, § 757; High, Inj. § 523.

Burch, J., delivered the opinion of the court:

The state of Kansas brought an action for an injunction to restrain the city of Concordia from committing a public nuisance be discharging sewage into an abandoned channel of the Republican river, lying outside but near the city limits. The material portions of the petition are the following: "That said defendant for a long time past has discharged and now discharges its sewage and other noxious substances upon premises near or adjoining said city on the north, thereby producing noxious and disagreeable gases and odors injurious and dangerous to the health and lives of the inhabitants of said city, more especially to those in the north portion thereof, and rendering that portion of the city an un-

396 (N. J. Ch.) 69 Atl. 225), which was practically a continuation of Grey ex rel. Simmons v. Paterson. The opinions are devoted mainly to the consideration of subsidiary questions as to measure of damages, evidence, and the like, with which this note is not particularly concerned.

In most of the foregoing cases the courts undoubtedly regarded the liability as resting fundamentally on the constitutional provision against taking private property for public use without compensation; and as thus attaching even upon the assumption that the municipality was authorized by statute to discharge the sewage into the stream. This, however, is not true of Vogt v. Grinnell, supra. In that case the decision is expressly placed upon the ground that the statute empowering the city to construct a system of sewers did not expressly authorize it to discharge the sewers into the stream, and that such authority could not be implied, and therefore the act of the city was unauthorized and unlawful, and no degree of care could purge it of its wrongful character. The court, however, said, upon the authority of Bowman v. Humphrey, 132 Iowa, 234, 6 L.R.A. (N.S.) 1111, 109 N. W. 714, 11 A. & E. Ann. Cas. 131, that, "where a nuisance results from the construction by a city of public work which is expressly or by necessary implication authorized by statute, the city is not liable in damages unless the nuisance is occasioned by some negligence on its part in the construction or maintenance of such work. In other words, an act which a statute, if constitutional, makes right, cannot be held to constitute an actionable wrong." While the decision is in harmony with the other cases which hold the city liable, the case differs materially in principle from those that regard the liability as based ultimately upon the constitutional provision against taking property without compensation, and, in the latter respect, is like Valparaiso v. Hagen, 48 L.R.A. 707, which, having held that the damages necessarily incident to the discharge of sewage into a stream by a municipality without negligence were consequential merely, and did not amount to the taking of property within the constitutional provision, also held that the city was impliedly authorized by statute to discharge the sewage into the stream, and was, therefore, in the absence of negligence, not liable to a riparian owner, since "what the law grants will not constitute a nuisance *per se*, public or private." The diversity of results reached in the Valparaiso Case and the Vogt Case is therefore due to a difference of opinion as to the implication of authority to discharge sewage into a stream from the power conferred by statute upon the municipality to construct a system of sewers. Possibly, even this difference of views as to statutory construction may have been due to a difference in the circumstances, as, in the Valparaiso Case, the physical conditions were such that it was impossible to carry out the legislative authority to construct a system of sewers without discharging the same into the stream, whereas that may not have been true in the Vogt Case. The court, in the latter case, however, would apparently have been disinclined under any circumstances to favor a construction of the statute which would lead to the immunity of the city. But, however this may be, it is apparent that the Vogt Case is not authority for the liability of the municipality, upon the assumption that the statute expressly authorizes the discharge of the sewage into the stream, or, as a matter of statutory construction, is held to imply such authority.

The decision in KANSAS v. CONCORDIA appears to rest upon the same ground as the Iowa Case, i. e., that the legislature, in authorizing the construction of a system of sewers, is not deemed to have intended to authorize the creation of a nuisance.

Even upon the hypothesis of the nonapplicability of the constitutional provision, and upon the assumption of an express provision in a statute authorizing the discharge of the sewage into the stream, the immunity of the municipality would perhaps not nec-

healthy and unsafe place to live. That said sewage and the place where the same is discharged, to wit, the old river bed, adjoining or near said city on the north, is a public nuisance; to wit, a nuisance to several hundred of the inhabitants of the north part of said city. That the said city has maintained, now maintains, threatens to maintain, and will maintain, said nuisance unless restrained. Wherefore plaintiff prays," etc. To this petition the defendant filed the following answer: "The said defendant, for answer to the petition of the plaintiff, says: (1) It admits that it is a corporation under the laws of the state, and is a city of the second class; that it did, at the time this action was begun, and a long time prior thereto, discharge its sewage at a place near to said

city on the north thereof; that said place was, until the summer of 1903, the channel of the Republican river, but that, before the beginning of this action, the said Republican river had abandoned this channel at its ordinary stage, except that Wolf creek and Lost creek, two tributaries of said Republican river, have continued to flow therein. The defendant avers that in 1901 the said defendant, being then a city of the second class, by due process of law obtained the lawful right to and did construct a sewer and connect the same with the said Republican river at the place aforesaid, and has ever since maintained the same. (2) For further answer the defendant says that it denies each and every averment and allegation in said petition, except as hereinbefore admitted." The facts stated in

essarily follow, since the court might take the view that the legislature did not intend to grant such authority to the city with immunity from liability for damages necessarily incident to its exercise. The case of *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622, lends some color to that view. In that case, a judgment for a riparian owner in an action against a municipal corporation for an injunction, and damages for pollution of a stream by the discharge of sewage therein, was affirmed, although the charter expressly authorized the city to discharge the sewage into the stream. The court (referring to the charter provision) said: "This is a permission, and not a direction, and a legislative permission neither implies a right to appropriate property without compensation, nor confers a license to commit a nuisance. To base upon a legislative grant of power to do a thing an immunity from consequences which deprive, or tend to deprive, a person of that which is his property, there should, at least, be found a direction which is clear and quite unmistakably imperative. . . . The charter, in authorizing a system of sewers and drains discharging into the stream, neither conferred an unusual power nor a right to deposit sewage upon the plaintiff's lands, situated miles below the city. If the results complained of are unavoidable, then we may not assume a power implied from the permission of the charter to destroy the plaintiff's property without compensation." The language thus far quoted is consistent with the immunity of the city from liability if such immunity were expressly or by implication conferred by the charter. The view that the decision rested upon the ground that the legislature did not intend to grant immunity to the city, and not upon the ground that it would be beyond its power to do so, is further supported by the following language from the opinion: "We think that the legislative intent was, that the discretion of the municipal authorities in maintaining a system of sewage should be exercised in conformity with private rights; 20 L.R.A. (N.S.)

and, if their destruction be involved, that, in such a case, payment must be made." In this view the case would differ from the *Valparaiso Case* only on the point as to the existence of statutory authority; and would not differ from the *Vogt Case* at all, except, perhaps, that the latter case implies that an express grant of authority to discharge sewage into the stream would carry with it an indication of legislative intent to extend immunity to the municipality from liability for the damages necessarily resulting, whereas the *Sammons Case* apparently holds that the grant of immunity must be express, and cannot be inferred, even from such a provision. That the court in the *Sammons Case* meant to place the liability of the municipality upon the ground that the legislature had not attempted to extend immunity to the municipality, rather than upon the ground that the pollution of the stream as a necessary incident of the discharge of the sewage constituted a taking of property within the constitutional provision, so that the legislature could not have extended such immunity, is rendered more probable from the position taken in *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385, and other cases not falling within the scope of this note, with respect to the nonapplicability of the constitutional provision to consequential damages incident to public work. Opposed to this view, however, is one sentence in the opinion in the *Sammons Case*, to the effect that "the legislature could not authorize such an injury without requiring payment for the consequences; and it has not assumed to do so." If this sentence expresses the deliberate views of the court, it is apparent that the *Sammons Case* goes beyond the *Vogt Case*, and, like most of the other cases cited in this note, is authority for holding the municipality liable not only when the statute under which the municipality acts may be construed consistently with an intention on the part of the legislature not to extend immunity, but also when the legislature has,

paragraph 1 of the answer being true, no reply was filed, and the defendant moved for judgment on the pleadings.

Concordia is a city of the second class. In 1887, the legislature passed an act (Sess. Laws 1887, chap. 102, p. 151 relating to sewerage and drainage in such cities, § 3 of which reads as follows: "Sec. 3. Such city shall have authority to lay sewer pipes and drains, and connect the same with any creek, ravine, or river at any point within 5 miles of the corporate limits of said city; and for this purpose the right of eminent domain is hereby granted to cities of the second class." Section 4 prescribes the method by which the right of eminent domain granted in § 3 may be exercised, and provides for the payment of damages to any person injured by the laying of pipes or drains to a creek, ravine, or river, whether the pipes or drains are laid through his land or he is otherwise damaged. Sess. Laws 1887, chap. 102, p. 152. The district court regarded the sewer connection with the river as a work specifically authorized

by the statute referred to, and therefore lawful, whatever the consequences. In deciding the case, the learned district judge said: "Where the law by one rule authorizes the city to do what it has done, it will not, by some other rule of law, enjoin it from doing the same thing." Therefore the motion for judgment on the pleadings was sustained, an injunction denied, and judgment rendered against the state for costs.

The allegations of the petition are so general that a question might have been raised if facts and circumstances are pleaded with sufficient certainty to show the city to be guilty of maintaining a public nuisance. However, no motion was made for a more full and definite statement. The defendant treated the petition as setting forth a cause of action for an injunction against a public nuisance, and filed an answer. The district court treated the case as if a nuisance were charged unless the statute legalized what the city had done and was doing. Under these circumstances, this court will give

in express terms, or by necessary implication, attempted to grant such immunity.

The latter position, which bases the liability upon a fundamental constitutional provision, and thus places it beyond the reach of legislative assault, seems, at least in the case of pollution of a stream to the material damage of the riparian proprietor, to be the only one consonant with justice, since the right of such riparian proprietor to have the water of the stream flow through his land unpolluted and uncontaminated by the discharge of the city sewage would seem, from a practical point of view at least, to be as real and tangible a property right, and as much entitled to the protection of the constitutional provision, as his right to have the soil remain in its place. In *Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 388, the court said: "The right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which the owner cannot be dispossessed except by due process of law; and the pollution of a stream constitutes the taking of property, which may not be done without compensation." This, however, involves a question as to which there are many conflicting decisions, and which far transcends the scope of this note. It is apparent, however, that, in jurisdictions in which the infliction of damages of this kind as incident of a public work is not regarded as a taking of property, the question of municipal liability depends upon the legislative intent; at least, in the absence of any other constitutional provision applicable to the subject.

In *Bailey v. New York*, 38 Misc. 641, 78 N. Y. Supp. 210, holding that the owner of oyster beds in Jamaica bay was entitled to an injunction against the city of New York, 20 L.R.A. (N.S.)

and to damages on account of the discharge of sewage, the court refers to the statute authorizing the commissioners to build sewers and discharge the same into the bay, and says that the act did not give or purport to give the commissioners of the town of Plattsburgh (the city's predecessor) the right to discharge at such point or in such a manner as to injure plaintiff's property.

The doctrine of *Valparaiso v. Hagen* does not appear to have been applied in any subsequent cases with the result of relieving a municipality from liability. It was, however, recognized *obiter* in the subsequent case of *Weston Paper Co. v. Pope*, 155 Ind. 400, 56 L.R.A. 902, 57 N. E. 719.

The liability of a city to a riparian owner for the pollution of a stream by the discharge of sewage into it was denied in *Atwood v. Biddeford*, 99 Me. 78, 58 Atl. 417, upon the ground that the authority to construct sewers was conferred by statute, not upon the city in its corporate capacity, but upon the municipal officers,—an entirely distinct tribunal,—and that such officers acted in the performance of their duties in this respect in the exercise of the authority with which they are vested by general law, and not as agents of the municipality.

In *Phillips v. Armada* (Mich.) 15 Det. L. N. 983, 118 N. W. 941, the court held that a municipality has no right to discharge its sewage into an open ditch by a residence, where it gives forth noxious and offensive odors. It also appeared in this case that the ditch into which the sewer was discharged emptied into a creek. The court, referring to this condition, said that it was very doubtful whether the discharge into the creek was not, under the decisions, a reasonable use of the stream, remarking that it was not prepared to say that the

the petition liberal interpretation against the city. The disposal of sewage in a city is frequently a serious problem. It may be practically impossible to devise a system adequate to the needs of the city, or within its ability to carry out, which will not occasion inconvenience and discomfort to somebody. The mayor and council must meet the situation as best they can. When their candid judgment has been deliberately exercised, and the work has been properly planned and skilfully executed, the rights of individuals must ordinarily be subordinated so far as all incidental disadvantage and loss is concerned. The city is, however, liable for negligence in the plan, construction, and maintenance of sewers as of other public works; and the right to build sewers and drains implies no right to create a nuisance, public or private. In the case of *Leavenworth v. Casey*, 1 Kan. Dasser's ed. 545, Appx., the syllabus reads: "It is the duty of a municipal corporation to build a sewer so that it will not be a nuisance to a neighborhood, as much as it is to avoid

the same result by keeping it in repair after it is built." In the case of *Atchison v. Challiss*, 9 Kan. 603, 613, it is said: "Of course, cities have no power, discretionary or otherwise, to create nuisances. And they probably could not abandon or discontinue a sewer or drain so as to leave an individual in a worse condition than if no sewer or drain had ever been constructed." In the case of *Gould v. Topeka*, 32 Kan. 485, 490, 49 Am. Rep. 496, 4 Pac. 822, the opinion reads: "A city has no more right to plan or create an unsafe and dangerous condition of one of its public streets than it has to plan and create a public or common nuisance; and it is admitted that it has no right to do this." In the case of *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88, the syllabus reads: "In devising a plan of sewerage, the municipal authorities of a city are vested with a large legislative discretion; and, if it is exercised in good faith, the city is ordinarily not liable for incidental injuries to property which are solely attributable to the plan. In such

pollution of a stream by sewage from a municipality, which renders the water below unfit for the use of man or for domestic animals, is unreasonable and may be enjoined. The question, however, was not decided, since the evidence failed to show how much damage was done by the pollution of the water in the creek.

In *District of Columbia v. Cromptley*, 23 App. D. C. 232, it was held that the District of Columbia was not liable, as for a nuisance, to purchasers of water lots on the Potomac river from the commissioners of the District, for changing the point of the discharge of a sewer after the sale of the lots, there being no element of negligence nor any claim for alleged defective or insufficient construction of the sewers. The ground of contention that the District was liable, namely, that, by the sale of the lots, it had divested itself of control over the sewers, seems to imply that, independently at least of such surrender of control, there would have been no liability on the part of the District by reason of the discharge of the sewage into the stream, and that also seems to be assumed by the court, as it cites and approves the opinion in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592 (referred to in the note in 48 L.R.A. 691), which denies the right of a riparian owner to recover from a city damages caused by the pollution of a stream by city sewage, so far as the pollution is attributable to the plan of sewerage adopted by the city. It will be observed that, in the *Cromptley* Case, however, the sewage was discharged into a tidal navigable stream, and, as shown in the note in 48 L.R.A. 691, the general rule as to municipal liability to riparian owners does not apply to navigable waters. 20 L.R.A. (N.S.)

The general principle that a municipality may be held to respond in damages or be subject to an injunction for discharging sewage into a stream to the damage of riparian owners has been recognized in some cases in which the facts were such as to take the case out of the operation of the rule. Thus, for example, *Matheny v. Aiken*, 68 S. C. 163, 47 S. E. 56, denied injunction and damages upon the ground that the owner had another and exclusive remedy.

And *Cleveland v. Standard Bag & Paper Co.* 72 Ohio St. 324, 106 Am. St. Rep. 613, 74 N. E. 206, 3 A. & E. Ann. Cas. 21, denied the liability of the city on the ground that it had acquired the right by prescription.

While the question whether the city may not obtain such right by prescription is not within the scope of this note, it may be noted here that such right is denied in *Birmingham v. Land*, 137 Ala. 538, 34 So. 613.

So, *Reese v. Johnstown*, 45 Misc. 432, 92 N. Y. Supp. 728, denied an injunction because the plaintiffs and their predecessors had themselves discharged refuse into the stream.

Wharton v. Bradford City, 209 Pa. 319, 58 Atl. 621, denied the liability of a city for the death of a child from drinking water from a well contaminated by water percolating from a stream into which the city discharged its sewage, upon the ground that the injury was too remote, and not the proximate result of the city's act. These cases are referred to merely for the purpose of showing that they are not in conflict with the general rule that holds the municipality liable, and are, of course, not exhaustive as to the points upon which the decisions rested.

cases, however, if, through any negligence in carrying out the plan, or in constructing or maintaining the sewers, the property of a private owner is injured, a liability will arise. The collection and precipitation of water or sewage upon the private property of an owner, in such a way as to constitute a direct invasion of the owner's rights, and in the nature of a trespass upon his property, will create a liability against the city, regardless of the plan upon which the sewer is constructed."

Such conduct may perhaps be classed as an excess or abuse of corporate power rather than as the negligent exercise of it; but, whatever descriptive term may be used, the principle is sound, and there can be no doubt but that, if the same or similar acts should result in a public and common nuisance, instead of a private one merely, the public would have the same right to protect itself as an individual. The subject is summed up in 2 Dillon on Municipal Corporations, 4th ed. § 1047, p. 1330, as follows: "Although a municipality having the power to construct drains and sewers may lawfully cause them to be built so as to discharge their refuse matter into the sea, or natural stream of water, yet this right must be so exercised as not to create a nuisance, public or private. If a public nuisance is created, the public has a remedy by a public prosecution; and any individual who suffers special injury therefrom may recover therefor in a civil action." In Joyce on Nuisances, § 284, p. 373, it is said: "Where municipal, quasi-municipal, and public bodies generally proceed to exercise, or do exercise, their powers in constructing and maintaining great public works of a sanitary nature, such as a sewerage system, and the question of the extent of or limitations upon their powers has come before the courts, these powers, and the rights of the public and of private individuals in connection therewith, have occasioned much discussion. But, notwithstanding certain decisions not in harmony herewith, it may be stated that, even though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity, nevertheless such public body is not justified in exercising its power in such a manner as to create, by a disposal of its sewage, a private nuisance, without making compensation for the injury inflicted, or being responsible in damages therefor, or liable to equitable restraint in a proper case; nor can these public bodies exercise their powers in such a manner as to create a public nuisance; for the grant presumes a lawful exercise of the power conferred, 20 L.R.A. (N.S.)

and the authority to create a nuisance will not be inferred."

The legislature may authorize many things to be done which create disturbance, annoyance, discomfort, and affect health, but which must be endured by private parties unless some constitutional mandate be violated. Thus, in *Atchison, T. & S. F. R. Co. v. Armstrong*, 71 Kan. 366, 1 L.R.A. (N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978, the syllabus reads: "An authorized business, properly conducted at an authorized place, is not a nuisance, for whatever is lawful cannot be wrongful; and the owner of a railroad thus authorized and operated is not liable in damages to one whose residence is permeated by smoke, cinders, and gas emitted from the engines to such an extent as to be injurious to the health and comfort of the inhabitants." As against the public, the legislature may go further, and direct or permit that to be done free from liability to state prosecution, civil or criminal, which, without the statute, would be a public nuisance. The legislature is the judge of what the public good requires.

In any action attacking what is claimed to be a public nuisance, the first question must always be: Has the legislature authorized it? In determining this question, certain rules of interpretation are well established. In 2 Wood on Nuisances, 3d ed. §§ 757, 758, pp. 1057 et seq., it is said: "An individual or corporation acting strictly within the scope of legislative power cannot be indicted for a public nuisance. The legislative grant is a license to do the act, and operates as a complete and full immunity from prosecution, either civilly or criminally, on the part of the public. But it by no means follows that, because an act is done under legislative authority, that the person doing the act cannot be punished therefor by indictment if the act creates a public nuisance. If the act is in excess of the power given, or if it is done in a manner not within the reasonable contemplation of the legislature, to be gathered from a fair construction of the grant,—as, if it is not a necessary and probable result of the exercise of the power given,—the act will be no protection against liability, both civilly and criminally. It is only against such consequences as are fairly within the contemplation of the legislature in conferring the authority, and such results as are necessarily incident to its being done,—in other words, such results as are the natural and probable consequence of an exercise of the power at all,—that the grant operates as a protection. Beyond that it affords no protection whatever. . . . The right given, however, in order to warrant the erection of a public nuisance, must be clearly within

the scope of the grant, and must fairly be within contemplation of the legislature in conferring the power."

In *Joyce on Nuisances* a stricter rule is derived from the decided cases: "In such cases the statutory sanction necessary to justify such act must be given either expressly or by clear and unquestionable implication from the powers conferred, so as to show that the legislature intended and contemplated the doing of the very act in question. Such statutes should receive a strict construction, and it will not be assumed that the legislature intended to authorize a nuisance unless this is the necessary result of the powers granted." § 72, p. 114.

In the case of *Morse v. Worcester*, 130 Mass. 389, 2 N. E. 694, the opinion reads: "When the legislature authorizes a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends to authorize the city or town so to construct its sewers, or so to use the stream, as to create a nuisance, unless this is the necessary result of the powers granted. On the contrary, if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the legislature intended that it should be so done. This principle has been recognized and applied in many cases."

... In the case at bar, the legislature authorized the city of Worcester to use Mill brook as a sewer; by necessary implication, the statute authorized it to empty its sewage into Blackstone river; but we cannot presume that it was the intention of the legislature to exempt the city from the obligation to use due care in the construction and management of its works, so as not to cause any unnecessarily injurious consequences to the rights of others. If it is practicable to use any methods of constructing the sewer, and, as a part of the construction, of purifying the sewage at its mouth, at an expense which is reasonable, having regard to the nature of the work and the magnitude and importance of the interests involved, it is the duty of the city to adopt such methods." The opinion in the *Morse Case* cites *Atty. Gen. v. Leeds Corp.* L. R. 5 Ch. 583. There an act of Parliament was interpreted to authorize the drainage of sewage into a river in such a manner as not to create a nuisance. In deciding the case, Lord Chancellor Hatherley said: "I think the true answer is that which had occurred to us before we called on Sir Roundell Palmer; namely, that when any person finds that the legislature has authorized a work to be done (and, of course, the force of this is increased by the view we have taken, that the true construc-

tion of the act is that it is to be done without creating a nuisance), he is not to assume it will create a nuisance. On the contrary, the presumption would be that the board would not do anything unlawful. It is lawful for them to make the sewers; it is lawful for them to conduct the sewage into the River Aire; but they are to do it in such a way as not to create a nuisance."

This seems to be a sensible view, and authorities need not be multiplied. If the legislature authorizes or directs something to be done by a city, it will be presumed no nuisance was intended, unless such as may be the natural and necessary result of the work. The act of 1887 conferred no new power on the city by declaring that it should have authority to lay sewer pipes and drains, and connect them with any creek, river, or ravine as an outlet. It had that power without the statute. 10 Am. & Eng. Enc. Law, 2d ed. p. 447. The declaration of the power was made merely for the purpose of attaching to it the right of eminent domain. The obligation to avoid committing a public nuisance was not weakened. It cannot be the law that this act authorizes a city to pour the contents of its sewer mains into any dry ravine it may find convenient to its borders, infect a populous neighborhood with disease, and then, in an action to abate the nuisance, exculpate itself by the simple answer: "The sewers were connected with a ravine." Perhaps some sewage may properly be emptied into a ravine, but manifestly the thought of the statute is that ravines may be utilized for drainage. Cities may lie in close proximity to each other on the banks of a river. It is impossible to believe that one city may empty all the filth of its sewers at the intake of another city's water supply, and then justify by saying: "The sewers were connected with the river." A city has no right arbitrarily to select the point of outlet for its sewers regardless of the public health and comfort. It may take its sewers to the river, but it must not be indifferent to the very interests to be subserved in building sewers. There is nothing unusual about the fact that the water of the Republican river changed to another channel. The valleys of Kansas are filled with channels old and new from which the water of the rivers has departed. The effect upon the sewer in question is the same as if a sand bar had blocked the mouth of the sewer, dammed up its contents, and caused them to overflow the streets; or as if a bar had formed opposite the mouth of the sewer in such a way as to form a foul and pestilence-breeding basin. In planning and in maintaining any sewer

system, provision must be made for that which naturally and reasonably may be anticipated. The petition is such that the court does not know what facts may be relied upon to show that the city is at fault. Assuming that a public nuisance exists, the first count of the answer states no defense.

The judgment of the District Court is reversed, and the cause is remanded for trial.

MAINE SUPREME JUDICIAL COURT.

ELMER H. DUNTON

v.

WESTCHESTER FIRE INSURANCE
COMPANY.

(— Me. —, 71 Atl. 1037.)

Insurance — arbitrators — title.

No question as to the title of the insured can be considered by referees appointed in accordance with a clause in a standard insurance policy which provides that, upon failure of the parties to agree as to the amount of loss, it should be referred to arbitrators, the award of a majority of whom should be conclusive as to the amount of loss and damage.

(September 15, 1908.)

EXCEPTIONS by defendant to the direction by the Supreme Judicial Court for Somerset County of a verdict in plaintiff's favor and to rulings made during the trial of an action brought to recover the amount alleged to be due under certain fire insurance policies. Overruled.

The facts are stated in the opinion.

Messrs. **Butler & Butler** and **Frederick W. Brown** for defendant.

Messrs. **Merrill & Merrill** for plaintiff.

Whitehouse, J., delivered the opinion of the court:

This is an action on two fire insurance policies issued by the defendant corporation in the standard form prescribed by Me. Rev. Stat. chap. 49, § 4, ¶ 7.

Among the provisions contained in this form of policy are the following stipula-

tions respecting the loss or damage, and the method of ascertaining and estimating such damage by arbitration, viz.:

"The amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions," etc.

"In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be within a reasonable time rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail," etc.

"In case of any loss or damage, the company, within sixty days after the assured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees as herein-after provided, or replace the property with other of the same kind or goodness," etc.

"If there shall be any other insurance on the property, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon.

"In case of loss under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss and damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

It is admitted by the defendant that three referees were seasonably chosen in all respects in accordance with these stipulations in the policy and the statutes of the state providing for "a reference of the question of amount to three disinterested men . . . in case of a failure of the parties to agree

Note.—As intimated by the court, the above decision seems to be one of first impression upon the authority of arbitrators under standard policies of insurance to consider the assured's title to the insured property, as an extensive search has failed to disclose any other case involving that question.

Attention however may be called to *Hogadone v. Grange Mut. F. Ins. Co.* 133 Mich. 339, 94 N. W. 1045, in which it was held that the provision in a mutual fire policy 20 L.R.A. (N.S.)

that, in case of disagreement as to the amount of valuation, in whole or in part, the matter should be determined by the arbitration committee of the company, whose decision as to the validity of the claim should be final, and preclude any suit to fix the amount or valuation, related only to cases as to disagreement as to the amount of valuation, in whole or in part, and was not applicable to a controversy between the parties in which the disagreement related to the assured's title to the insured property.

as to the amount of loss." Thereupon the defendant contended before the board of referees, thus legally constituted, that at the time of the fire the plaintiff had no title to the property insured, and offered evidence to prove that, prior to that time, the plaintiff had no title to the property insured, and had sold the property to a third party. The referees excluded this evidence and ruled that they had no jurisdiction of the question of the plaintiff's title or insurable interest, and that the only question submitted to them was the amount of damage done by the fire.

The referees accordingly proceeded to take evidence upon the question of the amount of damage done by fire to the property described in the policies, and made their award determining the amount of damage on the merchandise insured to be \$6,280, and on the tools and machinery, \$350. The defendant declined to recognize this award as a compliance with the requirements of the policy, and denied its validity on the ground that the referees had refused to hear evidence upon, and determine the question of, the plaintiff's title to the property insured. The plaintiff thereupon commenced this action upon the policies, and at the trial the court received evidence, subject to the defendant's objection, to prove title in the plaintiff to the property insured, and also admitted the award of the referees as to the amount of damage done to the property by the fire.

The defendant requested the court to rule that, upon this evidence, the plaintiff was not entitled to recover. The court refused to rule as requested, and ordered a verdict for the plaintiff for \$1,246.71. The case comes to the law court on exceptions to these rulings of the presiding justice.

The only question thus raised by the exceptions and argued by counsel is whether the stipulation in the Maine standard policy in regard to arbitration authorizes and requires the referees to take jurisdiction of one of the principal questions involved in the plaintiff's right to recover, and determine his title to the property insured, as well as the amount of the damage done to the property; or whether it contemplates only an appraisal by the referees of the value of the property described in the policy, and an estimate of the damage done by the fire to that property, leaving the question of the plaintiff's title and the general question of the defendant's liability to be judicially determined in the courts of law.

When this question is examined in the light of the uniform current of judicial opinion respecting such stipulations for arbitration in contracts of insurance made prior to the adoption of the Maine standard policy, and considered with reference to the provisions of the standard policy itself, specially involved in the inquiry, and the practical operation of the rule contended for by the defendant, the conclusion is irresistible that the ruling of the presiding justice was correct, and that the exceptions must be overruled.

It has been long established by authority, both in this country and in England, that, if parties stipulate in contracts of insurance and other similar contracts to submit to arbitration the question of the amount of damage or any similar matters that do not go to the root of the action, it is entirely competent for them to make such an agreement a condition precedent to the right of action; and, if it appears from the express terms of the contract, or from necessary implication, that such was the intention, it will be upheld by the courts, and no action can be maintained upon the contract without proof on the part of the plaintiff that he has fulfilled the stipulation in the contract, or made all reasonable effort to fulfil it. The effect of such an agreement is not to refer a cause of action, but to provide that a cause of action shall arise as soon as the amount to be paid has been determined, and not before. It does not deprive the courts of their jurisdiction, but simply provides a reasonable method of estimating and ascertaining the amount of the loss, and leaves the general question of liability to be determined by the judicial courts. *Scott v. Avery*, 8 Exch. 497, 5 H. L. Cas. 811; *Elliott v. Royal Exch. Assur. Co. L. R. 2 Exch. 237*; *Hamilton v. Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; *Wolff v. Liverpool & L. & G. Ins. Co.* 50 N. J. L. 453, 14 Atl. 561.

It is equally well settled that, if an agreement to arbitrate is confined to an appraisal of value or an assessment of the amount of damages, and is, at the same time, only an independent stipulation, and not made by the policy a condition precedent to the right of action, the plaintiff may still have his action and establish his claim by other evidence without procuring an award from the arbitrators. *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572. In such a case the agreement to refer is not an essential term of the covenant, but a power which may be revoked at any time before it is fully executed. It is simply a collateral agreement to refer to arbitration, and not an agreement that only the adjusted loss shall be paid.

But there is a third proposition of paramount importance, which has undoubtedly been regarded as settled by judicial authority ever since the days of Lord Coke; and that is, that a general stipulation in

such a contract to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount of damage will not be sanctioned or enforced so as to divest the courts of their established jurisdiction. *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 55, and authorities cited. In this case the distinction between a valid and invalid agreement for arbitration in such a contract is thus stated by the court: "While the parties may impose, as a condition precedent to application to the courts, that they shall have first settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law." See also *Wood v. Humphrey*, 114 Mass. 185; *White v. Middlesex R. Co.* 135 Mass. 216; *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282.

It does not appear from any of the decisions cited in support of the familiar propositions above stated, or from any other case to which the attention of the court has been called, that such a stipulation for the settlement of the question of damages by arbitration has ever been construed to require or authorize the referees to determine the question of the plaintiff's title to the property insured, as a condition precedent to the plaintiff's right of action on the policy. It has not been perceived that any judicial decision exists in which it has been held competent for the parties to stipulate that the determination of the question of the ownership of the property by arbitration should be a condition precedent to the plaintiff's right of action. No such doctrine has ever been suggested respecting stipulations for arbitration in policies of insurance not prescribed by legislative action, for the obvious reason that the question of the ownership of the property is not involved in the appraisal of the value of the property destroyed or the estimate of the damage done to the property insured, but goes directly and solely to the plaintiff's cause of action and the defendant's liability.

But the Maine standard policy, though its form is prescribed by statute, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties. As stated by the court in *Reed v. Washington F. & M. Ins. Co.* supra, with reference to the standard policy then prescribed by their statute: "It is their contract; as such, it does not deprive the plaintiff of his action and his trial by jury. It is not to be presumed that the legislature intended, by prescribing the form of contract, and prohibiting

any other, to give it effect in depriving a party of rights, which, as a contract, it would not have."

The fact, therefore, that the legislature put forward the Maine standard policy as a form for a contract to be executed by the parties affords no reason for giving to the arbitration clause any different construction from that heretofore given by the courts to all similar contracts made without legislative sanction. It has been seen that, unlike the form considered in *Reed v. Washington F. & M. Ins. Co.* supra, the arbitration clause in the Maine policy contains an express provision that the award of the referees "shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action . . . to recover for such loss."

It will be noticed that, in the judicial treatment of this subject in all the cases cited and to be found relating to it, every allusion to a submission to ascertain the "amount of loss or damage" has uniformly been understood to signify a proceeding to appraise and estimate the damage to the property described, but not to embrace the question of ownership or any other matter which goes to the root of the cause of action. *Stephenson v. Piscataqua F. & M. Ins. Co.* supra; *Bangor Sav. Bank v. Niagara F. Ins. Co.* 85 Me. 68, 20 L.R.A. 650, 35 Am. St. Rep. 341, 26 Atl. 991. There is no reason to suppose that it was in the contemplation of the parties or of the legislature that any other or different effect was to be given to those words in the Maine policy. All of the other terms of the policy and of the statutes relating to the subject are entirely consistent with this construction of the language of the arbitration clause in each of the policies in suit. There is nothing in any of the provisions of the policy prescribed, or of any of the statutes relating to it, which indicates, in the slightest degree, any purpose or desire to change the established doctrine of the courts in regard to the distinction above stated between valid and invalid agreements for arbitration in this class of contracts.

The case of *Cassidy v. Royal Exch. Assurance*, 99 Me. 399, 59 Atl. 549, differs *toto cœlo* from the case at bar, and is not an authority for the defendant's contention. The matter which was there deemed to be within the jurisdiction of the referees did not go to the cause of action, but to the amount of damages; and the only question of fact for the determination of the referees was whether certain piles of lumber were within 100 feet of each other.

Furthermore, the rule claimed by the defendant would not be a wise or beneficent one in its practical operation. The settlement of questions of title to real and personal property often involves the duty of examining a complex state of facts and important and difficult questions of law,—a duty which those not educated to the law would be wholly incompetent to perform; and yet it is a matter of common knowledge that, in a great majority of references under the arbitration clause of insurance policies, the referees are not selected from the legal profession for the reason that they are required to perform the functions of simple appraisers, and not of general arbitrators. Under the terms of the Maine policy, neither of the three persons named for the referees by each of the parties is required to be learned in the law.

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MAYNARD A. DAVIS

v.

NEW ENGLAND RAILROAD COMPANY
et al.

JAMES MCKEON

v.

SAME.

(199 Mass. 292, 85 N. E. 475.)

Eminent domain—interference with light and air—compensation.

1. Recovery cannot be had by an abutting owner because of interference with the light, air, or prospect of his property through an elevation of railroad tracks, in the absence of any taking of his land or destruction of his easements, under a statute requiring compensation to be made for all damage caused by the taking of land or by the change or discontinuance of

a private way or by the taking of an easement.

Trespass — railroad construction — remedy.

2. The remedy of one over whose property a temporary structure is erected for the running of trains pending an elevation of railroad tracks is an action for trespass, and not under the statutes allowing compensation for property taken by right of eminent domain.

(June 16, 1908.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of petitions for damages for injuries to petitioners' property by the elevation of certain railroad tracks after demurrers to the petitions had been overruled. Demurrers sustained.

The facts are stated in the opinion.

Messrs. Benton & Clarke for respondents.

Messrs. Samuel M. Child and Malachi L. Jennings, for petitioners:

Part of the petitioner's land having been taken, he is entitled to damages.

Sheldon v. Boston & A. R. Co. 172 Mass. 180, 51 N. E. 1078; Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544; Hyde v. Fall River, 189 Mass. 439, 2 L.R.A. (N.S.) 269, 75 N. E. 953; Whitney v. Com. 190 Mass. 531, 77 N. E. 516; Hyde v. Boston & W. Street R. Co. 194 Mass. 80, 80 N. E. 517.

Morton, J., delivered the opinion of the court:

These are petitions for the assessment of damages alleged to have been caused by the abolition of the grade crossing on Dudley street, in Boston. The cases come here on report after a demurrer in each had been overruled, and the question is the same in both. They were argued together, and we proceed to consider them together. The McKeon petition, after describing the premises and after referring to the decree of the su-

Case Note.—Right of property owner to compensation for interference with light or air by railroad structure on the company's own property.

Although there are many cases passing on the question whether the interference with light or air is to be considered an element of damages where a railroad structure is built in the street, or on property taken by condemnation proceedings from the complaining party, there seems to be very little authority on the question presented by DAVIS v. NEW ENGLAND R. Co. whether the interference of light or air will constitute an independent cause of action for damages, where such structure is built on the company's own property. 20 L.R.A. (N.S.)

Aside from the DAVIS CASE, the only American case found which presents that question is Egerer v. New York C. & H. R. R. Co. 17 N. Y. S. R. 225, 2 N. Y. Supp. 69, where it was held that an action will not lie, by the owner of property, against a railroad company, for deprivation of light and air, occasioned by elevating its tracks so as to obstruct a street; such elevation being in pursuance of an act of the legislature, and the city commissioners having discontinued that portion of the street under authority given them by the act. The court said: "Here the injury, if any, results from a discontinuance of the street itself by action of the city authorities, and a consequent deprivation of the

perior court under which the defendants have acted, alleges that the defendants "have caused and are causing great damage to the petitioner's property by the erection of retaining walls on Norfolk avenue, in front of and along the side of and in the rear of the plaintiff's property, causing him great and permanent loss in the value of the same, and that said defendant companies, in pursuance of said order and in doing the work thereunder, have caused your plaintiff great damage by the erection of the temporary bridges over said Norfolk avenue and upon and against your plaintiff's property, over which said bridges said companies have caused to be run during the prosecution of said work a great many trains daily; that the grade of the said road bed of said railroad has been raised a great height, shutting out your plaintiff's light and air and otherwise impairing the value of his property." The allegation in the Davis petition is that the defendants "have caused and are causing your plaintiff great damage to his property aforesaid by the building against his property of a high granite retaining wall impairing your plaintiff's right to light and air, and reducing the value of your plaintiff's property by a large amount."

The defendants contend that the remedy of the plaintiff McKeon, if any, for the erection of temporary bridges upon his property and running trains over the same, is in tort; that neither the plaintiff McKeon nor the plaintiff Davis has any remedy at common law for any damages caused by the building, by the defendants, of retaining walls upon their own premises, even though the result is to shut out light and air from the premises of the petitioners, and that neither has any remedy, under the statute, in regard to the abolition of grade crossings, for the reason that in neither case does the petition allege any taking of land or an easement therein or discontinuance of a private way.

easements formerly enjoyed therein. It is not contended that the plaintiff could acquire such easements by prescription over the lands of the defendant, an adjoining proprietor. The discontinuance of the street was within the authority expressly given to the commissioners of the city by the act of 1880, and the plaintiff had no cause of action against the defendant for damages caused thereby."

In England, however, the obstruction of light and air caused by the building of a structure by a railroad company on its own property is considered a damage to property, and therefore a property owner who is so injured may recover damages. *Re London. T. & S. R. Co. L. R. 24 Q. B. Div. 40; Eagle v. Charing Cross R. Co. L. R. 2 C. P. 20 L.R.A. (N.S.)*

It does not appear in either of the petitions when the proceedings for the abolition of the crossing were instituted. But it is said in the briefs for the petitioners, that the petition for the abolition of the crossing was filed under Rev. Laws, chap. 111, §§ 149-160, inclusive; and this is also stated in substance in the brief of the defendants, and we assume the fact to have been as both parties seem to agree that it was.

Rev. Laws, chap. 111, § 153, as amended by Stat. 1905, chap. 408, p. 351, § 3, and Stat. 1906, chap. 463, p. 495, pt. 1 § 37, which was the law in force at the time of the entry of the decree in the superior court, provides in regard to the liability of railroad corporations as follows: "All damages which may be caused by the taking of land for the railroad, or by the change or discontinuance of a private way, or by the taking of an easement in land adjoining a private way, or a railroad location in connection with the abolition of a grade crossing, shall primarily be paid by the railroad corporation; and all damages which may be sustained by any person by the abolition of private ways, except as hereinbefore provided, shall be entirely paid by the railroad corporation. If the parties interested cannot agree upon said damages, any party may have the damages determined by a jury in the superior court . . . in the same manner as damages may be determined which are caused by the taking of land for the locating of railroads and the laying out or discontinuance of public ways, respectively." The original grade crossing act provided for the determination of the damages "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively." The words, "and under like rules of law," were retained through all the various amendments that were made until the revision of 1902 when.

638; *Turner v. Sheffield & R. R. Co.* 10 Mees. & W. 425.

However, compensation cannot be allowed for deterioration in the value of property by reason of the premises being overlooked by persons on the railway. *Re Penny*, 7 El. & Bl. 660.

Right, under constitutional provisions against "damaging" private property for public use without compensation, to compensation for consequential damages to property, no part of which is taken, from smoke, noise, dust, etc., incident to ordinary operation of railroad, see case note to *Tidewater R. Co. v. Shartzler*, 17 L.R.A. (N.S.) 1053.

for some reason, probably because they were deemed superfluous, they were omitted from the statute. Stat. 1890, chap. 428, p. 463, § 5; Stat. 1891, chap. 123, p. 734; Stat. 1894, chap. 216, p. 196; Stat. 1897, chap. 264, p. 234; Stat. 1898, chap. 200, p. 133; Stat. 1900, chap. 463, p. 460. Their omission does not, however, we think, affect the rules of law applicable to the cases before us. At common law the petitioners would have no remedy for any damages caused to their property through interference with light and air and prospect by the erection, by the defendants, of retaining walls upon their own land. *Cassidy v. Old Colony R. Co.* 141 Mass. 174, 5 N. E. 142. Their remedy, if they have any, is under the statute in relation to the abolition of grade crossings; and, in order to bring themselves within the remedy afforded by that statute, their petitions must contain the necessary allegations. It is plain that, under the recent decisions of this court, the petitioners have suffered special and peculiar damages in the abolition of the crossing (*Whitney v. Com.* 190 Mass. 531, 77 N. E. 516; *Hyde v. Fall River*, 189 Mass. 439, 2 L.R.A.(N.S.) 269, 75 N. E. 953; *Sheehan v. Fall River*, 187 Mass. 356, 73 N. E. 544; *Sheldon v. Boston & A. R. Co.* 172 Mass. 180, 51 N. E. 1078; *Penney v. Com.* 173 Mass. 507, 73 Am. St. Rep. 312, 53 N. E. 865), and that, if that were all that it was necessary to allege in order to entitle them to maintain their petitions, then the demurrers were rightly overruled. But we do not think that it is. As we construe the statute, the defendants were liable only in case there was a taking of land or of an easement in land by them, or a change or discontinuance of a private way. And it is not alleged in either petition that either one of those things was done by the defendants, and that damage to the premises of the petitioners was caused thereby. It is not necessary that land of the petitioners, or an easement therein, should have been taken. But no case has gone so far as to hold that damages, like those sustained in these cases, can be recovered, where no land or easement in land is taken. Interference with light, air, and prospect does not constitute the taking of an easement in the land so interfered with, though it may result in damage to the property interfered with, and is a proper element of damage where land is taken. It should be noted that in *Rand v. Boston*, 164 Mass. 354, 41 N. E. 484, which has since been overruled (*Hyde v. Fall River*, supra), and in which there was a dissenting opinion; land on the opposite side of the street was taken, and also in *Hyde v. Fall River*, supra.

20 L.R.A.(N.S.)

The erection of temporary bridges on and over the property of the petitioner McKeon, and the running of trains over the same, was a trespass, not a taking, and the remedy, if any, for any damages caused thereby, is in tort. See *Peabody v. Boston & P. R. Corp.* 181 Mass. 76, 62 N. E. 1047; *Dodge v. Essex County*, 3 Met. 380.

It is stated in the briefs for the petitioners that land was taken, although it is not so alleged in the petitions. And the petitions can, perhaps, be so amended as to obviate the objections which are now urged to their maintenance. But that is a matter for the superior court to consider and pass upon.

The entry will accordingly be, demurrers sustained.

So ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HENRY TOMPKINS

v.

BOSTON ELEVATED RAILWAY COMPANY.

(201 Mass. 114, 87 N. E. 488.)

Passenger — platform — assumption of risk.

1. One voluntarily becoming a passenger on a street car so crowded that he is compelled to ride in the vestibule, with knowledge of a rule that persons riding on platforms do so at their own risk, assumes the risk of injury from being compelled temporarily to alight to enable other passengers to leave the car, including that of having the car negligently started before he resumes a safe position.

Street railway — passenger.

2. A passenger on a crowded street car does not cease to be such by momentarily stepping to the ground to enable other passengers to leave the car.

(February 25, 1900.)

Note. — A thorough search has brought to light no other cases upon the liability of a street railway company for injury to a passenger who alights temporarily for the convenience of other passengers.

An extensive note on the subject of riding on platform of street car as negligence will be found in connection with *Capital Traction Co. v. Brown*, 12 L.R.A.(N.S.) 831; and as to the contributory negligence of a passenger standing or riding on the running board of a street car, see the notes to *Burns v. Johnstown Pass. R. Co.* 2 L.R.A.(N.S.) 1191, and to *Harding v. Philadelphia Rapid Transit Co.* 10 L.R.A.(N.S.) 352.

REPORT of the Superior Court for the Suffolk County for the opinion of the full bench of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Judgment for defendant.

The facts are stated in the opinion.

Messrs. **James P. Magenis** and **J. B. Boland** for plaintiff.

Messrs. **Ralph A. Stewart** and **Henry J. Hart**, for defendant:

The plaintiff, having voluntarily become a passenger, assumed all additional risks fairly incident to the crowded condition.

Meesel v. Lynn & B. R. Co. 8 Allen, 234; *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639; *Burns v. Boston Elev. R. Co.* 183 Mass. 96, 66 N. E. 418.

The passenger was not in the exercise of due care.

Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; *Larkin v. New York C. & H. R. R. Co.* 166 Mass. 110, 44 N. E. 122; *Neylon v. Phillips*, 179 Mass. 334, 60 N. E. 616; *Moody v. Springfield Street R. Co.* 182 Mass. 158, 65 N. E. 29; *Baltimore City Pass. R. Co. v. Wilkinson*, 30 Md. 224; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L.R.A. 326, 23 Atl. 590.

Rugg, J., delivered the opinion of the court:

The plaintiff became a passenger upon a surface electric car of the defendant, so crowded with passengers that he could not sit or stand inside, and took his place in the front vestibule. He knew of the rule of the defendant, printed on the car, that "persons riding on the platforms do so at their own risk." Before his journey's end, the plaintiff stepped off the car, in order to enable some ladies to alight, and, as he was trying to get on again, he was injured by the car's being started suddenly and with more than ordinary jerk. The rule referred to was a reasonable one, and within the power of the defendant to make. *Burns v. Boston Elev. R. Co.* 183 Mass. 96, 66 N. E. 418; *Montgomery v. Buffalo R. Co.* 165 N. Y. 139, 58 N. E. 770. The plaintiff, by voluntarily becoming a passenger upon a car so crowded that he could not get inside took the risks incident to transportation under these circumstances. One of these was that of temporarily alighting for the purpose of permitting other passengers to get off the car conveniently. *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639. It has been argued by the defendant that his relation as passenger thereby ended. If this should be held, then it did not become re-established, for there was no evi-

dence from which it could be found that the plaintiff gave any notice of such intention on his part to those in charge of the car, or that they knew of any such intention or effort or offer on his part to that end, or that they accepted him as a passenger. *Hogner v. Boston Elev. R. Co.* 198 Mass. 260, 15 L.R.A.(N.S.) 960, 84 N. E. 464. But the plaintiff did not cease to be a passenger by leaving the car momentarily for this cause. He could not have been required to pay a new fare. The necessity or courtesy which prompted his action did not terminate his status as passenger. It is notorious that this is one of the common incidents of travel during rush hours. The acceptance of passengers upon cars so crowded already created an implication on the part of the defendant that, although some passengers might be obliged for an instant to step to the street for the accommodation of their fellows, the contract for carriage should not thereby be terminated. The plaintiff, by taking his position on the front platform of such a car, also impliedly contracted with reference to the same obligation resting on him. But he contracted subject to the rule of the defendant that he took all risks from riding on the front platform. One of these risks under the known conditions was that he might for a moment step off the car and get on again. Under the terms of his contract of carriage he took upon himself the consequences of injury ensuing from this act. Riding "at his own risk" could mean nothing less than at the risk of dangers resulting from the negligence of the defendant or its servants. The defendant was, in any event, apart from the rule, responsible for no other risks than those arising from its own failure or that of its agents to exercise the highest degree of care as to passengers consistent with the reasonable conduct of its business. It was not an insurer of the safety of its passengers. Hence, in order to give any effect to the rule, which, under the circumstances, became a term of the contract between the plaintiff and defendant, it must be held to exonerate the latter from all injuries which the plaintiff might receive while a passenger upon the front platform. A verdict should therefore have been ordered for the defendant. *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652; *McDonough v. Boston Elev. R. Co.* 191 Mass. 509, 78 N. E. 141; *Pike v. Boston Elevated R. Co.* 192 Mass. 426, 78 N. E. 497.

In accordance with the terms of the report the entry must be:

Judgment for the defendant.

**UNITED STATES CIRCUIT COURT
OF APPEALS, EIGHTH CIRCUIT.**

**MONITOR DRILL COMPANY, Appt.,
v.
MERCER, Trustee, etc., of Western Imple-
ment Company.**

(— C. C. A. —, 163 Fed. 943.)

Conditional sale — construction.

1. The effect of a provision in a contract for the sale of personal property, that the title shall remain in the vendor until the property is fully paid for, in creating a conditional sale, is not destroyed by a clause which authorizes the vendor, under certain conditions, to retake all property unsold by the vendee.

Same — collateral security.

2. Taking notes and collateral security for the purchase price of chattels does not destroy features of the contract constituting the transaction a conditional sale.

Same — construction.

3. A provision in a contract of conditional sale of chattels, authorizing the vendor to take possession of property, of whatever nature, derived from sale of the chattels by the vendee, reduce it to cash,

and apply the proceeds upon the amount due under the contract, does not qualify the title to the property remaining unsold by the vendee, which was retained by the vendor.

Same — settlement — notes.

4. A settlement between the parties to a contract of conditional sale in accordance with its terms, and the taking of notes from the vendee to cover such portions of the property as remained in his possession, or as he had sold and had not been paid for, is not a novation which will destroy the conditional sale features of the original contract; and it is immaterial that the settlement was not on the exact date provided for by the contract, and that a conditional sale agreement covering unsold articles was not given, if the original contract clearly reserved title in the vendor.

Same — failure to record — effect.

5. Failure to record a conditional sale contract will not make it ineffectual against trustees in bankruptcy of the vendee, if the recording acts make unrecorded sales voidable only against lien creditors, and the trustees represent no creditors having a prior lien on the bankruptcy proceedings.

(August 21, 1908.)

Case Note. — Effect of taking collateral security upon conditional sale.

The authorities are not in harmony on this question, although the weight of authority holds that subsequently taking additional collateral security to secure the amount due on a conditional sale is not sufficient to divest the seller of his title and transfer it to the buyer.

The leading case so holding is *William W. Bierce v. Hutchins*, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524. It is one of the few cases wherein the question seems to have received more than passing consideration by the court. In holding that the taking of additional security, either contemporaneously with the execution of a contract of sale, or subsequently thereto, was not sufficient to divest the vendor of his title, expressly reserved in the contract, a distinction was made between an election of remedies, the waiver of a lien, and a transfer of title. The court recognized that a lien would be waived by taking an inconsistent position in reference thereto, and, as to a transfer of title, it was said that the assertion of a lien upon the property to which the title was reserved was inconsistent with asserting title to it, and would be assumed to be sufficient to manifest an election, if title could be so transferred. On this point the court said: "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, 'if a man maketh a lease, rendering a rent or robe, the lessee shall have the election.' . . . So a man may ratify or repudiate an unauthorized act done in his name. . . . He may take the goods, or

the price, when he has been induced by fraud to sell. He may keep in force, or may avoid, a contract after the breach of a condition in his favor. . . . In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be divested by the performance of a condition, he has no election to divest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee."

Other cases have reached the same result as that reached in the *Bierce* Case, but not upon the same theory. Thus, in *Kimball v. Costa*, 76 Vt. 289, 104 Am. St. Rep. 937, 56 Atl. 1009, 1 A. & E. Ann. Cas. 610, it was held that the seller's lien under a conditional sale was not affected by his subsequently taking a mortgage upon other property, from a subsequent purchaser of the property conditionally sold, where the mortgage recited that the mortgagor had purchased the property described in the title-clause note, and that it was given as additional security for the payment thereof.

So, a mortgage of real estate subsequently executed as additional security for the amount due for property sold conditionally does not affect the seller's right under the contract as against a subsequent mortgagee, where at the time the mortgage was executed there was no pretense of any settlement between the buyer and the seller, and no

APPEAL by claimant from a decree of the District Court of the United States for the District of Minnesota affirming an order of a referee in bankruptcy refusing to recognize claimant's right to certain chattels found in possession of the bankrupt. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges, and W. H. Munger, District Judge.

Mr. George W. Buffington, with Mr. George S. Grimes, for appellant.

Mr. M. H. Boutelle, with Mr. N. H. Chase, for appellees.

W. H. Munger, District Judge, delivered the opinion of the court:

This is an appeal from a judgment of the district court, affirming the order and findings of the referee in bankruptcy. By the facts as shown it appears that the Western Implement Company, a corporation, and the Monitor Drill Company, a corporation, in

agreement to surrender the conditional sale notes. *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744.

And in *Pettyplace v. Groton Bridge & Mfg. Co.* 103 Mich. 155, 61 N. W. 266, it was also held that taking a real-estate mortgage as additional security to conditional sale notes did not render the sale absolute.

So accepting additional security on extending the time for the payment of the amount due on a conditional sale contract is not a waiver by the vendor of his rights thereunder. *Standard Steam Laundry v. Dole*, 22 Utah, 311, 61 Pac. 1103.

Reservation of title in such a contract is not waived by the seller afterward asking for and being promised additional security, which, however, was never given. *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368.

As against a mortgagee of real estate, machinery sold the mortgagor conditionally will not become a part of the realty, nor will the condition be deemed to be waived, by the seller subsequently taking a mortgage upon the property sold and other property, where the mortgage was taken as further security, as this fact rebuts the presumption of waiver if such a lien comes within the category of liens waivable in that way. *Page v. Edwards*, 64 Vt. 124, 23 Atl. 917.

And the fact that the seller of chattels conditionally subsequently took a mortgage on the property sold and other property of the buyer does not of itself amount to an election to treat the title as vested in the buyer, so as to give a prior mortgage executed by the buyer upon the property conditionally purchased precedence over the right of the seller under the contract. *First Nat. Bank v. Reid*, 122 Iowa, 280, 98 N. W. 107.

So, the mere fact that the attorneys for the seller, in ignorance of the reservation of title in the contract of sale, took from the

January, 1906, entered into two certain contracts, by the terms of which the Monitor Drill Company, designated the first party, agreed to sell to the Western Implement Company, designated the second party, certain agricultural implements at certain prices, to be delivered f. o. b. at its factory in St. Louis Park, Minnesota. Provisions in each of said contracts, appearing in the following order, and the only ones necessary to be considered for the proper determination of the case, were as follows:

"Terms. Party of the second part agrees to settle with party of the first part for all goods purchased under this contract, on or before June 1, 1906, as follows: . . .

"Fourth. Settlement for each and all machines sold by party of the second part shall be made at or before delivery, either by cash or the purchaser's note, secured by chattel mortgage covering the property sold, and other personal property of equal value, if possible, which notes and chattel mortgages shall be taken upon blanks to

buyer a mortgage on the same property to secure the balance due thereon, is not sufficient to divest the seller of his rights under the contract as to the other creditors of the buyer. *Jones v. Albin*, 53 Ga. 585.

Subsequently taking a trust deed covering property sold conditionally and other property does not, as against other creditors of the buyer, estop the seller from relying upon the reservation of title in an original contract of sale. *Foster v. Briggs Machinery & Supply Co.* 6 Ind. Terr. 342, 98 S. W. 120.

But in *Anundsen v. Standard Printing Co.* 129 Iowa, 200, 105 N. W. 424, the court, in disposing of the contention of the seller of property by conditional sale, that it was not subject to the debts of the buyer, said that, while it was true that the original contract was a conditional sale only, yet this was merged into an actual sale by the seller thereafter taking notes for the purchase price, secured by a mortgage upon the property sold, and by filing an intervening petition asking that the mortgage be held superior to other claims against the buyer.

And in *McCormick Harvesting Mach. Co. v. Lewis*, 52 Kan. 358, 35 Pac. 12, it was held that, where the possession of the property purchased on conditional sale was in the vendor, it was competent for the parties to treat the sale as absolute, and the title as having vested in the purchaser. Hence, the execution by the purchaser of a mortgage upon that and other property, and its acceptance by the seller, was inconsistent with ownership in the seller, as the purchaser assumed to have title by mortgaging the property to the seller, and, in applying for and accepting the mortgage, the seller recognized such title. It was accordingly held that the purchaser could not thereafter defend against a recovery on the original note

be furnished party of the second part by party of the first part; and, at said settlement time, party of the second part shall pay to party of first part the proceeds of such sales made for cash in cash, and shall be entitled to the discount above mentioned therefor; and party of second part shall at said settlement time turn over and deliver to party of the first part each and all said notes and chattel mortgages securing the same, taken in settlement for machines sold by party of second part, as collateral security to the note of party of second part; the party of second part shall also, at said settlement time, give party of first part a special conditional sale agreement covering unsold machines at each of its local places of business.

"Conditions. It is specifically understood and agreed that the title to each, every, any, and all machines and parts thereof, delivered to party of the second part under the terms of this contract, is in, and shall continue to remain in, the party of the

first until it shall receive full payment in cash therefor; that, if party of second part resells any of said machines, or parts thereof, then the full proceeds thereof, be such proceeds book accounts, notes, or cash, or other personal or real property, shall, in lieu of such machines or parts thereof so sold, immediately be, become, and remain the sole and exclusive property of party of the first part until the full indebtedness of party of second part to party of first part is paid in cash. And, until such indebtedness of party of the second part shall be paid in full to party of the first part, and until said proceeds and the whole thereof have been actually delivered to party of the first part, the possession and control thereof by party of the second part shall be that of a trustee for the use and benefit of the party of the first part, and not otherwise.

"Default. If party of second part fails, refuses, or neglects to make due and prompt settlement, or performs or permits

given for the purchase price of the property, on the ground that he never obtained the ownership of the property, as it had thereafter been taken from him on the mortgage.

So, a mortgage by the buyer of chattels sold conditionally to the seller, covering such chattels, constitutes an admission by the parties to the mortgage that the title to the property was in the mortgagee at the time of its execution, and the loss of the property thereafter by fire falls on the buyer. *American Soda Fountain Co. v. Blue*, 146 Ala. 682, 40 So. 218; *Blue v. American Soda Fountain Co.* 150 Ala. 165, 43 So. 709.

A somewhat different question is presented as to the effect of taking a mortgage upon property conditionally sold, as well as other property, contemporaneously with the execution of a contract of sale, wherein title is reserved in the seller. While the *Bierce Case* held the fact that additional security was taken contemporaneously with the execution of the contract of sale did not affect the validity of the reservation of title, yet the specific question was not presented or considered as to whether the contemporaneous execution of a mortgage upon the property purchased would be so inconsistent with the theory of a conditional sale as to invalidate the reservation.

Champanois v. Tinsley, 90 Miss. 38, 42 So. 89, held that taking a contemporaneous trust deed upon property sold and other property did not operate to divest the seller of the title reserved by him, and vest it in the buyer. In reaching this conclusion, the court distinguished between waiving a lien, and a seller of chattels waiving his title expressly reserved by him, saying that the doctrine of implied waiver could only be invoked to defeat implied liens, 20 L.R.A. (N.S.)

but that, where there was an express contract that the title be retained in the vendor, it was not waived by him by implication, because he took the additional security of a trust deed.

So, the right of a buyer of chattels on conditional sale to take advantage of the statute requiring the seller to return a portion of the money paid on such a contract under certain circumstances is not affected by the fact that he executed to the seller a chattel mortgage on the goods purchased, contemporaneously with the purchase. *Speyer v. Baker*, 59 Ohio St. 11, 51 N. E. 442. To the same effect is *Richcreek v. O'Donnell*, 26 Ohio C. C. 528. The foregoing cases were influenced by the language of the statute referred to, and can hardly be said to be authority on the general question uninfluenced by statutory provisions.

This question was presented in *Silver Bow Min. & Mill. Co. v. Lowry*, 6 Mont. 288, 12 Pac. 652, and it was held that taking a mortgage on other property, to secure the payment of conditional sale notes of even date with the mortgage, was inconsistent with the theory of a conditional sale, since, if the sale was merely conditional, the taking of a mortgage on other property would be utterly useless. The sale was accordingly held to have been an absolute one.

And in *C. Aultman & Co. v. Silha*, 85 Wis. 359, 55 N. W. 711, citing the *Lowry Case* with approval, it was held that the contemporaneous execution of a mortgage upon the property purchased and other property to secure notes of even date, which contained a stipulation to pay the balance remaining after a foreclosure, was inconsistent with the idea of a conditional sale, although the purchase-price notes contained a reservation of title in the vendor.

a breach of this contract in any respect, or if party of first part receives information concerning party of second part derogatory to his credit, financial standing, or reputation, and upon the termination of this contract, through the lapse of time or otherwise, party of the first part may demand, and shall be entitled to receive forthwith from party of second part, the possession of all machines and parts thereof, and extras and repairs, and all proceeds, of whatsoever nature or kind, from the resale by party of second part of any machines or parts thereof, by him received under this contract, without reimbursing party of the second part for any claim for storage, handling, freight, express, insurance, or any other charge, of whatsoever nature or kind. Party of first part in such case shall reduce such proceeds to cash, and apply the same, after deducting actual expenses in so doing, to the payment of the indebtedness due it from the party of the second part, and shall deliver the surplus, if any, to party of the second part."

Subsequently, in August, 1906, the parties had a settlement, required by the terms of the contracts. The books of the parties agreed, and showed that the first party had delivered to second party, under the contracts, goods to the value of \$15,653.07. At said settlement second party paid first party \$2,048.92 in cash, being the cash received from the sale of goods. At the same time second party executed to first party four promissory notes,—one for \$4,787.15, one for \$2,456. (which notes represented goods sold by second party on credit), one note for \$3,500, and one note for \$2,861; said last two notes representing the value of goods on hand and unsold by second party. At the time of said settlement second party gave to first party, as collateral security for the two notes representing goods sold on credit by second party, notes and mortgages aggregating the sum of \$5,322.84, of which amount \$3,308.84 were notes and securities of second party, which were not taken and received by it for goods so sold. In October following, proceedings in involuntary bankruptcy were instituted against said Western Implement Company, and in December following it was duly adjudged a bankrupt, and defendants took appointed trustees. The trustees took possession of the goods unsold, and the Monitor, Drill Company demanded the delivery of said goods to it by the trustees. Being refused, it filed its petition with the referee in bankruptcy for an order upon the trustees to deliver the portion of the goods which it had delivered to the bankrupt under the provisions of said contracts,* and which remained unsold. A hearing was had, the 20 L.R.A. (N.S.)

referee held said contracts evidenced not conditional, but absolute, sales, the interest of petitioner being that of an equitable mortgagee, that as mortgages they were void under the laws of Minnesota, and denied the prayer of the petition. An appeal was taken to the district court, where the decision of the referee was affirmed. From the judgment of the district court this appeal has been prosecuted.

The principal question involved is whether said contracts constituted an absolute sale by the Monitor Drill Company to the Western Implement Company of the property in question, or whether said contracts evidenced a conditional sale only of the property. The chief features of the case were disposed of by this court in the case of *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 545, where it was held that a contract nearly similar in its terms, entered into by the bankrupt with the Waterbury-Zimmer Implement Company, evidenced a conditional sale. In that case it was said: "The agreement has every element of a conditional sale,—a vendor, a vendee, agreed prices, an obligation of the vendee to pay them, an obligation of the vendor that upon condition that the vendee pays the agreed prices, but not otherwise, the title of the vendor shall vest in the purchaser. Thus it evidenced a sale in which the vesting of the title in the vendee was made subject to a condition precedent, and it became a contract of conditional sale."

So in this case there was a vendor, a vendee, agreed prices, obligation on the part of the defendant to pay them, obligation of the vendor that, upon condition that the vendee paid the agreed price, but not otherwise, the title of the vendor should vest in the purchaser.

It is said on the part of counsel for the trustees that, if the provision in the contracts in question above quoted under the title "Default" were eliminated, the contracts might, under the decision of this court, constitute conditional sales. It is claimed, however, on the part of the trustee, that such provision in the contracts qualifies the other provision quoted under the head "Conditions," so that, by construing the two provisions together, the contracts were not of conditional sale only, but constituted an absolute sale, giving to the vendor only an equitable lien. The portion of the contract above quoted under the heading "Conditions" is clear, specific, and unambiguous to the effect that the title to the property shall remain in vendor until fully paid for, and evidences clearly a contract of conditional sale only. The portion of the contracts quoted under the heading "Default," which authorizes the

vendor under certain conditions to retake possession of the unsold portion of the property, in no way qualifies the conditional sale feature of the contract. The taking of the notes for the purchase price, and the taking of collateral security, did not in any way qualify the conditional sale features of the contracts. This was expressly held in *William W. Bierce v. Hutchins*, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524.

The provision authorizing the vendor to take possession of proceeds of whatever nature derived from the sale of the portion of said property sold by said party of the second part, and reduce such proceeds to cash, and apply the same, after deducting the expenses of so doing, to the indebtedness due from the party of the second part, and deliver the surplus, if any, to second party, does not qualify in any respect the title to the portion of such property remaining unsold. This is fully established in *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51, and *William W. Bierce v. Hutchins*, supra. If the taking of such collateral security did not destroy or qualify the conditional sale feature of the contracts, as was said in the last-cited case, then we fail to perceive how the converting into cash of the securities obtained upon sales, and applying the same upon the notes of second party, would have such effect.

It is to be borne in mind that the contracts before us do not provide that the portion of the property remaining unsold, if retaken by the party of the first part, shall be sold and the proceeds applied upon the notes given by the second party. There is no provision in the contracts requiring the first party to make a sale or other disposal of the portion of the property remaining unsold which it could retake. But it is urged that the effect of the settlement in August was a novation of contract. Such contention has no force, as it was provided in the contract that a settlement should be had and notes given as was done. It would only be natural for the parties, even when the sale was conditional, to provide that at the close of the sale season a settlement should be made and an account taken to determine what portion of the goods had been sold by second party, and an adjustment made with respect thereto.

It is true this settlement was not made on or before June 1 as stipulated in the contracts, but was made August 25 following, and that at such settlement a special conditional sale agreement, covering unsold machines, was not given as stipulated; but in view of the clear, specific, and unambiguous terms of the provision headed "Condi-

tions," we think neither of these matters operated to take from the original contract the characteristics of a conditional sale, so clearly stamped upon it by that provision. Parties may modify parts of a contract without affecting the remainder.

It was alleged in the answer of the trustees that they were informed and believed that, at the time said contracts were executed, it was understood and agreed by the parties thereto that the same should have no force and effect except in the event of the financial embarrassment, insolvency, or bankruptcy of second party, in which latter event it was understood and agreed that the first party (petitioner) should claim said merchandise, or the proceeds thereof, under the purported claim of title evidenced by said agreements. Of this contention that the contracts were tainted with fraud, no allusion has been made in the briefs, and we would be warranted in concluding that the same was abandoned; but we have carefully examined the evidence and record, and think the contention not tenable. The contracts being conditional sales, the failure to properly acknowledge and record them is not fatal, because the state-recording statutes render such agreements voidable only against creditors who have a lien on the property, and here no creditor had a lien prior to the bankruptcy proceedings.

It follows that the decree of the District Court must be reversed, with directions to set aside the order of the referee and to direct the trustees to surrender to the Monitor Drill Company the property in question.

MINNESOTA SUPREME COURT.

HAROLD JOHNSON et al., Reapts.,

v.

JOHN FEHSEFELDT, Appt.

(106 Minn. 202, 118 N. W. 797.)

Entire contract—part performance—recovery.

1. Where a contract is entire, and one party, not in default, is willing to complete its performance, the other party, who abandons the contract or refuses to

Headnotes by JAGGARD, J.

Case Note.—Contract which fixes compensation at a certain amount per unit of work done, as entire or severable.

Cases involving contracts of sale have been excluded from this note. Although numerous cases seem to consider that such cases are governed by the same rules as cases of the character indicated in the title

perform it, cannot recover, on the contract or on a *quantum meruit*, the value of the labor he has expended in its partial performance.

Severable contract—price per unit.

2. The mere fact that a price has been affixed to each bushel of a crop contracted to be threshed is not sufficient to make it severable.

Entire contract—abandonment—recovery.

3. In this case it is held that, whether an agreement to thresh grain for a specified price was to thresh an entire crop or an indefinite number of bushels was a question of fact; and that, if the contract should prove to be an entire one, the thresherman, who abandoned the contract before all the grain had been threshed, because it was being performed at a loss, cannot recover, on the contract or on a *quantum meruit*, the agreed price of the number of bushels actually threshed.

(December 11, 1908.)

to this note, yet it might well be argued that, where a portion of the goods under a contract of sale has been delivered, the failure to deliver the balance does not, necessarily at least, tend to render the portion delivered of less value, as would be the effect of the failure to complete the performance of some piece of work upon the portion of work already completed. For the same reason, contracts for a general work, for a specified period of time, but not for a specified piece of work, have been excluded.

Cases falling within the scope of this note are not harmonious,—some following the doctrine of *JOHNSON v. FEHSEFELDT*, and holding that such contracts are entire, while others follow the contrary doctrine, that such contracts are severable, and there may be a recovery upon a *quantum meruit*.

Frequently the cases may be distinguished by some particular provision of the contract in question, or some other peculiar feature of the case; but numerous cases have clearly enunciated contrary doctrines.

Thus, in *McMillan v. Malloy*, 10 Neb. 228, 35 Am. Rep. 471, 4 N. W. 1004, a contract very similar in all respects to the one in *JOHNSON v. FEHSEFELDT* was held to be severable, and the plaintiff recovered for the value of the services performed, less any damages sustained by the defendant by reason of the breach of contract. The court said: "We are aware that there are a large number of cases, most of them tried in courts having no equity powers, holding that no recovery can be had in such case. These decisions are placed upon the ground that the contract is entire, and that no recovery can be had on the contract until the plaintiff has performed his part of the same. And, where a contract is entire and indivisible, and payment is to be made only after full performance, no action can be maintained on part performance. But, when the 20 L.R.A. (N.S.)

A PPEAL by defendant from an order of the District Court for Grant County denying a motion for a new trial after verdict for plaintiffs in an action brought to recover for services rendered under a contract to thresh defendant's grain. Reversed.

The facts are stated in the opinion.

Messrs. N. J. Bothne and James B. Ormond, for appellant:

The agreement was an entire contract, requiring full performance before payment of the consideration was due.

Widman v. Gay, 104 Wis. 277, 80 N. W. 450; *Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416; *Hansell v. Erickson*, 28 Ill. 257; *Kopitz v. Powell*, 56 Wis. 671, 14 N. W. 831; *Lantry v. Parks*, 8 Cow. 63; *Badgley v. Heald*, 9 Ill. 64.

Recovery cannot be had for services rendered in part performance of an entire contract unless a valid excuse for not fully performing is shown.

Griger v. Leppel, 42 Minn. 6, 43 N. W.

contract is susceptible of division, and its entirety has been destroyed by part performance, from which the other party has derived a benefit, the law raises an implied promise to pay to the extent of the benefit received; and an action may be maintained thereon after the time has expired for the completion of the contract." And to the same effect was the decision in *Sawyer v. Brown*, 17 Neb. 171, 22 N. W. 355, where the plaintiff agreed to plow a field for the defendant at a fixed amount per acre.

So, in *Bianchi v. Maggini*, 17 Nev. 322, 30 Pac. 1004, the plaintiff agreed to cut all the wood on defendant's premises and burn it into charcoal and deliver it to defendant at so much per bushel. In an action for the contract price, the court said: "If the respondents had not cut all the wood, this fact could have been pleaded, and damages, if any resulted from the failure, recovered as an offset; but it could not, under the circumstances of this case, be urged as an absolute defense to the action. The fourth instruction given by the court, at the request of plaintiffs, to wit: 'Even if you should believe, from the evidence in this case, that there was wood left upon the ranch where this coal was burned which the plaintiffs could have reduced into coal, this constitutes no defense in this action, brought to recover the contract price for the coal actually burned, unless the defendants have established, to your satisfaction, that the alleged failure of the plaintiffs damaged them, and then only to the extent of the damages'—was correct; and the court did not err in refusing to give the instructions asked upon this point by defendants."

And in *Jordan v. Fitz*, 63 N. H. 227, it was held that the plaintiff was entitled to recover for the timber hauled at the contract price, less the amount of defendant's damages for failure to haul the remainder.

A contract to haul all the wood from a

484; Von Heyne v. Tompkins, 89 Minn. 77, 5 L.R.A. (N.S.) 524, 93 N. W. 901; Elliott v. Caldwell, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; Peterson v. Mayer, 46 Minn. 468, 13 L.R.A. 72, 49 N. W. 245; Nelichka v. Esterly, 29 Minn. 146, 12 N. W. 457; Kohn v. Fandel, 29 Minn. 470, 13 N. W. 904.

The respondents cannot recover upon a *quantum meruit* because they failed fully to perform the contract.

Olmstead v. Beale, 19 Pick. 528; Cohn v. Plumer, 88 Wis. 622, 60 N. W. 1000; Elliott v. Caldwell and Kriger v. Leppel, supra; Galvin v. Prentice, 45 N. Y. 162, 6 Am. Rep. 58.

Messrs. F. W. Murphy and F. C. Anderson, for respondents:

The contract was severable, and recovery should be allowed on *quantum meruit*.

Katz v. Bedford, 77 Cal. 319, 1 L.R.A. 826, 19 Pac. 523; Parsons, Contr. 29; Cunningham v. Morrell, 10 Johns. 203, 6 Am. Dec.

lot, at so much per cord, was by implication held to be severable in Bailey v. Marden, 193 Mass. 277, 79 N. E. 257.

And in Katz v. Bedford, 77 Cal. 319, 1 L.R.A. 826, 19 Pac. 523, it was held that a contract is not entire, so as to prevent a recovery upon a *quantum meruit*, which provides for the laying of a sidewalk a specified number of feet wide, but does not state the number of feet in length. While it does not expressly appear that the work was to be done at so much per foot, it is clearly inferable from the language of the opinion that such was the fact.

Where the defendant contracted to run the plaintiff's sawmill in a workmanlike manner, and was to receive a certain amount per 1,000 feet for sawing the lumber, it was held, in Swift v. Harriman, 30 Vt. 607, that, in an action of assumpsit for a breach of contract to carry on the mill in a workmanlike manner, the defendant could claim in offset the balance due him for his earnings under the contract.

So, in Gilman v. Hall, 11 Vt. 510, 34 Am. Dec. 709, it was held that a plaintiff who contracted to build a wall of certain dimensions, at a fixed price per rod, could recover on a *quantum meruit* for the work done, although he did not complete the entire wall in the manner required by the contract.

And, in Voss v. Varden, 1 Cranch, C. C. 410, Fed. Cas. No. 17,016, in an action to recover for laying brick at so much per 1,000, the court refused to charge the jury that there could be no recovery at all if some of the brick were not laid in a workmanlike manner, as required by contract.

Where a piece of work was being done for the defendant by the plaintiff and another, and, when plaintiff came to quit work, the defendant treated the contract as severable, measured the work, and found what was due the plaintiff for his share of the work, and agreed to pay him as soon as the other con-

332; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Miner v. Bradley, 22 Pick. 457; Morse v. Brackett, 98 Mass. 205; Perkins v. Hart, 24 U. S. 237, 6 L. ed. 463; Hindrey v. Williams, 9 Colo. 371, 12 Pac. 436.

Where an employer actually receives benefit from the labor performed on the contract, over and above the damages occasioned by failure to complete, he should pay the reasonable worth for what has been done for his benefit.

Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713; Riech v. Bolch, 68 Iowa, 526, 27 N. W. 507; Clough v. Clough, 26 N. H. 24; McMillan v. Malloy, 10 Neb. 228, 35 Am. Rep. 471, 4 N. W. 1004; Pixler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; White v. Gray, 4 Ill. App. 228; Cohen v. Stewart, 98 N. C. 98, 3 S. E. 716; Matthews v. Jenkins, 80 Va. 463; Scofield v. Grow, 63 Vt. 283, 22 Atl. 457; Baeder v. Carine, 44 N.

tractor finished the work, it was held, in Sullivan v. Grass Valley Quartz Mill. & Min. Co. 77 Cal. 418, 19 Pac. 757, that the plaintiff had a separate cause of action for the amount thus found due him, and the defendant could not shield himself from liability to him by payment to the other contractor, even though the original contract might have been entire.

In Spear v. Snider, 29 Minn. 463, 13 N. W. 910, the plaintiff and defendant entered into a written agreement whereby the former undertook to bore and curb five wells for the latter at a dollar per foot, and to furnish for the same pipe at 35 cents per foot and other appliances at prices specified for each; it was further stipulated in the agreement that, in case of failure to get a good supply of water, plaintiff should have no pay. The court held that the agreement was not an entire one, to be performed for a lump price, but it was an agreement for the performance of a part of which the plaintiff was entitled to recover; as, for instance, for the completion of a single well. The court, however, did not pass upon the question whether a recovery might be had by the plaintiff for labor in boring a portion of a well.

In Perkins v. Locke (Tex. Civ. App.) 27 S. W. 783, a contract for the building of a railroad provided that, when any 5 miles were ready for the rolling stock, mortgage bonds were to be issued in payment thereof; and the contract was to be forfeited if any part thereof should not be completed and equipped. And it was held that the contract was severable, and the contractor could enforce the payment for each 5 miles completed, although the railroad had not been completed. And to the same effect was the decision in Wright v. Petrie, Smedes & M. Ch. 282.

But the contrary doctrine was upheld in Gruetznar v. Aude Furniture Co. 28 Mo. App. 263, where the plaintiff contracted to

J. L. 208; Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Elliott v. Caldwell, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845.

The party sued is fully protected by his claims for damage.

Brinkley v. Swicegood, 65 N. C. 626; Rogers v. Parham, 8 Ga. 190; Moulton v. Trask, 9 Met. 577; Madden v. Porterfield, 53 N. C. (8 Jones, L.) 166.

Jaggard, J., delivered the opinion of the court:

Plaintiffs and respondents, owners of a threshing outfit, entered into a verbal agreement with defendant and appellant to thresh defendant's grain, for which defendant agreed to pay the sum of 10 cents a bushel for wheat, 6 cents a bushel for oats, and 15 cents for flax. Plaintiffs contend that this case involved an agreement to thresh grain at so much per bushel; defendant, that it was to thresh all of his crop of grain. Upon the record, we are of the opinion that the question was one of fact. Pursuant to the agreement, the plaintiffs threshed a portion of the crop. Before the entire crop had been threshed, plaintiffs hauled their threshing machine away from defendant's premises and refused to thresh more, for the reason that they were losing money. There was testimony tending to show that there were some 300 acres of grain left in shock, which plaintiffs neglected and refused to thresh. Defendant then completed the threshing of his grain through other parties. Subsequently plaintiffs filed threshers' liens. The court directed a verdict in effect for the plaintiffs for the work and threshing they had done, at the agreed price per bushel. A motion for a new trial was denied, provided the plaintiffs stipulated for a reduction of the verdict. The stipulation was filed. The court thereupon denied the motion for a new trial, from which appellant appealed.

For present purposes, and for them only,

it must and will be assumed, upon a construction most favorable to the defeated party, that plaintiffs agreed to thresh all of defendant's crop. The essential question is whether the contract was entire and indivisible, in the sense that plaintiffs could not recover upon a *quantum meruit*, or upon the contract to the extent to which it had been performed. On principle, we are of opinion that plaintiffs could not recover. When they found that they were operating at a loss, they had the option to complete the contract, recover the contract price, and submit to the loss, or to abandon the contract, lose the work they had done, and be subject to whatever damages might be recoverable for the breach of the contract. The fact that plaintiffs had rendered services, the value of which defendant retained, did not entitle plaintiffs to recover on *quantum meruit*, because of the contract and of the inability of defendant to return the services. "As said in Galvin v. Prentice, 45 N. Y. 162, 6 Am. Rep. 58: 'When the contract is entire, and one party is willing to complete the performance and is not in default, no promise can be implied on his part to compensate the other party for a part performance.' Certainly it ought to be so where the failure to fully perform is due wholly to the fault of such other party." Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484. And see Nelichka v. Esterly, 29 Minn. 146, 12 N. W. 457; Kohn v. Fandel, 29 Minn. 470, 13 N. W. 904.

It would be obviously inconsistent with common justice that plaintiffs should recover *pro tanto*, on the contract which they had substantially violated. They were in the wrong. They were not in a position to say to defendant: "We will perform the contract we have agreed to if it prove profitable. If we find it unprofitable, we will abandon it." That would be to contradict the contract. Such reasoning is forbid-

make a certain number of articles at a fixed price per piece, and it was held that, when the plaintiff abandoned the contract, leaving some of the pieces unfinished, he could not recover upon a *quantum meruit*.

So, in M'Millan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299, it was held that a contract to work for a certain number of months, and spin yarn at so much per run, was an entire contract, and must be performed as a condition precedent before an action could be brought for the price of any labor performed.

And an agreement to clear a certain number of acres of land, at so much per acre, was held entire in Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367.

And a contract to furnish three slaves, at a fixed sum per month, to work upon a 20 L.R.A. (N.S.)

railroad until it was completed, was held to be entire in White v. Brown, 47 N. C. (2 Jones, L.) 403, where it contained no stipulation as to the time when the payments were to be made.

So, a contract to publish an advertisement, to appear in each issue of plaintiff's magazine for a year, at a fixed price per issue, was held an entire contract in Munsey v. Tadella Pen Co. 2 N. Y. Anno. Cas. 371, 38 N. Y. Supp. 169, and no recovery could be had for payment for any issue until the contract had been fulfilled.

A contract to dig a well at so much per foot for the first 500 feet, and for an increasing price as the depth became greater, the well to be put in a good finished order, was held to be entire in Stewart v. Weaver, 12 Ala. 538.

den by its terms. Defendant did not agree in advance to a breach of the contract, and to accept in lieu of performance the requirement that he pay plaintiffs for what they had done under the contract, and, for the balance, to accept the right to try damages before a jury. Such speculation on the part of the plaintiffs, it would be unreasonable to permit. It is well settled in this state that the failure to perform an entire contract ordinarily defeats the right to recover on the contract. *Atwater, J.*, said in *Mason v. Heyward*, 3 Minn. 182, Gil. 116, 122: "Where a party wilfully, or without cause, refuses to complete a contract which he has made, and upon the execution of which he has entered, courts should never interfere to protect him from the consequences of his own wrong." It is true that where, as in building contracts, there is a substantial performance, the court will not permit the owner of the land to retain the fruits of the labor, and refuse to pay for it. *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309. It is equally clear, however, that where there has been an intentional failure to complete the contract, or a departure so substantial as to be incapable of a remedy, there can be no partial recovery. *Elliott v. Caldwell*, 43 Minn. 357, 9 L.R.A. 32, 45 N. W. 845; *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408. This view accords with prevailing authority. "A partial performance may be a defense *pro tanto*, or it may sustain an action *pro tanto*; but this can be only in cases where the duty to be done consists of parts which are distinct and severable in their own nature, and are not bound together by expressions giving entirety to the contract. It is not enough that the duty to be done is in itself severable, if the contract contemplates it only as a whole." *Parsons, Contr.* * 658, *659. "The mere fact that . . . the value is ascertained by the price affixed to each pound or yard or bushel of the quantity contracted for will not be sufficient to render the contract severable." *Parsons, Contr.* *519.

Reversed, and a new trial granted.

MINNESOTA SUPREME COURT.

RE GEORGE W. HALL'S ESTATE.

C. R. DONALDSON, Exr., etc., of George W. Hall, Deceased,

v.

BOLT HALL et al., Respts.

MATILDA HALL, Intervener, Appt.

(106 Minn. 502, 119 N. W. 219.)

Will—implied revocation.

1. The common-law rule of implied revocation (N.S.)

ocation of wills by "changed conditions and circumstances" of the testator, arising subsequent to their execution, is affirmatively adopted as the law of this state by § 3665, Rev. Laws 1905.

Same—divorce settlement—effect.

2. A settlement of property rights between husband and wife, in anticipation of a divorce, by which the husband made over to the wife one third of all his property, coupled with the fact of divorce, revoked, by implication of law, a will theretofore executed by the husband, in and by which he devised and bequeathed to her the amount of property she so received on the settlement.

(January 15, 1909.)

APPEAL by intervener from a judgment of the District Court for McLeod County affirming a judgment of a probate court refusing to probate that part of the will of George W. Hall, deceased, under which intervener claims. Affirmed.

The facts are stated in the opinion.

Messrs. Daly & Barnard, for appellant:

The divorce of a testator from his wife after the making of his will does not revoke the will.

Re *Brown (Iowa)* 117 N. W. 263; *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307; *Jones's Estate*, 211 Pa. 364, 69 L.R.A. 940, 107 Am. St. Rep. 581, 60 Atl. 915, 3 A. & E. Ann. Cas. 221; *Lindesmith v. Lindesmith*, 96 Minn. 147, 104 N. W. 825.

Mr. W. C. Odell for respondents Hall et al.

Mr. F. R. Allen for respondent Donaldson.

Headnotes by BROWN, J.

Case Note — Settlement of property rights between husband and wife on account of divorce as implied revocation of will.

In adopting what would seem to be the better rule, namely, that a settlement between husband and wife in anticipation of a divorce impliedly revokes a will previously executed by the husband, the court, in *RE HALL*, cites and distinguishes what appear to be the only authorities coming properly within the scope of this note.

In *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, the facts involved the execution by a husband and wife of mutual wills, each devising all property to the other; the wife took possession of both documents, and preserved them for several years, when a decree of divorce was rendered, and she destroyed her own will; at the time of the divorce a property settlement was had between them, and, in consideration of the husband's conveyance to her of certain personalty and realty, the wife released him from all demands of any

Brown, J., delivered the opinion of the court:

The facts in this case, as disclosed by the findings of the trial court, are as follows: In 1893 George W. Hall, then a widower about fifty-six years of age, with several children, intermarried with Matilda Hall, appellant herein, who was about thirty years of age, and thereafter they continued to live together as husband and wife until some time in October, 1906, when a separation took place. No children were born to them. Subsequent to the marriage, in April, 1904, Hall duly made and executed his last will and testament, in and by which, after directing the payment of his just debts and funeral expenses, he granted, devised, and bequeathed "unto my wife, Matilda Hall, one third of the remainder of my property, both real and personal, which shall remain after the payment of my debts aforesaid," one sixth of what was left to certain daughters by his former wife, and the remainder, after the payment of certain specified legacies, to his sons of the former marriage. Thereafter, in October, 1906, Hall commenced an action for divorce, charging his wife with adultery, in which she answered, denying the charge made against her. During the pendency of this action the parties, guided by their attorneys, entered into certain negotiations for the settlement of their property rights in the event a divorce was granted in the pending action. By the arrangement then made Hall agreed to pay to his wife the sum of \$4,225 in money, and to convey to her certain real estate in the city of Hutchinson, and the wife agreed to convey to him a small tract of land near Stewart,

their place of residence. The deeds were duly executed, and the money so agreed to be paid delivered to a third person, to be by him delivered to the parties in accordance with the terms of the settlement immediately upon the entry of a decree of divorce. It was further understood and agreed, as a part of the settlement, that the wife should amend her answer in the divorce action by including therein a cross bill for a divorce against plaintiff on the general ground of his habitual drunkenness. Thereafter her answer was duly amended accordingly. The cause was brought on for trial, and resulted in a decree of divorce, based upon the allegations of defendant's cross bill. The settlement of the property rights was then completed by the payment to the wife of the money and the delivery of the deeds of the property referred to. This was completed on May 21, 1907. Mrs. Hall claimed no alimony on the final hearing of the divorce case, and the judgment therein awarded to her no pecuniary relief, not even the costs of the action. The amount received by Mrs. Hall on the settlement amounted to practically one third of the property then owned by Hall. Thereafter, on June 22, 1907, thirty days after the divorce and settlement, Hall, without having made any change or modification of his will, by which he gave to "my wife, Matilda Hall," one third of all his property, suddenly died. C. R. Donaldson was named in the will as executor, and he properly presented it to the probate court for allowance and probate. At the hearing of his petition certain of the children of deceased appeared and contested the allowance of that part of the will devising

kind or nature, and it was stated in the agreement that the deeds executed were intended as a property settlement between them. In holding that the effect of the settlement was to revoke by implication the husband's will, the court said: "It is not, in my judgment, the natural presumption that, after the testator had settled with her, had conveyed to her a good share of his property, and they, by agreement, had terminated all their property, as well as their marital relations, the will executed nearly ten years before should remain in force, and operate, upon his death, as a conveyance of the remainder of his property to her, to the exclusion of his heirs."

But the Nebraska court, in *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303, takes the opposite view, and holds that a settlement of a woman's property rights upon obtaining a divorce from her husband does not work a revocation of a will previously executed by the husband. The doctrine of revocation by implication of law was said by the court to be based upon a presumed alteration of

intention, arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under altered circumstances. It was suggested that change of circumstances may work a partial revocation, but the court expressly refused to consider the effect of the settlement as a revocation of the wife's legacy because that question was not before it.

Again, in *Re Brown (Iowa)* 117 N. W. 260, there is a refusal to set aside a will on the theory of implied revocation, although there had been an agreement, in a divorce action, with respect to the property rights of the parties, providing that certain property awarded to the wife should be in full payment and satisfaction and discharge of all her interest in her husband's property. The *Lansing Case*, supra, is distinguished upon the ground that the decision reached in that instance was due to the peculiar circumstances of the case; viz., the making of two wills, the destruction of one, and the adjustment of property rights.

and bequeathing to Mrs. Hall one third of testator's property, on the ground that the will in that respect was, by the settlement and adjustment of the property rights of the parties in the divorce action, revoked and annulled by implication of law. Mrs. Hall also appeared as intervener, and claimed under the will. The probate court sustained the contention of contestants, holding that the provisions made for Mrs. Hall were revoked by operation of law; but admitted the balance of the will to probate. Mrs. Hall appealed to the district court, where the same conclusion was reached, and she then appealed to this court from an order of the district court denying her motion for a new trial.

The assignments of error challenge certain of the findings of the trial court, and raise the single question whether the divorce and property settlement operated by implication of law to revoke the provisions made in deceased's will for his wife. Our examination of the record leads to the conclusion that all the findings of fact are sustained by the evidence. It would serve no useful purpose to enter into an extended discussion of the evidence, and we therefore refrain.

We come, then, directly to the main question in the case; namely, whether Hall's will was, to the extent of the provisions therein made for his wife, revoked by implication of law. An express revocation of a will involves an inquiry into the intention of the testator, and generally the manner and what acts will constitute a revocation in fact are expressly prescribed by statute. Page, Wills, 272; 2 Current Law, p. 2091; Re Knapen, 75 Vt. 146, 98 Am. St. Rep. 808, 53 Atl. 1003. Rev. Laws, 1905, § 3665. At common law, certain changes in the condition and circumstances of the testator worked a revocation by implication; and it was formerly held that this was *prima facie* only, and open to rebuttal by proof that the testator intended his will to remain, notwithstanding the change in his circumstances. The rule, however, by all modern authorities, is that the presumption of law arising from the changed conditions is conclusive, and no evidence is admissible to rebut it. *Mars-ton v. Roe*, 8 Ad. & El. 14; *Gay v. Gay*, 84 Ala. 44, 4 So. 42; *Hoitt v. Hoitt*, 63 N. H. 498, 56 Am. Rep. 530, 3 Atl. 604; *Hud-nall v. Ham*, 183 Ill. 486, 48 L.R.A. 557, 75 Am. St. Rep. 124, 56 N. E. 172; 30 Am. & Eng. Enc. Law, p. 644, and cases cited. The rule had its origin with the ecclesiastical courts of England, and was later adopted as a part of the common law. 4 Kent, Com. 775; *Brady v. Cubitt*, 1 Dougl. K. B. 31. And it is the settled law in 20 L.R.A. (N.S.)

nearly all the states of this country, where not abrogated by statute. 30 Am. & Eng. Enc. Law, p. 643. Our statutes on the subject provide that no will shall be revoked, except in the manner there pointed out; namely, by some other writing executed by the testator with the same formalities with which the will itself is required to be executed, or by burning, obliterating, or destroying the same with the intention of revoking it, or by the destruction thereof by a third person at the request of the testator, and in the presence of witnesses. To these restrictions is added: "But nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator,"—by which the common-law rule of implied revocation is affirmatively adopted as the law of this state. Rev. Laws 1905, § 3665.

Counsel for appellant do not contend that the common law is not in force in this state, but do claim that the facts here presented do not bring the case within the rule as properly understood and limited. There is much conflict in the adjudicated cases, both in England and in this country, as to the scope and limitations of the rule. In other words, authorities are not agreed respecting the character of the "change in the condition or circumstances of the testator" essential to give rise to the legal presumption of revocation. Some courts have restricted the rule to marriage and birth of issue in the case of a man, and mere marriage in the case of a woman. *Wogan v. Small*, 11 Serg. & R. 141; *Jones's Estate*, 211 Pa. 364, 69 L.R.A. 940, 107 Am. St. Rep. 581, 60 Atl. 915, 3 A. & E. Ann. Cas. 221; Page, Wills, 280. Chancellor Kent gives a broad and comprehensive definition of the rule in the following language: Implied revocations "are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties." 4 Kent, Com. 521. While cases involving a changed condition resulting from the marriage of the testator or testatrix have been before the courts most frequently, and new conditions so brought about have received the most attention, the authorities generally do not limit the application of the rule to a state of affairs thus created. To restrict the rule to such cases would narrow and unduly circumscribe its purpose. The different conditions which bring the rule into operation are fully given, and authorities cited, in a valuable note to *Graham v. Burch*, 28 Am. St. Rep. 344. It is there stated that a revocation by implication may result from

a change in the property of the testator, or from a change in his family, as by marriage, or in the beneficiaries named in his will. See also 30 Am. & Eng. Enc. Law, pp. 644 et seq. Of course, a change in respect to property or family relations, resulting from the act of the testator, should be of a nature to justify the inference, arbitrary though it be, that he intended to revoke his will, either in whole or in part, or that a moral or legal duty not only would require but prompt a change in the disposition of his property from that made in the will. In other words, the rule, if accorded substance and merit, must serve the purpose of doing by implication what the testator should, in justice to those entitled to his bounty, have done had his attention been directly called to the matter after the change of circumstances, and before his death. The rule, it is true, has not generally been extended so far. At least, the tendency of the reported cases has been to restrict, rather than enlarge, its scope. It was formerly held that the marriage of a man did not, at common law, revoke his will, whether executed before marriage or during the continuance of a previous marriage. *Christopher v. Christopher*, 4 Burr. 2182; *Bowers v. Bowers*, 53 Ind. 430; *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557. But that doctrine has been modified, either by statute or decisions of the courts, both in England and the several states in this country. While, within the application of the rule, the marriage of a man did not of itself revoke his pre-existing will, his marriage and birth of issue did so operate. Note to *Young's Appeal*, 80 Am. Dec. 518. The marriage of a woman, however, has always been held to revoke her will, without reference to the birth of issue; and this because of her legal incapacity after marriage to dispose of her property. But this has also been changed by statute. *Kelly v. Stevenson*, 85 Minn. 247, 56 L.R.A. 754, 89 Am. St. Rep. 545, 88 N. W. 739. But, as already suggested, the courts are not in full harmony in defining the scope of the "changed conditions or circumstances" giving rise to the rule of implied revocation.

Counsel for appellant in the case at bar insist that it should be limited to such changes as arise from the marriage of the man and the subsequent birth of issue, and to that arising from the marriage of the woman with or without subsequent issue. If we adopt counsel's suggestion, and limit the rule to the instances mentioned, then the saving clause of the statute above quoted would have nothing whatever to act upon; for by § 3686, Rev. Laws 1905, it is expressly declared that the marriage of the testator—and this necessarily includes

man or woman—shall revoke a previously executed will. No reference is made to the birth of issue. Simple marriage annuls a previous testamentary disposition of property. So that, if counsel's contention be sound, the clause in § 3685, reserving the common-law rule of revocation by implication, would serve no purpose. We must therefore look further, and inquire whether the facts here disclosed—the divorce and property settlement—bring the case within the rule.

Very few cases are found where the precise question has been presented or decided, though it seems to be settled that a divorce alone does not revoke a previously executed will. *Re Brown (Iowa)* 117 N. W. 260; *Baacke v. Baacke*, 50 Neb. 21, 69 N. W. 303; *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307; *Jones's Estate*, 3 A. & E. Ann. Cas. 221, and note; *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187; *Re Boddington*, L. R. 22 Ch. Div. 597, L. R. 25 Ch. Div. 685. It is probable that a divorce granted at the suit of the wife, with alimony expressly decreed to be in lieu of all her rights in the property of the husband, testamentary and otherwise, would, by implication of law, revoke the will of her husband in so far as it made provision for her (1 *Underhill, Wills*, 263, though *Re Brown*, supra, seems to hold otherwise. *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, and *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303, are the only cases to which our attention has been called where facts like those in the case at bar have been passed upon. In the Michigan case it was held that when, at the time a decree of divorce is granted, the parties to the action settle and adjust their property rights by mutual agreement, without mentioning wills theretofore made by them, the decree of divorce and settlement constituted an implied revocation of the will so theretofore made. The court there remarked that, by the decree of divorce and property settlement, the parties became strangers to each other, neither thereafter owing to the other either legal or moral obligations or duties; and that there was therefore a complete change in their relations, within the rule of implied revocation of wills. The Nebraska case holds to the contrary; but the decision is apparently upon the theory of a strict application of the rule; and the fact of the property settlement appears not to have been deemed of much consequence. Careful reflection and consideration of the subject leads us to the rule of the Michigan court. It appears to us more in accord with the reason and basis of the law, in harmony with the elementary rule of right and wrong, conflicts with no

equitable or substantial right of the woman in such case, and is opposed only by a strict adherence to some of the older views on the subject, based, however, upon the commendable purpose of sustaining the directions of a person respecting the disposition of his property, left in the form of a solemnly executed will, who, by reason of his death, is no longer able to speak for himself, or give further orders or directions in that behalf.

We recognize the importance of upholding the last wills of deceased persons, and we recognize the wisdom, also, of the rule of implied revocations by a change in the condition and circumstances of the testator. If the rule can have any proper or legitimate application in any case, it would seem to cover a case of this kind. Here the testator brought suit against his wife, charging her with adultery. He was then an old man, seventy years of age; and, with a view to a severance of all relations with his wife, he entered into an agreement by which she was to procure a divorce without contest by him, upon the consummation of which he made over to her in property and money practically what she would have received under the previously executed will, had he then died, and precisely what she would have received under the statute had he died intestate. He in effect withdrew his charge of infidelity, and voluntarily settled upon her all she could or would have received under the will. He died within thirty days thereafter, without having changed his will, and the wife now comes into court asking for another third of his property, leaving the remainder, or one third, to his children by his first wife. If this is not a change of his condition and circumstances, within the meaning of the law, then the rule of implied revocation upon that ground is really without much substance or merit. His obligations to his wife, legal, moral, or otherwise, wholly ceased at the time of the divorce and settlement. By the settlement he fully discharged all legal duties; and the inference that he intended the allowance in full of all future rights ought, in justice and good conscience, to be the legal conclusion. We so hold. Whether the fact that the testator in such a case permits his will to remain unchanged by express revocation for a number of years after the divorce and settlement would militate against the conclusion of implied revocation we need not determine. Testator in this case died within thirty days after the settlement, and his failure expressly to revoke within that time certainly creates no inference that he intended his will to continue in force.

The case of *Re Brown*, *supra*, wherein the 20 L.R.A. (N.S.)

Iowa supreme court held that a decree of divorce, with an award of alimony to the wife, was not an implied revocation of the will of the husband, is not in point. The court distinguishes that from the Michigan case on the ground that the property settlement was not the voluntary act of the husband, and therefore no legitimate basis for an inference of an intention on his part to revoke his former will.

Order affirmed.

MINNESOTA SUPREME COURT.

FRANK W. SHAW et al., Respts.,

v.

MILTON R. STAIGHT, Impleaded, etc.,
Appt.

(— Minn. —, 119 N. W. 951.)

Corporate stock — issuance below par — validity.

1. Shares of stock in a corporation, issued and sold as full paid stock, but for a sum less than its par value, are not void, but the agreement between the holder and the corporation, that it shall be considered and treated as paid in full, is voidable as to the creditors of the corporation.

Same — holders — rights.

2. The holder of such stock, though he paid therefor less than the par value, may maintain an action to protect such rights as accrue to him as a stockholder.

Same — fraudulent issue — action by stockholder.

3. A request of the managing officers of a corporation to institute an action to set

Headnotes by BROWN, J.

Case Note. — Effect upon one's rights as a stockholder of the fact that paid-up stock was wrongfully issued to him for a sum less than its par value.

This note is confined to cases in which the holder of paid-up stock issued to him for a sum less than its par value, or a transferee of such original stockholder, attempts to exercise some right of a stockholder as such; and cases which involve the rights of such a holder or his transferee, who is also a creditor of the corporation, and seeks to enforce his rights as creditor, have been excluded.

It will be noted in *SHAW v. STAIGHT* that the court expressly holds that the stock was not void, but voidable only; and the decision turns upon this distinction, the court holding, or implying, at least, that, were the stock void, the action could not be maintained. In a number of cases where such stock is absolutely void under the provisions of the Constitution or a statute, it has been held that the holder of such stock has no rights as a stockholder which a court of equity will enforce.

Thus, in *Hinckley v. Pfister*, 83 Wis. 64.

aside and cancel a fraudulent issue of corporate stock, and their refusal, is all that is necessary to enable an individual stockholder to maintain the suit.

Same — condition precedent — request of stockholders.

4. It is not necessary that he go further, and request other stockholders to commence the action.

Same — fraudulent issue — evidence — sufficiency.

5. Evidence held to justify the findings of the trial court to the effect that an issue of 28,000 shares of the stock of defendant corporation was fraudulent and void.

Same — knowledge of holder — evidence — sufficiency.

6. And that defendant Staight, the hold-

er of a part of the stock so issued, had full knowledge of the facts constituting the fraud, and was not a good-faith holder thereof.

(February 19, 1909.)

APPEAL by defendant, Milton R. Staight, from a judgment of the District Court for Hennepin County canceling certain shares of stock alleged to have been fraudulently issued and transferred to him. Affirmed.

The facts are stated in the opinion.

Mr. H. D. Irwin, for appellant:

The complaining stockholders' cause of action is based upon and arises out of contracts or transactions to which they were

53 N. W. 21, in an action for the appointment of a receiver, and to have certain indebtedness of the corporation to plaintiff declared a lien upon the corporate property, it was held that, as the plaintiff's stock fell under the condemnation of the statute, and was void, as not having been fully paid for to the amount of the par value, he could not make any claim by means of it or through it to the aid or protection of a court of equity, based upon the rights of a stockholder.

And in *Arkansas River Land, Town, & Canal Co. v. Farmers' Loan & T. Co.* 13 Colo. 587, 22 Pac. 954, it was held that, under a statute which declares all fictitious stock to be void, stockholders who did not pay or agree to pay anything for their stock could not, as stockholders, maintain an action to restrain the directors from transferring the property of the corporation, for a receiver, etc. The court said: "Plaintiffs could maintain this action only by showing that they were shareholders and vested with contract rights, of which the stock certificates issued to them were the evidence, which they could enforce against the corporation itself. This they have utterly failed to do. On the contrary, by the express allegations of the complaint, it appears that they acquired the stock not only in fraud of the rights of the corporation, but in express violation of the constitutional mandate of the state, and of the provisions of the law under which the corporation was organized. The stock held by them is fictitious, within the meaning of the Constitution, and no rights can be predicated upon it, either in law or equity. The bill was therefore properly dismissed as to them."

In *Robinson v. Dolores No. 2 Land & Canal Co.* 2 Colo. App. 17, 29 Pac. 750, there was an inference that one who has not given any value for his stock cannot come into equity for the appointment of a receiver, to restrain waste, etc.; but the complaint was dismissed upon various other grounds.

But where the stock is not absolutely void by law, a number of cases apply the 20 L.R.A. (N.S.)

doctrine adopted in *SHAW v. STAIGHT*, and hold that a stockholder is not deprived of his rights as such, merely by the fact that his stock was issued as fully paid up when in fact it was not.

Thus, in *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372, Gil. 348, it was held that, if the plaintiff was a legal stockholder, although not holding upon a bona fide cash subscription, his right to defend his interests in the corporation did not depend upon the manner of his acquiring his stock.

So, in *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783, the court said: "In the absence of a statute inflicting a penalty of some sort for issuing or receiving, as fully paid and nonassessable, shares for which less than their face value had been paid, or prohibiting its being done, we are not aware of any general principle which holds such a transaction to be fraudulent, or of moral turpitude, so as to prevent a party to such an act from having any standing in a court of equity." In this case a holder of watered stock sought a dissolution of the corporation upon the ground that it was fraudulently promoted, and a demurrer to the complaint was overruled.

And in *Central Land Co. v. Sullivan*, 152 Ala. 360, 44 So. 644, a bill by the trustee of a minority stockholder, to have the assets of the corporation distributed among the several stockholders, was entertained, although all of the stock, including plaintiff's, was issued in payment for property of much less value than the face of the stock.

In a number of cases it has been held, upon the general doctrine of estoppel, that a stockholder who has received stock for less than its face value cannot thereafter complain of the transaction.

Thus, in *Washburn v. National Wall-Paper Co.* 26 C. C. A. 312, 51 U. S. App. 380, 81 Fed. 17, it was held that a stockholder who received stock for the good will of a business which he had sold to the corporation was in no position thereafter to say that the good will had been overvalued.

parties, which were illegal, fraudulent, and against public policy, in that they bought their stock at a price below par, in violation of statute; and they are not entitled to equitable relief, as they do not come into court with clean hands.

Unckles v. Colgate, 148 N. Y. 529, 43 N. E. 59; Pom. Eq. Jur. § 397; Hastings Malting Co. v. Iron Range Brewing Co. 65 Minn. 28, 67 N. W. 652; Clarke v. Lincoln Lumber Co. 59 Wis. 655, 18 N. W. 492; Sturges v. Stetson, 1 Biss. 246, Fed. Cas. No. 13,568; Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; Zelaya Min. Co. v. Meyer, 28 N. Y. S. R. 759, 8 N. Y. Supp. 487; Knowlton v. Congress & E. Spring Co. 57 N. Y. 518; Kimball v. New England Roller Grate Co. 69

N. H. 485, 45 Atl. 253; Oliphant v. Woodburn Coal & Min. Co. 63 Iowa, 332, 19 N. W. 212; Congress & E. Spring Co. v. Knowlton. 103 U. S. 49, 26 L. ed. 347; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; State v. Great Northern R. Co. 100 Minn. 474, 10 L.R.A.(N.S.) 250, 111 N. W. 289; Anheuser-Busch Brewing Assn. v. Mason, 44 Minn. 318, 9 L.R.A. 506, 20 Am. St. Rep. 580, 40 N. W. 558; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Weed v. Little Falls & D. R. Co. 31 Minn. 154, 16 N. W. 851; 2 Clark & M. Priv. Corp. § 393; 9 Cyc. Law & Proc. pp. 546-550; 1 Pom. Eq. Jur. § 940; 1 Clark & M. Priv. Corp. § 226; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Ingersoll v. Randall, 14 Minn. 400, Gil. 304;

So, in Wood v. Corry Waterworks Co. 12 L.R.A. 168, 44 Fed. 146, it was held that a stockholder could not, by injunction, restrain the foreclosure of a mortgage given to secure bonds, upon the ground that the bonds represented a fictitious increase of the stock and indebtedness, where his own stock was a part of the same transaction.

And, in the absence of fraud, a stockholder cannot restrain the payment of dividends upon the ground that the stock was issued for property which was overvalued, when his own stock was a part of the same issue. Goodnow v. American Writing Paper Co. (N. J. Ch.) 66 Atl. 607.

In Green v. Abietine Medical Co. 96 Cal. 322, 31 Pac. 100, it was held that a stockholder who had sold property to a corporation, and had received therefor paid-up stock at a certain per cent of its par value, could not complain of an assessment upon his stock, where all the other stock of the company, issued at the same per cent of its value, was likewise assessed.

Nor is his transferee in any better position. Thus, in Clark v. American Coal Co. 86 Iowa, 436, 17 L.R.A. 557, 53 N. W. 291, in an action by the transferee of certain stock to cancel certain other shares of stock, issued without consideration, it was held that, as the plaintiff's transferrer had received his stock upon the same terms as the defendant, the action could not be maintained, as a bona fide purchaser of corporate stock acquired no greater equities than belonged to his assignor.

And, in Venner v. Atchison, T. & S. F. R. Co. 28 Fed. 581, the court said that it would be an anomaly for the transferee of stock issued below par to deny the validity of the act which gave birth to the stock which he held.

So, in Church v. Citizens' Street R. Co. 78 Fed. 526, it was held that the plaintiffs, although purchasers in good faith of stock issued below par, had no other or greater rights than their transferrer, and could not maintain an action to cancel the illegal stock.

20 L.R.A.(N.S.)

A transferee of stock originally issued fraudulently, for a sum less than its par value, cannot complain of the fraud. Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co. 40 Colo. 1, 122 Am. St. Rep. 1024, 90 Pac. 81. And to the same effect was the decision in Boldenweck v. Bullis, 40 Colo. 253, 90 Pac. 634, where it was held that stockholders who vote in favor of a transaction, and their transferees, cannot maintain a suit on behalf of the corporation and other stockholders to avoid such a transaction.

A transferee of stock acquires no rights not possessed by his transferrer, and cannot maintain an action to cancel stock on the ground of its being issued without adequate consideration, where his transferrer received his stock in a similar way. Drake v. New York Suburban Water Co. 26 App. Div. 499, 50 N. Y. Supp. 826.

In Sivin v. Mutual Match Co. (N. J. Ch.) 66 Atl. 921, it was held that, so long as a company is a going concern, the court will not interfere on behalf of a stockholder who is in the same default, simply to compel another stockholder to pay up his unpaid stock, although, upon the plaintiff's purchase of his shares, he was informed that the defendant's shares were fully paid up.

But, in United Electric Securities Co. v. Louisiana Electric Light Co. 68 Fed. 673, although the question was not before the court, it was suggested that, while a holder of stock issued without consideration could not maintain an action for the appointment of a receiver, a bona fide transferee might.

As to issuance of stock at a discount as affecting stockholders' liability for debts, see case note to Security Trust Co. v. Ford, 8 L.R.A.(N.S.) 263.

As to effect of creditor's knowledge that stock was improperly issued as fully paid upon his right to resort to holder of the same, see case note to Easton Nat. Bank v. American Brick & Tile Co. 8 L.R.A.(N.S.) 271.

Buckley v. Humason, 50 Minn. 195, 16 L.R.A. 423, 36 Am. St. Rep. 637, 52 N. W. 385; Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1034; Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208; Evans v. Folsom, 5 Minn. 422, Gil. 342; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Arkansas River Land, Town, & Canal Co. v. Farmers' Loan & T. Co. 13 Colo. 587, 22 Pac. 954; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21; Edgerton v. Electric Improv. & Constr. Co. 50 N. J. Eq. 354, 24 Atl. 540; Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339, 69 N. E. 614; McIntosh v. Wilson, 81 Iowa, 339, 46 N. W. 1003; 2 Parsons, Contr. p. 746; 2 Addison, Contr. § 1412; Chitty, Contr. 944; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; 24 Am. & Eng. Enc. Law, p. 620; Barnes v. Starr, 64 Conn. 155, 28 Atl. 980; Fitzgerald v. Forristal, 4 Ill. 228; Bolt v. Rogers, 3 Paige, 154; McVey v. Brendel, 144 Pa. 235, 13 L.R.A. 377, 27 Am. St. Rep. 625, 22 Atl. 912; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; Brown v. Duluth, M. & M. R. Co. 53 Fed. 889; Coppel v. Hall, 7 Wall. 555, 19 L. ed. 247; Collins v. Blanton, 2 Wils. 341, 1 Smith, Lead. Cas. 630; Broom, Legal Maxims, 732; Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 213.

The allegation that the stock was "fraudulently and unlawfully issued" for no consideration is not an allegation of fact constituting fraud, unless the want of consideration constitutes fraud or illegality, without other facts; and consideration being proven, cancellation is improper.

Kraemer v. Deustermann, 37 Minn. 469, 35 N. W. 276; Cummings v. Thompson, 18 Minn. 246, Gil. 228; Kelley v. Wallace, 14 Minn. 236, Gil. 173; Webb v. Bidwell, 15 Minn. 419, Gil. 399; Knudson v. Curley, 30 Minn. 433, 15 N. W. 873; Smith v. Prior, 58 Minn. 247, 59 N. W. 1016; Rand v. Hennepin County, 50 Minn. 391, 52 N. W. 901; Bliss, Code Pl. 3d ed. § 211; McKibbin v. Ellingson, 58 Minn. 212, 49 Am. St. Rep. 493, 59 N. W. 1003; Hodsdon v. Hodsdon, 69 Minn. 486, 72 N. W. 562; 18 Enc. Pl. & Pr. p. 809.

The issuance of this stock and the contract by which it was issued were ratified and acquiesced in by the corporation and the stockholders.

2 Pom. Eq. Jur. §§ 916, 965; Carlton v. Hulett, 49 Minn. 320, 51 N. W. 1053; Tilly v. Wolverton, 54 Minn. 75, 55 N. W. 822; Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427; Edwards v. Roberts, 7 Smedes & M. 544; Doherty v. Bell, 55 Ind. 205; St. John v. Hendrickson, 81 Ind. 350; St. Croix Lumber Co. v. Mittlestadt, 43 Minn. 91, 20 L.R.A. (N.S.)

44 N. W. 1079; 3 Clark & M. Priv. Corp. §§ 760, 764; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; Bjorngaard v. Goodhue County Bank, 49 Minn. 487, 52 N. W. 48; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Currie v. School Dist. No. 26, 35 Minn. 164, 27 N. W. 922; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Taylor v. South & North Ala. R. Co. 4 Woods, 575, 13 Fed. 153; Credit Co. v. Arkansas C. R. Co. 5 McCrary, 23, 15 Fed. 53; Hayward v. Eliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855; Evers v. Watson, 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430.

The complaining shareholders cannot maintain this action, as the bringing of an action to cancel the stock is a matter within the discretion of the board of directors; and, in the absence of fraud or bad faith on their part, their refusal is final.

2 Clark & M. Priv. Corp. § 543; Morrill v. Little Falls Mfg. Co. 46 Minn. 260, 48 N. W. 1124; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Hodgson v. Duluth, H. & D. R. Co. 46 Minn. 454, 49 N. W. 197; 3 Pom. Eq. Jur. § 1095; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Dunphy v. Traveller Newspaper Asso. 146 Mass. 495, 16 N. E. 426; Gamble v. Queens County Water Co. supra; Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 589, 110 N. W. 798; Theis v. Durr, 125 Wis. 651, 1 L.R.A. (N.S.) 571, 110 Am. St. Rep. 880, 104 N. W. 985; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827.

The complaining stockholders, before bringing suit, were bound to apply to the other stockholders, or show such circumstances as would make such application useless.

26 Am. & Eng. Enc. Law, p. 98; Clark & M. Priv. Corp. § 544; Foss v. Harbottle, 2 Hare, 461; Hawes v. Oakland, supra; Corbus v. Alaska Treadwell Gold Min. Co. 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; Kessler v. Ensley Land Co. 123 Fed. 546; Louisville & N. R. Co. v. Neal, 128 Ala. 149, 29 So. 865; Miller v. Murray, 17 Colo. 408, 30 Pac. 46; Chicago v. Cameron, 22 Ill. App. 91; Brewer v. Boston Theatre, 104 Mass. 378; Dunphy v. Traveller Newspaper Asso. supra; Morrill v. Little Falls Mfg. Co. 46 Minn. 265, 48 N. W. 1124; Cook, Stock & Stockholders, 4th ed. § 740.

Messrs. Benton, Molyneaux, & Morley, for respondents:

The only persons who could object to a sale of the stock of the corporation at less than par would be the state, nonparticipating stockholders, and creditors.

Olson v. State Bank, 67 Minn. 267, 69 N. W. 904; Dunn v. State Bank, 59 Minn.

221, 61 N. W. 27; *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; *DePuy v. Transportation & Terminal Co.* 82 Md. 408, 33 Atl. 889, 34 Atl. 910.

The transaction was fraudulent, and the shares should be canceled at the suit of the complaining stockholders.

McDermont v. Anaheim Union Water Co. 124 Cal. 112, 56 Pac. 779; *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048; *Clark & M. Priv. Corp.* § 400.

Application to the stockholders, or a showing of such circumstances as would make such application useless, is not necessary where the action is for the cancellation of stock fraudulently issued.

26 Am. & Eng. Enc. Law, p. 978; *Stebbins v. Perry County*, *supra*; *Kimball v. New England Roller Grate Co.* 69 N. H. 485, 45 Atl. 253; *Miner v. Beekman*, 50 N. Y. 337; 3 Pom. Eq. Jur. pp. 2115, 2124, 2125; *Luther v. C. J. Luther Co.* 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69; *Doud v. Wisconsin, P. & S. R. Co.* 65 Wis. 115, 56 Am. Rep. 620, 25 N. W. 533; *Wood v. Union Gospel Church Bldg. Asso.* 63 Wis. 9, 22 N. W. 756; 2 *Clark & M. Priv. Corp.* p. 1683, § 543; *Pencille v. State Farmers' Mut. Hail Ins. Co.* 74 Minn. 67, 73 Am. St. Rep. 326, 76 N. W. 1026.

The corporation could not ratify its fraudulent issue of stock so as to bind a non-participating stockholder.

Noble v. Blount, 77 Mo. 235; *Newell v. Randall*, 32 Minn. 171, 50 Am. Rep. 562, 19 N. W. 972; *Moore v. St. Paul Ice Co.* 59 Minn. 23, 60 N. W. 816; *Dunnell, Pl.* § 494.

Brown, J., delivered the opinion of the court:

The facts in this case are as follows: The defendant Pacific Coast & Norway Packing Company is a corporation duly created and existing under the laws of this state. It was incorporated in May, 1900, for manufacturing purposes, with authority to prepare, sell, and dispose of all kinds of canned goods, pickles, smoked and dried herring, fish, and other sea foods, and to acquire, own, and hold all property necessary to the conduct of its business. Its capital stock was placed at \$1,000,000 divided into 100,000 shares of a par value of \$10 each. At the first meeting of the board of directors, the sale of 150,000 shares of stock was authorized at \$1 per share. William S. Laton purchased and became the owner of 300 shares at that price. Plaintiffs Nellie and Fannie Cooley also became the owners of 100 shares, each paying therefor the same consideration. Said plaintiffs Cooley have at all times since been the owners and holders of the stock so purchased by them. Subsequent to the com-

mencement of the action, Laton died, and plaintiffs Shaw and Gillerson were substituted as parties to the action, they being the executors of his last will and testament. Laton, on his estate, has, at all times since the issuance of the stock to him, continued the owner thereof. In June, 1900, one Joseph Kildall, representing the Kildall Fish Company, a copartnership composed of himself, his father, and two brothers, made to the board of directors of defendant packing company the following proposition for the sale of certain rights and properties then claimed to be held and owned by the copartnership, namely:

Minneapolis, Minn., June 2, 1900.

Pacific Coast & Norway Packing Company,
City.

Gentlemen:

We hereby offer to sell to you our certain fishing outfit, consisting principally of fishing nets, lines, floats, boats, and articles now stored in our storehouse at Marietta, Washington. This fishing outfit originally cost us about \$1,800. Also all our right and title to certain fishing and packing locations which we have explored and decided upon in the territory of Alaska, main location at Killisno, between Sitka and Juneau, which we value at \$20,000. These we agree to convey to you in consideration of 28,000 shares of the capital stock of your company, to be issued to Joseph Kildall. If this proposition is accepted, then, in consideration of its acceptance, we collectively and individually agree to give to your company the benefit of our knowledge and experience in the fishing and packing business, and give to your company our best advice in its affairs, and Joseph Kildall to be bound to generally supervise the affairs of your company for a period of two years without further compensation. It is further understood that if the services of P. C. Kildall and Michael Kildall should be required by your company in the fishing and packing business, they will hold themselves in readiness to serve your company for compensation to be agreed upon by the board of directors, covering the time actually engaged. It is further understood that, in addition to the above, Joseph Kildall, in the event this proposition is accepted, binds himself to continue the management of the company's affairs for an additional period of three years at a compensation to be agreed upon by the board of directors, and none of the Kildalls here mentioned shall exact or demand anything more than a fair compensation.

Respectfully submitted,

Kildall Fish Company,

Joseph Kildall.

Kildall was a promoter of the packing company and one of the incorporators, and, at the time of the submission of this proposition a director, and acted as secretary of the meeting at which it was accepted. So that he acted in the dual capacity of seller and buyer, selling for his copartnership, and participating in the purchase as one of the directors of the corporation. The proposition was accepted, and the 28,000 shares of stock, the purchase price of the property therein named, subsequently issued to Kildall. By the terms of the acceptance, 10,000 of the shares were, to prevent the Kildalls from controlling the corporation, transferred to a trustee, to be held and controlled by him for the term of five years, and then turned over to Kildall. But this fact is unimportant. Thereafter Kildall sold and transferred 4,000 shares of the stock issued to him to defendant Staight, who is now the owner and holder thereof. In September, 1903, plaintiffs, as stockholders, on the claim that the transaction by which the corporation accepted the Kildall proposition was a fraud, and that no consideration ever passed from Kildall to the corporation, demanded that the officers thereof bring an action to set the same aside, and to cancel and annul the stock so issued. The officers refused to comply with the demand, and this action followed, by which plaintiffs, as stockholders, seek to avoid the transaction on the ground of alleged fraud, and to cancel the stock held by Staight. The trial court found the facts substantially as stated; that the transaction was fraudulent; that the Kildall Fish Company had no fishing locations on the Pacific coast or elsewhere, and conveyed none to the corporation in consideration of the stock issued to Kildall; that the fishing tackle and other property offered to be transferred to the corporation by the written proposition heretofore set out was old, worn out, and of no value whatever; and, further, that the corporation received no consideration for the issuance of this stock save the value of Kildall's services as secretary for the corporation for two years, at \$300 per year. The court also found that defendant Staight had full knowledge of all the facts, and of the fact that Kildall had no fishing locations to sell or convey to the corporation; that the corporation never acquired such rights from the Kildall copartnership; also that the 4,000 shares of the stock issued to Kildall and transferred to Staight were transferred to him wholly without consideration. The court also found that plaintiffs herein knew nothing of the merits of the transaction until about the time of the commencement of the action. Judgment was ordered and entered, 20 L.R.A. (N.S.)

canceling and annulling the stock so held by Staight, and he appealed.

Several questions are presented by the assignments of error which will be considered in their order. Three of them, *viz.*, that the complaint fails to state a cause of action, that the evidence is insufficient to justify the findings of fact, and that the findings of fact do not justify the conclusions of law, require no extended mention. Though the complaint is not so full and complete as perhaps it might have been made, it is sufficient in all essential respects, and sets forth facts entitling plaintiffs to the relief prayed for. With respect to the sufficiency of the evidence to sustain the findings, we have only to say that the record has been read with care, with the result that, in our opinion, all the findings of fact are fully supported by competent evidence. Whether the conclusions of law are supported by the findings of fact depends upon the result to be arrived at respecting the several contentions of defendant, presently to be considered. That the proper judgment was ordered by the trial court we have no doubt. We come, then, to the specific contentions of defendant.

1. Defendant contends that plaintiffs cannot maintain the action, for the reason that the stock held by them is void, and they do not come into court with clean hands. This is based upon the fact, about which there is no controversy, that plaintiffs purchased and paid for the stock held by them at the rate of \$1 per share, the par value being \$10, with the understanding and agreement that the amount so paid should be in full and entitle them to certificates of fully paid stock. Fully paid stock was accordingly issued to them. The point is that this agreement was in violation of § 2878, Rev. Laws 1905, prohibiting the issuance of corporate stock for less than its par value; and it is urged that the transaction was void, that plaintiffs are holders of stock illegally issued, and therefore without standing in a court of equity. The contention is not sound. It appears from the record that the stock of the corporation was divided into 100,000 shares of the par value of \$10. But, at the time of the organization, the stock was placed on the market at \$1 per share, at which price plaintiffs purchased the shares held by them. This was probably a violation of the statute above referred to, but the stock so issued was not necessarily so tainted with illegality as to render it void nor as fraudulent in the hands of the holders. The agreement that it should be fully paid stock was undoubtedly voidable, and could be so adjudged at the suit of creditors; but, until set aside and declared void at their instance, it is valid, not only between the corporation and stockholders, but as between the several stockhold-

ers as well. *Olson v. State Bank*, 67 Minn. 267, 89 N. W. 904; *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27. As remarked in the case of *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783, it would be a new doctrine to hold that because a stockholder has bought stock from a corporation at a price less than its par value, under an agreement that it shall be treated as paid in full, his stock is void, and he without standing in court to protect rights accruing to stockholders by reason of the misconduct of the corporation or its managing officers. Such a doctrine would, as intimated by Judge Mitchell in the *Olson Case*, supra, convert the statute prohibiting such an issue of stock into a shield in the hands of the stockholders to defraud creditors who might trust the corporation. If the stock so issued is void, then, in proceedings by creditors to compel the holders thereof to pay into the corporation the unpaid value, the fact that the stock was void would be a complete defense, and relieve them from any and all obligations to creditors. The true doctrine in such cases is that the stock is not void, but the holder thereof may be compelled, at the suit of creditors, to pay into the corporation the full par value. The stock is valid, but the agreement that it shall be considered as paid in full is voidable. The authorities sustaining this view may be found collected in a note to *Easton Nat. Bank v. American Brick & Tile Co.* 8 L.R.A. (N.S.) 271, and *Security Trust Co. v. Ford*, 8 L.R.A. (N.S.) 263. The Minnesota cases cited by appellant do not sustain the position that such stock is void, or tainted with illegality to such an extent as to deprive the stockholder of the rights incident to his relation to the corporation. *Wallace v. Carpenter Electric Heating Mfg. Co.* 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189, and *Hastings Malting Co. v. Iron Range Brewing Co.* 65 Minn. 28, 67 N. W. 652, involved rights of creditors, while *Rogers v. Gross*, 67 Minn. 224, 69 N. W. 894, was an attempt to enforce an executory contract for the purchase of stock at less than its par value.

2. It is further contended by defendant that the action, as disclosed by the allegations of the complaint, is one to set aside the stock held by him on the sole ground that it was issued without consideration; and that the court erred in admitting evidence of and finding as a fact that the transaction was fraudulent. We do not construe the complaint in the light presented by counsel. Its allegations are broad enough squarely to present the issue whether the Kildall transaction was a fraud from beginning to end, to which the question of consideration or no consideration was a mere incident. It alleges that stock was unlaw-

fully and fraudulently issued to Kildall, and that he paid no consideration therefor. If defendant desired more particular information in reference to the fraud, he should have moved seasonably for more definite and specific allegations. The objection that the complaint is indefinite or uncertain in this respect cannot be raised either by demurrer or objection at the trial. The evidence established beyond doubt that the transaction was a fraud. Kildall had no fishing locations to sell, and the fishing tackle and other items of property referred to in his offer to the corporation were worthless and of no value whatever. By his offer of sale he valued the "locations" at \$20,000, yet he had no locations whatever, and conveyed no such rights to the corporation. At the time of the transaction, he was one of the directors of the corporation, and acted as secretary at the meeting at which the bargain and sale was consummated, and voted in favor of accepting his proposition, well knowing that the corporation would, in fact, receive no value for the stock to be issued to him. It is this fraud that plaintiffs seek to expose, and not a cancellation of the stock on the simple ground of no consideration, and the fact that the evidence disclosed, and the court found, that a small consideration did in fact pass to the corporation in the form of Kildall's services as secretary for the term of two years, which the court valued at \$300 per year, and which services he agreed to render as a part of his proposition, does not defeat the main purpose of the action. If the case involved a mere question of legal title to the stock, the consideration stated would be sufficient to establish that legal right; but it is not such an action. On the contrary, it is one in equity, and is controlled by the rules and principles of law appropriate to that branch of jurisprudence. Defendant Staight was a party to the fraud; at least, had knowledge of all the facts, and is in no position to complain of the result; for, so far as disclosed by the record, he parted with nothing for the stock transferred to him by Kildall, and no rule of equity with which we are familiar will sustain his title to the stock so fraudulently obtained.

3. It is also contended that plaintiffs cannot maintain the action for the reasons (1) "that the bringing of an action to cancel the stock was a matter within the discretion of the board of directors; and, in the absence of fraud or bad faith on their part, their refusal is final; and (2) in any event, application should have been made to the stockholders, or such circumstances shown as would make such application useless." Neither of these points is well taken. The fact that the transaction complained of was fraudu-

lent and operated to the damage and injury of the stockholders of the corporation made it the duty of the officers thereof to bring an action in compliance with the request of plaintiffs. This they refused to do for the apparent reason that it might involve some of the present directors, who were such at the time of the transaction, but were in fact guilty of no intentional wrongdoing. However, when the demand to sue was made upon them, at a meeting of the managing officers, they placed upon the records a resolution to the effect that the transaction was a fraud, but they declined to go further, anticipating, it is fair to assume from the evidence, the bringing of this particular action. It being the duty of the officers to protect the stockholders and the corporation from the fraud of others, it cannot well be said to be discretionary with them whether to perform that duty, and their refusal cannot bar an action by an interested stockholder. There is respectable authority for the proposition that, in cases of this kind, where stock of a corporation has been fraudulently issued by its officers, the stockholders may maintain an action for its cancellation without requesting that the action be brought by the corporation. The action in such case is not in the interests of the corporation, but in the interests of, and for the protection of, the individual rights of stockholders. 26 Am. & Eng. Enc. Law, p. 978; Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048; Kimball v. New England Roller Grate Co. 69 N. H. 485, 45 Atl. 253; Luther v. C. J. Luther Co. 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69. But we need not go so far in the case at bar. A demand was in fact made upon the officers of the corporation; they refused to bring the action; and we hold that their refusal was not final. In other words, they had no discretion in the premises whatever; at least, in so far as an exercise thereof would bar an action by individual stockholders. It is also clear that the demand upon the managing officers of the corporation was sufficient, and it was unnecessary that plaintiffs go further, and invoke the aid of other stockholders. 2 Clark & M. Priv. Corp. 543; Pencille v. State Farmers' Mut. Hail Ins. Co. 74 Minn. 67, 73 Am. St. Rep. 326, 76 N. W. 1026; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276; 3 Pom. Eq. Jur. 3d ed. 1905, and cases cited. A different rule is applied by the Federal courts. 26 Am. & Eng. Enc. Law, p. 979. There is a class of cases, however, where the refusal of the corporation, through its officers, to proceed, is not sufficient to justify an action by an individual stockholder, and in which he must appeal to the other stockholders to join him. This includes such rights of action as accrue to the 20 L.R.A. (N.S.)

corporation itself, not those accruing to the stockholders. In such case, the refusal of the officers to bring suit if, in their judgment, the interests of the corporation require that they refrain, is final, and can be overcome only by a combination of a majority of the stockholders. *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 393; 26 Am. & Eng. Enc. Law, 2d ed. p. 981. To this class belong nearly all the citations in appellant's brief in support of his contention on this branch of the case, within which the case at bar does not come. Here the injury complained of, and consequently the right of action, accrued to the stockholders, and not to the corporation as such.

4. Counsel also contend that the transaction, however fraudulent it may have been, was subsequently ratified by the corporation. This claim is without merit. In the first place, no facts are found which justify the contention, and there was no error in the refusal of the court to so find. Moreover, if the transaction was fraudulent as to the stockholders, it was incapable of ratification by the corporation without their acquiescence and consent. 2 Cook, Corp. 653. It may be that the record presents such acts on the part of some of the stockholders or officers of the corporation as would sustain the theory of ratification, if, at the time, they were aware of the fraud. But no such conduct, with notice of the fraud, was traced to these plaintiffs, or either of them; and a finding that they had ratified the fraud, had it been made, would find no support in the evidence.

This covers all questions requiring special mention. We discover no error in the refusal to amend the findings, nor in the action of the court directing, on its own motion, an amendment to the complaint (*Briggs v. Rutherford*, 94 Minn. 23, 101 N. W. 954; *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637), and no reversible error in any of the other assignments.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK, Resp't.,

v.

JOSEPH J. CAHILL, Appt.

(193 N. Y. 232, 86 N. E. 39.)

Perjury — election — self-crimination.

1. One who, having been subpoenaed in a proceeding against himself for illegal registration as a voter, makes oath that other persons against whom proceedings have al-

so been instituted, who are registered from the same place, were properly registered cannot escape punishment for perjury with respect to the latter statement on the theory that he had been compelled to become a witness against himself, in violation of the provisions of the Constitution, although the information with respect to all cases was embodied in one affidavit.

Witness — self-crimination — statutory exemption.

2. One implicated in the illegal registration of another as a voter cannot avoid testifying as to the facts of such registration, on the theory that he would incriminate himself, where the statute provides that the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person testifying, and that a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given.

Same — claiming privilege.

3. The privilege against self-crimination in testifying as to illegal registration of voters must be claimed; and, if it is not, a prosecution for perjury because of the testimony given cannot be defeated on the ground that the constitutional rights of the accused were violated.

Evidence — perjury — knowledge.

4. Upon the question of perjury in swearing that certain voters lived at the place from which they registered, evidence is admissible that, at the time accused instructed them to register, he told them that if any harm came he would see that they got out.

Same — admission — application.

5. Where one who a person on trial for perjury falsely swore was properly registered as a voter from a certain place was disqualified both because of nonage and nonresidence, evidence of an admission by accused, prior to his registry, that he was not qualified, may be considered by the jury as relating to either disqualification.

Same — motive.

6. Upon trial of one for perjury in falsely swearing that certain persons were properly registered as voters from a certain place, evidence is admissible that accused directed them to register, and promised to protect them from harm if they did so, as tending to establish a motive for the testimony as to their being properly registered.

Same — entire conversation.

7. Upon the question of perjury on the part of one who swore that certain persons were properly registered as voters from a certain place, the admission of evidence of a prior conversation tending to

show that he knew that they could not properly register from that place is not prejudicial error, although it contains statements tending to show the commission of another crime, if the jury is cautioned to disregard that portion of it.

(Willard Bartlett and Chase, JJ., and Cullen, Ch. J., dissent from propositions 6 and 7.)

(October 23, 1908.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Kings County convicting him of perjury. Affirmed.

The facts are stated in the opinion.

Messrs. **Martin W. Littleton** and **Frederick Allis**, with **Mr. Luke O'Reilly**, for appellant:

There was no perjury, because defendant was not lawfully under oath.

Boyd v. United States, 116 U. S. 616, 20 L. ed. 746, 6 Sup. Ct. Rep. 524; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *People v. Courtney*, 94 N. Y. 490; *People v. Sharp*, 107 N. Y. 446, 1 Am. St. Rep. 851, 14 N. E. 319; 30 Am. & Eng. Enc. Law, p. 1159; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74; *O'Reilly v. People*, 86 N. Y. 154, 40 Am. Rep. 525; *Case v. People*, 76 N. Y. 242; *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293; *Ortner v. People*, 4 Hun, 323; *People v. Albertson*, 8 How. Pr. 363; *People v. Tracy*, 9 Wend. 265; *People v. Lewis*, 14 Misc. 266, 35 N. Y. Supp. 664; *People ex rel. Weston v. McClave*, 32 N. Y. S. R. 824, 10 N. Y. Supp. 764; *Kellogg v. Sowerby*, 32 Misc. 327, 66 N. Y. Supp. 542; *Holman v. State*, 72 Miss. 108, 16 So. 294.

The immunity given by the statute is not an adequate substitute for that of the Constitution.

Counselman v. Hitchcock and *People v. Forbes*, supra; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353; *People v. Priori*, 164 N. Y. 466, 58 N. E. 668; *People ex rel. Lewisohn v. Court of General Sessions*, 96 App. Div. 210, 89 N. Y. Supp. 364; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The testimony of the witnesses **White** and **McKenna**, relative to conversations had with the defendant in regard to their registration, admitted over defendant's objection, was incompetent.

Wharton, Ev. 8th ed. §§ 23, 29.

Messrs. **James A. Donnelly** and **Wil-**

Note.—On the question of false testimony given under statute promising immunity against its use in criminal proceedings, see case note to *Edelstein v. United States*, 9 L.R.A. (N.S.) 236, 20 L.R.A. (N.S.)

llam Schuyler Jackson, Attorney General, for respondent:

The statements sworn to by the defendant in the investigation conducted by the deputy state superintendent of elections were material.

People v. Courtney, 94 N. Y. 494; *People v. Ellenbogen*, 114 App. Div. 182, 99 N. Y. Supp. 897, affirmed in 186 N. Y. 603, 79 N. E. 1112.

The constitutional privileges and immunities of the defendant were not violated, nor was he in any sense compelled to be a witness against himself.

Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787; *Re Knickerbocker S. B. Co.* 139 Fed. 713; *Re Consolidated Rendering Co.* 80 Vt. 55, 66 Atl. 790, 11 A. & E. Ann. Cas. 1069; 3 Wigmore, Ev. §§ 2268, 2281; 5 Wigmore, Ev. § 2281a; *Mackin v. People*, 115 Ill. 312, 56 Am. Rep. 167, 3 N. E. 222; *United States v. Kimball*, 117 Fed. 165; *People ex rel. Taylor v. Seaman*, 8 Misc. 152, 29 N. Y. Supp. 329; *Re Leich*, 31 Misc. 671, 65 N. Y. Supp. 3; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *People ex rel. Lewisohn v. Court of General Sessions*, 96 App. Div. 201, 89 N. Y. Supp. 364, affirmed in 179 N. Y. 594, 72 N. E. 1148; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; *Ex parte Cohen*, 104 Cal. 524, 26 L.R.A. 423, 43 Am. St. Rep. 127, 38 Pac. 364.

The immunity from prosecution guaranteed by § 41 did not include permission to the defendant to commit perjury in the investigation in which he made his affidavit.

People v. Courtney, 31 Hun, 199, affirmed in 94 N. Y. 490; *State v. Hawkins*, 115 N. C. 712, 20 S. E. 623; *State v. Faulkner*, 185 Mo. 673, 84 S. W. 967; *Mackin v. People*, supra; *People v. Lewis*, 14 Misc. 264, 35 N. Y. Supp. 664; *People v. Bowe*, 34 Hun, 533; *Com. v. Turner*, 98 Ky. 528, 33 S. W. 88.

The conversations between White, McKenna, and the defendant, with respect to the registration of the former, were relevant, material, and competent.

People v. Van Tassel, 156 N. Y. 561, 51 N. E. 274; *People v. O'Neill*, 112 N. Y. 361, 19 N. E. 796; *People v. Doty*, 175 N. Y. 164, 67 N. E. 303; *People v. Mills*, 91 App. Div. 331, 86 N. Y. Supp. 529, affirmed in 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786; *People v. Putnam*, 90 App. Div. 125, 85 N. Y. Supp. 1056, affirmed in 179 N. Y. 518, 71 N. E. 1135; *People v. Clark*, 90 App. Div. 605, 86 N. Y. Supp. 1142, affirmed in 179 N. Y. 518, 71 N. E. 1135; *People v. Summer-* 20 L.R.A. (N.S.)

field, 96 App. Div. 636, 89 N. Y. Supp. 1113, affirmed in 180 N. Y. 511, 72 N. E. 1147; *People v. Weller*, 98 App. Div. 623, 90 N. Y. Supp. 1109, affirmed in 180 N. Y. 556, 73 N. E. 1129; *People v. Gaffey*, 182 N. Y. 257; 74 N. E. 836; *People v. Abeel*, 182 N. Y. 415, 1 L.R.A. (N.S.) 730, 75 N. E. 307, 3 A. & E. Ann. Cas. 287; *People v. Dolan*, 186 N. Y. 4, 116 Am. St. Rep. 521, 78 N. E. 569, 9 A. & E. Ann. Cas. 453; *People v. Weisenberger*, 73 App. Div. 428, 77 N. Y. Supp. 71; *People v. Ammon*, 92 App. Div. 205, 87 N. Y. Supp. 358; *People v. Shea*, 147 N. Y. 80, 41 N. E. 505; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950.

Hiscock, J., delivered the opinion of the court:

Chapter 689, p. 1846, of the Laws of 1905, entitled, "An Act to Amend Chapter Six Hundred and Seventy-Six of the Laws of Eighteen Hundred and Ninety-Eight, Entitled 'An Act to Create a Metropolitan Elections District; Provide for the Appointment of a State Superintendent Therein, and to Prescribe His Powers and Duties,' Generally," amongst other things authorizes the state superintendent or his deputy to subpoena persons and examine them with reference to cases of suspected illegal registration. Said official having reason to suspect that the appellant and two other persons, named respectively McKenna and White, had illegally registered from a certain building in the borough of Brooklyn, caused the appellant to be subpoenaed for the purpose of giving information in regard to said cases. He appeared, and, without any objection, made an affidavit dated November 2, 1905, tending to show that he and each of said other individuals was entitled to register as he had. He has been convicted of perjury on the ground that the statements made with reference to the other individuals were false.

We regard as too clear to require discussion the propositions questioned by counsel for the appellant, that said chapter 689, p. 1846, of the Laws of 1905, is constitutional; that there was evidence permitting the jury to find as it did that the statements made by appellant in respect to McKenna and White were material and false, and that the appellant is not immune from punishment for giving such false testimony under the immunity statute hereafter to be referred to, or for any other reason, if his examination was legal.

Contenting ourselves with thus merely stating our conclusions upon these points, we pass to a consideration of the other questions which have been argued.

Appellant contends that the proceeding be-

fore the superintendent of elections in which he made his affidavit was a "criminal case" against him, and that, having been subpoenaed and examined under the compulsion of the statute, he has been compelled to become a witness against himself, in violation of the provisions of the Constitution both of the United States (U. S. Const. 5th Amend.) and of the state (N. Y. Const. art. 1, § 6), which provide that "no person . . . shall be compelled in any criminal case to be a witness against himself;" and that therefore the whole proceeding, including his affidavit containing the alleged false statements, is absolutely null and void, and furnishes no basis for a charge of perjury.

It is answered with considerable force that the proceedings before the superintendent in which appellant was examined were not of such a character as to constitute a "case," and come within the purview of the constitutional provisions just quoted. An inspection of the statute creating and prescribing the duties of the office of superintendent of elections does give much weight to the argument that it creates a purely administrative official, who is empowered in various ways, including an examination of witnesses, to investigate, amongst other things, the subject of registration of voters, to the end that illegal registration may be discovered and voting thereon prevented. Such official, by the provisions of the statute, has no power to punish or entertain proceedings for the punishment of a person guilty of illegal registration. In this respect he differs from a grand jury, investigating and having the power to take action looking to the punishment of alleged crimes, and proceedings before which body have been held to come within the contemplation of the constitutional provision quoted. *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353.

But, if we assume that an investigation by such official was a case or proceeding contemplated by the Constitution, we do not think that appellant's constitutional rights were violated in obtaining from him the testimony on account of which he has been convicted.

If the proceeding was more than a mere general investigation, then there were three separate cases or proceedings, and the alleged false testimony for which conviction has been had is to be regarded as given in cases against McKenna and White, rather than in any case against himself, and it was not harmful to him.

It appears without contradiction that, at the time when appellant appeared and made

his affidavit, there was pending in the office of the superintendent an investigation of the registration of all three men, and subpoenas had been issued in the investigation of White and McKenna. The deputy superintendent testified as follows: "Mr. Cahill came in and was referred to me, and I told him we had received some information to the effect that there were three men registered from 413 Henry street who did not reside there, of whom he was one. . . . I asked him would he relate the facts with reference to these three cases, and give me the names of the other two registered persons besides himself, and he said that he would. We had first a general conversation. I asked him if he lived at that place himself, and he stated that he did. . . . I then asked him with reference to McKenna and White. . . . I then asked him if he would swear that that was true, and he said he would."

The information, including the alleged false statements with respect to the residence of McKenna and White, for which alone the appellant has been convicted, was then incorporated in the affidavit which has been made the basis of this prosecution, and the witness was sworn for the first time when he verified it.

While the deputy superintendent testifies that the affidavit was entitled "*People v. Joseph J. Cahill*," the affidavit itself shows that it was simply entitled "Case No. 354." We do not, however, regard the mere title of the affidavit as very material. As a matter of fact, the superintendent was endeavoring to secure information in regard to three cases, and the witness was brought in, and, in rather an informal manner, interrogated in regard to each, and then his statements as to all were embodied in one affidavit, and verified as they chanced to be applicable to one or the other. So far as the practical result was concerned, it was not different than it would have been had the witness verified separately the statements pertinent to each case.

Naturally, illegal registration is an individual crime. The illegal registration of the three men could not well constitute a joint offense, and there was nothing on the face of the proceedings then pending to indicate that Cahill was implicated in the illegal registration of White and McKenna, and that, therefore, he was constitutionally relieved from giving information in respect to them, or that such information in any way incriminated him. Apparently it was perfectly proper and legal to subpoena and examine him in respect to the others, and no one could say that, in so doing, he was being

called on to give testimony against himself.

The real and precise question, therefore, seems to be whether the validity of his oath to statements relating to White and McKenna, which he could be compelled to make, is destroyed because, at the same time, he was required to verify other statements relating to himself, and which it will be assumed he could not have been forced to make.

We think that it was not, and that to hold otherwise under the circumstances of this case would be going beyond that which has been held in any of the cases called to our attention.

In *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, the defendant had been examined before a legislative committee about certain acts of alleged bribery, and subsequently the attempt was made to use the evidence so given by him for the purpose of proving his complicity in the crime; and what was said with reference to compelling a person to be a witness against himself in a criminal case must be read in the light of those fundamental facts.

People ex rel. Lewisohn v. Court of General Sessions, 96 App. Div. 201, 89 N. Y. Supp. 364, involved contempt proceedings against the relator because of his refusal to answer certain questions before a grand jury on the ground that such answer would tend to incriminate him; and what was said upon the subject of the right of a person not to be a witness against himself was said in the discussion of that general question.

The case of *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, also involved a discussion of questions arising in connection with the refusal of a witness to answer questions on the ground that they would tend to incriminate him.

In *United States v. Edgerton* (D. C.) 80 Fed. 374, it appeared that the defendant was required to appear before a grand jury without knowing that his own conduct was under investigation, and was called on to give evidence material to a charge for which he was subsequently indicted, and it was held that this was improper.

In *People v. Singer*, 18 Abb. N. C. 96, the defendant was indicted for murder, and it appeared that she had been brought before the grand jury and interrogated with reference to the charge against herself for which she was subsequently indicted, and this was held to be improper.

Boone v. People, 148 Ill. 440, 36 N. E. 99, presented substantially the same facts.

Thus it appears in each one of the cases that the question involved was as to com-

pelting a person to give evidence in regard to an offense alleged to have been committed by the witness. Here, as already sufficiently appears, the statements related to apparently independent offenses, committed by other people.

If, in the light of what was subsequently testified to on the trial, it should be contended that appellant was in fact implicated in the illegal registration of White and McKenna, and that therefore he should not have been compelled to give evidence in their cases, two answers may be made:

In the first place, we have no doubt that he secured immunity against any harm from such testimony, which was as broad as the protection afforded by the constitutional provisions to which we have referred. Section 41q of the Penal Code, which is here applicable, provides as follows: "A person offending against any section of this title [which title relates, amongst other things, to illegal registration] is a competent witness against another person so offending, and may be compelled to attend and testify on any trial, hearing, or proceeding or investigation in the same manner as any other person. The testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person testifying. Any such person testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution."

Secondly, if appellant felt that his testimony in regard to White and McKenna might disclose criminal conduct on his own part, from which he was not otherwise protected, it was his right and duty to decline to answer the questions, which he did not do. *People v. Priori*, 164 N. Y. 459, 58 N. E. 668; *People ex rel. Lewisohn v. Court of General Sessions*, supra.

Certain objections and exceptions to the admission of evidence are urged upon our consideration.

Both McKenna and White were sworn as witnesses for the prosecution to alleged statements by the appellant. Over objections and exceptions the former testified as follows:

Mr. Cahill told me to register. . . .

Q. What did he say to you about registering, and what did you say to him about registering first? (Objections.)

Mr. Jones: Answer this last question as to who spoke first.

A. Mr. Cahill asked me did I register, and I said no, I wasn't of age; he said: "How many months do you lack of twenty-

one?" I said, "Six or seven." He said, "Go on and register anyway; I voted when I was sixteen years of age."

Mr. Littleton: I object, and move to strike out the answer on the ground that it is utterly and entirely without any issue in this case or to any conception of the indictment in this case.

The court: Standing by itself it may be, but he can have all the conversation as bearing on the defendant's knowledge when he swore the man slept there, if he knew he did not. . . .

Mr. Littleton: I object to it on the ground that the sole issue to be submitted to this jury is whether this man swore falsely when he swore this man slept there always; and that is no part of this issue, but does tend to prove another charge and another crime against this defendant.

The court: I think it is pertinent, and I will allow it. (Defendant excepted.)

Mr. Jones: Go on and tell what was said by you.

A. Mr. Cahill told me to go ahead and register, and I said I wasn't of age; and he said, "You go up; I will see no harm comes to you;" and I said, "I am kind of afraid," and he said, "Go on up, anyway;" and I came back. He told me where to register from,—413 Henry street. I didn't say anything about registering from 413 Henry street.

The witness White testified, over objection and exception:

Go on and tell the court and jury what the defendant said. How did you come to register from 413 Henry street, if you didn't sleep there?

A. I stood on the opposite corner, and Mr. Cahill came out with a cigar in his mouth, . . . and he said: "Mr. White, go up and register, and if any harm comes to you I will see that you get out."

It may be conceded at once that this evidence was material, and calculated to prejudice the appellant's case, and, if error was committed in its reception, he ought to have relief. The question is whether it tended, directly or indirectly, in any degree, great or small, legitimately to establish that the appellant was guilty of the crime of perjury which he was charged with having committed when he testified before the superintendent of elections in the following November: "I formerly resided at Henry street, . . . and took up my residence at 413 Henry street two or three months ago, . . . and both John White and Bernard McKenna have slept there almost every night during that time."

In determining this question it is well to bear in mind the circumstances under 20 L.R.A. (N.S.)

which the appellant is charged with having committed perjury in making the statement which he did. The subject under investigation was the right of those two men to register from 413 Henry street, and the record makes it quite apparent that, on the hearing before the superintendent of elections, the questions whether they were entitled to register and whether they had slept at 413 Henry street, as testified to by appellant, were regarded as identical. If they had so slept at the place in question, as testified by appellant, it indicated that they were entitled to register; and, conversely, if they were not entitled to register, it would indicate that they had not been living at Henry street, as appellant testified.

If the appellant, at the time they registered, did or said anything which indicated appreciation of danger in their so doing, we think it was some evidence of an admission on his part that they had not been staying at Henry street for a sufficient length of time to permit their registry, and, therefore, that he was swearing falsely when he testified to facts establishing their right to register. This was certainly true in the case of White, whose only known lack of qualifications was lack of residence. We think it was also true in the case of McKenna. For while he gives nonage as an excuse for not registering, there is also evidence to show that he was not qualified by residence; and therefore anything in the way of an admission by appellant that he was not qualified to register might be considered by a jury as relating to either disqualification.

It remains, then, but to add in this connection that, in our opinion, appellant's direction to McKenna and White to register from Henry street, followed in each case by a promise to protect the man from harm if he did so, was susceptible of the construction by the jury that he knew that each man was liable to get into trouble if he registered, and that this trouble would arise from lack of that very residence in the district which appellant subsequently attempted to establish by false testimony.

But, further than this, evidence of these conversations, showing his direction to each man to register, and his promise to protect him from harm if he did so, both by reason of the express promise and by reason of his having become connected with the registry as he did, established a direct motive for his testimony before the superintendent, that each man was qualified, by staying at 413 Henry street, to make the registry which was then being investigated, and was competent for that purpose. *Com. v. Hudson*, 97 Mass. 565; *Pierson v. People*, 79 N. Y. 424, 435. 35 Am. Rep. 524.

Much stress is laid on the fact that the

evidence of McKenna tells of an admission by the appellant that he had voted before he was entitled to, and, therefore, had committed another crime than that for which he was being tried. Evidence of such admission by itself might have been entirely incompetent, and the court so indicated at the time of its reception. But the conversation detailed by each witness was an entire and connected one, relating to a single subject, and even if that question was raised, as it probably was not, neither authority nor good practice required counsel, by leading questions, to draw from the witness what he deemed a material sentence scattered here and there through the conversation. Under the circumstances he was entitled to ask for the conversation as an entirety. The court plainly laid down the rule that the object of the conversation was not to show the commission of some other crime by the appellant, and that it simply bore on his knowledge when he swore to the facts already detailed.

The judgment should be affirmed.

Haight, Vann, and Werner, JJ., concur.

Willard Bartlett, J., dissenting:

Under the act creating the metropolitan elections district, consisting of the counties of New York, Kings, Queens, Richmond, and Westchester, and providing for the appointment of a state superintendent therein, and prescribing his powers and duties, the deputy superintendents of elections are authorized, among other things, to investigate all questions relating to the registration of voters, and for that purpose they are empowered to visit and inspect any house, dwelling, building, inn, lodging house, or hotel within the metropolitan district, and to interrogate any inmate, house dweller, keeper, care taker, owner, proprietor, or landlord thereof or therein as to any person or persons residing or claiming to reside therein or thereat. Laws 1898, chap. 676, p. 1612, as amended by Laws 1905, chap. 689, p. 1846. See § 6, subd. 1, Laws 1905, chap. 689, p. 1849. The superintendent, his chief deputy, and not more than ten deputies, duly designated by the superintendent for that purpose, are authorized to administer oaths and affirmations to any person in any matter or proceeding authorized as aforesaid, and in all matters pertaining or relating to the elective franchise. Section 7. In November, 1905, a deputy thus designated, named Jesse Fuller, Jr., administered an oath in Kings county to the defendant, and took his examination under oath with regard to the residence of John White and Bernard McKenna.

McKenna, two men who had registered in the sixth election district of the third assembly district in Kings county for the purpose of voting at the ensuing election. The defendant made affidavit before Deputy Superintendent Fuller on the 2d day of November, 1905, as follows: "I reside at number 413 Henry street, Brooklyn; I formerly resided at the corner of Henry and Baltic streets, but took up my residence at 413 Henry street two or three months ago, and slept there on the second floor, the one just above the saloon, almost every night since, and both John White and Bernard McKenna have slept there also almost every night during that time." The indictment charged the defendant in the first count with the crime of feloniously making a false statement under oath before a deputy state superintendent of elections; and, in the second count, with the crime of perjury; and alleged that the sworn statement above quoted was false, and was known to be so by the defendant at the time when he made it.

Upon the trial there was no attempt to prove that the statement was false so far as it related to the residence of defendant himself. The learned trial judge instructed the jury that it was not claimed that the affidavit was false entirely, but that the people contended "that when Joseph J. Cahill swore that both John White and Bernard McKenna had slept there at 413 Henry street also almost every night during the past two or three months before the 2d day of November, 1905, he swore wilfully to that which he knew to be false; and that McKenna and White had not so slept there." It is apparent, therefore, that the verdict of guilty must have been based solely upon a finding by the jury that the defendant had knowingly sworn falsely in regard to the residence of these two men. Both McKenna and White testified as witnesses for the prosecution upon the trial.

After McKenna had stated that he registered as living at No. 413 Henry street at the instance of the defendant, his examination proceeded as follows:

Q. What did he say to you about registering, and what did you say to him about registering first?

Mr. Littleton: I object to the evidence upon the ground that the sole issue charged against this defendant is he made a false statement, not as to this man's age or qualifications, nor as to his residence; but that he made a false statement in that he said this man had slept almost always in 413 Henry street; and that is the sole issue of this affidavit.

The court: Bearing on whether or not he did, he has the right to ask this question.

(Objection overruled and defendant excepted.)

Mr. Jones: Answer this last question as to who spoke first.

A. Mr. Cahill asked me did I register, and I said no, I wasn't of age; he said, "How many months do you lack of twenty-one?" I said, "Six or seven." He said, "Go on and register anyway; I voted when I was sixteen years of age."

Mr. Littleton: I object, and move to strike out the answer on the ground that it is utterly and entirely without any issue in this case or to any conception of the indictment in this case.

The court: Standing by itself it may be, but he can have all the conversation as bearing on the defendant's knowledge when he swore the man slept there, if he knew he did not.

Mr. Littleton: Your honor doesn't seem to want to hear my objection.

The court: State your objection and don't think I do not, but I think it is perfectly competent.

Mr. Littleton: I object to it on the ground that the sole issue to be submitted to this jury is whether this man swore falsely when he swore this man slept there always; and that is no part of this issue, but does tend to prove another charge and another crime against this defendant.

The court: I think it is pertinent, and I will allow it.

(Defendant excepted.)

White also testified under appropriate objection, and exception, in answer to the question how he came to register from 413 Henry street if he did not sleep there: "I stood on the opposite corner, and Mr. Cahill came out with a cigar in his mouth—no, he did not have a cigar, he had his hands in his pockets. He came out and he said, 'Mr. White, go up and register, and if any harm comes to you I will see that you get out.'"

I think that the admission of this evidence was clearly erroneous; that it must have been exceedingly prejudicial to the defendant, and that the error in receiving it and in refusing to strike it out demands a reversal of this judgment, unless we are prepared to ignore, and, indeed, virtually repeal, the general rule of evidence in criminal cases which prohibits proof on the part of the prosecution of the commission of crimes other than that alleged in the indictment.

A conspicuous instance of the recent enforcement of this rule by this court is furnished by the case of *People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286, in which its character and scope were fully discussed in the opinion of Werner, J., who reviewed the numerous authorities by which it 20 L.R.A. (N.S.)

is supported in this and other states, and clearly classified the exceptions to it which have been recognized in the development of criminal procedure here and in other jurisdictions where the common law prevails. It is to be observed the defendant was indicted for false swearing and perjury; not for false registration or inducing others to commit that crime, and not for voting illegally. Yet the sole tendency of the testimony of McKenna and White, which has been quoted, was to establish the defendant's guilt of these other and different offenses. Upon no theory of the doctrine of relevancy does it seem to me that the fact that the defendant had voted when he was only sixteen years of age can be deemed relevant to any of the issues which were litigated under the indictment and plea in this case. The defendant's declaration to that effect, assuming that he made it, merely tended to show that years ago he had committed another crime. To hold that evidence of this sort was not harmful to a man upon trial for a crime relating to the elective franchise would be, in my judgment, to ignore those influences which common experience shows to be powerfully operative upon the human mind. The only question which the jury were called upon to determine upon the trial was whether the defendant had sworn falsely in stating under oath that these men slept for two or three months at 413 Henry street, in the borough of Brooklyn; and the fact, assuming it to be such, that he had once voted illegally, had no conceivable bearing on that question, nor was the evidence properly receivable under any of the exceptions to the general rule recognized and so well stated in the *Molineux Case*. It did not tend either to establish motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more related crimes, or the identity of the defendant. It had no relation to the crime charged, and its sole effect must have been to make the jury think that the defendant was a bad man, whose antecedents indicated a willingness to commit any offense against the election laws.

The objectionable character of the testimony of these two witnesses to the effect that the defendant urged them to register, and said he would take care of them if they did so, is almost equally manifest. As has been pointed out, he was not on trial for the crime of false registration or inducing others falsely to register, and this evidence had no relevancy to the charge that he knowingly state an untruth when he testified before the deputy superintendent of elections in reference to the sleeping place of these witnesses. I recognize to the fullest extent the wisdom of the statutory rule which prevails in this state, that, upon an appeal in criminal

cases, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the party. Code Crim. Proc. § 542. It seems clear to my mind, however, that the errors which I have discussed cannot justly be deemed technical, and that they must have operated to the detriment of the defendant to such an extent as to deprive him of the fair trial to which he is entitled by law. Entertaining this view, I deem it my duty to vote for a reversal of the judgment. Upon the other question in the case I concur in the conclusions reached by Judge Hiscock.

Cullen, Ch. J., and Chase, J., concur with Willard Bartlett, J.

OHIO SUPREME COURT.

ALMA COAL COMPANY, Plff. in Err.,
v.
COZAD, Treasurer.

(79 Ohio St. 348, 87 N. E. 172.)

Eminent domain — private benefit.

1. The provisions of the Constitution forbid not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another.

Partition fence — cost of erection.

2. The act of April 18, 1904 (97 Ohio Laws, 138), may not be so construed and

Headnotes by the COURT.

Case Note. — Applicability of statutory provision for joint construction of line or division fence, where lands of one of adjoining owners are otherwise uninclosed.

The reasoning of the court in ALMA COAL Co. v. COZAD leads naturally to the conclusion that an owner of uninclosed lands should not be burdened with the expense of constructing fences between himself and his neighbor, because the former, by reason of his property being uninclosed, derives no benefit from a division fence. This doctrine finds general support in the reported cases. Bouchereau v. Guilne, 116 La. 534, 40 So. 863; Wiggin v. Baptist Soc. 43 N. H. 260; Perkins v. Boody, 62 N. H. 452; James v. Tibbetts, 60 Me. 557; Kent v. Lix, 47 Mo. App. 567; Palmer v. Silverthorn, 32 Pa. 65.

The intention of legislatures which have specifically provided that owners of "inclosed" lands shall maintain partition fences between their own and the next adjoining inclosure has invariably been carried out by the court in holding that an

owner was bound to charge an owner of lands which are, and are to remain, uninclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor.

(February 2, 1909.)

ERROR to the Circuit Court for Vinton County to review a judgment affirming an order of the Court of Common Pleas sustaining a demurrer to the petition in an action brought to restrain the collection of a certain tax alleged to have been unlawfully levied. Reversed.

Statement by Shauck, J.:

The coal company filed its petition in the court of common pleas, alleging, in substance, that it is the owner of a tract of land in Vinton township, Vinton county, Ohio, and that one W. H. Allen is the owner of an adjoining tract; that in the year 1906 said Allen, being desirous of having his lands inclosed, filed his application with the trustees of the township, asking them to view the line dividing his lands from those of the plaintiff, and assign to each the share of a partition fence to be constructed and maintained by him; that the trustees complied with that request, and ordered Allen to build one half of said fence and the plaintiff to build the other half; that the plaintiff refused to comply with that order, and that thereupon the portion so allotted to it was caused to be built, and the expense thereof certified to the auditor of the county to be charged upon the tax duplicate against the lands of the plaintiff; and that the defendant, the treasurer, said charge having been made, now threatens to collect

owner was bound to contribute to the cost of a partition fence only where his own lands were actually inclosed. Bechtel v. Neilson, 19 Wis. 49; Hazard v. Wolfram, 31 Wis. 194; Whyte v. East Whiteland Twp. 2 Chester Co. Rep. 219; Farmer v. Young, 86 Iowa, 382, 53 N. W. 279; Fay v. Elliott, 154 Mass. 587, 28 N. E. 1052. Boenig v. Hornberg, 24 Minn. 307. This same rule is applied in Loeb v. Niesley, 2 Legal Chron. 149, where the lands in question were city lots.

See also Syas v. Peck, 58 Iowa, 256, 12 N. W. 304, where unfenced land in use for growing crops was said to be used in common because statutory restraint of stock made fences unnecessary.

It has also been held that one of adjoining owners whose lands have been inclosed, and who has borne his share of the cost of a partition fence, may relieve himself from maintaining the fence or a section of it by allowing his entire lands, or so much as he sees fit, to again lie in common. Jones v. Perry, 50 N. H. 134; Chamberlain v.

the same as a lien upon said lands. Plaintiff further alleges that its lands and all of them are wild, uncultivated, and unfenced, and that it has no desire or intention to improve, fence, or cultivate any portion thereof, and that said fence is of no value or benefit to it whatever. It alleges that there is no authority whatever for said imposition upon its lands or upon it, and prays that the defendant be enjoined from the collection thereof. To this petition a demurrer was sustained in the court of common pleas, and the petition dismissed. In the circuit court the judgment of the court of common pleas was affirmed.

Mr. J. M. McGillivray for plaintiff in error.

Mr. James W. Darby for defendant in error.

Shauck, J., delivered the opinion of the court:

Statutes regulating the construction and maintenance of fences between the lands of adjoining proprietors, when used by both for the purpose of inclosing their lands, have long been in operation in this state, and their provisions and effect have become quite familiar. But the judgment below in the present case implies the view that, by the act of April 18, 1904 (97 Ohio Laws, 138), the general assembly has thought itself empowered to enact that one must submit to an imposition for the construction of his neighbor's fence, even though his own lands are not otherwise inclosed, and he makes no use whatever of the fence to whose construction he is required to contribute, and has no intention whatever of

making such use thereof; and that, by the act referred to, the general assembly has exercised that authority. Some doubt as to the intention of the legislature will survive a careful analysis of the statute. The first section, as amended by the act referred to, being § 4239, Rev. Stat., provides: "That the owners of adjoining lands shall build, keep up, and maintain in good repair all partition fences between them in equal shares, unless otherwise agreed upon between them, which agreement must be in writing and witnessed by two persons. . . ." Section 4242 provides that: "If any party neglects to build or repair a partition fence, or the portion thereof which he ought to build or maintain, the aggrieved party may complain to the township trustees," etc. Section 4243 provides that, if he fails upon notice to construct said portion, the trustees shall, upon the application of the aggrieved party, sell the contract to the lowest responsible bidder to furnish the labor and material, and build such fence according to the specifications to be proposed by the trustees, after advertising the same, etc. There are other provisions for reporting to the county auditor the cost of the proceeding, and the cost of the erection of the designated portion of the fence, for the record thereof, etc.; and an express provision that they shall be collected as other taxes are collected. The act contains no definition of a partition fence which would necessarily include a fence constructed and maintained by one proprietor for his sole use, and not used by the other in the inclosure of his lands. It would naturally be expected that an intention to inaugurate so radical a departure from previous legisla-

Reed, 14 Hun, 403; Boyd v. Lammert, 18 Ill. App. 632.

A statute providing that owners of adjoining lands shall each make and maintain a just proportion of the division fence between them unless either "shall choose to let such land lie open" is construed in *Chrysler v. Westfall*, 41 Barb. 159; and the exception in favor of those who choose to let their lands remain uninclosed is extended to the benefit of an owner who has not fenced his land, but finds it fully inclosed by reason of the action of others in fencing their land.

But an act requiring "that owners of adjoining lands shall build, keep up, and maintain partition fences between them, in equal shares, is held, in *Nichols v. Turner*, 10 Ohio C. C. N. S. 509, to apply to all owners of adjoining lands, whether the same are inclosed or not. It should be said that this decision was influenced by the fact that the act construed repealed former statutes whose language was specifically applicable to lands "inclosed."

20 L.R.A. (N.S.)

And the fact that land is unfenced does not bring it within an exception, granted by statute, to an adjoining owner who "shall choose to let his land lie open to a public common," releasing him from the duty imposed of making and maintaining his just proportion of a division fence. *Perkins v. Perkins*, 44 Barb. 134.

The theory that an owner should not be compelled to contribute to the cost of a fence from which he derives no benefit has also been applied where one builds a fence upon his own land, and back from the division line, so as to leave an uninclosed way or lane between his own and his neighbor's land. In these cases the owner of the lane is not liable to share the cost of a fence erected on the line. *Lantis v. Reithmiller*, 95 Mich. 45, 54 N. W. 713; *Smith v. Johnson*, 76 Pa. 191; *Bills v. Belknap*, 38 Iowa, 225; *Bland v. Hixenbaugh*, 39 Iowa, 536; *Painter v. Reece*, 2 Pa. St. 126; *Rohrer v. Rohrer*, 18 Pa. 367.

tive policies, and so manifest a disregard of the commonly accepted views as to the rights of landowners, would be indicated by the use of language of an unequivocal character. The statute of the state had long applied, by appropriate terms, to a partition fence "dividing the inclosures of two or more persons." But some purpose must have prompted the amendment of the statute now under consideration, and no conjecture as to that purpose seems more probable than that made by the courts below. No other explanation of the amendment occurs to us or is suggested by counsel. But whatever the intention in fact of the general assembly, as indicated by the terms of the act, may have been with respect to this question, constitutional considerations seem to forbid the interpretation of the act which is implied in the proceedings of the township trustees and in the judgment under review. The powers of the imagination will be exhausted in vain to find a member of society who will be benefited by the imposition which is sought to be made upon the plaintiff, except Allen, the adjoining proprietor, who desires to inclose his land. In pursuing inquiries of this character, we need not be seriously concerned about forms if we correctly comprehend the substance of things. In the contemplation of the Bill of Rights, a legislative act to transfer title to a portion of the plaintiff's lands to its neighbor by compulsion, and without consideration, would not differ from one to assess its lands to an equivalent extent for his exclusive benefit. It would be neither more reprehensible nor less availing.

Upon this aspect of the case, two propositions are urged in support of the judgment below. It is said that the act, construed as it was in the circuit court, is not an exercise of the right of eminent domain, but only the exercise of the power of levying a tax or assessment, and that these are essentially different powers. That differences between them exist is obvious, and that they are sometimes important is true; but that they are of no importance whatever in the present inquiry is made clear by three propositions which are elementary in constitutional law. In the exercise of the right of eminent domain property can be taken for a public use only. A special assessment can be made only in consideration of a special benefit conferred upon the owner of the property assessed or upon the property itself. The power to levy a general tax may be exercised only for the carrying out of governmental purposes, which constitute the only function of the state. Enough upon this subject has been said in 20 L.R.A. (N.S.)

Reeves v. Wood County, 8 Ohio St. 333, and Chicago & E. R. Co. v. Keith, 67 Ohio St. 290, 60 L.R.A. 525, 65 N. E. 1020.

In support of the judgment below, we have the definite proposition that the act, as there construed, is a legitimate exercise of the police power, which is confessedly within the constitutional grant of legislative power to the general assembly. Again the vain longing for conceptual definition of the police power is intensified. Counsel are obviously embarrassed by the realization that, to the valid exercise of this power, it is indispensable that every invasion of a private right must be vindicated by a consideration of the public weal. To meet that requirement, it is suggested that the purpose of the amended legislation is to prevent the occurrence of "devils' lanes," which are supposed to provoke neighborhood animosities, and in which live stock, especially horned cattle, are liable to be restrained and injured. Such lanes, instead of being provocative of neighborhood animosities, are indicative of such animosities already in a very high state of development. It will be quite apparent that this conjecture falls far short of helpful suggestion when it is realized that such a lane cannot possibly occur when the lands of one of the adjoining proprietors remain wholly without fence.

We do not follow counsel in the present case, nor the circuit court, in a case cited, in a consideration of the extent of the lands within the state whose owners might be subjected to a like imposition, under like circumstances, in the view taken of this statute in the courts below. The larger it might appear to be, the more effectively it would divert attention from the really important aspect of the case. In the opinion of those who framed and adopted our Constitutions, and in accordance with the observation and experience of those who have happily enjoyed their protection, private rights in property are subject only to the limit of the public use or the public benefit. In determining the limits of the rights so vested and secured, surveyors' instruments cannot be profitably employed. The record informs us that the plaintiff, in the orderly mode appointed, seeks relief from a forbidden imposition. Further information is unnecessary. The experiences of courts which have departed from principles of obvious soundness, because the particular cases in which such departures were permitted were not otherwise important, have not been so happy as to invite repetition.

The judgments of the Circuit Court and Common Pleas Court will be reversed, and

the demurrer to the petition will be overruled.

Crew, Ch. J., and Summers, Spear, Davis, and Price, JJ., concur.

CALIFORNIA SUPREME COURT.

JAMES CUZNER, Resp't.,

v.

CALIFORNIA CLUB, a Corporation, Appt.

(— Cal. —, 100 Pac. 868.)

Intoxicating liquors — license — social club.

1. A clause in an ordinance providing for a license tax upon those conducting, managing, or carrying on the business of retail liquor dealers, which defines a "retail liquor establishment" to be any place where intoxicating liquors are sold, served, or given away in quantities less than 5 gallons, does not include a social club which serves liquors to its members at a slight advance on the cost, the profit being devoted to the maintenance of the club, where the purpose of the definition is to distinguish between retail and wholesale business and restaurants.

Same — construction.

2. An ordinance merely imposing a license tax upon the business of selling intoxicating liquors does not include a bona fide social club which merely distributes such liquor to its members at a slight ad-

Case Note. — Applicability of liquor laws to social club dispensing liquors to members.

Prior cases upon this question are gathered in the case note to South Shore Country Club v. People, 12 L.R.A. (N.S.) 519. From these it appears that the decisions are various and conflicting; that, with few exceptions, it has been held that, where the club is incorporated, it is amenable to the liquor laws; and all the authorities agree that it is amenable where it appears that the formation of the club was a mere device to evade the law. The following cases have appeared since the preparation of that note:

In State v. Warcholik, 80 Conn. 351, 68 Atl. 379, the trial court instructed the jury that, "while it is true that a member of a club, or an agent or servant of the club, can dispense liquors to a fellow member of the club, the club receiving the income from the sale, no member of the club has a right to sell liquors to one who is not a member." The latter part of the charge was held to be correct. Commenting, however, on the first part of this charge, the supreme court said: "The instruction that an unlicensed club or its agent can lawfully sell liquors to a fellow member for the benefit of the club was favorable to the defendant, and for this reason we have no occasion to de-

vance over the cost, the profit being devoted to the expenses of the institution.

(March 6, 1909.)

A PPEAL by defendant from a judgment of the Superior Court for Los Angeles County enjoining the sale or serving of intoxicating liquors upon its grounds. Reversed.

The facts are stated in the opinion.

Mr. Edward E. Bacon, with Messrs. Gibson, Trask, Dunn, & Crutcher, for appellant:

The ordinance applies only to "retail liquor dealers" carrying on business as such.

Ex parte Braun, 141 Cal. 204, 74 Pac. 780.

The serving of liquors by a bona fide social club to a limited number of members and invited guests does not constitute "carrying on the business of a retail liquor dealer," and is not within the purview of the ordinance.

Manassas Club v. Mobile, 121 Ala. 561, 25 So. 628; Harris v. State, 50 Ala. 127; Weil v. State, 52 Ala. 19; Koenig v. State, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; State v. Austin Club, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298; Piedmont Club v. Com. 87 Va. 540, 12 S. E. 963; Merced County v. Helm, 102 Cal. 159, 36 Pac. 399; Black, Intoxicating Liquors, § 142; People v. Adelphi

side upon its correctness; without intending, however, any implication of opinion that the proposition, as advanced by the trial judge, can be sustained. In this case the question is purely academic."

In State v. Kline, 50 Or. 426, 93 Pac. 237, the court said that it was generally conceded that, where a social club is unincorporated, the dispensing to members only of liquors purchased by the club is not a sale in the strict sense of the term. It was held, however, that, where the liquors were purchased by an incorporated society, the corporation became the owner of the liquors, and when they were dispensed to a member with intent to pass the title in the goods, the act constituted a sale.

And, in State ex rel. Young v. Minnesota Club, 106 Minn. 516, 119 N. W. 494, it was held that the rule declared by some of the cases, that the distribution of intoxicating liquors to club members does not constitute a sale, for the reason that the members are the joint owners of the property, and are merely distributing to themselves property which they already own, has no application where the organization is a legally constituted corporation, and the statute prohibiting sales without a license makes no express exception in favor of such corporation.

Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606; State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 664; Com. v. Smith, 102 Mass. 144; Com. v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340; Barden v. Montana Club, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 23 Pac. 1042; State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290; Graff v. Evans, L. R. 8 Q. B. Div. 373; Davies v. Burnett [1902] 1 K. B. 666; Newell v. Hemingway, 60 L. T. N. S. 544; Seim v. State, 55 Md. 566, 39 Am. Rep. 419; State v. Maryland Club, 105 Md. 585, 66 Atl. 667; United States v. Cerecedo Hermanos y Compania, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532.

Messrs. Anderson & Anderson for respondent.

Messrs. Leslie R. Hewitt and Lewis R. Works, *amici curia*.

Angellotti, J., delivered the opinion of the court:

This action was brought by a member of the California Club, a bona fide social organization existing in the city of Los Angeles, to enjoin the selling or serving of liquors by the club to its members and their guests, upon the ground that, by making such sales, the club is violating the provisions of an ordinance of the city of Los Angeles requiring the payment of a license fee by all persons engaged in the business of retail liquor dealers. The complaint charges that the defendant maintains a bar, at which its members and their guests are served with liquors at retail, and intoxicating liquors are also served to either members or guests at other places in the club; and it is contended by the plaintiff that, in so doing, the defendant is conducting a place for the sale of liquors within the meaning of said ordinance, and thereby lays itself liable to heavy fines, and also to a forfeiture of its charter if it persists in this conduct. A general demurrer to the complaint for want of facts sufficient to constitute a cause of action was overruled, and defendant declined to answer. Judgment was thereupon entered for plaintiff, and defendant appeals.

It is assumed by the parties that such an action will lie on behalf of a member of the club. See Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606. The only question presented by the appeal is whether the provision of an ordinance of the city of Los Angeles, "providing for licensing and regulating the carrying on of certain professions, trades, callings, and occupations carried on within

the limits of the city of Los Angeles," adopted January 27, 1908, that imposes a license tax of \$100 per month upon "every person, firm, or corporation conducting, managing, or carrying on the business of a retail liquor dealer," is applicable to the defendant. The defendant is a bona fide social club, incorporated in December, 1888, under the laws of the state of California, solely "with a view to promote social intercourse among its members," and not for profit, and is without any capital stock. Its principal place of business, as stated in its articles of incorporation, is the city of Los Angeles, wherein it maintains a clubhouse for the use of its members and their guests. In this clubhouse are maintained all those conveniences for the use of such members and their guests as are ordinarily to be found in a social clubhouse, such as a library, parlors, and reception rooms, adequately furnished, dining rooms where meals are furnished, billiard rooms, and sleeping apartments. It owns its clubhouse building, and the furniture therein, and the land on which the building stands. The aggregate value thereof being in excess of \$500,000. During the whole period of its existence, it has kept therein a stock of vinous, spirituous, and malt intoxicating liquors, in sufficient quantities to supply the wants of its members and their guests, and, "without any license whatever of any kind from the city of Los Angeles so to do," has furnished such members and guests with such quantities thereof as they ordered, receiving therefor from the parties taking the same more than the cost price thereof. The moneys so received by the club are, like the money received for dues, meals, etc., used solely for the maintenance of the club. The permanent membership of the club is limited in number to 850. No person who is a resident of Los Angeles, not a member of the club, is entitled to any of its privileges, except that he may be introduced once by a member; but, when so introduced, cannot purchase anything therefrom, and cannot remain in the clubhouse after the departure therefrom of the member introducing him. Persons not residing within 50 miles of Los Angeles may be introduced to said club by any member, and receive a card entitling them to the privileges thereof for a period of not more than thirty days in any period of twelve months. Such persons constitute the guests of whom we have spoken. The member introducing such a visitor is responsible for his conduct, and for any indebtedness which he may incur. The whole object of the club is to furnish to its members the conveniences and privileges of a social club, and everything that is done by it, in the way of furnishing meals, lodg-

ings, and liquors, is merely incidental to this object, just as the furnishing of a library, parlors, and reception rooms, of the advantages of which all members may partake without charge, is incidental to that object. Whatever profit may be derived by the club from any of the transactions is used, and to be used, solely, for the main object above stated. In the way above stated only does the club engage in any business other than the conduct of a bona fide social club.

It must be conceded at the outset that the municipality of Los Angeles, in the exercise of the power to regulate traffic in intoxicating liquors that is a part of the police power conferred upon it by the Constitution, may enact prohibitory laws applicable not only to those engaged in the business of selling intoxicating liquors to the public, but also to such transactions in regard thereto as we have described above; and that they may regulate, by license tax or otherwise, any and all kinds of dealings with relation to such liquors, including such dealings as are had by the defendant with its members. It may also be conceded that the transactions above detailed are of such a nature that, in the exercise of the power to impose a license tax for revenue on any business, etc., the municipality may treat them as the carrying on of a business that may be taxed for revenue, and impose a license tax thereon for that purpose. This is apparently not disputed by learned counsel for defendant. The sole question, then, is whether it was the intention of the framers of the law or ordinance to include such clubs.

The ordinance of January 27, 1908, is, in all respects material here, a re-enactment of an ordinance adopted February 28, 1903, with a substantially similar title, viz., "An Ordinance Providing for Licensing and Regulating the Carrying on of Certain Professions, Trades, Callings, and Occupations Carried on Within the Limits of the City of Los Angeles." It makes it unlawful for any person to carry on "any trade, calling, profession, or occupation" specified in the ordinance, without having procured the license to do so. It imposes a license tax on a great variety of businesses and callings, over eighty in number, generally in terms providing that the tax is imposed on anyone "carrying on the business" named. The provisions in regard to the liquor business are as follows:

"Sec. 49. For every person, firm, or corporation conducting, managing, or carrying on the business of a retail liquor dealer, \$100 per month.

"For every person, firm, or corporation conducting, managing, or carrying on the 20 L.R.A. (N.S.)

business of a wholesale liquor dealer, \$75 per month.

"For every person, firm, or corporation carrying on the business of a restaurant or eating place where spirituous, vinous, malt, or mixed intoxicating liquors are sold, served, or given away, in original packages containing not less than 1 pint, to be consumed on the premises with bona fide meals, \$75 per month, in addition to the regular restaurant license required by the ordinances of the city of Los Angeles.

"For the purpose of this ordinance, a retail liquor establishment is defined to be any place where spirituous, vinous, malt, or mixed intoxicating liquors are sold, served, or given away, in quantities of less than 5 gallons, to be drunk either upon the premises or elsewhere.

"Any person, firm, or corporation who, either as owner, agent, lessee, or otherwise, conducts or carries on a retail liquor establishment, as herein defined, is, for the purpose of this ordinance declared to be a retail liquor dealer; provided, however, that none of the definitions herein given shall apply to the sale, serving, or giving away, in a restaurant or eating place of spirituous, vinous, malt, or mixed intoxicating liquors, in original packages, containing not less than 1 pint, to be consumed on the premises with bona fide meals.

"For the purpose of this ordinance, a wholesale liquor establishment is defined to be any place where spirituous, vinous, malt, or mixed intoxicating liquors are sold, served, or given away in quantities of not less than one fifth of a gallon, and not to be drunk upon the premises where so sold, served, or given away; and any person, firm, or corporation who, as owner, agent, lessee, or otherwise, conducts or carries on a wholesale liquor establishment, as herein defined, is, for the purpose of this ordinance, declared to be a wholesale liquor dealer.

"For the purposes of this ordinance, a restaurant is defined to be a place fully equipped with modern conveniences for cooking and preparing victuals, and where hot meals are actually served at least three times a day, and at least six days in the week; and a bona fide meal is defined to be a meal consisting of such quantity and quality of food as is ordinarily served for a meal in hotels or restaurants. Merely sandwiches or lunches or crackers or cheese shall not be held nor considered to be a bona fide meal, within the provisions of this ordinance."

Reasonably construed, these provisions regarding liquor dealers must be held to have been intended to apply only to such persons, etc., as are engaged in the "business of selling liquor" in the sense in which the term

"business" is ordinarily used in that connection. We concede that it was entirely within the power of the city council to define in the ordinance what it meant by the term "business of a retail liquor dealer," upon the "managing or carrying on" of which it imposed the license tax by the first paragraph of § 49, and to define it in such a way as to include transactions of the character that we have detailed. But we see, in the definitions contained in the succeeding paragraphs, no intention to depart from the manifest policy of the whole ordinance, which was to impose a license tax upon the doing of various kinds of business; or, as put in the title, "upon the carrying on of certain professions, trades, callings, and occupations." The object of the definitions was to distinguish between the different classes of persons engaged in the business of selling liquor,—retail liquor dealers, wholesale liquor dealers, and restaurant keepers,—as to whom different rates of license tax were fixed, so as to make it clear and definite in which class any such person falls, and also to guard against evasions by persons really engaged in the business of liquor dealers, who might attempt to cloak their transactions as gifts; as, for instance, by selling a cracker and giving a drink,—a device not unknown in the past,—or to obtain the reduced rate of a restaurant keeper under the cloak of a sham restaurant. We think the ordinance clearly shows that these were the sole objects of the definitions, and that the idea of including acts that would not ordinarily be held to be included within the term "managing or carrying on a business" was not present. Taking the provision defining a "retail liquor establishment" by itself, and construing it literally and technically, it would include a man's home, if a man served or gave spirituous, vinous, malt, or mixed intoxicating liquors to his guests therein, for such home would then be a place where such liquors were served or given away in quantities of less than 5 gallons. Admittedly, this provision must be read in connection with the next following provision, which defines a "retail liquor dealer" as one who "conducts or carries on" such a place. These words, in the connection in which they are used, clearly imply a conducting or carrying on of a place as a business,—the conducting or carrying on of a place "where liquors are vended as a business." *Ex parte Mansfield*, 106 Cal. 405, 39 Pac. 775. As learned counsel for plaintiff suggests, in reply to the claim that any other construction would include a host serving liquors in his own house, the words indicate "a dealing or trafficking in liquors." As we read the various provisions, so far as retail liquor

dealers are concerned, they simply impose the tax on the business of selling and disposing of, at a fixed place of business, spirituous, vinous, malt, or mixed intoxicating liquors, in less quantities than 5 gallons; and the words "sold, served, or given away" include only such disposition of liquors as may properly be held to be made in the conducting of a business. This we think to be the fair and reasonable construction of the language used, especially when the whole ordinance is considered together, and we see nothing in the charter provisions or other ordinances of the city that are before us under stipulation of the parties, to indicate otherwise. See *Ex parte Seube*, 115 Cal. 629, 632, 47 Pac. 596; *Ex parte Mansfield*, 106 Cal. 404, 39 Pac. 775.

The question, then, as it appears to us, is whether a bona fide social club, engaged in transactions of the character hereinbefore detailed, with the sole object, as we look at it, of distributing articles, provided for the use of the members, in such a way "that there shall not be unequal contributions to the treasury which purchases them" (*Klein v. Livingston Club*, 177 Pa. 231, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 608), is to be held to be within the purview of a law or ordinance which simply imposes a license tax upon the business of selling liquors, and does not contain other provisions that show a clear intent to include them. Upon this question, we are satisfied that the great weight of authority is in favor of the proposition that they are not so included. The matter is exhaustively discussed by Mr. Black in his valuable work on *Intoxicating Liquors*, and he sums up as follows: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic,—then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way, and to the same extent, that the supplying of diners or daily papers might be,—then it cannot be considered as within either the pur-

pose or letter of the law." *Black, Intoxicating Liquors*, § 142.

The term "business," as used in a law imposing a license tax on business, trades, professions, and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood. A bona fide social club, if permitted by its articles of incorporation or association, may, of course, so engage in business, either by transactions with its members, or members of the public; as, for instance, by letting for a consideration rooms not used for the ordinary purposes of the clubhouse, or by engaging in some outside enterprise for the purpose of realizing profits to be devoted to club purposes; and, so far as it does such things, even incidentally for the purpose of realizing profit to be devoted solely to club purposes, it would be engaged in business in the commercial sense as fully as any person could be. But, in its transactions with its members, in the carrying on of the clubhouse, looking simply to the giving to them such privileges in the property devoted to bona fide club purposes as they are all, in common, entitled to, under the constitution and rules of the club, it is not engaged in business at all in the commercial or trade sense, as ordinarily understood. Such property is beneficially owned in common by the members in equal shares, and is devoted to their common use. So far as such property can be actually used equally by all the members, as in the case of reading rooms, sitting rooms, etc., no special charge is made against any member for such use. All may actually use such things in common. But when, in the exercise of the common privilege, one member appropriates to his exclusive use food or drink, or a room for sleeping purposes,—things that cannot be actually used in common by all the members,—he pays therefor simply because it is the only fair and equitable way of apportioning the expense of the club among the members. As stated in *Klein v. Livingston Club*, supra: "The purpose of the whole system is to distribute the advantages, comforts, and luxuries of the club among the members so that there shall not be unequal contributions to the treasury which purchases them."

The following cases fully support the doctrine that transactions of the character here detailed do not bring a bona fide social club within the purview of a law or ordinance simply imposing a license tax upon the business of liquor selling: *Manassas Club v. Mobile*, 121 Ala. 561, 25 So. 628; *State v. Austin Club*, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; *Koenig v. State*, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; *Tennessee Club v. Dwyer*, 11 Lea, 20 L.R.A. (N.S.)

452, 47 Am. Rep. 298; *Piedmont Club v. Com.* 87 Va. 540, 12 S. E. 963; *Barden v. Montana Club*, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 25 Pac. 1042; *People v. Adelphi Club*, 149 N. Y. 5, 15, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; *Klein v. Livingston Club*, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606; *State v. Boston Club*, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895; *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604; *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 23 Am. St. Rep. 826, 14 S. E. 290; *Graff v. Evans*, L. R. 8 Q. B. Div. 373, involving the Grosvenor Club; *Davies v. Burnett* [1902] 1 K. B. 666, involving the North Wolverhampton Workingmen's Club. It is perhaps true, as claimed by learned counsel for plaintiff, that some of these cases proceed upon the theory that such a transaction in no sense constitutes a sale, which theory we are inclined to believe is not entirely correct. But, as we read most of the cases which, it is said, approve the doctrine of no sale, the real point decided is that, while such transactions may technically constitute sales, they do not constitute sales within the meaning of the act under consideration,—are not sales of the commercial character contemplated by such act. If we were of the opinion that the ordinance before us should be construed as imposing a tax upon any and all sales, as distinguished from such sales as are made in the carrying on of the business of selling liquor in the ordinary sense, it is doubtful whether we could assent to the doctrine of some of the cases, that it was not intended to include transactions of the character under consideration. But, as we have said, we do not think that the ordinance before us means this, under any fair and reasonable construction. In some of these cases cited, as in *People v. Adelphi Club*, supra,—a case where the law apparently imposed a tax on the sale,—it is true the court, in part, based its conclusion upon another provision, or provisions, which it thought indicated that sales of this character were not contemplated; but we think that such provisions no more clearly indicated such intent than does the ordinance before us. In *State v. Boston Club*, supra, which holds that it is not the intention of such an ordinance to require a license of a social club, as being in business or in trade, it was also held that, by reason of special provisions as to liquor dealing, in some respects analogous to those in the ordinance before us, viewed in the light of the history of legislation in that state upon the subject, such transactions were intended to be included. The

same conclusion has been reached by some other courts, in cases cited by learned counsel for plaintiff, upon special provisions as to liquor selling, which it was held showed such intention. We shall not attempt to analyze or distinguish these cases. The question is one which must be determined upon a construction of the ordinances and laws applicable to Los Angeles, in the light of the history of our own legislation on the subject.

Many of the cases relied on by learned counsel for plaintiff are cases involving the proper construction of prohibitory or local option laws, as applied to transactions of the character under discussion. As said by counsel for defendant, "such laws are not confined, either in terms or in purpose, to the business of selling liquors, but extend generally to all dealing therein," and they must be construed from a very different standpoint. Some of the other cases so cited are those where the alleged club is a mere form, adopted for the purpose of cloaking the operations of what was really a retail liquor business. In such cases the mere form will, of course, be disregarded, and the law held applicable. In other cases, such as *Army & Navy Club v. District of Columbia*, 8 App. D. C. 544, and *Kentucky Club v. Louisville*, 92 Ky. 309, 17 S. W. 743, there were special provisions in terms as to "clubs," "clubhouses," and "clubrooms," which it was thought specially showed the intent to include them. Eliminating these cases, it is true that there still remain cases that are in conflict with our conclusion upon the general proposition involved. Of these, *People v. Soule*, 74 Mich. 250, 2 L.R.A. 494, 41 N. W. 908—a practically analogous and well-considered case—is probably the most conspicuous example. It appears to us that the opinion in that case lays too much stress upon the fact that such transactions possess all the elements of legal sales, and apparently regards that fact as determinative of the controversy. We have already referred to *State v. Boston Club*, supra. The cases of *South Shore Country Club v. People*, 228 Ill. 75, 12 L.R.A. (N.S.) 519, 119 Am. St. Rep. 417, 81 N. E. 805, 10 A. & E. Ann. Cas. 383, and *State, Newark, Prosecutor, v. Essex Club*, 53 N. J. L. 99, 20 Atl. 769, were cases where the tax was apparently imposed upon the sales; but the reasoning of the opinions probably places the cases among those opposed to the view heretofore quoted from *Black on Intoxicating Liquors*. The same is true of *State v. Shumate*, 44 W. Va. 490, 29 S. E. 1001. The decisions of the Federal courts (*United States v. Wittig*, 2 Low. Dec. 466, Fed. Cas. No. 16748; *United States v. Alexis Club* [D. C.] 98 Fed. 20 L.R.A. (N.S.)

725) are based upon a construction of the provisions of the internal revenue law, which, for the purposes of that act, must probably now be considered as settled for all time, that renders all persons selling liquor liable, whether or not they can properly be regarded as being engaged in the business of selling. It was expressly recognized in both the cases cited that there would be great doubt if the question was merely whether the club was "dealing" in liquors, or "engaged in the business of selling," within the common meaning of those words. The statute there provided: "Special taxes are imposed as follows: . . . Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors." U. S. Rev. Stat. § 3244, U. S. Comp. Stat. 1901, p. 2096. Section 3242, U. S. Comp. Stat. 1901, p. 2094, provided that "every person who carries on the business of a . . . retail liquor dealer . . . without having paid the special tax as required by law" shall be fined and imprisoned, etc. It will be observed, as stated by counsel for defendant, that while, in the ordinance before us, the limitation to persons "carrying on the business" is an integral part of the very provision which imposes the tax in the United States statute, the tax was imposed upon "retail dealers in liquor," and these were in terms defined in such a way, the courts held, as to exclude the idea of carrying on business. The construction given that it included all sales, without regard to whether the person was engaged in the business of selling in the ordinary sense, is based, in part, upon the rule declared in the *Wittig Case*, as follows: "This is a revenue law, and the decisions of the Supreme Court require us to construe it liberally in favor of the revenue, to prevent evasions." But, as said before, we shall not attempt to reconcile the cases. A full examination but demonstrates that there is a conflict in the views of the courts upon both the propositions we have discussed: viz., the proper construction of such an ordinance as the one before us, and, assuming the correctness of our construction, the question whether such transactions as we have detailed bring defendant within its operation. We believe our construction of the ordinance to be the only fair and reasonable construction of its various provisions; and, upon the proposition that a bona fide social club, engaged in transactions of the kind above set forth, is not engaged in the business of selling liquors, within the meaning of an ordinance simply

imposing a tax upon such business, we are satisfied that the great weight of authority is in accord with our conclusion.

Upon the question of the proper construction of the ordinance, it may be added that it appears to us to be a material fact, in determining the intent of the council in adopting the ordinance of January, 1908, that although substantially similar ordinances have been in force during all of defendant's existence as a club, defendant has never been required to have a license from the city. The brief of *amici curiæ*, in support of plaintiff's position, in fact states that the license ordinances have never been enforced against clubs of this kind, but the record available to us contains no information on this subject except as to defendant. But this fact as to defendant is alleged. As to defendant, we have an administrative construction of many years of similar ordinances, in accord with views announced by many courts, upon a question which all must concede was at least debatable,—a construction as to which the city council could not be deemed ignorant when it enacted the ordinance before us. If it had been intended by that body, in enacting the ordinance of January, 1908, that a license tax should be imposed on a bona fide social club so engaged, it is reasonable to assume that it would have made some change in the law, as it previously existed, to clearly and unmistakably show that it was intended to include it. See *People v. Adelphi Club* and *Klein v. Livingston Club*, *supra*. If it be deemed proper by the city of Los Angeles that bona fide social clubs, engaged in the transactions of the kind here involved, should pay a license tax, or be in any way subjected to the operation of reasonable regulations relative to the sale or disposition of intoxicating liquor, it will be a very simple matter for it to so provide by the use of language that would clearly show such an intent. While the question is not entirely free from doubt, we do not believe that any such intent is shown by the existing laws of the city.

The judgment is reversed, and the cause remanded, with directions to the lower court to sustain the demurrer of defendant, with leave to plaintiff to amend his complaint, if he so desires.

We concur: Sloss, J.; Melvin, J.; Henshaw, J.

Shaw, J., by reason of being a member of the defendant club, deeming himself disqualified, does not participate herein. Lorgan, J., by reason of sickness, does not participate herein.
20 L.R.A. (N.S.)

Beatty, Ch. J., concurring:

I concur in the judgment, but not with that assured conviction of the validity of my conclusion which, in a matter so important, I should wish to feel. If the cause were to be decided with sole reference to the terms of the ordinance, unaffected by any extrinsic circumstance, it would be impossible for me to say, in view of the admitted facts, that the defendant is not carrying on the business of a retail liquor dealer. The numerous decisions cited by its counsel in support of the opposite view are either distinguishable on what appear to me substantial grounds, or, where strictly in point, rest upon reasoning which, to my mind, is not satisfactory. If we had been called upon, shortly after its adoption, to give a construction to the ordinance of 1903 (of which the existing ordinance is, in every material particular, a mere re-enactment), I should not have entertained a doubt that the California Club was clearly within its terms.

But it is conceded that, during the whole period of five years between the adoption of the ordinance of 1903 and its re-enactment in 1908, no demand was ever made upon the club for the payment of a license tax; and it seems to be an unavoidable inference from this circumstance that it was the common understanding of the municipal authorities that the course of dealing between the club and its members and guests was not the carrying on of the business of retailing liquors. It was, in other words, a contemporaneous construction of the ordinance by those who enacted it, and the fact that it was re-enacted in the same terms seems to justify the conclusion that the intention of its framers was that it should have no wider operation than that to which it had been so long restricted.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. EDWARD T. YOUNG, Attorney General, Appt.,

v.

MINNESOTA CLUB, Respt.

(106 Minn. 515, 119 N. W. 494.)

Intoxicating Liquors — social clubs — license — "person."

1. A social organization, or club, incorporated under the laws of this state, is a "person," within the meaning of § 1510, Rev. Laws, 1905.

Headnotes by LEWIS, J.

Note. — See note to preceding case.

Same — necessity of license.

2. The distribution of intoxicating liquors in less quantities than 5 gallons by such a club to its members, for a consideration, though without profit, constitutes a "sale" within the meaning of that section, and is prohibited, unless protected by license as provided by law.

(Elliott and Jaggard, JJ., dissent.)

(January 2, 1909.)

APPEAL by relator from a judgment of the District Court for Ramsey County in defendant's favor in an action brought to determine defendant's right to retail intoxicating liquors without a license. Reversed.

The facts are stated in the opinion.

Messrs. Edward T. Young, Attorney General and C. Louis Weeks, for appellant:

The transaction was a sale.

State v. Lockyear, 95 N. C. 633, 59 Am. Dec. 287; People ex rel. Stevenson v. Law & Order Club, 203 Ill. 127, 62 L.R.A. 884, 67 N. E. 855; State, Newark, Prosecutor, v. Essex Club, 53 N. J. L. 99, 20 Atl. 769.

The statutes required the club to take out a license.

South Shore Country Club v. People, 228 Ill. 75, 12 L.R.A. (N.S.) 519, 119 Am. St. Rep. 417, 81 N. E. 805, 10 A. & E. Ann. Cas. 383; State, Newark, Prosecutor, v. Essex Club, supra; People v. Soule, 74 Mich. 250, 2 L.R.A. 494, 41 N. W. 908; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 186, 12 So. 895; Martin v. State, 59 Ala. 34; Mohrman v. State, 105 Ga. 716, 43 L.R.A. 398, 70 Am. St. Rep. 81, 32 S. E. 143; State v. Easton Social, Literary, & Musical Club, 73 Md. 97, 10 L.R.A. 64, 20 Atl. 783; State v. Neis, 108 N. C. 787, 12 L.R.A. 412, 13 S. E. 225; State v. Lockyear and People ex rel. Stevenson v. Law & Order Club, supra.

Messrs. C. D. O'Brien and W. H. Lightner, for respondent:

The statute is intended to regulate the retail business or traffic in intoxicating liquors conducted for a profit, and is not applicable to a bona fide social club.

People v. Bird, 138 Mich. 31, 67 L.R.A. 424, 110 Am. St. Rep. 299, 100 N. W. 1003, 4 A. & E. Ann. Cas. 1062; State v. Orth, 38 Minn. 150, 36 N. W. 103; State ex rel. Patterson v. Bates, 96 Minn. 110, 113 Am. St. Rep. 612, 104 N. W. 709; People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606; Com. v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340; Com. v. Ewig, 145 Mass. 119, 13 N. E. 365; Seim v. State, 55 Md. 566, 39 Am. Rep. 419; 20 L.R.A. (N.S.)

State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604; State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290; Piedmont Club v. Com. 87 Va. 541, 12 S. E. 963; Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298; Barden v. Montana Club, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 25 Pac. 1042; Koenig v. State, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; State v. Austin Club, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; Manassas Club v. Mobile, 121 Ala. 561, 25 So. 628; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895; Black, Intoxicating Liquors, § 142; 17 Am. & Eng. Enc. Law. 2d ed. p. 361; Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; Donald v. Scott, 76 Fed. 554; Hardy v. State, 48 Tex. Crim. Rep. 298, 87 S. W. 1038; Graff v. Evans, L. R. 8 Q. B. Div. 373; Com. v. Smith, 102 Mass. 144.

Mr. Jared How also for respondent.

Lewis, J., delivered the opinion of the court:

Does the serving of liquors to its members by the Minnesota Club, of St. Paul, subject the club to the necessity of obtaining a license, pursuant to the provisions of chapter 16, Rev. Laws 1905? The cause was argued upon the following agreed statement of facts:

"The Minnesota Club is a corporation organized solely for social purposes, and not for pecuniary profit, under the statutes of the state applicable to such organizations. It was created and has existed ever since 1884. It maintains a clubhouse building, which it owns. The articles of incorporation, constitution, and by-laws of said club are hereby referred to for greater certainty, and may be used on presentation of the question herein involved by either party. Ever since its organization said corporation has maintained its clubhouse, and carried on therein a restaurant, and served its members with meals and wines and liquors upon their request. It always has and maintains certain rooms and sleeping apartments for the use of its members, and is conducted as a bona fide social club. Its membership consists of resident and non-resident members, each of whom is elected under the provisions touching membership found in the constitution and by-laws. No person not a member of such club can enter upon its premises, or be entertained therein, save that nonresidents of Ramsey county may be admitted to the privileges of said club for a period not exceeding ten days, upon a written invitation of a member in good standing and a written card issued to such visitor. During the period of

such visit, such visitor is entitled to all the privileges of the club, but the person introducing him is responsible for him. Residents of Ramsey county not members of the club may be entertained in one of the private dining-rooms of said club, at a dinner given by some member for not less than four persons, and such persons attending such dinner as such guests are not entitled to any of the privileges of the club whatever; nor may they enter upon any part of said club, except such private dining-room, and the entrance to and egress therefrom. Each member of said club, besides his initiation fees, pays annual dues; resident members, \$60 per annum, and nonresident members, \$30 per annum. The club transacts all its business in its corporate name, through regularly chosen officers. It furnishes its members and their guests with meals to order, also with cigars, or any kind of intoxicating liquor to order, but only serves liquor within the club by the drink, and therefore in quantities of less than 5 gallons. The meals, cigars, or liquors so served are taken from the common stock of such articles owned by the club, and are charged to the member ordering the same, at such price as will reimburse the club for the cost of the article furnished and the expense of the service; the aim being to make the club self-sustaining, but not to make a profit on its gross business. Members are required to pay their accounts for meals, cigars, or liquors monthly. Up to this time, no license for the sale of liquor has been required of said club by the city of St. Paul, in which said club is situated; but said club has always paid the special tax imposed by the United States government for the sale of liquors."

The learned trial court was of opinion that the object of this class of legislation has always been to control the traffic in liquors as a business, and has no application to a purely private social club, where the dispensing of liquors is a mere incident to the main purpose of the organization. We believe this is the first time in the history of this state that the courts have been called upon to construe the statute with reference to such organizations, and the importance of the question demands that it be considered from the various points of view suggested at the argument. The Minnesota Club is a corporation duly created and existing under the laws of this state. It is a legal entity, and, within its corporate powers, transacts business in the commercial world and with its members with the same effect as any other corporation. As a corporation the club purchases liquors at wholesale, keeps them in stock, and, upon application, furnishes its members liquor

in quantities less than 5 gallons to be drunk upon the premises.' The trial court was of opinion that the drastic measures of the statute could not have been intended to apply to social clubs, for the reason that it would be detrimental to the purpose of such institutions, and subject them to such espionage and restrictions as to practically interfere with the main object of their existence.

From territorial times one continuing purpose runs through the legislative expression on this subject, and that is to prohibit absolutely the sale or dispensing of intoxicating liquors, less than a certain quantity, unless duly licensed. By chapter 8, p. 43, Laws 1849, the sale of intoxicating liquors without a license in quantities less than one quart was prohibited. This remained unchanged until 1858, when the amount was increased to 5 gallons, at which time the language of the statute was: "If any person or persons shall sell or barter any spirituous, vinous, or fermented or malt liquors, in less quantity or quantities than 5 gallons, without first having obtained license therefor," etc. Pub. Stat. 1849-1858, chap. 18, § 20. In the revision of 1866 (Gen. Stat. 1866, chap. 16, § 4) the prohibition was expressed as follows: "Whoever sells or barter any spirituous, vinous, fermented, or malt liquors in a less quantity than 5 gallons, without first having obtained license therefor," etc. The same provision was carried into the statutes of 1878 (Gen. Stat. 1878, chap. 16, § 4), and keepers of drug stores, dispensaries, apothecary shops, or other business houses in any manner dealing in spirituous, vinous, or malt liquors, for whatever purpose, were brought within the provisions of the law (§ 16). In 1866 (Laws 1866, chap. 40, p. 84) for the first time the provision prohibiting the sale of liquors at the State Capitol, and the hour for closing saloons, was introduced, and chapter 16, § 10, Gen. Stat. 1878, prohibited the sale to minors. In 1887, the license fee was regulated (Laws 1887, chap. 5, p. 40), and what is known as the "blind pig" law was enacted (Laws 1887, chap. 7, p. 44), and it was provided that pharmacists and druggists might dispense liquors, in good faith, for medicinal purposes, upon a written prescription of a reputable and duly licensed physician (Laws 1887, chap. 8, p. 45). By Laws 1889, chap. 21, p. 67, the sale of liquor in the vicinity of the State Fair Grounds was prohibited. Section 4, chap. 16, Gen. Stat. 1878, was carried into § 1993, Gen. Stat. 1894; but the revisers of 1905 condensed the various provisions, and § 1519, Rev. Laws 1905, is the statute now in force. It reads: "Any person who shall sell any intoxicating liquors in quantities

less than 5 gallons, or in any quantity to be drunk upon the premises, except as herein: after provided, is guilty of a misdemeanor," etc. Students in any educational institution in the state, intoxicated persons, habitual drunkards, spendthrifts, and improvident persons are all placed under the protection of the law. The line separating the retailing from the wholesaling of intoxication liquors is a certain quantity,—5 gallons,—and brewers and wholesalers are not required to take out a license so long as they do not sell at retail.

As a result of the evolution of public sentiment on this question, as voiced in the legislation above outlined, it is evident that the unrestrained sale of intoxication liquor has been regarded as an evil, and that the public good requires that it should be restrained. Absolute prohibition has not been adopted as the most effectual method, but prohibition to a certain extent is the principle now established as the most effective method of restraint. Up to the present time the people have been satisfied to apply the principle of prohibition to a limited extent; viz. (1) that no liquor in any quantity, under any conditions whatever, shall be sold to certain persons, and none shall be sold in any quantity to any person within certain specified districts; (2) that no liquor shall be sold in quantities less than 5 gallons, or in any quantity, to be drunk upon the premises, unless licensed according to law. "Any person," as used in the statute, includes all persons and parties, unless excepted. There are no express exceptions in favor of social clubs, and, considering the history and purpose of the law, we are of opinion that no such exception is implied.

There are many decisions from the different state courts bearing upon the subject, and in several instances the statutes differ in some essential feature. In one class of cases the question turned upon whether a commercial club was a public place, within the meaning of a statute prohibiting unlawful games of cards in public places. *Grant v. State*, 33 Tex. Crim. Rep. 527, 27 S. W. 127. The court was of opinion that the commercial club under consideration was not open to the public generally, and hence was not a public place, within the meaning of the statute. *Koenig v. State*, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835, is to the same effect. There the statute made it a misdemeanor for any person to play at any game of cards at any house for retailing spirituous liquors, storehouse, tavern, inn, or any other public house, or in any street, highway, or other public place. It was held that a clubroom of a private incorporated social club, in 20 L.R.A. (N.S.)

which liquors were sold to members only, was not a public house for retailing spirituous liquors, within the meaning of the statute. Again, in *State v. Austin Club*, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113, a license tax was imposed upon persons engaged or engaging in the business of selling spirituous liquors; and it was held that the law did not apply to a social club where liquors were sold to its members only; and the decision is based upon the ground that the tax was not intended to apply to any one not engaged in the selling of spirituous liquors as a business. The club was not engaged in the retail business, and hence it was not within the act. To the same effect is *Manassas Club v. Mobile*, 121 Ala. 561, 25 So. 628, where the statute required a license tax to be paid by persons or corporations trading or carrying on any business, trade, or profession, and it was decided that the club was not within the act, upon the ground that the business intended to be taxed was one carried on for a livelihood or profit. However, in *Martin v. State*, 59 Ala. 34, it was held that a commercial club was engaged in retailing liquors, within the meaning of the statute which prohibited the sale of intoxicating liquors without a license; and the court called attention to the difference between that statute, which was aimed at any sale, and statutes with reference to the business of retailing as such.

A case often referred to is that of *Piedmont Club v. Com.* 87 Va. 540, 12 S. E. 963, where it was held that liquors kept by a club in its rooms, and served only to its members and their invited guests, without profit, was not a sale of intoxicating liquors within the meaning of an act which provided that no person, corporation, company, firm, partnership, or association should engage in the business of selling liquors, etc., without obtaining a license. The same view was taken in *Barden v. Montana Club*, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 25 Pac. 1042. In *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, the court was of opinion that the disposing of beer on Sunday to members of a social club was not in violation of a statute which prohibited the sale of intoxicating liquors on the Sabbath; but in the later case of *State v. Easton Social, Literary, & Musical Club*, 73 Md. 97, 10 L.R.A. 64, 20 Atl. 783, it was distinctly held that a social club was within the meaning of the statute, which prohibited any person from selling spirituous liquors in certain districts in a certain county, and the court referred to *Seim v. State*, supra, as follows: "In that case the party was indicted for selling and disposing of beer on Sunday; and it was supposed that

because the license laws had never been construed to apply to social clubs, that therefore the law restraining the sale and disposition of liquor on Sunday was not intended to apply to them. But no such reasoning can apply in this case. Here the law is an unqualified prohibition to everyone within the districts mentioned; and there can be no pretense that social clubs, such as the defendants in this case, were intended to be exempted from the operation of the law."

The case of *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604, was decided upon the ground that a social club was not a "person," within the meaning of the dramshop act, to take out a license as a dramshop keeper. The decision seems to have been based upon the peculiar wording of the law. A dramshop is not a place where liquor is sold by a club incidentally to its members. A dramshop is a place where a party is engaged in the sale of intoxicating liquors as a business. A similar case is *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290. The statute prohibited the sale of intoxicating liquors, except as the same might be licensed by incorporated cities, towns, and villages, and permitted such authorities to grant licenses at retail, inside incorporated limits, to keepers of drinking saloons and eating houses apart from taverns, and required all such persons to expose their license to public view in the chief place of making sales, and that all such sales should be in a room fronting the public street, without any screen, curtain, or other device for preventing the passing public from fully viewing what may be transpiring within. The court was of opinion that social clubs were not within the scope of the statute, because they were not organized for the purpose of engaging in the business of dispensing liquors for profit.

As we understand the case of *State v. Boston Club*, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895, it was decided upon the same general ground. The statute construed in *Klein v. Livingston Club*, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606, reads as follows: That "it shall be unlawful to keep or maintain any house, room or place, hotel, inn or tavern, where any vinous, spirituous, malt or brewed liquors, or any admixture thereof, are sold by retail, except a license therefor shall have been previously obtained as hereinafter provided." [1 *Pepper & L. Dig.* 1894, p. 2700. § 1] It was held that, where the steward of a social club was authorized to purchase and distribute intoxicating liquors to its members without profit, this did not con-

stitute a sale within the meaning of the act. The New York and Massachusetts courts have passed upon statutes similar to our own, and came to conclusions directly adverse to the view we entertain. The leading New York case is *People v. Adelphi Club*, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410, where the statute under consideration provided that any person who should sell intoxicating liquors in less quantity than 5 gallons, to be drunk or used upon the premises, without a license, should be guilty of a misdemeanor. The court squarely decided that the sale of liquors by the club to one of its members was not a sale within the meaning of the act. In Massachusetts the statute read that no person should sell, or expose or keep for sale, spirituous or intoxicating liquors, except as authorized by law; and in *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340, it was decided that incorporated social clubs were not within the statute. This ruling was adhered to in *Com. v. Ewig*, 145 Mass. 119, 13 N. E. 365, where the only question for trial was the good faith of the club.

In the following cases the statutes involved did not materially differ from our own; and the position was distinctly taken that clubs were within the statutes, and that the distribution of liquor by a club to its members constituted a sale. In *State, Newark, Prosecutor, v. Essex Club*, 53 N. J. L. 99, 20 Atl. 769, the statute prohibited the sale of spirituous liquors in quantities not less than 5 gallons at any time, at any place within the city of Newark, without having a license. The Essex Club was incorporated under the laws of the state, and liquors were kept and furnished to members by the steward upon order therefor. Settlements were made at the end of each month, and no one but a member paid for liquors. There was no intention to make any profit, and the club was conducted in good faith, not intending to violate the liquor laws. It was held that the liquor belonged to the club, and that, when furnished to a member to be drunk upon the premises, a sale was effected within the meaning of the law. A social club incorporated under the laws of the state of Michigan (*Laws 1887*, p. 446, No. 313, § 2) is within the scope of the liquor laws, which define "retail dealers" as follows: "Retail dealers of spirituous or intoxicating liquors, and brewed, malt, and fermented liquors, shall be held and deemed to include all persons who sell any of such liquors by the drink, and in quantities of 3 gallons or less, or 1 dozen quart bottles or less, at any one time, to any person or persons." *People v. Soule*, 74 Mich. 250, 2 L.R.A. 494, 41 N. W. 903.

The supreme court of North Carolina, in *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287, held that the furnishing of liquor to the members of a duly incorporated club by its steward, without profit, constituted a sale of such liquor. To the same effect is *State v. Neis*, 108 N. C. 787, 12 L.R.A. 412, 13 S. E. 225. In Georgia the statute provided a penalty for keeping open a tippling house on the Sabbath day, and in *Mohrman v. State*, 105 Ga. 709, 43 L.R.A. 398, 70 Am. St. Rep. 74, 32 S. E. 143, the supreme court held that an incorporated social club was subject to the provisions of the act. In Alabama the statute prohibited the keeping open of a barroom or other place for the sale of liquors on Sunday, and the supreme court of that state in *Beauvoir Club v. State*, 148 Ala. 643, 121 Am. St. Rep. 82, 42 So. 1040, held that an incorporated private social club was within the purview of the act. The Maryland Club, a duly incorporated social club, was held to be subject to the penalty imposed by statute for selling liquors to its members on the Sabbath day. *State v. Maryland Club*, 105 Md. 585, 66 Atl. 667. In South Dakota the statute required every person engaged in selling liquors to annually pay a certain sum for license; and the court held that an incorporated commercial club was subject to the provisions of the act; that the club was the owner of the liquor dispensed to its members; and that the method of distribution by means of checks, upon which settlement was made from time to time, constituted a sale, although the business was conducted without profit. *State v. Mudie* (S. D.) 115 N. W. 107. The supreme court of Illinois has also passed upon this question, and held that a similar arrangement for the distribution of liquor among the members of a duly incorporated social club constitutes a sale. *People ex rel. Stevenson v. Law & Order Club*, 203 Ill. 127, 62 L.R.A. 884, 67 N. E. 855. To the same effect is *South Shore Country Club v. People*, 228 Ill. 75, 12 L.R.A.(N.S.) 519, 119 Am. St. Rep. 417, 81 N. E. 805, 10 A. & E. Ann. Cas. 383.

As we understand the Pennsylvania, New York, and Massachusetts decisions, they follow the principle first announced in the English case of *Graff v. Evans*, L. R. 8 Q. B. Div. 373, decided in 1882. From the meager report of the facts in that case it does not appear whether the Grosvenor Club was an incorporated organization or a partnership; but the court took the position that the liquor distributed by the club to its members did not belong to the club as a legal entity, but was the property of the members of the association in common, and hence, when the manager or steward deliv-

ered the liquor to one of the members, it did not constitute a sale, for the reason that a party cannot be charged with selling to himself property which he already owns. In a later English case, *Newell v. Hemingway*, 58 L. J. Mag. Cas. N. S. 46, the club was a limited company organized for the purpose of providing a clubhouse, hotel, and other conveniences for the use of the club. *Newell*, not a member, furnished liquors to the members of the club, for which he was paid. Lord Coleridge, Ch. J., was of opinion that liquors constituted a part of the refreshments, one of the purposes for which the club was organized, and that *Newell* was merely acting as the agent or representative of the directors in distributing the liquor, and that such distribution did not constitute a sale by him. *Manisty, J.*, concurred, upon the ground that the liquors belonged to the members of the club, and that the distribution thereof among the members, by a designated party, did not constitute a sale by the manager of the club to the members. In a still more recent case—*Davies v. Burnett* [1902] 1 K. B. 666—an attempt was made to hold a waiter of a working-men's club criminally liable for selling liquors to the members. The court followed *Graff v. Evans*, supra, and assumed that the liquor was owned in common by the members of the club, and the particular question under discussion was whether the waiter was entitled to furnish liquor to one of the members, through the agency of his wife, to be taken from the premises; and the court held that he was not liable for so doing. In the Pennsylvania, New York, and Massachusetts cases, the clubs were certain corporations, legally constituted under the state laws; and we cannot accept the conclusion that, under such circumstances, the liquor did not belong to the club, but was owned by the members in common. In *People v. Adelphi Club*, supra, it was stated that, while the property and supplies were technically owned by the club, yet each member was in equity an equal owner in common. We fail to see the force of this argument. If such a corporation is authorized to purchase and own the property necessary to carry on its business, the title thereto vests in the corporation to no less an extent than does title to property owned by any corporation engaged in any line of business.

It will thus be seen that the cases relied upon by respondent either follow the English rule, that the distribution of intoxicating liquors to club members does not constitute a sale, for the reason that the members are the joint owners of the property and are merely distributing to themselves property which they already own, or are

based upon peculiar statutes which fairly indicate that the legislature only intended to make the license law apply to the retail of intoxicating liquors, where it was carried on as a business for profit as a means of livelihood. Whatever may be the proper application of the statute to voluntary associations, where property is held in common, the English rule has no application where the organization is a legally constituted corporation. The statute makes no express exception in favor of such corporations, and, considering the purpose sought to be accomplished in restraining the distribution of intoxicating liquors, as expressed in the plain terms of our statute, we fail to discover any implied exceptions.

Reversed.

Elliott, J., dissenting:

Instead of proceeding as in ordinary cases and charging a violation of the criminal law, the parties stipulated the facts, as authorized in civil cases by § 4286, Rev. Laws 1905. The proceeding, then, can be sustained only on the theory that the club is charged with maintaining an unlicensed drinking place, which may be abated as a nuisance by injunction or other legal proceedings. It follows that the judgment about to be entered determines that the Minnesota Club is conducting an unlicensed drinking place which is a public nuisance. The statute provides that every person who directly or indirectly, by himself or by combining with others, shall keep an unlicensed drinking place, is guilty of a misdemeanor, and shall be punished by a fine of not less than \$50, or imprisonment in the county jail for not less than thirty days. The Minnesota Club was authorized under the authority of the state for the purpose stated in its charter, and for twenty-four years it, like other social clubs of the same character, has existed without any one discovering that it was a public nuisance and all its members criminals. I feel very certain that the liquor license laws were never intended to apply to such a club. If the practical construction, which for more than a generation has been placed on the statute, is wrong, it is a very easy matter for the legislature so to declare.

The opinion of the court rests on a very narrow and literal construction of the language of a single section of a statute, which itself constitutes but a part of a body of legislation designed to regulate the retail liquor business. The United States government, for the purpose of raising revenue, levies a tax on all sales, and leaves the matter of the regulation thereof to the state. Minnesota has not made the drinking of liquor a crime. It does not even

require a license from those who desire to sell intoxicating liquor at wholesale. Now, the sale of a pint of whisky can be no more inherently contrary to public policy than is the sale of five gallons of the same article. The reasons which justify freedom in one case and stringent regulation in the other are found in the different conditions under which the sales are made. Experience has shown that the unregulated sale of liquor at retail leads to the development of undesirable places, which become the resorts of evil-doers and centers of disorder. The state may, by virtue of its general police power, prohibit the traffic entirely, or attempt to control the evil by merely restricting and regulating it. In view of the divided sentiment of the community as to the extent of the evils which result from the traffic, it has been the policy of this state to allow the business to be carried on under carefully defined restrictions as to persons, places, times, and facilities for inspection and control.

Without proper police supervision, the retail liquor traffic would be intolerable. To be endurable, it must be conducted under the eyes of the authorities; and such supervision necessitates extra expense and trouble, the burden of which should be borne by the traffic instead of the general public. In order to cover this expense, those who engage in the business are required to secure a license and pay, for the privilege, an amount which will fairly reimburse the public for the extra expense and trouble incident to the regulation. From the concessions made in the record presented in this case, it is apparent that what the state is here seeking is revenue, and not regulation. But the Minnesota statute requiring a license for certain kinds of sales is a police, and not a tax, measure. Its purpose is regulation, not revenue. *Claussen v. Luverne*, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643; *Leavitt v. Morris*, 105 Minn. 170, 17 L.R.A.(N.S.) 984, 117 N. W. 393; *Rochester v. Upman*, 19 Minn. 108, Gil. 78; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *State v. Deusting*, 33 Minn. 102, 53 Am. Rep. 12, 22 N. W. 442; *State v. Funk*, 27 Minn. 318, 7 N. W. 359; *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N. W. 269. The license fee is imposed, not as a tax, but as an incident of the police power. *Rochester v. Upman*, *supra*. The justification of the exercise of the police power is found in the necessity for the regulation of the retail liquor business—not in the mere fact that A, sells to B, a gill, instead of 5 gallons, of whisky.

A study of the Minnesota legislation upon this matter makes it perfectly clear that the purpose was to frame a body of laws

which should control and regulate the retail liquor traffic when conducted with a view to profit. That idea has always been in the mind of the court. As said in *State v. Orth*, 38 Minn. 150, 36 N. W. 103: "All the provisions of the laws in regard to procuring the license, the contents of the license, and the regulating the business, point unequivocally to the retail trade, . . . and, taking the laws as a whole, we conclude the legislature did not intend to depart from the former policy of the state, and require licenses for any but the retail trade." Similar language was used in *State ex rel. Krebs v. Jones*, 88 Minn. 27, 92 N. W. 468, and *State ex rel. Patterson v. Bates*, 96 Minn. 110, 113 Am. St. Rep. 612, 104 N. W. 709. Chapter 16, Rev. Laws. 1905, when read as a whole, cannot be considered in any other light. It contemplates that there are certain persons who desire to engage in the business of selling intoxicating liquors at retail. It opens with the general statement, that "any person who shall sell any intoxicating liquor in quantities less than 5 gallons, or in any quantity to be drunk on the premises, except as hereinafter provided, is guilty of a misdemeanor." The words "sell" and "sale" are declared to include all barter, gifts, and all means of furnishing liquor in violation or evasion of the law. The general prohibition must be read in the light of what follows in the same statute. A pharmacist may sell intoxicants on the prescription of a physician, and any other person who is duly licensed may sell at certain times and places to certain persons only. Certain persons only may be licensed. The conditions show that the legislature had in mind the selling of liquor at retail. Otherwise, why so carefully provide for an investigation into the character of the licensee? Why limit the right of the licensee to sell at any place other than that referred to in the license?

The applicant must file with the proper officer a written application, stating the place for which a license is desired and the date from which it is to run. The officer must then give two weeks' published notice of the application, specifying the applicant, a description of the room for which the license is desired, and a time for a hearing on the question whether the application shall be granted. Application for what? For the privilege of selling a pint of liquor? Certainly not. The applicant must file a bond in the sum of \$2,000, conditioned that he will not do certain specified things, and generally observe the law. This contemplates that the applicant is going into the retail liquor business, and that the public is interested in the character of the applicant, as well as the place where the busi-

ness is to be carried on. The character of the applicant is supposed to be of vital importance, and this can be so only on the theory that he is to be licensed to carry on a business. Hence it is provided that ". . . no license shall be granted to any person of known bad character, to the keeper of any house of prostitution, or place frequented by prostitutes or other disorderly persons, to the keeper of any gambling house or place where," etc. The places where sales may not be made are carefully defined, and the times when sales may be made are carefully limited. Sales may not be made on Sunday, or on special or general election days, or on any day between 11 o'clock P. M. and 5 o'clock A. M. The persons to whom sales are not to be made are also enumerated: "Any person duly licensed by the county board, or by the proper authorities of the municipality for which such license is issued, may sell such liquors in the room named in the license, . . . in the manner and to the persons allowed by law, but not otherwise." The form of the license is prescribed, in order that the holder may be able to claim no rights free from the restrictions imposed by the statute. Every such license shall be for one year from its date, unless sooner annulled, shall specify the room in which sales are allowed, and shall state that the person named is authorized to sell such liquor only in such place and at the time, in the manner, and to the persons allowed by law. That the legislature was thinking of saloons and the retail liquor business appears from the provision that, in cities of the first class, "not more than five such licenses for places on one side of any block within the patrol limits of such city, and fronting on such limits, shall be granted."

The Minnesota Club is a corporation, and cannot secure a license in its corporate name. A corporation cannot legally take a license in the name of an agent or employee. It follows that the club cannot legally secure a license, and must cease to supply liquor to its members. I can find no authority in the statute for granting a license to sell intoxicating liquors in private. The statute contemplated public sales at a designated place, which must at all times be open to police visitation. There can be no privacy in a saloon. The ordinance of the municipality with reference to hours of closing, arrangement of rooms, screens, etc., applies to all public drinking places. The very purpose of such legislation is to prohibit privacy and retirement. If social clubs are obliged to secure liquor licenses, they must comply with the statutes and ordinances enacted for the government and regulation of the holders of such licenses. They become

public drinking places, and subject to the laws regulating the same. All this, it is true, is of no consequence, if the legislature intended that such clubs should not serve liquor to members or their guests; but, when seeking the legislative intention, it is proper to consider the consequences of any particular construction. The same legislature which enacted the license laws also authorized the incorporation of such clubs, and if the construction contended for by the state would produce results which are destructive of the clubs, it is fair to conclude that such a construction was not contemplated by the legislature.

The great weight of authority is contrary to the opinion expressed in the majority opinion. It is the established law in England that the distribution of liquors to club members does not constitute a sale within the meaning of the license laws. It is useless to try to explain the cases away by fine distinctions between the statutes. In *Graff v. Evans* (1882) L. R. 8 Q. B. Div. 373, *Graff*, the steward of the Grosvenor Club, was indicted for selling liquor to a member of the club under a statute (License Act 1872 [Stat. 35 & 36 Vict. chap. 94] § 3) which provided that "no person shall sell, expose for sale, by retail, any intoxicating liquor without being duly licensed to sell the same." In holding that the transaction was not within the statute, Mr. Justice Field says: "The section must be construed by looking at the language used, and taking a large view of the . . . [language used]. The legislature has come to the conclusion that it is inadvisable that intoxicating liquors should be sold anywhere without a license. The enactment is limited to 'sales' of intoxicating liquors, and only seems aimed at sales by retail dealers, because the wholesale trade is not touched." In *Newell v. Hemingway*, 58 L. J. Q. B. N. S. 171, the manager of a limited company, the shareholders of which constituted the membership of the club, was held not liable criminally under the same statute for selling liquor to the members. In *Davies v. Burnett* [1902] 1 K. B. 666, it was held that "where intoxicating liquor is sold by a servant of a bona fide workman's club, not licensed for the sale of intoxicating liquors, to the duly authorized agent of a member, for consumption by the member off the club premises, no offense is committed against § 3 of the licensing act 1872, and the seller cannot be convicted for selling intoxicating liquors by retail without a license."

The same conclusion was reached by the supreme judicial court of Massachusetts. The statute (Mass. Pub. Stat. 1882, chap. 100, § 1) contained the usual provision that

"no person shall sell, or expose or keep for sale, spirituous or intoxicating liquor, except as authorized by this chapter." In *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340, it was held that the steward of a bona fide social club could not be convicted for selling liquors without a license. Mr. Justice Field said: "It is well known that clubs exist which limit the number of the members, and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of the many conveniences which the members enjoy. . . . One inquiry always is whether the organization is bona fide a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the constitution and rules of the club, or whether either the form of a club has been adopted for other purpose, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it." *Com. v. Ewig*, 145 Mass. 119, 13 N. E. 365, was determined upon the question whether the club was a bona fide club, and not a mere device to cheat the government of a license fee.

In *People v. Adelphi Club*, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410, it was held that the furnishing of liquor to its members upon their written orders, at a price designed to cover the purchase price and disbursements of service, by a bona fide social club regularly organized under the statute for a legitimate purpose, to which the furnishing of liquor to its members is merely incidental, and having a limited and selected membership, does not constitute a sale within the meaning of the liquor license law. So in *Klein v. Livingston Club*, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606, it was held that an incorporated club, organized and conducted in good faith with a limited and selected membership, owning its property in common, formed for social purposes, to which the furnishing of liquor is merely incidental, may furnish liquor to its members without first procuring a license. The court quotes, with approval, the following statement from *Black on Intoxicating Liquors*, § 142: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide members with a convenient method of obtaining

a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book, or buying a ticket or chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common; and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be,—then it cannot be considered as within either the purpose or letter of the law."

The cases are reviewed in *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308. 26 L.R.A. 573, 28 S. W. 604, where it was held that a corporate club is not a "person," within the meaning of the statute regulating the sale of intoxicating liquors, and that the sale of liquor by a bona fide social club not incorporated for profit is not a sale within the meaning of the law. "It seems to us," said Gantt, P. J., "that, inasmuch as this club has been organized since 1878, it is not created for profit, and that the legislature must have been cognizant that many similar organizations had been created under the same statute, and, if it had been the intention to require them to take out a liquor license, it would have made some provision for it, or provided a license tax suitable to the case, as they cannot, under the dramshop act, exercise their other corporate rights. The club has pursued this method of providing refreshments for some fifteen years. Its right seems never to have been challenged before, although the dramshop act has remained substantially the same all these years."

Further discussion of the authorities is not possible with reasonable limitations of time and space. The views expressed in the cases cited from courts of the very highest standing are sustained in the following cases: *Piedmont Club v. Com.* 87 Va. 541, 12 S. E. 963; *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419; *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290; *Barden v. Montana Club*, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 25 Pac. 1042; *Koenig v. State*, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; *State v. Austin Club*, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; and, in effect, *State v. Boston Club*, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895. The courts of Illinois, Michigan, New Jersey, and North Carolina have reached a contrary conclusion. 20 L.R.A. (N.S.)

The law as declared in England, Massachusetts, New York, Pennsylvania, and other states has prevailed in Minnesota since social clubs were known. The statutes have always, so far as my knowledge extends, been held not to apply to such organizations. This certainly has been the construction placed on them by the Executive Department. It is true that the exact question has not before been presented to this court; but the trial courts have generally, if not universally, held that the question is always as to the good faith of the club. I am not aware that it has been found particularly difficult to apply the law upon this theory. Judge Kelly's decision leaves the law as it has always been in this state. It seems to me that the change, if desirable, should be made by the legislature, and not by the court.

I therefore respectfully dissent.

Jaggard, J., dissenting:

I concur with the reasoning and result of the dissenting opinion.

ILLINOIS SUPREME COURT.

THOMAS F. HOUREN

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.

(236 Ill. 620, 86 N. E. 611.)

Proximate cause — fire — interference with apparatus.

1. The wrongful act of a railroad company in permitting a train to stand across a street in a city cannot be held not to be the proximate cause of the burning of a dwelling house because the fire appa-

Case Note. — Duty of steam railroad or street railroad company to avoid interference with extinguishment of fires.

The earlier cases upon this subject are collected in the note appended to the case of *American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co.* 12 L.R.A. (N.S.) 382.

In *Phenix Ins. Co. v. New York C. & H. R.R. Co.* 122 App. Div. 113, 106 N. Y. Supp. 696 (reported since that note), the court refused to disturb a verdict against a railway company, although it was a disputed question whether the engineer and fireman of a train were informed of the progress of a fire before arriving at the point where it was raging, it appearing that, as they approached a point where lines of fire hose were laid across the track, they failed to observe signals given them to stop the train, but ran over and cut the hose, and, in consequence thereof, the operations of the firemen were delayed so that the fire, which

tus could not reach it on account of the obstruction because a prudent man would not have foreseen that the burning of that house would follow the wrongful act.

Same — spread.

2. Interference with the fire departments reaching the fire may be found to be the proximate cause of the burning of a building to which the fire was communicated from that in which it originated.

Same — official neglect.

3. A railroad company cannot avoid liability for loss of a building by fire on account of its delaying the fire department by maintaining a train across the street because the policemen might have cleared the crossing.

Evidence — extinguishment of fire — sufficiency.

4. That firemen would have been able to prevent the destruction of a building by fire had they not been interfered with may be found by the fact that the buildings on fire were small and burned slowly, and that, but for the interference, they would have reached the scene seventeen minutes before the building in question began to burn, and would have been fully equipped to fight the fire.

Appeal — variance.

5. A question of variance between pleading and proof cannot be raised for the first time on appeal.

Railroad — obstruction of fire department — negligence.

6. The violation by a railroad company of a statute forbidding the obstruction of street crossings in cities is negligence, as

was then under control, became unmanageable, and extended to and destroyed property that otherwise would have been saved.

But, where a freight train was stopped at a point where it was customary and necessary to obtain orders before proceeding further, without the train crew being aware of the fact that the plaintiff's building was burning, or of the intention of the fire department to lay hose across the track, and its journey was resumed immediately upon receiving orders to that effect, the liability of the railway company for the destruction of the plaintiff's building was denied, although it appeared that apparently the train crew refused to move the train sooner when requested by the fire department so to do. *Louisville & N. R. Co. v. Scruggs & Echols* (Ala.) 49 So. 390. The court said that: "in the legitimate use of its own tracks, in the orderly course of business, the defendant, under the evidence in this case, was not by law charged with the duty to move its train of cars otherwise than according to its own rules and regulations. . . . In respect to legal responsibility to a third person, there is, we think, a distinction to be drawn between an active and a passive use, in the enjoyment of one's property rights. To illustrate: If, in the present case, the fire hose had been laid from the hydrant, 20 L.R.A. (N.S.)

matter of law, as against the owner of a house destroyed by fire, because of failure of the fire department, whose progress was interfered with by the obstruction, to reach it in time to extinguish the fire.

Appeal — preliminary statement.

7. Objections to the time of making statements as to what counsel intended to prove cannot be raised for the first time on appeal.

(December 15, 1908.)

A PPEAL by defendant from a judgment of the Branch Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago in plaintiff's favor in an action brought to recover the value of plaintiff's house, which was alleged to have been destroyed through defendant's wrongful obstruction of the fire department. Affirmed.

Statement by Scott, J.:

This is an appeal by the Chicago, Milwaukee, & St. Paul Railway Company from a judgment of the branch appellate court for the first district, affirming a judgment for the sum of \$600, recovered by Thomas F. Houren for his own use and for the use of the Buffalo Commercial Insurance Company, appellee, in the municipal court of Chicago, in an action for damages for the destruction of a dwelling house owned by appellee, by fire, which destruction is alleged to have been caused by the negligence of appellant. The branch appellate court

across the tracks of the defendant, to the fire, and the defendant's servants, with knowledge of the existing conditions as to the fire and the laying of the hose, had wilfully or negligently run the train of cars over the hose, destroying it, and thereby prevented the extinguishing of the fire, a legal liability for such conduct would have arisen. That would have been an active use of one's property in violation of the maxim, *Sic utere tuo ut alienum non laedas*. On the other hand, if (as was the case here) the defendant's train of cars was already rightfully standing on its tracks intervening the hydrant and the plaintiff's burning house, and the defendant merely failed or refused to promptly move its train out of the way, when requested so to do, in order that the hose might be laid across its tracks, there would be no case for the application of the above-quoted legal maxim. In the latter instance the use would be merely passive. The law imposes no duty on one man to aid another in the preservation of the latter's property, but only the duty not to injure another's property in the use of his own." However, McClellan, J., dissented, saying that, in his opinion, none of the cases supported the conclusion of the majority of the court.

granted to appellant a certificate of importance. The negligence of appellant charged by appellee is set out in the following bill of particulars filed in the municipal court: "Plaintiff's claim is for loss and damage by fire sustained by him to his frame building, which formerly stood on rear of lot 12, block 21, being the northwest corner of Sixty-Third and Bloomingdale avenues, Chicago, Cook county, Illinois (Galewood), and which was destroyed by fire on the morning of October 3, 1906, through no fault or neglect of the plaintiff, but by reason of the negligence of the defendant in blocking and closing of the crossing at Sixty-Third avenue, and said defendant's railroad tracks, in the said city of Chicago, Cook county Illinois, by leaving and permitting to remain across said public highway, a train consisting of a large number of freight cars belonging to, or in the charge, custody, and control of, the defendant, whereby the fire department of the said city of Chicago were detained and prevented from passing over said public highway for a long space of time, and, in the meantime, the fire, which was in an adjacent building, was communicated to the plaintiff's building, and destroyed and damaged same, whereas, had the said fire department been able to pass over said crossing upon arriving there, the fire would have been extinguished before it was communicated to plaintiff's property, and by reason of such negligence," etc. *Ad damnum*, \$950.

From the record it appears that the building in question was located about 150 feet west of Sixty-Third avenue, on the north side of Bloomingdale road, in the city of Chicago. It was a small frame cottage. On the west side of this cottage were two frame cottages, each of about the same size as this one. The three were separated by spaces of 6 feet. At about 1:40 o'clock, on the morning of October 3, 1906, the building west of the one here involved was discovered to be on fire. The nearest station of the fire department in this part of the city was located about 3 miles east. Within five minutes after the fire was discovered an alarm was received at this station, and the men of the department, with an engine, hose cart, truck, and other appliances started at once for the fire. Both the burning building and the station of the fire department were located on the south side of the railroad tracks of appellant, which ran east and west through this portion of the city. While the shortest route from the station to the fire would have been, at all times, on the south side of the railway tracks, in order to secure a better road, the firemen drove north on Grand avenue until they reached a street north of appellant's tracks, where they

turned west. When they turned south, they came to a crossing of the appellant's tracks, a short distance north of the fire. They found this crossing blockaded by box cars to which no engine was attached, extending two blocks east and one block west of the crossing. The cars were coupled together and the brakes were set. Evidence was offered by appellant which tended to show that its track from this point east for some distance was considerably downgrade, and that, by uncoupling the train at the crossing and releasing the brakes on the cars, those upon the east of the crossing would have moved east without the aid of an engine and the crossing could have thus been opened. With the firemen at the crossing were two policemen, who testified that they knew of these facts, and had seen cars moved at this point in that way. The fire apparatus reached the crossing at ten minutes after 2 o'clock. The fireman immediately notified appellant to remove the cars from the crossing; and it was about thirty minutes later when the engine of the appellant arrived and made an opening at the crossing to let the firemen through. In the meantime, Houren's house had taken fire, and was entirely destroyed before the firemen could control the fire. This house took fire about 2:35 o'clock, and it is not disputed that, if the crossing had not been blockaded, the firemen would have reached the scene of the fire about 2:12 o'clock. It was a damp, foggy night, and there was no wind blowing. Immediately east of the burning buildings, on the corner of the same block, was located a two-way fire hydrant, to which the firemen attached hose after they arrived. At the close of all the evidence, the court denied the motion of appellant for a directed verdict. A number of errors have been assigned.

Mr. John A. Russell, with Mr. O. W. Dynes, for appellant:

A railway company is not liable to the owner of property for an interference by it with the efforts of a city fire department to extinguish fire, unless the railroad company is shown by the evidence to have had actual or constructive knowledge of the existence of the fire at the time it committed the act of interference.

American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A. (N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 A. & E. Ann. Cas. 626; *Bosch v. Burlington & M. R. Co.* 44 Iowa, 402, 24 Am. Rep. 754; *Mott v. Hudson River R. Co.* 1 Robt. 585; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689; *Little Rock Traction & Electric Co. v. McCaskill*, 75 Ark. 133, 70 L.R.A. 680, 112 Am. St.

Rep. 48, 86 S. W. 997; Dale v. Grant, 34 N. J. L. 142; Byrd v. English, 117 Ga. 191, 64 L.R.A. 94, 43 S. E. 419.

Messrs. Bates, Harding, & Atkins, for appellee:

The blockading of the street for a period greater than permitted by statute constituted negligence as matter of law.

Chicago & E. I. R. Co. v. Mochell, 193 Ill. 211, 86 Am. St. Rep. 318, 61 N. E. 1028; Terre Haute & I. R. Co. v. Voelker, 129 Ill. 555, 22 N. E. 20; Chicago & E. I. R. Co. v. Goyette, 133 Ill. 21, 24 N. E. 549; Morris v. Stanfield, 81 Ill. App. 270; Belleville v. Hoffman, 74 Ill. App. 503; Chicago, B. & Q. R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; Baltimore & O. S. W. R. Co. v. Then, 159 Ill. 537, 42 N. E. 971.

The negligent blockading of the street by the railroad company resulted in the destruction of the plaintiff's property, and for that destruction the railroad company is liable.

Rock Falls v. Wells, 65 Ill. App. 557; Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440; Joliet v. Shufeldt, 144 Ill. 408, 18 L.R.A. 760, 36 Am. St. Rep. 463, 32 N. E. 969; Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; Little Rock Traction & Electric Co. v. McCaskill, 75 Ark. 133, 70 L.R.A. 680, 112 Am. St. Rep. 48, 86 S. W. 997; Kiernan v. Metropolitan Constr. Co. 170 Mass. 378, 49 N. E. 648; Scott v. Hunter, 46 Pa. 192, 84 Am. Dec. 542; Geo. C. Murphy Pottery Co. v. Pennsylvania Co. (C. C. N. D. Ohio); White v. Colorado C. R. Co. 5 Dill. 429, Fed. Cas. No. 17,543.

Scott, J., delivered the opinion of the court:

In support of the motion for a directed verdict, it is said that there is no evidence tending to show that the obstruction of the street by the appellant was the proximate cause of the destruction of the house owned by Houren. Section 77, chap. 114, Hurd's Rev. Stat. 1908, forbids a railroad company obstructing a public highway by stopping any train thereon, for a longer period than ten minutes. Appellant's train was standing over the street in violation of this statute. Appellant regards the damages as being too remote to be considered the proximate result of this violation of the law, and contends that a prudent and experienced man, fully acquainted with all the circumstances which existed at the time the train was left upon the street, would not have thought it reasonable that the house in question would have been destroyed by fire, as a consequence of the obstruction of the street; and that, for this reason, the damages are not such as could be recovered on account of 20 L.R.A. (N.S.)

the unlawful act in question. It is not necessary that the burning of this particular house could have been foreseen. It is only damages of the character of those which occurred, to wit, damages by fire, that must have been within the range of the consequences of the act reasonably to be expected. It seems clear to us that, if a prudent man of experience had reflected upon the probable consequences of entirely closing up this street in a great city, he would have foreseen, first, that to so close the street would obstruct and delay public travel thereon; second, that among the travel liable to be so obstructed and delayed would be the passage of teams, engines, and other appliances of the fire department; third, that, if the travel of the fire department was so obstructed and delayed, any fire which the men of that department were seeking to reach would be more extensive and do greater damage than if the obstruction and delay had not taken place.

It is then contended that the fire, and not the obstruction of the street, was the proximate cause of the destruction of the building. The fire began in the cottage next to the one here involved, and the fire, in fact, did destroy the Houren building; but, if the obstruction occasioned the delay, and if but for the obstruction the fire department would have been able to control and extinguish the fire before it reached this building, then the obstruction is to be regarded as an intervening and concurrent cause of the burning of the building, and in law would, with the fire itself, form the proximate cause, and appellant, under such circumstances, would be liable even though the fire might be regarded as the primary cause. Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440.

It is then said that the policemen who were present at the obstruction when the fire engine reached there knew that, by uncoupling the cars and releasing the brakes, the cars would, on account of the slope of the track, move off the crossing without any propelling force other than the force of gravity, and that appellant could not be expected to foresee that the policemen, in the event of the fire department's teams and vehicles approaching the crossing, would fail to adopt this measure to get the cars off the street. This is entirely too far-fetched. It was not the business of the police to keep the cars off the street; and, besides, there is nothing in this record to indicate that a reasonable man might not have supposed that the result of so setting the cars in motion would result in greater disaster than would the delay of the fire department. The evidence shows that, when the teams reached the obstruction, they had been running several miles, and were very much exhausted.

There is proof which tends to show that, passing to the east or west of the crossings obstructed by this train of cars, another railroad crossing, over which the men with the fire equipment could have passed to the south, would not have been reached until they had gone several blocks from the crossing at which they waited. The firemen might reasonably have expected to be able to obtain the assistance of an engine of appellant within a short time to remove the cars unlawfully upon the street.

It is next contended that there is no proof that the fireman would have been able to prevent the flames destroying the building had the delay not occurred. It is not possible to prove absolutely what the result of the fire department's efforts would have been had the progress of the men not been delayed. The proof is, however, that a fire hydrant belonging to the city was conveniently located, and that the department, had the delay not occurred, would have been fully equipped to fight the fire in the ordinary way. The men, with the engine and other appliances of the fire department, reached the blockade not later than 2:10 A. M., and, but for the obstruction they would have reached the fire in two or three minutes thereafter. The Houren cottage did not take fire earlier than 2:30 A. M., and, except for the unlawful act of appellant, the fire department would have been on the scene of the fire at least seventeen minutes before that cottage began to burn. On account of the weather conditions, the fire burned slowly. The cottages were small wooden buildings, 14 by 20 feet in dimensions, and a story and a half in height. We fail to see how it can be reasonably argued that this proof does not tend to show that the fire department would have been able to prevent the destruction of the building, had no delay occurred at the crossing. So far as this particular question is concerned, the case is not different from *Kiernan v. Metropolitan Constr. Co.* 170 Mass. 378, 49 N. E. 648, where the fire department, in attempting to attach a hose to a hydrant, were unable to do so on account of certain acts of the defendant. In that case a recovery was permitted for property which might have been saved had the firemen been able to promptly connect a hose with the hydrant, and there, as here, it could not be said with absolute certainty that they would have been able to prevent the destruction of plaintiff's property, had no interference occurred.

It is urged that there is a variance between the proof and the statement of the cause of action filed, in reference to the location of the property which was destroyed. No such variance was pointed out in the 20 L.R.A. (N.S.)

municipal court, where the difficulty, if it existed, could have been readily obviated by an amendment. The point will therefore not be considered here.

The violation of the statute was negligence as a matter of law. In this respect the case is distinguished from those upon which appellant principally relies. As was well said by the branch appellate court here, the case is "as if the defendant had, at the moment when the fire department was about to pour a flood of water on the original fire, interposed, by superior force directly applied, to prevent this being done until too late to save the plaintiff's cottage." The motion for a peremptory instruction was properly denied.

The action of the municipal court in taking judicial notice of the existence of an ordinance of the city, general in its nature, which prohibited appellant leaving these cars on this crossing for a period longer than five minutes, is challenged. Section 317, chap. 74, Hurd's Rev. Stat. 1908, provides that the municipal court shall take judicial notice of such ordinances. Any question that might otherwise arise as to the validity of this statute has been waived by appellant by taking the judgment of the appellate court upon other alleged errors.

Complaint is made of a statement of counsel for appellee in regard to what he would prove, which statement was made while he was conducting the examination of a witness. It does not appear that the trial court was given opportunity to act upon any objection in relation thereto.

The defendant's refused instruction No. 2 was, in substance, the same as defendant's given instruction No. 7. Defendant's refused instruction No. 3 was designed to advise the jury of the considerations to be given weight in determining whether the blockade of the street was the proximate cause of the injury. It was not in accord with the views which have been above expressed in this opinion, and was properly refused.

The judgment of the Appellate Court will be affirmed.

ILLINOIS SUPREME COURT.

MARTIN EMERICH OUTFITTING COMPANY, Piff. in Err.,

v.

SIEGEL, COOPER, & COMPANY.

(237 Ill. 610, 86 N. E. 1104.)

Contract — space in building — termination.

A contract for space, for a term of years, on a particular floor of a building occu-

pied by a department store, in which to conduct a particular line of business in connection with the general enterprise, which is to be paid for by a monthly rental and a percentage of sales in excess of a certain amount, is terminated by the destruction of the building, and the beneficiary cannot insist on the allotment of space in the new building to which the department store business is moved.

(December 15, 1908.)

ERROR to the Appellate Court, First District, to review a judgment affirming a judgment of the Chicago Municipal Court in defendant's favor in an action brought to recover damages for breach of contract. Affirmed.

The facts are stated in the opinion.

Messrs. Newman, Northrup, Levinson, & Becker and Arthur B. Schaffner, for plaintiff in error:

The contract between the parties should be fairly and liberally construed with regard to all its stipulations, and in the light of the circumstances surrounding the parties at the time it was made, the objects which they had in view, and the construction which they have themselves given to it.

17 Am. & Eng. Enc. Law, 2d ed. pp. 18, 23; Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391; Worcester Gaslight Co. v. Worcester, 110 Mass. 353; Pressed Steel Car Co. v. Eastern R. Co. 57 C. C. A. 635, 121 Fed. 609; A. B. Dick Co. v. Sherwood Letter File Co. 157 Ill. 325, 42 N. E. 440; Illinois Terra Cotta Lumber Co. v. Owen, 167 Ill. 360, 47 N. E. 722; Torrence v. Shedd, 156 Ill. 202, 41 N. E. 95, 42 N. E. 171; Fitzgerald v. First Nat. Bank, 52 C. C. A. 276, 114 Fed. 474; Work v. Welsh, 160 Ill. 468, 43 N. E. 719.

The subject-matter of the contract was not the particular space designated, but the right and duty of plaintiff to conduct the furniture department of defendant's business in a building occupied by it.

Dickinson v. Hart, 142 N. Y. 183, 36 N.

Note. — The general principle upon which the case above reported is based, that, under a contract which, by the intent of the parties, requires for its performance the continued existence of a specific subject-matter, the destruction of such subject-matter operates as a discharge where neither party has assumed such risk, is well established. A search has failed to reveal the existence of any other decision as to whether a contract for allotment of space in a department store is to be considered as necessarily contemplating the continued existence of the building in which the space is allotted, so that destruction of the building will operate to terminate the contract. 20 L.R.A. (N.S.)

E. 801; Corn v. Board of Education, 39 Ill. App. 446; Mayer v. Temple Beth El, 23 N. Y. Supp. 1013.

If the contract was susceptible of substantial performance by defendant, it was its duty to perform substantially if a literal performance became impossible.

Wald's Pollock, Contr. Williston's ed. 542; 2 Parsons, Contr. 8th ed. 786, 787; 7 Am. & Eng. Enc. Law, 2d ed. p. 148; Bacon v. Cobb, 45 Ill. 47; Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Turner v. Goldsmith [1891] 1 Q. B. 544; The Teutonia, L. R. 4 P. C. 171, 41 L. J. Prob. N. S. 57; White v. Mann, 26 Me. 361.

If the obstacle to the performance of the contract by defendant was only temporary, then, when such temporary obstacle was removed, defendant was obliged to perform, or respond in damages.

1 Wharton, Contr. § 313; Keystone Lumber & Salt Mfg. Co. v. Dole, 43 Mich. 370, 5 N. W. 412; Hadley v. Clarke, 8 T. R. 259; Baylies v. Fettyplace, 7 Mass. 325.

Mr. Augustus Binswanger, for defendant in error:

Defendant's contract to allot floor space was terminated by the destruction of the building then occupied.

Pollock, Contr. 263; 2 Chitty, Contr. 11 Am. ed. 1076; Taylor v. Caldwell, 3 Best & S. 826; Walker v. Tucker, 70 Ill. 527; Siegel, C. & Co. v. Eaton & P. Co. 165 Ill. 550, 46 N. E. 449; Huyett & S. Mfg. Co. v. Chicago Edison Co. 167 Ill. 233, 59 Am. St. Rep. 272, 47 N. E. 384; Smith v. Preston, 170 Ill. 179, 48 N. E. 688; Wells v. Calnan, 107 Mass. 516, 9 Am. Rep. 65; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Shear v. Wright, 60 Mich. 159, 26 N. W. 871; Howell v. Coupland, L. R. 9 Q. B. 462; Appleby v. Myers, L. R. 2 C. P. 651; Anglo-Egyptian Nav. Co. v. Rennie, L. R. 10 C. P. 271; Kerr v. Merchants' Exch. Co. 3 Edw. Ch. 323; McMillan v. Solomon, 42 Ala. 364, 94 Am. Dec. 654; Stockwell v. Hunter, 11 Met. 456, 45 Am. Dec. 220; Winton v. Cornish, 5 Ohio, 477; Shawmut Nat. Bank v. Boston, 118 Mass. 131; Alexander v. Dorsey, 12 Ga. 12, 56 Am. Dec. 443; Waite v. O'Neil, 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408; Taylor, Land. & T. 7th ed. § 520.

Dunn, J., delivered the opinion of the court:

In an action of assumpsit the court directed a verdict for the defendant, on which judgment was rendered in its favor, which was affirmed by the appellate court. A writ of error is prosecuted to reverse the judgment of affirmance.

In 1890 the Martin Emerich Outfitting Company, the plaintiff in error, was engaged

in the retail furniture business at 261 and 263 State street, in Chicago, occupying six floors and the basement at those numbers. On July 12, 1890, it entered into a written contract with Siegel, Cooper, & Company, the defendant in error, whereby, after reciting that the plaintiff in error was desirous of offering for sale, in the premises of defendant in error, in the following described space, *viz.*, the entire third floor of the buildings known as 211, 213, and 215 State street, and the south 25 feet front of the third floor of the main building, corner State and Adams streets, being 25x80 feet, more or less, a full line of furniture, mattresses, springs, and all articles strictly appertaining to such a business, and the defendant in error was willing to grant the use of said space to the said party of the second part on certain terms and conditions, it was agreed that the defendant in error should set apart for the use of the plaintiff in error the space above mentioned, for the sale, by the plaintiff in error, of furniture, mattresses, springs, and articles strictly appertaining to the furniture business; and that the plaintiff in error should use said space for said purpose; should keep it in like clean and good condition as other parts of the building at all times; should carry, at all times, a first-class stock of furniture, and sell the same for cash, and at as low a price as the same quality should be sold by any other merchant or dealer in the same line within a radius of 2 miles, but should not, at any time, be compelled to sell any article below cost price; should conduct the business in a business-like manner; should employ such help only as should be satisfactory to the defendant in error, which help must comply with, and be subject to, the regulations governing the general employees of defendant in error; should enter into no contracts nor incur any liabilities in the name of the defendant in error; should not erect any signs or make any display distasteful to the defendant in error; should report at the office of defendant in error each business day the gross sales of said department, should keep account of all the transactions of the department in books which should always be open to the inspection of defendant in error; should pay for all expenses of said furniture department, and furnish a cashier, who should receive all moneys for sales made in said furniture department, and should turn them over to the defendant in error at the close of each business day. Settlement was to be made each week for all sales during the preceding week, at which time a statement of receipts and expenses was to be rendered. Plaintiff in error agreed to furnish all wagons and horses needed in the

delivery and handling of the goods sold in said furniture department, the wagons to be of uniform color and bear the name of "Siegel, Cooper, & Co.—Furniture Department." in lettering like that used on all the delivery wagons of the defendant in error; to deliver promptly and free of charge, within the city limits, all furniture sold in the department, and to advertise the department in the daily papers, in the name of Siegel, Cooper, & Company, to the extent of not less than \$5,000 during the first year of the agreement, and a like amount, or more, during each year thereafter, all advertisements to be submitted to and approved by the defendant in error. The advertising was to be paid for with the advertising bills of the defendant in error, and charged to the plaintiff in error at same rate as paid by the defendant in error. The plaintiff in error agreed to pay the defendant in error for the use of said space, on the first day of each month, beginning with September 1, 1890, the sum of \$500 per month. Should the gross sales in the department, after September 1, 1891, exceed \$75,000 during any year, then the plaintiff in error agreed to pay, in addition to the monthly rental, 5 per cent of the amount of sales in excess of \$75,000, at the end of the fiscal year. The plaintiff in error further agreed to purchase from the defendant in error all the furniture, and all articles pertaining to the furniture department, then in the premises of the said defendant in error. It was further agreed, that in case of death or the dissolution of the plaintiff in error, the defendant in error should have the right and power to cancel the agreement on giving thirty days' notice to the legal representative of the plaintiff in error. The defendant in error agreed to furnish, in connection with said space, like heat, light, and elevator service as it furnished, in the regular course of business, to its other departments. The agreement was to continue in force for five years from the 1st day of September, 1890, with the privilege, on the part of the defendant in error, to cancel it and retake possession of said space at any time when the plaintiff in error, in the opinion of the defendant in error, should fail to fulfil any of its agreements; but the agreement was not to be canceled nor possession of said premises taken by the defendant in error until after written notice, to the plaintiff in error, in what manner the agreement had been violated, in order to enable the plaintiff in error to rectify any act of omission or commission in or connected with said furniture department business. A failure, after such written notice, to immediately rectify such an act of omission or commission, or a wilful repetition of

such or similar acts, should authorize the cancelation of the agreement by the defendant in error upon giving the plaintiff in error thirty days' notice of its intent to cancel this agreement. From September 1, 1890, the plaintiff in error occupied the space designated, for several months, at the expiration of which time a change was made, whereby the plaintiff in error gave up a part of the space on the north and received space on the south, somewhat greater, and the monthly payment of \$500 was increased to \$615. On August 3, 1891, the buildings mentioned in the contract were totally destroyed by fire. The defendant in error, in a few days, moved into other quarters, at the corner of Wabash avenue and Adams street, and later moved to the corner of State and Van Buren streets, where it continued to conduct its business. Plaintiff in error requested to be allowed to occupy space in the new location, but was refused, the defendant in error claiming that the destruction of the building had put an end to the contract; and this is the vital question in the case.

In contracts to whose performance the continued existence of a particular person or thing is necessary, a condition is always implied that the death or destruction of that person or thing shall excuse performance. Thus, contracts for the performance of personal services terminate upon the death of the party by whom the services are to be performed. *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688. A covenant, by a lessee of a coal mine, to work the same, for the period of ten years, under his lease, is discharged by the exhaustion of the mine. *Walker v. Tucker*, 70 Ill. 527. Under a contract to place certain machinery in a particular building, the building and the machinery having been destroyed by accidental fire before the completion of the contract, it was held that both parties were excused from further performance of the contract. *Appleby v. Myers*, L. R. 2 C. P. 651; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 46 N. E. 449; *Huyett & S. Mfg. Co. v. Chicago Edison Co.* 167 Ill. 233, 59 Am. St. Rep. 272, 47 N. E. 384. A contract to let, at a stated daily price, a music hall for giving a series of concerts, was held to be conditional upon the continued existence of the hall, and was put an end to by the destruction of the hall by fire. *Taylor v. Caldwell*, 3 Best & S. 826. A lease of rooms in a building is terminated by the destruction of the building by fire (*Kerr v. Merchants' Exch. Co.* 3 Edw. Ch. 333; *Alexander v. Dorsey*, 12 Ga. 12. 56 Am. Dec. 443; *Winton v. Cornish*, 5 Ohio, 477), and, in case a new building is erected, having a similar space in the same location as 20 L.R.A. (N.S.)

in the old building, the tenant is not entitled to occupy it (*Stockwell v. Hunter*, 11 Met. 456, 45 Am. Dec. 220).

The plaintiff in error contends, however, that this contract was not for the occupation of any particular space in a specified building, but was rather for the conducting of a department of the business of the defendant in error. It may be conceded that the relation of the parties was not that of landlord and tenant, but their agreement concerned the occupation of certain space in the building. The plaintiff in error had the right to occupy that space, and no other. The defendant in error had no right to demand that the plaintiff in error should conduct the business elsewhere. When the contract was entered into, Siegel, Cooper, & Company was engaged in business at the corner of State and Adams streets, and the plaintiff in error had a large store and warerooms not far away, on State street. The parties for their mutual benefit, contracted that the plaintiff in error should take charge of the furniture department of the defendant in error. Their motives and intentions can only be known from the writing to which the contract was reduced. By that writing it is recited that the plaintiff in error desired to offer for sale, in certain specified parts of the premises of the defendant in error, a line of furniture, etc.; and it was the use of these particular premises for this purpose which defendant in error granted. No other space in the building or in any other building was contemplated. The defendant in error would have had a no right to require plaintiff in error to change to the fourth floor or the second. The plaintiff in error had the right, for five years, to insist upon occupying that particular space, and the defendant in error had no right to require it to go to another. The parties, apparently, did not contemplate any change of location. The defendant could not voluntarily have removed to another location and required the plaintiff in error to carry on the furniture business in the new location.

The plaintiff in error insists that the contract must be construed in the light of the circumstances surrounding the parties and of the objects they had in view, and that the primary object in view was the carrying on the furniture business by the plaintiff as a part of the business of the defendant. This is an assumption contrary to the language of the instrument, which provides, in the last clause, only that the privilege of the plaintiff in error to conduct said furniture department should be exclusive of any other like department in said premises. It is manifest that the idea of a change of location was

not in the minds of the parties in making the agreement. It was supposed the business would continue at the same place during the whole term of the agreement. The burning of the building, and its effect upon the rights of the parties, were not in their minds. The difficulties of providing either for such contingency or the case of a voluntary removal are manifest. If the building and the stock of defendant in error were totally destroyed, would it be required to start in business again? Could it start on a much smaller scale, or would it be required to carry as large a stock and occupy as extensive quarters as before the fire? Would the plaintiff in error be obliged to follow it wherever it might choose to go? Within what distance should it relocate its business, and how far would the plaintiff in error have to follow? What proportion of the reduced or increased space would the plaintiff in error be entitled to and would it be obliged to pay for? All these questions would necessarily have to be decided, but the contract made no provision for them. If they were thought of by the parties, they were intentionally omitted because of the difficulty of providing for them.

If the contract was, as we hold, a contract for the conduct of the business in a particular place, then it could not be substantially performed by carrying on the business in another place. To require the plaintiff in error to conduct the business, or to require the defendant in error to permit it to be conducted, at a place and under conditions different from those mentioned in the agreement, would not be a substantial performance of the contract they had entered into, but an imposition of terms to which they had not agreed. The continued existence of the building was a necessary condition to the performance of the agreement, and its destruction relieved the parties from further obligation to perform the contract.

The judgment of the Appellate Court is affirmed.

A petition for rehearing having been filed, the following additional opinion was handed down on February 4, 1909:

The plaintiff in error, in a petition for a rehearing, calls our attention to the statement, in the original opinion, that the vital question in the case is whether the destruction of the building put an end to the contract, in connection with the alleged fact that the principal building in which the plaintiff in error was conducting the furniture business, under its contract with the defendant in error, was not destroyed by the fire. The cause was decided here upon the record made in the trial court, and was 20 L.R.A. (N.S.)

tried in that court upon the case made by the pleadings. The two original counts did not mention the fire, but declared upon the refusal of the defendant in error to set apart to the plaintiff in error, the portion of the premises described in the contract between them. Two additional counts, after averring the taking possession by the plaintiff in error of the premises described in the contract, alleged their destruction by fire, the occupation of other premises by the defendant in error, and its refusal thereafter to set apart, for the use of the plaintiff in error in carrying on said furniture business, any space in the premises then occupied by the defendant in error. No mention is made, in the pleadings, of any right of plaintiff in error, before the fire, to occupy any premises other than those mentioned in the contract, or of its occupation of any other premises; nor is any such right made the basis of any claim against the defendant in error. Naturally, therefore, no such right could be considered either by the trial court or by this court.

It is also said that the defendant in error collected and retains the payment, specified in the contract, for the month of August, 1891, though the fire occurred on the 3d day of that month, and that the defendant cannot retain this payment and the contract, at the same time, be regarded as canceled as of the date of the fire. The destruction of the building terminated the contract. Whether or not the plaintiff in error could recover the overpayment is a question which does not arise, as the declaration is not based upon such claim.

Rehearing denied.

KANSAS SUPREME COURT.

CHARLES M. HINES, Plff. in Err.,
v.
FRANK M. STAHL.

(— Kan. —, 99 Pac. 273.)

Execution — property subject — intoxicating liquors.

1. Intoxicating liquor is not subject to seizure on execution, because the statute forbids its sale except by certain persons, for restricted purposes, and upon affidavit of the buyer showing the occasion for his purchase.

Headnotes by MASON, J.

Case Note. — *Right to levy legal process upon intoxicating liquors.*

This note is confined to the question of the right to levy legal process upon intoxicating liquors, excluding, however, the right

Intoxicating liquors — seizure — replevin — presumptions.

2. Where replevin was brought for intoxicating liquors, and, after obtaining possession thereof, the plaintiff dismissed his action, evidence that, at the commencement of the litigation, the defendant held the property as city marshal under a warrant issued by the police court, justifies a presumption, in the absence of anything to suggest the contrary, that he was acting under an ordinance passed in aid of the prohibitory law, authorizing the seizure and destruction of liquors kept for sale in violation of the statute.

Same — return — alternative remedy.

3. In such a case, if the defendant is found to be entitled to a return of the property, he is also entitled to a judgment for its full value in case a return cannot be had.

to search for and seize under process intoxicating liquors kept in violation of law.

Seizure and sale upon attachment or execution.

The right to levy legal process upon intoxicating liquors for the debts of the owner has been denied on the ground that, as the sale thereof is prohibited, except by those duly licensed, an officer of the law cannot make his seizure effectual by judicial sale, and, as such sale is forbidden by implication, the seizure is likewise prohibited. *Nichols v. Valentine*, 36 Me. 322; *Ingalls v. Baker*, 95 Mass. 449; *Kiff v. Old Colony & N. R. Co.* 117 Mass. 591, 19 Am. Rep. 429; *Barron v. Arnold*, 16 R. I. 22, 11 Atl. 298. See, however, contra, *Wildermuth v. Cole* and *Nutt v. Wheeler*, *infra*, as well as the cases following them.

And, for the same reason, the right to attach such liquors for the owner's debts has been denied under a law declaring all liquors contraband, unless sold by a state dispensary, notwithstanding the liquor is seized in the original packages. *Lanahan v. Bailey*, 53 S. C. 489, 42 L.R.A. 297, 69 Am. St. Rep. 884, 31 S. E. 332.

Where it is declared by statute that "no action of any kind shall be maintained . . . for the recovery or possession" of intoxicating liquors, they cannot be seized on attachment for the owner's debts, when kept for sale in violation of law. *Nichols v. Valentine*, *supra*.

But it has been said that such statute applies only to actions for the recovery of possession of intoxicating liquors when liable to seizure or forfeiture, or intended for sale in violation of law. *Dolan v. Buzzell*, 41 Me. 473; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290.

It was held in *Standard Oil Co. v. Angeline*, 6 Kan. App. 312, 51 Pac. 70, that the prohibition of the sale of intoxicating liquors, except by a licensed pharmacist for medicinal, scientific, and mechanical purposes, prevents the levy of execution thereon in satisfaction of the owner's debts. 20 L.R.A. (N.S.)

Office — expiration — effect.

4. In such a case a recovery by the defendant is not defeated by the fact that his term of office has expired.

(December 12, 1908.)

ERROR to the District Court for Shawnee County to review a judgment in defendant's favor in an action brought to recover possession of a quantity of intoxicating liquors which had been seized by defendant as city marshal and chief of police of Topeka. Affirmed.

The facts are stated in the opinion.

Messrs. Otis E. Hungate and C. A. Magaw, for plaintiff in error:

The defendant has only a mere possessory interest in the liquors, and is not entitled to the full value thereof.

So, intoxicating liquors, when sold in a lawful manner in a prohibition state, may not be attached for the vendor's debts. *Niles v. Fries*, 35 Iowa, 41.

It was held in *McCullough v. Large*, 20 Fed. 309, that whisky in a government bonded warehouse cannot be seized on execution against its owner, even though the officer offers to pay the taxes due thereon, as, being held for the internal revenue tax by the government and in its possession, it cannot be disturbed by legal process. See, however, *May v. Hoaglan*, *infra*.

It was held in *Equitable Loan & Secur. Co. v. Edwardsville*, 143 Ala. 182, 111 Am. St. Rep. 34, 38 So. 1016, that a stock of intoxicating liquors owned by a municipality, and kept for sale in a public dispensary, being held for public purposes, is not subject to execution at the suit of a corporate creditor.

In holding that unfermented beer, which will require from four to five weeks time and the expenditure of labor to place it in a marketable condition, it not subject to levy under judicial process, the decision, in *Herman Goepper & Co. v. Phoenix Brewing Co.* 115 Ky. 708, 74 S. W. 726, was based upon the ground that property that has not a salable quality is not subject to seizure under judicial process.

But, on the other hand, it has been held that an officer may sell intoxicating liquors at a judicial sale by virtue of a writ of attachment or execution, and therefore it may be seized for the owner's debts. *Wildermuth v. Cole*, 77 Mich. 483, 43 N. W. 889; *Nutt v. Wheeler*, 30 Vt. 436, 73 Am. Dec. 316.

And he may do so without obtaining a license and paying the tax imposed upon the business of selling intoxicating liquors, as, in making such sale, he is not within the letter or spirit of the law. *Wildermuth v. Cole*, *supra*.

And it was said in *Williams v. Troop*, 17 Wis. 403, that an administrator might sell, in the course of administration, intoxicating liquors belonging to the intestate.

Guy v. Doak, 47 Kan. 366, 27 Pac. 968; Shahan v. Smith, 38 Kan. 474, 16 Pac. 749; Wolfley v. Rising, 12 Kan. 535; Friend v. Green, 43 Kan. 167, 23 Pac. 93; Moore v. Shaw, 1 Kan. App. 103, 40 Pac. 929.

Mr. W. H. Cowles, for defendant in error:

The defendant is entitled to judgment for the return of the property, or the full value thereof in case a return cannot be had.

Karr v. Stahl, 75 Kan. 387, 98 Pac. 669; Garrett v. Wood, 3 Kan. 231; Werner v. Graley, 54 Kan. 383; 38 Pac. 482; Edwards v. Bricker, 66 Kan. 241, 71 Pac. 587; Lemp v. Fullerton, 83 Iowa, 192, 13 L.R.A. 408, 48 N. W. 1034; Funk v. Israel, 5 Iowa, 438; P. Schoenhofen Brewing Co. v. Armstrong, 89 Iowa, 673, 57 N. W. 436; Cen-

tral Nat. Bank v. Brooke, 71 Kan. 769, 81 Pac. 498; Burchett v. Purdy, 2 Okla. 391, 37 Pac. 1053; Irwin v. Walling, 4 Okla. 131, 44 Pac. 219; Rose v. Cash, 58 Ind. 278; Whitford v. Horn, 18 Kan. 455; State v. Harris, 38 Iowa, 242.

Mason, J., delivered the opinion of the court:

Charles M. Hines brought an action against Frank M. Stahl to recover the possession of a quantity of intoxicating liquors. An order of delivery was procured, upon which the property was taken from the defendant and delivered to the plaintiff. Thereupon the plaintiff dismissed his action. A trial was then had in accordance with the statute (Gen. Stat. 1901, § 4618) to

without first obtaining a license therefore, it not being any more necessary for him than it would be for a sheriff when selling liquors taken upon an execution.

So, a statute prohibiting the sale of intoxicating liquors, except by those licensed to sell them for medicinal, mechanical, and chemical purposes, "and for no other use or purpose," does not prevent the seizure thereof upon mesne process in the same manner as other property of a debtor. State v. Johnson, 33 N. H. 441.

Where intoxicating liquors are shipped into a state, consigned to one selling them in violation of law, they may be seized upon attachment for debts while awaiting delivery in a freight warehouse, the statute regulating traffic in intoxicating liquor not affecting it as property subject to judicial sale. Howe v. Stewart, 40 Vt. 145.

And the right of creditors to attach intoxicating liquors, although kept for sale in violation of a prohibitory law, is recognized in Tucker v. Adams, 63 N. H. 361.

Notwithstanding it is declared unlawful to sell or barter for a valuable consideration, directly or indirectly, or to give away or furnish intoxicating liquor in a county where local option has been adopted, it is lawful for an officer to sell, upon a writ of fieri facias, liquors seized under a chattel mortgage. Fears v. State, 102 Ga. 274, 29 S. W. 463. The reasons given by the court for its decision being that the local-option law does not destroy the right of property in intoxicating liquors, therefore it remains subject to a judgment against the owner in like manner, and to the same extent, as other property; and neither does the act by its terms, or necessary implication, apply to sales under judicial process.

However the court further said if collusion to evade the law, existed between the mortgagor and mortgagee and, just before it went into effect, the former added large quantities of liquor to his stock, and then suffered a foreclosure of the mortgage and the issue of execution thereon, and, under the guise of a judicial sale, attempted to sell and continued the sale of small quantities of liquor from day to day, it would be re- 20 L.R.A. (N.S.)

strained as an abuse of judicial process. Ibid.

Where a distiller has a large number of barrels of intoxicating liquors in a government warehouse, it may be seized under execution for his debts, where the government tax thereon has been paid by him and the lien of the government therefor been released. May v. Hoaglan, 9 Bush, 171. See McCullough v. Large, supra.

Notwithstanding intoxicating liquors are purchased with the intent to be sold in violation of law, they become the property of the purchaser, and, if in the possession of his agent, or another, cannot be attached for the latter's debts. Monty v. Arneson, 25 Iowa, 383; Priest v. Pinkham, 18 N. H. 520; Barron v. Arnold, 16 R. I. 22, 11 Atl. 298. Contra. Donohue v. Maloney, 49 Conn. 163.

Seizure on writ of replevin.

The case of HINES v. STAHL was followed and applied in Lake v. Stahl (Kan.) 99 Pac. 275.

It was held Cottonwood v. Austin (Ala.) 48 So. 345, under an Alabama public dispensary law prohibiting a municipality purchasing intoxicating liquors except "for cash only," that a vendor who sold a municipality liquors upon credit, with an understanding that, if any part thereof were not sold or not paid for, they might be returned upon the closing of the dispensary, could not recover, in an action of detinue, the remainder of the liquor on hand that was unpaid for.

Where the vendor of intoxicating liquors has knowledge of the vendee's purpose to sell in violation of the law, the former cannot exercise the right of stoppage in transit upon the vendee's insolvency, and replevin the liquors so sold, where the statute prohibits actions for the recovery of possession of intoxicating liquors. Howe v. Stewart, supra.

Under a statute prohibiting the maintenance of any action for the recovery of the possession of intoxicating liquors sold with an intent to enable any person to violate

determine the defendant's right of possession. He testified that, when the action was begun, he was the city marshal and chief of police of the city of Topeka, and held the liquor under a warrant against Hines issued by the police court; that his term of office had since expired. This was substantially all the evidence. Judgment was rendered for the return of the property, and for its value, as fixed in the replevin affidavit, in case a return could not be had. The plaintiff prosecutes error.

The principal attack is made upon that part of the judgment allowing the plaintiff to recover the full value of the property in case a return could not be had. The argument is this: Even conceding that under the authority of *Karr v. Stahl*, 75 Kan.

387, 98 Pac. 669, the plaintiff was entitled to an order for a return of the goods, the measure of his recovery in case a return could not be had was the value, not of the property itself, but of his interest in it. He had the burden of proving the extent of his interest. His only evidence was that he held it under an ordinance. He did not introduce the ordinance, and the court cannot take judicial notice of its character. Therefore he failed to show that his interest, whatever it might have been, was of any value, and the judgment should have been limited to a return of the property. The fault of this reasoning lies in its ignoring the effect to be given to the presumptions that arise from the circumstances of the case. It must be presumed

the law, it was held in *Marienthal, Lehman & Co. v. Shafer*, 6 Iowa, 226, that the vendor of liquor intended to be sold by the vendee in violation of a prohibitory law cannot recover possession by replevin, when seized on attachment for the vendee's debts, although the former claims title thereto.

Where intoxicating liquor has been seized for an agent's debt, the owner may recover possession thereof by replevin from the officer seizing it, notwithstanding it is provided by statute that no action of any kind shall be maintained for the possession of liquors held, purchased, or sold in violation of law. *Barron v. Arnold*, supra. The court based its decision upon the ground that it was not the intent of the law to strip intoxicating liquor of its character as property, and, although kept in violation of law, it cannot be taken to pay another's debt.

And, for the same reason, it was held in *Monty v. Arneson*, supra, that intoxicating liquors, although kept for sale in violation of law, when seized for the debt of its custodian, might be recovered by replevin by the owner, notwithstanding the statute forbids the maintainance of such action, except where the person owning or possessing such liquors with a lawful intent has been illegally deprived thereof.

The contrary, however, under similar circumstances, was held in *Donohue v. Maloney*, supra, where such actions were forbidden by statute.

The local option law of Texas, providing for the search and seizure of liquors held in violation of law, expressly permits the owner thereof, when so seized, to maintain replevin therefor at any time before trial, by giving a bond conditioned that, if such liquor is condemned as a nuisance, the value thereof, with costs and fees, will be paid to the state. *Meyers v. State* (Tex. Civ. App.) 105 S. W. 48.

Where a law, prohibiting the sale of intoxicating liquors, provides for the seizure and forfeiture thereof, as well as a full hearing before a court, after public notice of the proceedings, where all persons claiming an interest therein may show cause why the liquor should not be condemned, and, if not

subject to forfeiture, that it shall be restored to the person entitled thereto,—the owner or claimant of liquors seized thereunder cannot recover possession by an action of replevin, the remedy provided being ample. *O'Neal v. Parker*, 83 Ark. 133, 103 S. W. 165; *Funk v. Israel*, 5 Iowa, 450; *Weir v. Allen*, 47 Iowa, 482; *Fries v. Porch*, 49 Iowa, 351; *Lemp v. Fullerton*, 83 Iowa, 192, 13 L.R.A. 406, 48 N. W. 1034; *Anheuser-Busch Brewing Asso. v. Fullerton*, 83 Iowa, 760, 50 N. W. 56; *P. Schoenhofen Brewing Co. v. Armstrong*, 89 Iowa, 673, 57 N. W. 436; *Greentree v. Wallace*, 77 Kan. 149, 93 Pac. 598; *State v. Barrels of Liquor*, 47 N. H. 369.

And the rule above stated has been applied notwithstanding liquors are shipped into the state and remain in the original packages, and, therefore, being an article of interstate commerce, the owner, a nonresident, is entitled to have them restored to his possession, as his rights are amply protected by the hearing provided for by the search and seizure act. *Lemp v. Fullerton*; *Anheuser-Busch Brewing Asso. v. Fullerton*; and *P. Schoenhofen Brewing Co. v. Armstrong*,—supra.

And, in *Senior v. Pierce*, 31 Fed. 625, the Federal court held, following the Iowa decisions, that an action of replevin would not lie to recover possession of intoxicating liquors seized under the Iowa prohibitory law, notwithstanding it is alleged they were imported in original packages for a lawful purpose, with no intent to evade the laws of the state.

And the doctrine that replevin will not lie to recover intoxicating liquors seized by an officer for violation of the law is recognized in *State v. Harris*, 38 Iowa, 242.

And in *Ring v. Nichols*, 91 Me. 478, 40 Atl. 329, the right to maintain replevin for intoxicating liquors so seized was denied, where it was provided by statute that liquor so seized "shall not be taken from the custody of the officer by a writ of replevin or other process while the proceedings . . . provided are pending; and [that a] final judgment in such proceedings is in all cases

that the defendant's official conduct was regular and lawful, unless something is offered to indicate the contrary. The statute (Gen. Stat. 1901, § 2499) authorizes a city ordinance providing for the seizure and destruction of intoxicating liquors kept for sale in violation of law. And that is the only way, so far at least as now occurs to the court, or has been suggested, by which the city marshal could legally acquire the possession of intoxicating liquors in virtue of his office. Doubtless, if the officer had levied an execution on the property to satisfy a pecuniary demand (assuming that a police court may issue an execution as a means to enforce the collection of a fine or costs), he would have been required to show the amount of the claim, and, if he had

a bar to all suits for the recovery of any liquors seized."

Where an officer is authorized by law, upon receiving a warrant to search for and seize liquors held in violation of law, to keep them until final action shall be had on the warrant, the owner thereof cannot recover possession from the officer by replevin while the process is pending. *Allen v. Staples*, 6 Gray, 491.

But where a law, authorizing the search for and seizure of liquor unlawfully held, fails to provide for notice of the hearing to declare it forfeited, one claiming title thereto may maintain replevin against an officer holding under a search warrant. *Re Massey*, 56 Kan. 120, 42 Pac. 365.

And where a prohibitory liquor law fails to provide a remedy for one from whom intoxicating liquor is taken by mistake, or which he rightfully held, he may replevin it from an officer seizing it in the honest discharge of his duty, notwithstanding the statute provides for public notice of the seizure, and requires any person claiming the liquor to appear and make such claim in a given time, but fails, however, to provide for the return of liquor improperly seized. *Moore v. Ewbanks*, 66 S. C. 374, 44 S. E. 971.

As it has been held that a statutory provision, that "no action of any kind shall be maintained . . . to recover possession" of intoxicating liquors, applies only when kept for an unlawful use (see *Dolan v. Buzzell*, 41 Me. 473, and *Lord v. Chadbourn*, 42 Me. 429, 66 Am. Dec. 290), when it does not appear that liquors shipped into, and stored within, a state for safe keeping are intended for unlawful use, the owner may recover possession by replevin from one who has seized it on the ground that it is kept in violation of law, as the prohibitory liquor law does not prevent one acquiring property in intoxicating liquors when kept for his own use, or transported through the state. *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639.

It was held in *Sullivan v. Stephenson*, 62 Ill. 290, that intoxicating liquors, which have been seized under a void ordinance au-

thorizing a search and seizure of the same, may be recovered by replevin. And intoxicating liquors which are seized under an unconstitutional law may be replevied from an officer, where the law permits such action to be maintained to recover property exempt from execution when unlawfully seized. *Cooley v. Davis*, 34 Iowa, 128.

But in *Karr v. Stahl*, 75 Kan. 387, 98 Pac. 669, the right of one from whom intoxicating liquor had been taken upon a search warrant issued under a void municipal ordinance providing for the seizure and destruction of liquor unlawfully kept, to replevin it from the officer making the seizure, was denied on the ground that the replevin statute did not apply to property taken "in execution on any order or judgment against the plaintiff . . . or any other mesne or final process" against him; it being said that ample remedy had been provided for testing the validity of any law, process, or judgment without recourse to an action of replevin.

And it was held in *Musgrave v. Hall*, 40 Me. 498, that, as neither by statute nor common law can the owner of property replevin it from an officer who seizes and distrains it upon a legal precept, intoxicating liquor which has been seized under a warrant because unlawfully kept cannot be recovered by the owner from the officer who executed the writ.

It was held in *Easter v. Traylor*, 41 Kan. 493, 21 Pac. 606, that the clerk of a court, being merely a ministerial officer, would not be justified in refusing to issue a writ of replevin against a sheriff, because it was sought to recover intoxicating liquors seized by him, as being kept in violation of the law, since it is for the defendant, if he has any defenses, to set them up in the replevin action; and intoxicating liquors are still property, in contemplation of law, and may be sold for certain purposes, and the fact that such property is in the possession of the sheriff, and, in one sense, in the custody of the law, is no defense to the clerk in refusing to issue the writ.

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counties in which they are in force, do not, in the absence of special statutory provisions, apply to sales under judicial process, and that spirituous liquors are property, and as such under the protection of the law, and may be taken on meane process or execution." Whether the cases cited in support of this statement go to the extent indicated by the text, and whether, if so, they were well decided, need not be considered. Our statute not only forbids all sales except by certain persons and for restricted purposes, but provides that the buyer must make a showing as to the occasion of his purchase. It would manifestly be impracticable for an execution sale to be conducted according to that method, and, as said in *Nichols v. Valentine*, 36 Me. 322, "after thus prohibiting our citizens . . . from all general traffic in intoxicating liquors, it would be an absurdity to say that the officers of the law, under its forms and by its protection, may become the vendors of those inhibited articles, restrained only by the obligation to sell to the highest bidder."

Assuming, then, that the marshal held the liquors under an ordinance passed in aid of the prohibitory law, with the purpose of destroying them if found to be kept or used in violation of the statute, the measure of his interest was manifestly either their full value or nothing at all. No other test is possible. There is no way of compensating in dollars and cents the loss of the right to destroy contraband goods unless it be by restoring their full value. The question is one of statutory construction, and we cannot suppose that the legislature intended that the elaborate provisions of the statute for the seizure and destruction of property used for forbidden purposes could be nullified by the device of regaining possession by replevin, and then dismissing the action, making away with the goods, and leaving the public officers remediless. True, the situation presented by the substitution of a sum of money for property that is held only for destruction is anomalous, but any difficulty as to the proper disposition of the fund need not give present concern. However much anxiety and embarrassment the problem may cause those charged with the interpretation and execution of the law, it need occasion none to the defendant. He voluntarily assumed the burden of taking the property subject to the order of the court, under liability to account for its value if he should fail to produce it when ordered. That he is held to this measure of accountability affords him no just ground of complaint. We think there was no error in permitting a recovery by the defendant, in case a return of the liquor could not be had, of its full 20 L.R.A. (N.S.)

value. This view was taken by the supreme court of Iowa in *Funk & Hardman v. Israel*, 5 Iowa, 438, 454, against a strong dissent, based mainly upon the difficulty of finding a proper beneficiary for the proceeds of the money judgment if collected. The case has since been followed. *Fries v. Porch*, 49 Iowa, 351, 357. The plaintiff mentions that in the answer the defendant designates the ordinance upon which his warrant was based as that numbered 2,211, and that in *Re Van Tuyl*, 71 Kan. 659, 81 Pac. 181, this court held an ordinance of the city of Topeka bearing that number to be in conflict with the statute. We cannot, however, take notice here of the proceedings in that case, or presume the identity of the ordinance there held void with the one referred to in the pleadings in this case.

The defendant's right of recovery is also questioned upon the ground that at the time of the trial his term of office had expired. Where a public officer is involved in litigation in his official capacity, the expiration of his term does not require a substitution of his successor. The public is conceived as being the real litigant. *Pittsburgh, Ft. W. & C. R. Co. v. Martin*, 53 Ohio St. 386, 41 N. E. 690; *Covington & C. Bridge Co. v. Mayer*, 31 Ohio St. 317; *Shull v. Gray County*, 54 Kan. 101, 107, 37 Pac. 994. Moreover, there is express authority for permitting a recovery in the name of Stahl, notwithstanding he is no longer in office; for the statute provides that, "in case of any other transfer of interest [than by death or other disability], the action may be continued in the name of the original party." Gen. Stat. 1901, § 4468; *Hegewisch v. Silver*, 140 N. Y. 414, 35 N. E. 658.

The judgment is affirmed.

Petition for rehearing denied January 20, 1909.

MICHIGAN SUPREME COURT.

JOHN CARROL GOODFELLOW, by Next Friend, Plff. in Err.,
v.

DETROIT UNITED RAILWAY.

(— Mich. —, 119 N. W. 900.)

Street railway — boy passenger — injury — fault of conductor.

A street car company is not liable for injury to a boy who, upon being harshly told by the conductor to show him his father, who the boy asserts has paid his fare, attempts to go to the other end of the car, along the running board, and falls off to his injury, where there is nothing to lead

the conductor to anticipate such action by the boy, who might have pointed out his father without changing his position.

(March 3, 1909.)

ERROR to the Circuit Court for Wayne County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. May & Dingeman, for plaintiff in error:

Any interference on the part of the conductor, from which injury would ensue constituted negligence, and plaintiff would be entitled to damages for such injury.

Bradley v. Ft. Wayne & E. R. Co. 94 Mich. 35, 53 N. W. 915; Etson v. Ft. Wayne & B. I. R. Co. 110 Mich. 494, 68 N. W. 298; Burgess v. Stowe, 134 Mich. 204, 96 N. W. 29; Hennessey v. Muskegon Traction & Lighting Co. 135 Mich. 29, 97 N. W. 36; Fox v. Michigan C. R. Co. 138 Mich. 433, 68 L.R.A. 336, 101 N. W. 624, 5 A. & E. Ann. Cas. 68.

Messrs. Corliss, Leete, & Joslyn, for defendant in error:

The brusque or indecorous manner of con-

ductor was not sufficient to warrant the complainant in going upon the running board. Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530.

Hooker, J., delivered the opinion of the court:

The plaintiff, a boy over thirteen years of age at the time, and timekeeper in an amusement side show at the Belle Isle bridge, in Detroit, in company with his father, boarded one of defendant's open cars about 11 o'clock in the evening on June 15, 1908. The car had running boards. They took seats near the rear of the car. At a stop made by the car, the boy changed to the front seat, facing toward the rear. He was separated from the outside of the car by one or two persons. Facing him was a boy who had told him that he intended to "beat his fare." The plaintiff's father paid fares for both himself and plaintiff while the plaintiff sat with his father. After he had gone to the front of the car, plaintiff was asked twice for his fare, and each time he answered the conductor that his father had paid his fare. The conductor again approached from the rear of the car, this time on the left running board, and again asked plaintiff for his fare, and he again answered

Case Note. — Liability of carrier for injury to child passenger who exposes himself to danger in consequence of conduct of employee.

In McGehee v. McCarley, 33 C. C. A. 629, 63 U. S. App. 422, 91 Fed. 462, it was held that the trial court did not err in refusing to direct a verdict in favor of the carrier in an action against it for the death of a seven-year-old child, where there was evidence that, while the child and its mother were waiting in the carrier's station for a train at night, the depot agent, by making an assault upon the mother, so terrified the child that she ran out upon the track, and that, while there, because of her fright and the circumstances then surrounding her, she was run over and killed by a passing train. This ruling was affirmed upon rehearing in 44 C. C. A. 252, 103 Fed. 55.

In Gray v. Metropolitan Street R. Co. 39 App. Div. 536, 57 N. Y. Supp. 587, the street railway was held guilty of negligence where the fall of a boy, sixteen years of age, from a crowded car, was caused by the act of the conductor in endeavoring to force his way upon the platform while the car was in motion. On appeal, the court said that there was no reversible error in the record, except that certain competent evidence was erroneously excluded, and, for this reason, the case was reversed in 165 N. Y. 457, 59 N. E. 262.

In Schiffer v. Chicago & N. W. R. Co. 96 Wis. 141, 65 Am. St. Rep. 35, 71 N. W. 97, it was held that a boy of ordinary intelligence, seventeen years of age, who, on several occasions, had made journeys by rail alone, assumed the risk of jumping from a moving train at a station at which the train was not scheduled to stop, although the conductor had accepted his fare to that station and promised to slow up for him, and the boy thought the promise was being kept, and jumped, when the train did not appear to be slowing up any more; the boy having no right to infer that the conductor had any power to bind the company by his promise to slow up, or to run the train otherwise than according to the published schedule.

In Moeller v. United R. Co. 133 Mo. App. 68, 112 S. W. 714, it was held that it was a question for the jury whether a twelve-year-old passenger was guilty of contributory negligence in attempting to alight from an electric car, moving a little faster than a walk, where the conductor had told him that it would stop to let him off, and it did actually slow up in such a manner as probably to lead him to believe it would stop.

In Buck v. People's Street R. Electric Light & P. Co. 46 Mo. App. 555, it was held that the street railway company's negligence was for the jury where its driver permitted a six-year old boy to ride on the front platform of a car and to undertake to alight from the platform, and, while in the act of so alighting in the presence of the driver, he allowed the car to lurch forward so as to throw the boy off and under the car.

that his father had paid it. A boy said by some witnesses to have been sitting next to the plaintiff, and by plaintiff said to have been facing him, was the one who had said to others and to the plaintiff that he intended beating his fare, and that he generally did so; and there was testimony tending to show that he was dodging the conductor by going back upon one running board as the conductor went forward upon the other. After the plaintiff stated for the third time that his father had paid his fare, the conductor, who was distant 6 or 8 feet, on the opposite side of the car, said: "Show me your father." There was testimony that he spoke harshly and in a loud tone. Thereupon, the boy got up from his seat, and started along the running board, on his side of the car, toward the rear of the car, and, slipping off, was hurt.

This action was brought to recover damages, negligence being charged. The first count charged that "the said conductor, in charge of said car, rudely and menacingly insisted that the plaintiff herein show the said conductor where his father, said Willard H. Goodfellow, was, and required and forced, by his commanding, menacing, and threatening conduct the plaintiff herein to go out of his seat and place of safety in said

vehicle, where he was then located, and go out and along the running board, or footboard, of said car while the said car was going at a high rate of speed." The second count alleged: "Its conductor rudely approached plaintiff herein while the said car was going at a high rate of speed, and demanded the payment of his fare; and when the plaintiff herein explained that Willard H. Goodfellow, his father aforesaid, had already paid plaintiff's fare, defendant's said servant rudely and menacingly denied that plaintiff's fare had been paid, and rudely and threateningly insisted that the plaintiff herein show the said conductor where his father, said Willard H. Goodfellow, was, and menacingly and threateningly reached for and attempted to grab the plaintiff herein, and put plaintiff in fear of bodily harm on the part of said conductor. That plaintiff herein, in attempting to avoid the apprehended danger from the said conductor, stepped out of his seat and on the running board, or footboard, of said car." The learned circuit judge directed a verdict for defendant, apparently upon the ground that the plaintiff had failed to prove negligence on the part of the conductor.

The plaintiff testified on direct that:

After the fare was paid, and I had taken

In *Cronan v. Crescent City R. Co.* 49 La. Ann. 65, 21 So. 163, where it appeared that the conductor of a street car signaled a ten-year-old passenger to come to the platform, saying, "The next corner is yours," and he was injured by missing his footing on alighting from the car before it came to a full stop, it was held that the company could not be adjudged responsible for the accident.

The doctrine of the turntable cases, in which liability is fixed upon the owners of dangerous machinery because of enticements or invitations held out to children to expose themselves to the dangers incurred in being in or about such places, is not applicable to the mere act of allowing children to get upon cars fitted up and used for the conveyance of all classes of persons. *Denison v. S. R. Co. v. Carter*, 98 Tex. 196, 107 Am. St. Rep. 626, 82 S. W. 782.

But in 5 Am. & Eng. Enc. Law, 2d ed. p. 583, it is said to be the duty of passengers to obey the reasonable directions of the agents in charge of the train, unless there is knowledge on the part of the passengers that obedience to such directions will lead them into danger. In the following cases this rule appears to have been applied to infant passengers:

In *Drew v. Sixth Ave. R. Co.* 26 N. Y. 49, the street railway company was held liable where it appeared that an eight-year-old boy signaled the brakeman to stop the car, and the latter beckoned the boy to come toward the car; that the brakeman seized him by the coat to place him on the platform, but allowed him to slip out of his

hands upon the track, where the front wheel passed over the boy's foot.

In *Maher v. Central Park, N. & E. River R. Co.* 67 N. Y. 52, it was held that the street railway company was negligent where it appeared that, upon being hailed by a ten-year-old boy, the driver stopped the car and told the boy to jump on in front; and, while he was on the first step, the driver struck the horses, the car gave a jerk, and the boy fell under the car.

In *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 342, it was held not to be negligence *per se* for a passenger, between fourteen and fifteen years old, to attempt, in the daytime, at the invitation of the conductor, to board a train moving no faster than a walk; but, if the train was running 6 or 8 miles an hour, such attempt would be negligence as a matter of law.

In *East Tennessee, V. & G. R. Co. v. Hughes*, 92 Ga. 388, 17 S. E. 949, it was held that, although the conductor ordered a seventeen-year-old girl passenger to jump from the moving train, and, in obeying the order, she was injured, there could be no recovery, if the order should have been disobeyed on account of the obvious danger.

In *Dietrich v. Baltimore & H. S. R. Co.* 58 Md. 347, it was held that the invitation of the driver of a street car to a boy fifteen years old to board the front platform of a moving street car from which the step had been broken, was no justification for incurring the risk that was open and apparent to his senses.

my seat in the front part of the car, the conductor came up the aisle, and said, "Give me your fare," and I said my fare was paid, and he went back, and, in a few minutes, he came up again and said, "Where is your fare?" and I said, "My fare is paid," and he came a third time and said, "Where is your fare?" and I said, "It is paid," and he said, "Who paid it?" and I said, "My father," and he said, "Show me your father," and I went down the aisle to show him my father, and I must have made a slip, for I fell off; and that is the last I know. When I speak of the aisle, I mean the outside board,—the running board.

Q. Now, what was—just explain to the jury what is the manner of the conductor, what was his manner with reference to what he said and did; did he say it in a gentle voice or did he say it—what did he say?

A. In a rough tone.

Q. What was his manner? Indicate, if you can, the tone of voice as far as you can, and anything that he did, or his actions, the actions or tone of voice on the part of the conductor, at the time he gave you those instructions.

A. He said: "Show me your father." The conductor was on the opposite side to what I was, and I was within 1 foot of the other side of the car.

Q. Now, state how you came to fall?

A. I must have missed my hold or slipped.

Q. Slipped?

A. Yes, sir.

On cross-examination, he testified:

Q. Do you know a boy that was riding on the car the night of the accident?

A. I didn't know him. I saw him trying to beat his fare.

Q. Who was he?

A. I don't know. I could not tell. He told me he was going to beat his fare before he got on. There was a boy up there that did not pay his fare, and the conductor was trying to locate that boy. I did not get up and go forward and sit next to that boy. He sat in front of me, I think. I cannot explain that exactly. I saw him go up to the back of the car when the conductor came up for my fare.

Q. He had been up in front of the car, and, when the conductor came up this time on the right-hand side, this boy went back on the other side, didn't he?

A. The conductor was on the left-hand side and the boy was on the right-hand side.

This was all of his testimony bearing on the conduct of the conductor.

Julius Suckert testified:

A. I was standing on the back of the car, and I heard a rather loud argument on the 20 L.R.A. (N.S.)

forward part of the car, and all of a sudden a boy came running along the running board on the left side of the car between the tracks, sideways, grabbing from seat to seat, to get back, and he was almost up to the rear when he lost his grip, and fell. There were a number of gentlemen back there. The general appearance of the boy indicated that he was very much frightened.

Charles Heck testified:

Q. What first attracted your attention to it with reference to the accident?

A. Why, I heard an argument in the front end of the car that attracted my attention that way naturally, and, about the time of the argument, or right shortly after that, it seems the boy got up from the seat. I didn't see him get from the seat, but I saw him step down on the running board. He probably went a foot or two back of that, and slipped by reaching one of those handles. He fell anyway.

On cross-examination he said:

I think that it is about between 7 and 8 feet from one running board to the other. The seats were all filled at the time to the best of my recollection. All were seated. There were some standing on the rear platform. There was nobody on the inside running board. Whether on the other running board, I do not remember. This running board is 10 to 12 inches wide, in the neighborhood of 12 inches wide, with handles on the posts. I didn't notice the boy at all before he got up and made the slip. I saw him just as he was stepping down on the running board. He stepped down all right and took hold with his hands of the bars, and apparently passed 2 or 3 feet towards the rear, and then fell. I think he had got about as far as the second or third seat. I would not be positive of that. I saw the conductor when I heard the argument in front. He was standing on the running board on the east side of the car. He was about the second seat. It may have been the third seat. He was close to the front. I would not say positively. I would not be positive about that. He might have been a little to the rear of the first seat.

Q. What was said at that time was said in such a tone of voice that at your distance you could not tell what was said?

A. No, sir.

Q. If the conductor was opposite the second or third seat when you heard the conversation or voices, he would have been perhaps 7 or 8 or 10 feet from the boy?

A. It depends upon where the boy was sitting. I don't know whether he was in the middle of the seat.

Q. He said he was sitting in the second

seat from the west side of the car. That makes the conductor 8 or 10 feet away?

A. It would not be quite that far. The car is not that wide.

Q. But he was back opposite the second seat, you say?

A. Perhaps 6 feet or so.

Q. The noise of the car was as usual in the gearing and moving wheels?

A. The same as a car usually runs.

Q. Of course, in order to speak to a person 7 or 8 feet away, it would be necessary to raise your voice in order to be heard?

Martin Lang testified:

I saw the conductor go up there. The conductor asked the boy for his fare. The boy says, "My father has paid it." The conductor went to the rear of the car. He was gone two or three minutes perhaps. Then he came up, and asked the boy for his fare again. The boy said, "My father paid my fare."

Q. Tell us what the conductor said to the boy. Indicate it, as near as you can, his manner in doing it. Indicate what transpired there to the jury. Give us the conversation and his manner and tone.

A. The conductor asked the boy for his fare the second time, and he said, "My father paid my fare," and by that the conductor got harsh, and he said, "Show me"—

Q. Tell us, state the exact conversation that took place between the conductor and the boy on this last occasion, and, if there is anything done, any actions on the part of the conductor, I should like it if you would indicate those, those actions and the tone of voice on the part of the conductor.

A. The conductor leaned over in the aisle, and said, "Show me your father, who paid your fare," and by that the boy got up and started for his father. He said it louder than I said it. The boy got up and left his seat, and went towards the rear end of the car. The boy passed one boy that was sitting on the outside of the seat, and he went down on the running board and straight for the rear end of the car. The conductor started for the rear end of the car, too, on the opposite side.

On cross-examination he said: "I had known this boy for some time. He was a neighbor of ours once. He lived from 75 to 100 feet from where I was. I had seen another boy up with this boy. I had seen this other boy once or twice before. I seen him on the car. I was talking to the other boy the night the accident happened before I got on the car. Johnny Goodfellow was not with me at the time. This other boy said, 'I am going to beat my fare home. I most generally do.' That boy was up in front next to Johnny. I was three or four seats back from the front seat. . . . The conductor

was there when I heard between the conductor and John Goodfellow occurred after I had changed my seat. I sat right next to the plaintiff. The conductor was standing on the running board at the time of the conversation. He was right in between the front two seats, both facing one another, on the running board. I was nearest the conductor. Johnny did not say to him, 'I will go back and show you my father.' The first time that I saw Johnny Goodfellow on the car was when I noticed him in the front seat of the car. I did not see him pass from the rear end of the car on the running board up to the front."

This is all of the testimony bearing upon the question of negligence. It justified the inference that the conductor had doubts of the payment of plaintiff's fare, and, when the boy reiterated that his father had paid it, he asked him to show him his father. There is nothing to sustain the allegation of the first count, that the conductor required and forced, by his commanding manner and threatening conduct, the plaintiff to go upon the running board. Nothing indicates that he expected him to do more than designate his father, which he could easily have done without leaving his place. The case is entirely wanting in proof of the allegation in the second count, that he menacingly and threateningly reached for, or attempted to grab, the plaintiff. The entire testimony goes no farther than to show a request or demand that he show him his father, said in a harsh and cross tone of voice. There was nothing to indicate to the conductor, or lead him to anticipate, the action of the plaintiff. It was his plain right and duty to ascertain whether this fare had been paid, and a right to have the plaintiff point out the person who paid it. That is all that he asked the plaintiff to do, and the plain implication of the question was that he would ask such person if the statement of the boy was true. There was nothing to cause the boy to attempt to escape from the conductor, and nothing which required the conductor to anticipate such action. Hence there was no negligence.

The judgment is affirmed.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. EDWARD T. YOUNG, Attorney General,

v.

JOHN E. C. ROBINSON, Appt.

(101 Minn. 277, 112 N. W. 289.)

Attorney general — powers.

1. The attorney general, as the chief law

Headnotes by BROWN, J.

officer of the state, possesses and may exercise, in addition to the authority expressly conferred upon him by statute, all common-law powers incident to and inherent in the office.

Municipal corporation — duties imposed by legislature.

2. Officers of municipal corporations organized under legislative authority are, in respect to all general laws having force and operating within their municipality, agents of the state, and may be charged with the performance of such duties in the enforcement of the same as the legislature may, from time to time, impose.

Intoxicating liquors — regulation by state.

3. The general statutes of the state regulating the sale of intoxicating liquors operate and have force uniformly throughout

the state, anything contained in municipal charters or ordinances to the contrary notwithstanding.

Attorney general — removal of mayor.

4. The forfeiture of office and pecuniary penalty prescribed by Rev. Laws 1935, §§ 1561, 1562, for the failure of the mayor or other officer named therein to make complaint of known violations of the statutes regulating the sale of intoxicating liquor, may be enforced by the attorney general, through appropriate proceedings brought for that purpose.

Same — concurrent power with city council — effect.

5. The power conferred by the charter of St. Cloud upon the city council thereof, upon the subject of the removal of municipal officers for misconduct in office, does not exclude the power of the state, through

Case Note. — Is power conferred upon municipality to remove its officers exclusive.

The conclusion reached in the above decision finds support in *Coffey v. Superior Court*, 147 Cal. 525, 82 Pac. 75, in which it was held that a provision in a municipal charter for the removal of municipal officers by proceedings instituted by the mayor before the trustees of the municipality did not confer an exclusive power, but one concurrent with that given to the superior court to proceed for the removal of a municipal officer upon presentation by the grand jury, in accordance with the Penal Code. The court said that these different provisions simply provided several tribunals in which to administer the same remedy, and the remedies were cumulative.

In the case last cited and in *STATE v. ROBINSON*, the contention by the defendant was that the authority conferred upon a municipality to remove its officers was exclusive, and prevented any other proceeding for that purpose; but, in most of the cases, the opposite contention has been made, — that the municipality had no power to remove one of its officers where, either by general law or by a state Constitution, such authority was placed elsewhere. In all these cases such contention was overruled, and it was held that the remedy prescribed was merely concurrent with that conferred upon the municipality.

Thus, in *State ex rel. Barnett v. Noblesville*, 157 Ind. 31, 60 N. E. 704, it was held that where the general act for the incorporation of cities expressly authorized the common council to remove any city officer, and a subsequent statute provided that any officer might be removed for intoxication upon the complaint of any citizen, filed in the circuit court of the county in which he resided, and a still later act provided for the impeachment and removal of any municipal officer upon accusation in writing by the grand jury, such provisions were to be read as the several sections of a single act, and were all to stand. The court said that the various acts merely provided different rem-

edies for such official misconduct as would have authorized the removal of the officer under the rules of the common law, and that, in their practical operation, the remedies they afforded were auxiliary and cumulative.

And the language of the court in *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372, would seem to bear the inference that the authority conferred by a city charter upon the mayor and the board of aldermen, to remove any municipal officer, was concurrent with that conferred upon the circuit courts by a later general act, though the specific holding was that the charter provision was not repealed by such general act.

And this view of the case just cited was taken by the same court in *State ex rel. Reid v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 863, 24 S. W. 457, in which *Manker v. Faulhaber* was followed as to a similar provision in another city charter, and the later general act was regarded as simply furnishing a cumulative remedy to that of such charter.

To the same effect is *State ex rel. Heimbürger v. Wells*, 210 Mo. 601, 109 S. W. 758, in which the two cases last cited were followed.

So, in *State ex rel. Whitaker v. Adams*, 46 La. Ann. 830, 15 So. 490, it was held that the constitutional provision that, for certain causes, municipal officers should be removed by the judgment of the district court of the domicile of such officer, was not exclusive of all other methods by which such officers might be displaced, and that the power granted to a common council in a city charter, to remove officers by impeachment proceedings, was constitutionally granted. And this case was followed in *State ex rel. Bezou v. Civil Dist. Judge*, 50 La. Ann. 655, 23 So. 886.

And in *Com. ex rel. Kelly v. Sanderson*, 11 Pa. Co. Ct. 593, it was held that the provisions of a city charter for the removal of municipal officers were simply additional to the methods and causes of removal mentioned in the Constitution, and might exist side by side with them.

the attorney general, to effect a removal for a violation of the statute above referred to. The power and authority of each is concurrent.

Same — concurrent power with county attorney — effect.

6. Nor is the authority of the attorney general taken away or superseded by the provisions of § 1561, by which the county attorney of each county is required to prosecute violations of the statute.

(June 7, 1907.)

APPEAL by defendant from a judgment of the District Court for Stearns County overruling a demurrer to the complaint in an action brought to remove defendant from the office of mayor of St. Cloud for alleged malfeasance in office, and to recover the statutory penalty. Affirmed.

The facts are stated in the opinion.

Mr. Theodore Bruener for appellant.

Messrs. Edward T. Young, Attorney General, and George W. Peterson for the State.

Brown, J., delivered the opinion of the court:

This action was brought by the attorney general, under the authority conferred by § 4545, Rev. Laws 1905, for the removal of defendant from the office of mayor of the city of St. Cloud for his alleged malfeasance in office, and to recover the penalty provided by § 1562. Defendant interposed a general demurrer to the complaint, and appealed from an order overruling it.

Section 1561, Rev. Laws 1905, makes it the duty of the mayor of every municipality in this state, and other public officers named therein, to make complaint to the proper magistrate of any known violation of the laws of the state on the subject of the sale of intoxicating liquors; and § 1562 declares a neglect of that duty malfeasance in office, subjecting the guilty officer to removal and a penalty of not less than \$100, and not more than \$500.

The complaint before us charges a violation of this statute. It alleges that the defendant is, and, at the time stated therein was, the mayor of the city of St. Cloud, an incorporated municipality of this state; that, long prior to the date mentioned, the city council thereof had duly licensed numerous persons to deal in intoxicating liquors within the city; that, for a period of four months immediately preceding the commencement of the action, the several holders of such licenses had openly, flagrantly, and continuously kept their saloons or places of business open for trade on Sunday, and often after the hour of 11 o'clock at night on other days, contrary to L.R.A. (N.S.)

to the provisions of the general statutes on the subject; that their business was so conducted and carried on with the full knowledge, approval, and consent of defendant, as mayor; and that he failed and refused to compel an observance of the law by making complaint of known violations thereof, or otherwise. Judgment is demanded that he be removed from his office, and that the state have and recover the penalty fixed by law for his neglect of duty.

It is contended by defendant (1) that the action cannot be maintained, for the reason that there is another exclusive remedy at law provided by the charter of the city of St. Cloud; and (2) that the attorney general cannot maintain an action to recover the penalty prescribed by § 1562, Rev. Laws 1905, for the reason that the duty of enforcing the same is imposed, by § 1561, upon the county attorney. The charter of the city of St. Cloud, on the subject of removal of municipal officers, provides as follows:

"Any person holding office under this charter may be removed from such office by the vote of two thirds of all the aldermen authorized to be elected. But no officer elected by the people shall be removed except for cause, nor unless first furnished with a written statement of the charges against him, nor unless he shall have a reasonable opportunity to be heard in his defense."

It further provides a course of procedure when charges are preferred seeking the removal of an officer, and empowers the council to compel the attendance of witnesses and the production of books and papers, and to hear and determine the matter on its merits. Section 7. (subs. 14) provides that no general law shall be construed as repealing or modifying any of its provisions, unless that purpose be expressly set forth in such law. Rev. Laws 1905, § 747, continues in force all existing laws relative to municipal corporations. In view of these enactments applicable to the city of St. Cloud, it is urged by defendant that the remedy for the removal of delinquent city officers provided by the charter is exclusive, and that the state, through the attorney general, has no power to interfere.

We do not concur in this contention. A municipal corporation, on coming into existence, assumes a double character. As respects its business or proprietary functions, its local affairs, it is an independent corporation, in no way subject to the control or supervision of the state, and may manage its internal affairs free from legislative interference. State ex rel. Atty.

Gen. v. Moores (State ex rel. Smyth v. Moores) 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175. It may, within the limitations of its charter, contract and be contracted with, and is solely responsible for its obligations. It may install various public utilities, and provide generally for the comfort and convenience of its inhabitants. For default in any of its obligations in this respect, the state does not concern itself; but, in so far as the general laws of the state operate and have force and effect within the municipality, and the officers thereof are charged with their enforcement, the municipality and its officers are the agents, and subject to the command and control, of the state government at all times. The legislature may impose upon the local officers specific duties in the matter of the enforcement of the laws of the state, and prescribe penalties for a failure to perform the same. Indeed, the efficient administration of the law, adopted for the welfare of the state at large, renders it imperative that the state, as guardian for the people as a whole, should possess and exercise this unqualified control. Its absence would lead to a failure of law enforcement, so essential to the good order of society and the protection of property and property rights. That the state, when creating a municipal subdivision for local self-government, retains this general supervisory control over the affairs thereof, except so far as expressly or by fair implication surrendered, there can be no serious question.

The city of St. Cloud is no exception to the rule, nor was it granted by its charter any exclusive authority respecting the removal of its officers for causes other than a violation of municipal duties. Authorities sustain the suggestion of the attorney general to the effect that the power of removal conferred upon the city vested in the council thereof such powers only as exist at common law; viz., power of determination and removal for causes involving a violation of duties to the municipality. 2 Kent, Com. 297; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; R. v. Richardson, 1 Burr. 517. In the last case cited it was laid down by Lord Mansfield that the power of removal vested in municipal corporations at common law, for causes other than misconduct toward the corporation, was dependent upon prior conviction of the offense charged by a court of competent jurisdiction; that while the corporation, through its governing body, has authority to hear and determine charges of official misconduct, it cannot hear and determine charges of other violations of law, and make its determination thereof the 20 L.R.A. (N.S.)

basis of an order of removal. That decision was rendered nearly one hundred years ago, and has since been followed both in England and in this country, particularly as applied to private corporations.

But we are not disposed to place our decision in this case upon that ground. Whether, in the many evolutionary changes of the law respecting local municipal government, the rule stated has come down unimpaired, is unnecessary to determine at this time. It may be conceded in the case at bar that, in view of the relation existing between municipal corporations, their officers, and the state, respecting the enforcement of the general laws, the power of a motion expressly conferred upon the city of St. Cloud authorizes a removal from office of any of its officers for any cause which would justify a like act by the state. But it does not necessarily follow that the power so conferred is exclusive. There was no purpose on the part of the legislature in so granting the power to surrender or divest the state of its superior authority in the premises, or to deprive it of the right to call to account, in its own way, those of its agents who fail in the performance of their official duties with respect to the general law. Indeed, it is questionable, on principle, whether the legislature could, within constitutional limitations, surrender the authority of the state in this respect. It is charged with the duty of enforcing all laws designed for the public welfare, and its obligation to the people can neither be surrendered nor contracted away. 20 Am. & Eng. Enc. Law, 2d ed. p. 1219; Philadelphia v. Fox, 64 Pa. 169. Essential to the complete performance of this duty is the unrestricted control and authority over all officers who are charged with the enforcement of the laws. This control necessarily includes power of removal for official misconduct, a surrender of which by the legislature would disable the state in a large measure from performing fully its obligations to the people. Its command to the local officers to proceed with the enforcement of the law might or might not be complied with, depending upon the nature of the law sought to be enforced, and the temper and disposition toward it of the local removing power. This would result in the enforcement or the nonenforcement of wholesale regulations for the public weal, as suited the notions of those in local power. The fundamental principles of law will not justify a decision which would result in an indifferent administration of our laws naturally to follow from such a doctrine.

The section of the Revised Laws already referred to makes it the duty of the mayors

of all municipalities of the state to enforce the liquor statutes, and declares a failure to perform that duty malfeasance in office, subjecting the delinquent to removal from office. Section 4545 expressly empowers the attorney general to enforce forfeitures of office, without restriction or limitation as to particular officers. No reason occurs to us why this authority may not be exercised concurrently with the power conferred upon the city council, conceding that its power extends to causes of removal other than those disclosing delinquency in the performance of duties to the city. The charter does not purport to confer the exclusive power upon the council and we are not justified in presuming that the legislature so intended. There is nothing in the charter so indicating, and, by the general rule applicable to the subject, all general laws and regulations remain unimpaired by municipal charters, except to the extent expressly declared to the contrary.

This rule is illustrated by the case of *State v. Lee*, 29 Minn. 445, 13 N. W. 913, where the court held that a prosecution under an ordinance of the city of St. Paul for keeping a house of ill fame was not a bar to a prosecution for the same act under the general statutes. In discussing the subject the court said: "The Constitution assumes and recognizes the existence and necessity of municipal corporations as bodies politic, having such powers of local self-government under grants from the legislature as are ordinarily conferred on them, and such as they have usually possessed and exercised in the past, both in England and this country. *St. Paul v. Colter*, 12 Minn. 41, Gil. 16, 90 Am. Dec. 278; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 96, 9 Am. Rep. 103; *Greenwood v. State*, 6 Baxt. 567, 32 Am. Rep. 539. Though its authority is derivative and local, the municipal corporation may be considered a separate government under its charter, which, subject to the general laws, stands for its Constitution. The operation of the general laws remaining unimpaired, the local laws of the municipality are extra, and relate to matters which are properly of municipal cognizance. The local government simply enforces its own laws, for a purpose separate and distinct from that of the general laws, having special reference to the suppression and restraint of the elements of disorder and immorality. *State v. Charles*, 16 Minn. 474, Gil. 426. In view of the history, nature, and purposes of such corporations, it seems to be clear that the legislature has the power to grant such chartered privileges to them as bodies politic, without surrendering any of the jurisdiction of the state over of-
20 L.R.A. (N.S.)

fenses against it. *State v. Oleson*, 20 Minn. 507, 5 N. W. 959. It is essential to good government and the public welfare that the authority of the state and municipality should thus stand together." See also *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531. It is appropriate that the power of a motion be granted to all municipalities, to aid in the government and control of their local affairs; but the orderly administration of such affairs does not require that the power should be exclusively of the general supervisory control of the state. Both powers may stand together without conflict. We so dispose of the question. *State ex rel. Hastings v. Smith*, 35 Neb. 13, 16 L.R.A. 791, 52 N. W. 700.

It is further contended that the attorney general cannot maintain an action to recover the penalty imposed by § 1562, for the reason that the duty of enforcing all penalties resulting from a failure to observe the liquor statutes is cast upon the county attorney. In this we do not concur. The authority of the attorney general to maintain the action for a forfeiture under § 4545 is not questioned. The contention is that the county attorney alone may enforce the penalty provided for by § 1562. This question might be disposed of adversely to defendant on the ground that a misjoinder of causes of action is not raised by the demurrer. But we pass that point and dispose of the question upon its merits.

That the unrestrained traffic in intoxicating liquors is detrimental to the good order and welfare of the state and its citizens is conceded and declared by all courts where the subject has been under consideration, and statutes designed to restrain and regulate it are uniformly upheld. Such statutes find support in the police power, and the general subject is under the complete control of the legislature. *Black, Intoxicating Liquors*, 24; *Winona v. Whipple*, 24 Minn. 61.

For many years prior to 1887, the laws of this state upon the subject were in a condition of much confusion. The legislature had practically surrendered control of the traffic to the municipalities of the state, which had in turn enacted ordinances regulating the same in harmony with the varying notions of the numerous local municipal councils and governing boards. This resulted in a total lack of uniformity in administrative regulations, and induced extremely lax enforcement of such restrictions as were imposed, creating discontent in the public mind and a strong demand for exclusive control by the state. In 1887 the legislature laid hold of the subject, and asserted its authority in the premises by enacting the so-called "high license

law." Laws of 1887, chaps. 5, 6, pp. 40, 41. These statutes were expressly made applicable to all cities, villages, and other municipal subdivisions to which the legislature had previously delegated the power of regulation, and all exclusive authority theretofore granted and delegated was thereby in effect repealed. Chapter 6 imposed many specific duties and obligations upon public officers in reference to the subject, including that which defendant is charged with neglecting, and prescribed severe penalties for a violation of any of its provisions. The prior statutes were enlarged and made more specific by chapter 90, p. 211, Laws 1895, and the legislature therein again declared that the provisions thereof should apply to all municipal corporations of the state, anything in the charters or ordinances thereof to the contrary notwithstanding. Other similar acts have since been placed upon the statute books, all of which lead to but one conclusion, *viz.*, that the legislature intended thereby for the future to restore to the state its superior authority respecting the regulation and control of the liquor traffic. *State v. Swanson*, 85 Minn. 112, 88 N. W. 416. This necessarily included a restoration of the authority of the executive officers of the state, who are charged with the duty of enforcing the law, which the prior statutes had in effect taken away. It restored the authority of the attorney general in the premises, and he may maintain this action unless it be held that the legislature intended, by the provision of § 1561, imposing the duty of prosecuting violations of the statute upon the county attorney, to commit to that officer exclusive authority in respect to proceedings to enforce that particular statute.

In view of this attitude of the legislature, and its evident purpose of re-establishing the supreme authority of the state in reference to this subject, the contention that the attorney general has no authority to prosecute the action does not require extended discussion. The office of attorney general has existed from an early period, both in England and in this country; and is vested by the common law with a great variety of duties in the administration of the government. The duties are so numerous and varied that it has not been the policy of the legislatures of the states of this country to attempt specifically to enumerate them. Where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto at the common law. *State ex rel. Young v. Kent*, 96 Minn. 255, 1 L.R.A.(N.S.) 826, 20 L.R.A.(N.S.)

104 N. W. 948, 6 A. & E. Ann. Cas. 905; 4 Cyc. Law & Proc. p. 1028; *Hunt v. Chicago & D. R. Co.* 20 Ill. App. 282; *Parker v. May*, 5 Cush. 336; *People v. Miner*, 2 Lans. 396; *People v. Tweed*, 13 Abb. Pr. N. S. 25. From this it follows that, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time, require. He may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. We have no statutory restrictions in this state.

The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement, is, in no proper view, a limitation upon, nor does it exclude, the general authority of the attorney general upon the same subject. We have numerous instances where particular duties are expressly imposed upon the county attorney, yet it is clear that the attorney general has the right, in virtue of his office, to co-operate with or act independently of that official in all cases where the public interests justify it. The purpose of this statute was not to confer special exclusive authority upon the county attorney, but rather specifically to require of him the performance of an existing official duty. The authority to conduct proceedings there required to be brought is incidental to his office, and the statute was in effect but a command of the state to perform his duty. If the command thus made were to be held a vesting of exclusive authority, then with equal propriety it could be held that the duty imposed by the same statute upon mayors and other municipal officers, to make complaint of known violations of the statutes, would necessarily preclude complaints by others. The reason for so holding would apply with the same force to both cases. But that is not the law; and it is manifest that the legislature did not intend, by the statute under consideration, to vest the exclusive power in the county attorney for enforcing its various provisions. The authority conferred upon that officer and the general power of the chief law officer of the state may stand together without conflict; and we so hold.

The question is not affected by § 4540, which provides that actions for fines and forfeitures may be prosecuted by certain designated persons. That statute is permissive, and does not exclude the attorney general.

Our conclusion, therefore, is that the at-

torney general is authorized by law to maintain the action to enforce the pecuniary penalty in question, notwithstanding the fact that the county attorney might also maintain proceedings to recover it. The commencement of the action by him is in complete harmony with the attitude of the legislature in restoring the exclusive authority of the state in the matter of regulating the liquor traffic, effected by the high license and other statutes on the subject, and the demurrer to the complaint was properly overruled.

Order affirmed.

MINNESOTA SUPREME COURT.

C. G. ANDERSON et al., Respts.,
v.

WISCONSIN CENTRAL RAILWAY COMPANY, Appt.

(— Minn. —, 120 N. W. 39.)

Auction — bid — effect.

1. An announcement or advertisement that certain property will be sold at auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received. It is not an

Headnotes by ELLIOTT, J.

Case Note. — Right to withdraw property from an auction sale after it has been offered.

To the case of *Tillman v. Dunman*, 57 L.R.A. 784,—holding that an executor, offering land for sale at public outcry, may withdraw the same at any time before the hammer falls,—is appended a note collecting the earlier cases upon this subject.

It is said in 17 Am. & Eng. Enc. Law, 2d ed. p. 979 (title Judicial Sales), that in South Carolina it is considered that property offered at judicial sale may be withdrawn after a bid has been made (citing *Miller v. Law*, 10 Rich. Eq. 320, 73 Am. Dec. 92), but that the contrary has been held in Ontario (citing *McAlpine v. Young*, 2 Ch. Chamb. Rep. (U. C.) 85, 171; *O'Connor v. Woodward*, 6 Ont. Pr. 223).

It is provided by the uniform sales law, which has been adopted in Arizona, Connecticut, New Jersey, Massachusetts, Ohio, and Rhode Island, that goods offered for sale at auction may be withdrawn at any time before the fall of the hammer, unless the sale has been announced to be without reserve. See *Williston, Sales*, § 294.

The recent case of *McPherson Bros. Co. v. Okanogan County* 45 Wash. 285, 9 L.R.A. (N.S.) 748, 88 Pac. 199, which sustains the right of withdrawal is sufficiently set forth in the opinion of *ANDERSON v. WISCONSIN C. R. Co.*
20 L.R.A. (N.S.)

offer to sell, which becomes binding, even conditionally, on the owner when a bid is made.

Same — acceptance.

* 2. An acceptance asks for bids for the property, and a "bid" is an offer to purchase at the price named. Until the offer is accepted, no contract relations exist.

Same — withdrawal.

3. At any time before the bid is accepted, the bidder may withdraw his offer to purchase or the owner his offer to sell.

(March 5, 1909.)

APPEAL by defendant from an order of the District Court for St. Louis County denying an alternative motion for judgment notwithstanding a judgment in plaintiffs' favor or for a new trial in an action brought to recover damages alleged to have been sustained by reason of refusal to accept a certain bid at a public sale. Reversed.

The facts are stated in the opinion.

Messrs. Crassweller & Crassweller, for appellant:

An advertisement of a sale by auction is a mere declaration of intention, and does not bind the seller to sell at all, or to sell to any particular bidder, or to accept the highest bid.

Clark, Contr. pp. 41-43; 9 Cyc. Law & Proc. p. 280; Addison, Contr. p. 12; Bate-

It was held in *Bean v. Kirkpatrick*, 105 Ga. 476, 30 S. E. 426, to be the right and duty of an administrator, in conducting a public sale of property belonging to the estate of his intestate, to withdraw it from sale when it is manifest that it is about to be sacrificed at a grossly inadequate price. And language to the same effect is to be found in *Rogers v. Dickey*, 117 Ga. 819, 45 S. E. 71.

It was said in *Henderson v. Sublett*, 21 Ala. 626, that, in making a judicial sale of property, an officer, if the price offered is grossly inadequate, should not proceed with the sale, but should return the fieri facias as levied, but that the property was not sold for want of buyers, and wait for a *venditioni exponas*.

And the court, in *State Bank v. Brown*, 128 Iowa, 665, 105 N. W. 49, said that a sheriff in making a judicial sale undoubtedly has some discretion, and, for reasons which appear good and satisfactory to him, may refuse a bid, or, having accepted it, may, before the transaction is closed, repudiate the same, or authorize its withdrawal and resell the property.

As a bidder at an auction is entitled to withdraw his bid at any time before the hammer falls, a corresponding right exists in the seller, within the same time, to withdraw the goods from sale. *Fenwick v. Macdonald, F. & Co.* 6 F. 850, Ct. of Sess. 1 *Butterworths' Ten Years'*, Dig. p. 90.

man, Auctions, pp. 30-126; 1 Parsons, Contr. 8th ed. pp. 479, 480; Story, Sales, § 461; Benjamin, Sales, § 42; 1 Warvelle, Vendors, § 247; Sugden, Vendors, 8th Am. ed. 21; Williams, Vend. & P. 19; 3 Am. & Eng. Enc. Law, 2d ed. p. 501; Payne v. Cave, 3 T. R. 148; Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339, 53 Pac. 812; Donaldson v. Kerr, 6 Pa. 486; Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335; Kent, Com. 538; 4 Cyc. Law & Proc. p. 1044; Tillman v. Dunman, 114 Ga. 406, 57 L.R.A. 784, 88 Am. St. Rep. 28, 40 S. E. 244; Corryolles v. Mossy, 2 La. 504; Girardey v. Stone, 24 La. Ann. 286.

A bid is a mere offer, which binds nobody until accepted by the seller, and the bidder may retract his bid, or the owner withdraw his property, at any time before the hammer falls.

Blossom v. Milwaukee & C. R. Co. 3 Wall. 196, 18 L. ed. 43; Nebraska Loan & T. Co. v. Hamer, 40 Neb. 282, 58 N. W. 695; Grotenkemper v. Achtermeyer, 11 Bush, 222; Bateman, Auctions, 30; Leake, Contr. p. 21; Sugden, Vend. & P. 14th ed. p. 14; 1 Dart, Vend. & P. 6th ed. p. 139; 3 Am. & Eng. Enc. Law, p. 501; Fisher v. Seltzer, supra; Harris v. Nickerson, L. R. 8 Q. B. 286; Cooke v. Oxley, 3 T. R. 653; Benjamin, Sales, 7th ed. §§ 41, 42; 1 Parsons, Contr. 8th ed. 491-496; Stensgaard v. Smith, 43 Minn. 11, 19 Am. St. Rep. 205, 44 N. W. 669; Bailey v. Austrian, 19 Minn. 535, Gil. 465; Tarbox v. Gotzian, 20 Minn. 139, Gil. 122; Ashcom v. Smith, 2 Penn. & W. 211, 21 Am. Dec. 437; Farr v. John, 23 Iowa, 286.

An auctioneer may exercise a reasonable discretion in refusing a bid which he believes to be detrimental to the interests of his employer and likely to depress the bidding.

Taylor v. Harnett, 26 Misc. 36, 55 N. Y. Supp. 988; Holder v. Jackson, 11 U. C. C. P. 546; Newman v. Vonderheide, 9 Ohio Dec. Reprint, 164; Warlow v. Harrison, 1 El. & El. 309; Payne v. Cave, supra; Bateman, Auctions, p. 139; Addison, Contr. 10th ed. 443; Mainprice v. Westley, 6 Best & S. 428; Boyd v. Greene, 162 Mass. 566, 39 N. E. 277.

Messrs. Jaques & Hudson, for respondents:

The refusal of the auctioneer to sell the building to the highest bidder constituted a breach of its contractual obligation.

Warlow v. Harrison, 1 El. & El. 308; Bowman v. McClenahan, 20 App. Div. 346, 46 N. Y. Supp. 945; Conolly v. Parsons, cited in Bramley v. Alt, 3 Ves. Jr. 620; Woodward v. Miller, 2 Colly. Ch. Cas. 279; Robinson v. Wall, 2 Phill. Ch. 372; Thornett v. Haines, 15 Mees. & W. 367; Harris v. 20 L.R.A. (N.S.)

Nickerson, L. R. 8 Q. B. 286; Johnston v. Boyes [1899] 2 Ch. 73; Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q. B. 256; O'Connor v. Woodward, 6 Ont. Pr. Rep. 223.

Elliott, J., delivered the opinion of the court:

The Wisconsin Central Railway Company, having acquired certain real property in the city of Duluth through condemnation proceedings, advertised that, at a time and place stated, the buildings thereon would be sold at public auction. Bids for a certain house had been made until the amount offered amounted to \$675. Anderson then increased his bid \$5, making his offer \$680. The auctioneer refused to consider this bid, because, as he stated, the amount of the raise was too insignificant. After waiting for a time to give Anderson an opportunity to increase it, the auctioneer announced that the house was sold to the last previous bidder for \$675. An entry of this sale was made by the auctioneer in his entry book, as required by § 2815, Rev. Laws 1905. Anderson demanded to know why the auctioneer had not accepted his bid, and on the same day he tendered the \$680, and it was refused. Before this tender was made, a bill of sale of the building had been executed and delivered to the party to whom the building had been knocked down. Anderson then brought this action for damages, and recovered a verdict for \$1,500. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict, or for a new trial.

The conflicting contentions of the parties arise out of fundamentally different conceptions of the nature of an auction. The appellant contends that the advertisement of a sale at auction is a mere declaration of intention, which does not bind the owner to sell, or to sell to any particular bidder, and that the contract is not made until the bid is accepted. The complaint charges the defendant with liability for damages resulting to the plaintiffs from its unlawful refusal to sell the building to them, and to carry out the terms and conditions of the auction sale. It proceeds upon the theory that, notwithstanding the bid, no sale was in fact made to them, because the defendant refused to recognize their right to purchase. The claim, as stated in the brief, is that "the advertisement constitutes a complete memorandum of contract, not of sale, but to sell, to the person who shall comply with its conditions; i. e., becomes the highest bidder at the auction provided for in the writing. The proposal became a binding written contract to sell to that person the building at his bid." While the action was thus

brought for the breach of an agreement to sell to the highest bidder, the argument proceeds upon the theory that, under such conditions, a contract has its inception in the announcement or advertisement of the owner's intention to sell the designated property at public auction to the highest bidder; that, unless the contrary is expressly stated in the announcement, the sale is to be without reserve; that the bid of the highest bidder is the acceptance of the offer; that the fall of the hammer is an announcement by the agent of the owner that he will wait no longer for a higher bid; and that the one whose bid was highest when the hammer fell is the purchaser without reference to the action of the auctioneer in announcing that some other bidder is the purchaser. Reduced to its lowest terms, this means that the offer to sell is made in the advertisement of intention to sell at auction, and that the contract is completed by the acceptance of that offer by the bidder. There is some ground for this theory, but the decided weight of authority sustains the view that the announcement is a mere statement of intention to hold an auction, and that no contract of any character is made until the offer to purchase is accepted by the auctioneer.

The jury, under proper instructions, found that the property was offered without express reservations as to the amount of the bids, that the bid of \$5 was made in good faith, and that, under the circumstances, the amount was not so small as to justify the auctioneer in declining to consider it on that ground. No exceptions were taken to the instructions which submitted these questions to the jury, and on this appeal we accept the conclusions of the jury as final. The issue is also simplified by the fact that the case involves no question of puffing or by-bidding by the owner, or of fraud or misrepresentation in the announcement of the sale. For the purpose of the argument, we assume the correctness of the respondent's claim that an advertisement or announcement of an auction sale which does not state limitations and conditions is equivalent to the announcement that the sale will be without reserve. The issue of law is thus clearly defined.

The custom of selling goods at auction is as old as the law of sale. In Rome military spoils were disposed of at the foot of the spear—*sub hastio*—by auction, or increase. In later times we find a mode of auction called a "sale by the candle," or by the "inch of candle," which consisted of offering the property for sale for such a length of time as would suffice for the burning of an inch of candle. In Holland they inverted the usual process, and put the property up

at a price usually greater than its value, and then gradually lowered the price until some one closed the sale by accepting the offer and thus becoming the purchaser. In ancient Babylon the young women were sold at a public auction according to a method which combined the features of the Dutch and ordinary kinds of auctions. The group of prospective wives would ordinarily contain some who, by reason of personal beauty, were thought more desirable than others. The attractive ones were first sold to the highest bidders. When the supply of this quality was exhausted, those less favored by nature were offered and sold to the bidders who would take them with the least dowry, which was payable out of the money received from the sale of the beauties. Herodotus considered this custom very commendable.

In view of the general prevalence of the custom of selling by auction, it is remarkable that no very early cases are found in the English reports. The parent case of *Payne v. Cave*, 3 T. R. 148, was decided by Lord Kenyon, Ch. J., sitting at Guildhall in 1788. The plaintiff offered a distilling apparatus for sale, including a pewter worm, at public auction, on the usual conditions that the highest bidder should be the purchaser. There were several bidders for the worm, of whom Cave, who bid £40, was the last. The auctioneer dwelt on this bid for some time, until Cave said: "Why do you dwell? You will not get more." The auctioneer stated that he was informed that the worm weighed at least 1,300 hundred-weight, and was worth more than £40. The bidder then asked him if he would warrant it to weigh so much, and, receiving an answer in the negative, he declared that he would not take it. The worm was then resold on a subsequent day for £30, and an action was brought against Cave for the difference. Lord Kenyon ruled that the bidder was at liberty to withdraw his bid at any time before the hammer fell, and nonsuited the plaintiff. On motion to set aside the nonsuit, it was contended that a bidder is bound by the conditions of the sale to abide by his bid, and could not retract; that the hammer is suspended, not for the benefit of the bidder, or to give him an opportunity for repenting, but for the benefit of the seller; and that in the meantime the person who bid last is a purchaser, conditional upon no one bidding higher. But the court thought otherwise, and held that the auctioneer was the agent of the vendor, and that the assent of both parties was necessary to make the contract binding, and "that is signified on the part of the seller by knocking down the hammer, which was not done here until the plaintiff had re-

tracted." "An auction," said the court, "is not inaptly called a *locus penitentie*. Every bidding is nothing more than an offer on one side, which is not binding on either side until assented to."

The idea that an action will lie for the breach of an implied undertaking to sell to the highest bidder was advanced in *Warlow v. Harrison* (1859) 1 El. & El. 309, and *dicta* supporting it will be found in *Harris v. Nickerson* (1873) L. R. 8 Q. B. 288, *Spencer v. Harding* (1870) L. R. 5 C. P. 563, *Re Agra & Masterman's Bank* (1867) L. R. 2 Ch. 391, 397, and *Johnston v. Boyes* [1899] 2 Ch. 73. These cases assume that an offer to sell property at auction is indistinguishable from the case of an offer to the general public, such as a reward for the return of lost property, where it is held that contract rights are created in favor of one who complies with the conditions of the offer. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256; *Anson, Contr.* p. 52. *Langdell* seems to be the only text-writer who takes this view of what the law should be. In his *Summary of the Law of Contracts* (page 24) it is stated that the correct view is "that the seller makes the offer when the article is put up,—namely, to sell it to the highest bidder,—and that when a bid is made there is an actual sale, subject to the condition that no one else shall bid higher." See note to *Tillman v. Dunman*, in 57 L.R.A. 784, 789.

Warlow v. Harrison, the source of all the uncertainty, was an action against an auctioneer who had advertised that he would sell certain horses, "the property of a gentleman, without reserve," at auction. Warlow bid 60 guineas for one of the horses, whereupon the owner bid 61 guineas. Warlow refused to increase his bid, and the horse was announced as sold for 61 guineas to the owner. Warlow, claiming to be the highest good-faith bidder, tendered the amount of his bid to the auctioneer and demanded the horse, and, on this being refused, brought an action against the auctioneer, alleging that the defendant was his agent to complete the contract, that he had refused to do so, and that he had thereby lost certain money in attending the auction, and had been deprived of the benefit of his contract. The defendant pleaded: (1) Not guilty; (2) that the plaintiff was not the highest bidder; and (3) that the auctioneer did not become the bidder's agent to complete the sale. The plaintiff recovered a verdict, but the common pleas (Lord Campbell, Ch. J., Wightman, J., and Erle, J.) ordered a nonsuit on the ground that the plaintiff's allegation as to the agency of the defendant and the duty of the defendant to complete the contract on behalf of the

plaintiff was not sustained. It was urged in argument that an auctioneer is the agent of the bidder to receive the bid; that the bidder is a conditional purchaser; that, when the sale by the conditions is without reserve, the bidder is absolutely the purchaser, unless there be a bona fide higher bidding; and that the auctioneer, in consideration of the bidding by which a commission will come to him, promises the highest bidder to knock down the article to him and to do all that is necessary to complete the sale. "But this reasoning," said Lord Campbell, "is wholly at variance with the case of *Payne v. Cave*, supra, which has been considered good law for nearly 70 years. That case decided that a bidding at an auction, instead of being a conditional purchase, is a mere offer, that the auctioneer is the agent of the vendor, that the assent of both parties is necessary to the contract, that this assent is signified by knocking down the hammer, and that till then either party may retract. This is quite inconsistent with the notion of a conditional purchase by a bidding, and with the notion of there being any personal promise by the auctioneer to the bidder that the bidding of an intending purchaser shall absolutely be accepted by the vendor. The vendor himself and the bidder being respectively free till the hammer is knocked down, the auctioneer cannot possibly be previously bound." Holding, thus, that no action would lie against the auctioneer, the court found it unnecessary to consider whether there was any remedy against a vendor who had violated a condition that the property would be sold to the highest bona fide bidder without reserve. In the Exchequer Chamber the decision was affirmed; but, as the plaintiff might amend his declaration, the court discussed the merits of the case which might be made. Barons Martin, Byles, and Watson were of the opinion that the plaintiff was entitled to recover from the auctioneer, because the auction was announced to be "without reserve," which meant that neither the owner nor any one in his behalf should bid at the auction, and that the property would be sold to the highest bidder, whether the sum bid was equivalent to the real value or not. On the principle which creates a contract between the loser of property who offers a reward for its return and the finder, or a railway company which advertises a time-table and one who purchases a ticket, it was said that an auctioneer who put the property up for sale upon such conditions pledges himself that the sale shall be without reserve, and that a contract is made with the highest bidder, who, in case of a breach thereof, has a right of action against the auctioneer. "We think," said Baron

Martin, "the auctioneer has contracted that the sale shall be without reserve, and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or it be the last bid upon which the article is knocked down. In either case the sale is not 'without reserve,' and the contract of the auctioneer is broken. We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority; but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified." Baron Bramwell and Willes, J., preferred to rest the judgment upon the ground that the auctioneer had undertaken to have, and yet there was evidence that he had not, authority to sell without reserve.

Mainprice v. Westley (1865) 6 Best & S. 420, was also an action against the auctioneer. The declaration averred that in handbills and circulars it was "stated and represented by him that he, the defendant, would offer the said message and shop for peremptory sale by public auction" at a day and place named; that the plaintiff, confiding in the statements, attended at the time and place; that the message and shop were offered according to the representation; that the plaintiff then bid a price which was the highest bid, except a sum which, to the knowledge of the defendant, was bid by an agent of the vendor contrary to the representation that the sale would be peremptory; and that the defendant refused the plaintiff's offer. It was said that if it had been alleged that any part of the representation had been false to the knowledge of the defendant, and that the plaintiff, by reason of the deceit, had been induced to incur expense by going to the place of auction, the count would have been good. But intentional deceit was not alleged, the plaintiff relying on the claim that there was a contract on the part of the auctioneer that, if the plaintiff was the highest bidder, the premises would be knocked down to him. It was held that no contract had been proven, because the handbills disclosed that the auctioneer was merely the agent of a principal, the name of whose solicitor was given. If any express contract was made, it was with this solicitor. The court declined to determine whether there was any liability on his part, and merely held that no case had been proven against the auctioneer. Cockburn, Ch. J., Shee, J., and Blackburn, J., *dubitante*, were of the opinion that when a auctioneer, without disclosing his principal, advertises a sale with-

out reserve, he personally contracts that there shall be a sale without reserve. But the point was not decided. As to *Warlow v. Harrison*, Blackburn, J., said: "Three learned judges gave their opinion that, where an auctioneer advertised a sale without reserve, not disclosing in any way who his principal was, he personally contracted that there should be a sale without reserve. Two other learned judges did not agree in this view; and it appears that ultimately the court of exchequer chamber pronounced no other judgment than that the pleadings should be amended to enable the parties to raise the question, unless they consented to a *stet processus*, which they did. We do not think, therefore, that we are precluded by this as a judgment of the court of error; and, if necessary, we should be at liberty to consider the question whether, even in a case where the name of a principal is not disclosed by an auctioneer, there is a contract by the latter such as is now insisted on."

In *Harris v. Nickerson* (1875) L. R. 8 Q. B. 286, the nature of the advertisement was considered, and it was held that it should be construed as a mere declaration of intention, which did not amount to a contract with any one who might act upon it, or constitute a warranty that the articles advertised would be offered for sale. Certain articles were not offered, and a party who attended for the purpose of bidding brought an action to recover for his loss of time and expense. Blackburn, J., said: "This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale, for his cab hire and traveling expenses." Referring to *Warlow v. Harrison*, the learned judge remarked that there the majority of the judges held that an action would lie for not knocking down the property to the highest bidder, when the sale was advertised as without reserve; that in such a case there is a contract to sell to the highest bidder, and, if the owner bids, there is a breach of the contract. Quinn, J., was also of the opinion that the particular action could not be maintained without going to the extent of saying that, where an auctioneer issues an advertisement of the sale of goods, if he withdraws any part of them without notice, the persons attending may all maintain actions against him. He was of the opinion, however, that when a sale is advertised without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow v. Harrison*, that a contract is entered into between the auctioneer and the highest bona fide

bidder. But that rule was not applicable to the case under consideration, as the property was never put up for sale, and it was impossible to say that there was a contract with everyone attending the sale. The real point in the case was brought out by Justice Archibald, who said: "This is an attempt on the part of the plaintiff to make a mere declaration of intention a binding contract. He has utterly failed to show authority or reason for the proposition. If a false and fraudulent representation had been made out, it would have been quite another matter. But to say that a mere advertisement that certain articles will be sold by auction amounts to a contract to indemnify all who attend, if the sale of any part of the articles does not take place, is a proposition without authority, or ground for supporting it."

Re Agra & Masterman's Bank (1867) L. R. 2 Ch. 391, held that the holder of a letter of credit is the agent of the writer, for the purpose of entering into a contract. Lord Cairns referred to *Warlow v. Harrison* and *Denton v. Great Northern R. Co.* 5 El. & Bl. 860, as analogous cases. In *Spencer v. Harding*, L. R. 5 C. P. 561, it appeared that the defendant had sent out circulars inviting offers for a stock of goods. Mr. Justice Willes said that, "if the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them." It was held that the circular contained no words intimating that the highest bid would be accepted.

In *Johnston v. Boyes* [1899] 2 Ch. 73, it appeared that Boyes had advertised the freehold of a public house for sale at auction, under conditions providing that the highest bidder should be the purchaser. The plaintiff, a married woman of financial standing, sent her husband to bid for her, but did not supply him with the necessary funds. The property was knocked down to him; but the auctioneer, who knew that he was financially irresponsible, refused to accept his check for the amount of the required deposit, and sold the property to another person. The husband assured the auctioneer that his wife would furnish the money to make the check good, and the court found that his statement was true. The plaintiff sued the vendors for breach of the contract that the highest bidder should be the purchaser. It was held that the bidder had

not complied with the conditions of sale, which required that the deposit should be in cash. This disposed of the case; but the court stated that the action could have been maintained, had the deposit been tendered in cash and the highest bidder been refused the property. "A vendor," said Cozens-Hardy, J., "who offers property for sale by auction on the terms of the printed conditions, can be made liable to a member of the public who accepts the offer, if those conditions be violated,"—citing *Warlow v. Harrison*, 1 El. & Bl. 295, and *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256.

But the doctrine of *Warlow v. Harrison* was never generally acquiesced in, and in *Lord Halsbury's Laws of England*, vol. 1, p. 511 (n), doubt is expressed as to its correctness. In a recent English edition of *Benjamin on Sales* (1906) the learned editors say that "two points were involved in *Warlow v. Harrison*; viz. (1) Is an announcement that a sale will be without reserve, or will be made to the highest bidder, an offer of a contract with the highest bona fide bidder, and accepted by his bid? (2) When an auctioneer, acting for an undisclosed principal, makes such an announcement, does he thereby offer to contract personally? Although technically *Warlow v. Harrison* may not have been an actual decision upon these points, yet there was the strongest intimation of opinion in the affirmative on both points on the part of three judges, from which the other two did not dissent; and the case has been subsequently treated as actually deciding them. On the second point, however,—the personal liability of the auctioneer acting for an undisclosed principal,—the case was doubted by Cockburn, Ch. J., and Shee, J., in *Mainprice v. Westley*, because the employment of an auctioneer necessarily involves the character of agent only, and therefore, *prima facie*, he does not contract personally. . . . As pointed out by a learned writer [Pollock, *Contr.* pp. 17, 19], *Warlow v. Harrison* involves the theory that bidding at an auction advertised to be without reserve is not, as in other cases, a mere offer, but a conditional acceptance, the condition being that no higher bidder presents himself. But this theory cannot hold good under § 58 (2) of the Code, as the sale is not 'complete' until the fall of the hammer, so that, until then, neither party is bound. Yet, when once the goods are put up, there may, perhaps, be an implied contract not to withdraw them" [*Benjamin, Sales*, p. 487],—citing *Johnston v. Boyes*, *supra*.

In commenting on *Warlow v. Harrison*, Sir Frederick Pollock says that "the opinions expressed by the judges, therefore, are not equivalent to the actual judgment of a

court of error, and have been, in fact, regarded with some doubt in a later case, where the court of Queen's bench decided that, at all events, an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without reserve." Pollock, Contr. (Williston ed.) p. 18, citing *Mainprice v. Westley*, supra. It is now settled that the fact of disclosure or nondisclosure of the principal is immaterial. *Woolfe v. Thorne* (1877) L. R. 2 Q. B. Div. 355; *Rainbow v. Howkins* [1904] 2 K. B. 322.

Sale of Goods Act 1893 (Stat. 56 & 57 Vict. chap. 71) § 58 (2), provides that ". . . (2) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid." It was held in the Scotch case of *Fenwick v. Macdonald, F. & Co.* (1904) 6 F. 850, Ct. of Sess. 1 *Butterworth's Ten Years' Dig.* p. 90, that, whatever may have been the law formerly, this statute entitles a bidder to withdraw his bid at any time before the fall of the hammer, and the vendor must be equally free to withdraw his offer to sell, because one party cannot be bound while the other is free. But in the recent case of *McManus v. Fortescue* [1907] 2 K. B. 1, some support was again given to *Warlow v. Harrison*. It appeared that the property was actually knocked down to the highest bidder at a price below the reserve; and it was held that the bidder had no right of action against the auctioneer, either for breach of duty, or for refusing to sign a memorandum or otherwise complete the contract, or for breach of warranty of authority to accept the bid. Lord Justice Cozens-Hardy, in agreeing with this disposition of the case, said: "I am of the same opinion, and I only desire to add one remark. This action was really launched on the lines of *Warlow v. Harrison*, but in my opinion the attempt to set up an analogy between the two cases fails. The exchequer chamber had there to consider a case in which the sale was advertised to be without reserve, and the auctioneer was sued by a man who claimed to be the highest bidder, the only bid overtopping his being that of the vendor. The court decided that the defendant, the auctioneer, might be liable on the ground that he had contracted that the sale should be without reserve, and had broken that contract. Here the contract between the parties is subject to the reserve, and that contract has not been broken, and consequently the plaintiff has no cause of action."

The Canadian cases of *McAlpine v. Young*, 2 Ch. Chamb. Rep. (U. C.) 85, and *O'Connor v. Woodward*, 6 Ont. Pr. 223, seem to 20 L.R.A. (N.S.)

approve the doctrine of *Warlow v. Harrison*; but *Holder v. Jackson*, 11 U. C. C. P. 543, is to the contrary. The plaintiff there rested his claim on the theory that an auctioneer at a public auction must receive the bid of any person present, and does a wrong to any person whose bid he refuses to receive. After conceding, on the authority of *Warlow v. Harrison*, that, when the sale is advertised to be without reserve, the auctioneer cannot receive a higher bid on the behalf of the owner, to the prejudice of the preceding bidder, the court said: "But, in such a sale as is stated in this count, I do not understand on what ground any person can claim as a right to be allowed to bid,—to offer to become a purchaser. It will be going beyond any authority I have seen to hold that, by holding an auction under such circumstances, there is an implied duty or contract to deal with any person who presents himself, and that the auctioneer, with due regard to his responsibilities to his principal, has not a right to refuse to deal with any particular person. The principal might refuse from mere caprice to sell to A, B, or C, and might direct the auctioneer to refuse to sell to certain parties; and I can see no reason why the auctioneer (the agent) is bound by law to accept offers or bids, any more than his principal would be." See *Cull v. Wakefield*, 6 U. C. Q. B. O. S. 178.

In the United States a distinction has sometimes been made between ordinary private and judicial and official sales, but the only difference seems to be that the latter may require the approval of the court. *Clifford, J.*, in *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43.

In *Corryolles v. Mossy*, 2 La. 504, the court approved the rule stated by Chancellor Kent (2 Com. 424), that a bid is no more than an offer on one side, which is not binding until accepted by the auctioneer; but the decision was rested on the construction of a provision of the Louisiana Code.

In *Newman v. Vonderheide*, 9 Ohio Dec. Reprint, 164, it was said that, "where property offered at public auction for sale is withdrawn before the acceptance of a bid, there is no contract of sale, and the highest bidder cannot compel a conveyance by an action for specific performance, or obtain damages for refusal to convey."

Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168, and *Hartwell v. Gurney*, 16 R. I. 78, 13 Atl. 113,—both cases of puffing,—give some support to the doctrine of *Warlow v. Harrison*. In the latter it was held that the vendor cannot hold the bidder when the price has been run up by means of puffing. The statement of the court that "an offer to sell at auction is an offer to

sell to the highest bidder, and every bid is an inchoate acceptance, entitling the bidder to the property offered, if it turns out to be the highest, and there is no retraction on either side before the hammer falls," must be read in connection with the facts of the case which was under consideration.

Taylor v. Harnett, 26 Misc. 362, 55 N. Y. Supp. 988, holds that an auctioneer has the right to refuse to accept a bid which is a trifling advance, where the sum offered is not commensurate with the actual known value of the property. In the course of the decision the court said: "Their claim is that, as a matter of law, where an auctioneer advertises a sale at public auction, and, in response to this invitation, bidders attend, an implied contract arises between them that the property will be knocked down to the highest bidder, for a breach of which an action will lie against him at the suit of such bidder. There is no case in this state which is directly in point upon the proposition advanced. The question, however, seems to have been determined in England in the case of Warlow v. Harrison, 29 L. J. Q. B. N. S. 14, in the exchequer chamber, error from the Queen's bench. There it was held, as the headnote expresses it, that, if the auctioneer inserts in the condition of a sale by auction that the property is to be sold 'without reserve,' he, by so doing, contracts with the highest bona fide bidder that the sale shall be without reserve; and the contract is broken if, during the auction, a bid is made by or on behalf of the owner of the property sold; and in such case the auctioneer is liable to an action at the suit of the highest bona fide bidder."

It has been held that the highest bidder at a judicial sale is entitled, as a matter of law, to the property. *State v. Johnson*, 2 N. C. (1 Hayw.) 293; *McLeod v. McCall*, 48 N. C. (3 Jones, L.) 89; *Gilbert v. Watts-DeGolyer-Co.* 169 Ill. 129, 61 Am. St. Rep. 154, 48 N. E. 430; *Morton v. Moore*, 4 Ky. L. Rep. 717. But the decided weight of authority is otherwise. *Knox v. Spratt*, 19 Fla. 833; *Rogers & B. Hardware Co. v. Cleveland Bldg. Co.* 132 Mo. 458, 31 L.R.A. 335, 53 Am. St. Rep. 494, 34 S. W. 57; *Davis v. McCann*, 143 Mo. 178, 44 S. W. 795. See also *Keightley v. Birch*, 3 Campb. 521.

Blossom v. Milwaukee & C. R. Co. supra, holds that the highest bidder at a judicial sale at public auction, whose bid has not been accepted, cannot require that the sale be confirmed to him. Mr. Justice Clifford said: "Biddings at an auction, says Mr. Addison, are mere offers, which may be retracted at any time before the hammer is down and the offer has been accepted. Addison, Contr. 1857 ed. 26. The leading case upon that subject is that of *Payne v. Cave*, 20 L.R.A. (N.S.)

3 T. R. 148, where it was expressly held that every bidding at an auction is nothing more than an offer on one side until it has received the assent of the auctioneer as the agent of the owner. The supreme court of Pennsylvania held, in the case of *Fisher v. Seltzer*, 23 Pa. 308, 62 Am. Dec. 335, that a bidder at a sheriff's sale has a right to retract his bid before the property is struck down to him, and that the sheriff has no right to prescribe conditions which will deprive him of such a right. Express ruling was that a bid at an auction before the hammer falls is like an offer before acceptance, and that, when the bid is withdrawn before it is accepted, there is no contract, and that such a bidder cannot be regarded in any sense as a purchaser. Rule, as laid down in the last edition of 'Story on Sales,' is substantially the same as that adopted in the preceding case. Speaking of ordinary sales at an auction, the author says that the seller may withdraw the goods, or the bidder may retract his bid, at any time before they are struck off; and the reason assigned for the rule is that, so long as the final consent of both parties is not signified by the blow of the hammer, there is no mutual agreement to a definite proposition. 1 Sugden, Vend. & P. 25. But as soon as the hammer is struck down, says the same author, the bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid, nor the buyer to withdraw from the contract. *Routledge v. Grant*, 4 Bing. 653; *Cooke v. Oxley*, 3 T. R. 654; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Story, Sales*, 461. Same rules prevail upon a sale under common-law process as in other cases of sales at public auction, so far as respects the question now before the court. Until the property is actually struck off to the bidder, he may withdraw his bid as a mere offer or proposition. Judicial sales, made under the decretal orders of courts of chancery, are also, in this country, governed substantially by the same rules, except that such sales are usually made by the marshal, or master in chancery acting as an officer of the court, and are always regarded as under the control and subject to the power of the court to set the sale aside for good cause shown, or open it any time before it has been confirmed, if the circumstances of the case require the exercise of that power. . . . Subject to those qualifications, and perhaps some others which need not be noticed, the question of sale or no sale, when it arises under a state of facts such as are exhibited in this record, may be fully tested by substantially the same rules as those which apply in cases of sales under common-law process, or in other cases of sales at public auction. Tested by those

rules, it is clear to a demonstration that there was no sale of the mortgaged premises in this case, because the property was never struck off to the appellant, nor was his bid, by act or word, or in any manner, ever accepted by the seller; and the record shows that, at the hearing in the court below, nothing of the kind was pretended by the appellant. Instead of setting up that pretense, his complaint was that the marshal erred in refusing to accept his bid, which, if possible, is less defensible upon the facts and circumstances of the case than the theory of the sale and purchase."

In *Boyd v. Greene*, 162 Mass. 566, 39 N. E. 277, an auction sale of certain real estate had been advertised to take place without reserve. The plaintiff bid \$1,725 for the property, and the auctioneer told him that if he would bid \$1,750 the property would be knocked down to him. The bid was made; but the auctioneer, after consulting with the owner, then announced that the property would not be sold for \$1,750. After referring to *Warlow v. Harrison*, and the other English cases in which it had been cited, the court said: "The case at bar is not an action to recover for the trouble and expense of attending the auction under the inducement held out by the defendants in their advertisement. See *Harris v. Nickerson*, *ubi supra*. It is an action to recover damages because the defendants, through their agent, the auctioneer, did not sell the property to the plaintiff, and did not do what was necessary to make a valid sale . . . to him, as they had agreed to do." The court held that, even if the conversation between the auctioneer and bidder did amount to a contract, it was unenforceable, because within the statute of frauds. *White v. Dahlquist*, 179 Mass. 427, 60 N. E. 791.

The recent case of *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 9 L.R.A. (N.S.) 748, 88 Pac. 199, is very like the one at bar. The county advertised property for sale at public auction to the highest and best bidder. The complaint alleged that the plaintiff was the highest and best bidder, and that the defendant refused to knock down the property to it, and demanded that the defendant be required to convey the property to it. A demurrer to the complaint was sustained. On the appeal the appellant contended that, since its bid for the property when it was offered for sale was the highest and best bid, it was the duty of the auctioneer to strike off the property to it, and that the failure so to do could not affect its right to have the sale completed. After citing *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43, and other cases, the court said: "Measured by the tests thought sufficient in these cases, the

offer to sell the property, and a bid therefor by the appellant, did not create a contract of sale between the county and the appellant, . . . nor his bid accepted; and, there being no contract of sale between the parties, there is no contract capable of being specifically performed." It was also held that the officer making the sale was clothed with a certain discretion as to refusing a bid, when in his judgment it was not made in good faith, or was made in such a sum as would amount to a virtual sacrifice of the property. To the same effect is *Warehime v. Graf*, 83 Md. 98, 34 Atl. 364, which held that the contract was not complete until the property was knocked down to the highest bidder.

In *Ives v. Trement*, 29 Mich. 390, Mr. Justice Cooley said: "The assignees had put an auctioneer in charge of the sale, and must be understood to authorize him to speak for them. When he accepts a bid and knocks down the property, a bargain is closed." *Tillman v. Dunman*, 114 Ga. 406, 57 L.R.A. 784, 88 Am. St. Rep. 28, 40 S. E. 244, holds that it is the right of an executor offering land at sale at public auction to withdraw the same at any time before the hammer falls, which, of course, could not be done if the contract was complete when the bid was made.

The earnestness with which the respondent contends that the trial court was right in holding that the contract was complete when the bid was made, conditional on there being no higher bid, has induced us to make a somewhat extended examination of the authorities. The result discloses the fact that there has been running through some of the English cases a recognized, but never applied, principle which would sustain the right of action in such a case as the present. But all the cases in which the doctrine is recognized were decided on other grounds. No substantial support for the doctrine is found in the American cases. It is, in fact, utterly irreconcilable with principles which are universally recognized. Mutuality is an essential element of a contract. One party thereto cannot be bound, and the other remain free. If the announcement of an auction is an offer to sell to the highest good-faith bidder, and the contract is closed when the bid is made, both the vendor and the vendee must be bound thereby. But it is conceded by all the authorities that the bidder may withdraw his bid at any time before the hammer falls, and this means necessarily that the bid is a mere offer which is not binding until accepted. *Grotenkemper v. Achtermeyer*, 11 Bush, 222; *Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 53

Pac. 812; *Fisher v. Seltzer*, 23 Pa. 308, 62 Am. Dec. 335; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741, 55 S. W. 233; *Payne v. Cave*, 3 T. R. 148; *Blossom v. Missouri P. R. Co.* 3 Wall. 196, 18 L. ed. 43; *Halsbury, Laws of England*, § 1039; 1 *Dart, Vend. & P.* p. 200; 1 *Benjamin, Sales*, 5th Eng. ed. p. 66; *Story, Sales*, 4th ed. § 461; *Baker, Sales*, § 550; *Bateman, Auctions*, § 730; 1 *Warvelle, Vend. & P.* § 7; note to *Tillman v. Dunman*, 57 L.R.A. 784; 4 *Cyc. Law & Proc.* p. 1044; 3 *Am. & Eng. Enc. Law*, p. 501; 1 *Sugden, Vend. & P.* 6th ed. 139; *Williams, Vend. & P.* 19; *Auctions & Auctioneers*, 8 *Southern L. Rev.* 555. 'English Sales of Goods Act 1893, § 58 (2), expressly provides that "every bidding being but an offer on one side, which is binding on neither until assented to." Similar provisions are found in the statutes of California, (Civ. Code, § 1794) and North Dakota (Rev. Codes 1905, § 5438).

On principle and authority the correct rule is that an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received; that a bid is an offer which is accepted when the hammer falls; and until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase, or the auctioneer his offer to sell. The owner's offer to sell is made at the time through the auctioneer, and not when he advertises the auction sale. A merchant advertises that on a certain day he will sell his goods at bargain prices; but no one imagines that the prospective purchaser, who visits the store and is denied the right to purchase, has an action for damages against the merchant. He merely offers to purchase, and, if his offer is refused, he has no remedy, although he may have lost a bargain, and have incurred expense and lost time in visiting the store. The analogy between such a transaction and an auction is at least close. As the advertisement in this case was a mere statement of intention to offer the property for sale at public auction to the highest bidder, the respondent's bid did not complete either a contract of sale or a contract to make a sale.

The question of the application of the statute of frauds has been fully argued; but it disappears from the case when we reach the conclusion that no contract of any kind was entered into between the parties.

The order is therefore reversed, with directions to enter judgment for the defendant.

20 L.R.A. (N.S.)

MISSOURI SUPREME COURT.

STATE OF MISSOURI, Resp.,

v.

JESSE B. WEBB, Appt.

(216 Mo. 378, 115 S. W. 998.)

Counseling suicide — repentance — effectiveness.

1. To relieve one from liability to punishment for counseling suicide who repents and endeavors to persuade the person so counseled not to do so, before he has committed the act, it is not necessary that deceased should have abandoned his purpose, and led accused in good faith to believe that he had done so.

Same — burden of proof.

2. One accused of counseling suicide has not the burden of showing that decedent acted of his own volition, and not under the advice and counsel of the accused.

Same — inability to escape.

3. One who, after agreeing with another that they should commit suicide together, and procuring a pistol for that purpose, afterward changes his mind and endeavors to escape from the consequences of his agreement, but is unable to do so because of physical weakness, is not liable for assisting the suicide, in case deceased refuses to permit him to escape, and proceeds to shoot him and then kill himself.

Evidence — admission — effect.

4. To make applicable to one suffering from a shot wound, and weakened by disease so that he was too weak to sign his name, and who is alleged to have made statements in answer to questions propounded to him, the rule as to presumptions arising against one accused of crime from statements made against himself, he must be found to have been in such condition of mind and body as to have been able to know the statement he was making, and to understand the questions propounded to him.

(February 2, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Clay County convicting defendant of manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. B. A. Reed, W. J. Courtney, and Martin E. Lawson, for appellant:

It was the duty of the state to prove beyond a reasonable doubt that defendant was deliberately present, assisting, counseling,

Note. — The above case appears to be one of first impression upon the question of repentance and withdrawal from a suicide pact, or subsequent attempt to dissuade one from suicide after having counseled the same, as affecting the guilt of the penitent.

Upon the general subject of inciting or abetting suicide, see note to *Burnett v. People*, 66 L.R.A. 304.

and advising deceased to commit suicide; and the instruction placing the burden on defendant to show that deceased killed herself of her own volition was erroneous.

State v. Wingo, 66 Mo. 181, 27 Am. Rep. 329; State v. Hickam, 95 Mo. 329, 6 Am. St. Rep. 54, 8 S. W. 252; State v. Hardelein, 169 Mo. 585, 70 S. W. 130; Lillenthal v. United States, 97 U. S. 266, 24 L. ed. 905; State v. Thornton, 10 S. D. 349, 41 L.R.A. 542, 73 N. W. 196; State v. Schweitzer, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787; Phillips v. State, 26 Tex. App. 228, 8 Am. St. Rep. 471, 9 S. W. 557; Tiffany v. Com. 121 Pa. 165, 6 Am. St. Rep. 775, 15 Atl. 462; 2 Bishop, New Crim. Proc. 4th ed. §§ 599, 600; 1 Bishop, New Crim. Proc. 4th ed. § 1049.

Messrs. Elliott W. Major, Attorney General, and John M. Atkinson, for respondent:

The mere act of advising another to commit suicide is unlawful; and, if the latter acts on such advice, and kills himself, the former is guilty.

Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; R. v. Alison, 8 Car. & P. 418; Blackburn v. State, 23 Ohio St. 146; Burnett v. People, 204 Ill. 208, 66 L.R.A. 304, 98 Am. St. Rep. 206, 68 N. E. 505; State v. Ludwig, 70 Mo. 412; State v. Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

The charge as to burden of proof was correct.

Dill v. State, 35 Tex. Crim. Rep. 240, 60 Am. St. Rep. 37, 33 S. W. 126.

Gantt, P. J., delivered the opinion of the court:

The defendant has appealed to this court from the conviction of manslaughter in the first degree, at the November term, 1907, of the circuit court of Clay county.

The prosecution was begun on November 7, 1906, by the prosecuting attorney of Clay county filing an information in the circuit court, duly verified, wherein he charged the defendant with having, on the 11th day of October, 1906, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, shot and killed one Inez Webb. He was duly arraigned and entered his plea of not guilty, and the cause, as above stated, was tried at the November term, 1907.

The evidence tended to show that at the Peddicord Hotel, in Smithville, Clay county, on the morning of the 11th day of October, 1906, the defendant, Jesse Webb, and Inez Webb, or Walkup, were both shot. Defendant received a pistol bullet near the heart, and the deceased received three bullet wounds near the heart and one through the head. 20 L.R.A. (N.S.)

She died immediately. Prior to the shooting, for some months both the defendant and the deceased worked at the State Hospital for the Insane, at St. Joseph, Missouri. They had associated together for some time and the evidence tended to show that he was a consumptive. He quit work at the hospital October 1, 1906, and she quit work some two days later. They were both employed at the hospital as day nurses. He had been employed at the hospital about two years, and she had been employed there from seven to twelve months. They had been associated together for about two months. Dr. Woodson, the superintendent of the hospital, testified that Webb was run down and not strong, and he had prescribed malt and cod-liver oil for him. After leaving the hospital, defendant went down into the city of St. Joseph to live, and deceased followed him, and they remained together, holding themselves out as man and wife. After remaining a few days in St. Joseph, they went to Plattsburg to visit his relatives, where they remained a few days. While there he was very sick. They left Plattsburg, saying they were going to Hot Springs, Arkansas, for his health, and started, but went to Smithville, where they remained several days. At Plattsburg the deceased said that when the defendant died she wanted to die too. The defendant, in his testimony, stated that she suggested that they commit suicide, but he refused. After reaching Smithville, however, they agreed to commit suicide together, and wrote letters to their relatives indicative of their intention so to do. The deceased bought morphine, which they both took on Monday night, but they woke up about 1 o'clock on Tuesday. The deceased then said she would get some strychnine. She got it, and they took it Tuesday night. The strychnine did not kill them, and they woke up about 10 or 11 o'clock Wednesday morning. The defendant then got the deceased to telephone to a Mr. James Reed at Trimble, Missouri, to come to him at Smithville, and Reed, in response, arrived at Smithville that evening at 5 or 6 o'clock. Prior to Reed's arrival at Smithville, however, defendant purchased a revolver from a Mr. Dougherty, who was a clerk in a hardware store, and who loaded the revolver for him. When Reed arrived at Smithville, the deceased and the defendant were in bed. She represented herself as Mrs. Webb, and Reed sat down on the edge of the bed, and the defendant requested him to take defendant to Edgerton to his brother, Louis Webb. Reed started to get defendant's clothes for him, but the deceased got between Reed and the clothes, and told him that defendant was not going away from there; if he did, she

would follow him and kill him. Reed then left them and told them he would be back in the morning; but before he reached the hotel the next morning both of them had been shot. Reed testified that the defendant was awfully weak and was spitting blood, and he could scarcely hear him talk. The defendant testified that the evening before the shooting he abandoned his purpose to destroy himself. And after Reed left the hotel that evening, he had a long talk with the deceased, endeavoring to persuade her to give up the idea of suicide, and he thought she had given it up, and they then agreed to take the pistol back to the store in the morning and get back what money they could; that the pistol was then put under the pillow until morning, and they went to sleep. He was awakened the next morning by something against his breast. As he opened his eyes, she said, "Here is where we die," and shot him. He testified that he knew no more until he heard the parties breaking into the room. The shooting occurred about 8:30 Friday morning. When the people broke into the room, they found the deceased dead and the defendant in a spasm. One of the witnesses testified that before they broke in the door he heard the man saying "Shoot me again." The other witness heard this statement, but he thought it was immediately after he got into the room. Defendant testified that he did not know in which hand the deceased held the revolver; that he had no recollection of her shooting herself.

The statement of the defendant was offered in evidence, which had been taken by the coroner, but the defendant testified that he had no remembrance of making any statement whatever. The statement was signed before the coroner by defendant's mark. In this statement the defendant said his wife did the shooting, and as soon as she shot him she laid down on the bed and shot herself two or three times. She put her arms around his neck, and said, "Oh, Jess, are you dead?" She said this, however, before she shot herself. He also stated that they were married a week before at Topeka, Kansas, and then went to St. Joseph and Plattsburg, and then came to Smithville; that he had a hemorrhage from his lungs, which caused him to get off at Smithville. They had started to Hot Springs. His reason for wanting to die was that he had tuberculosis and did not think he could live long anyway, and she said her reason for dying was because she loved him and did not want to live without him. He also testified that his wife wrote a letter to her father and one to a Mrs. Hart. And he wrote one to his sister and mother, and 20 L.R.A. (N.S.)

they left a note requesting the landlady to mail the letters and notify his brother.

The court instructed the jury on murder in the first degree and on manslaughter in the first degree. As the jury found the defendant guilty of manslaughter only, the charge of murder is eliminated from the case. The fifth instruction is in the following words: "If the jury believe from the evidence that deceased committed suicide, and that defendant counseled, advised, and assisted deceased to do so, then, even though defendant may have changed his mind before the act was committed, and endeavored to dissuade her from such purpose, then the mere fact that defendant did change his mind and endeavor to dissuade her will not excuse defendant from such counsel, advice, and assistance, if any, unless you believe that deceased led defendant to believe in good faith that she had abandoned such idea, and then afterwards killed herself of her own volition, and not under the influence of his counsel, advice, and assistance, if any, to do so. And if he did counsel, advise, and assist her to commit suicide, and she afterwards killed herself, the burden is on defendant to show that such killing was done of her own volition, and not under the influence of his advice, counsel, or assistance, if any." The questions presented for our consideration relate entirely to the correctness of the instructions given and refused.

1. Under the common law, if one counseled another to commit suicide, and the other, by reason of the encouragement and advice, killed himself, the adviser was guilty of murder as an aider and abettor, provided he was present when his advice was carried out. It was ruled in *R. v. Dyson*, Russ. & R. C. C. 523, that, if two persons mutually agree to die together, and, in pursuance of the agreement, each attempts to kill himself, but the means employed to produce death takes effect on only one, the survivor is guilty of murder. But under the statute of this state (§ 1822, Rev. Stat. 1899 [Anno. Stat. 1906, p. 1266]), "Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter in the first degree." The crucial point in the case is as to the correctness of instruction No. 5, as above set out in the statement of the cause. It will be noted that this instruction required the jury to find, first, that the deceased committed suicide, and, second, that the defendant counseled, advised, and assisted her to do so; and then directed the jury that, even though the defendant changed his mind before the criminal act was committed, and endeavored to dissuade her from such purpose, then the fact that he did

change his mind and endeavor to dissuade her will not excuse him from such counsel, advice, and assistance, unless the jury believe that the deceased led the defendant to believe in good faith that she had abandoned such idea, and then afterwards killed herself of her own volition, and not under the influence of his counsel, advice, and assistance, if any, to do so. The diligence of counsel has not availed to find a precedent for this instruction, and we have been unable to find any; and accordingly the correctness of this instruction must be determined upon reason and the analogies of the law. In effect we take it that this prosecution is based upon the theory of a conspiracy between the defendant and the deceased that each should commit suicide; and the instruction directs the jury, in effect, that, although the defendant withdrew from the conspiracy before the suicide was committed by deceased, and although he endeavored to dissuade her from her purpose to kill herself, these facts did not excuse the defendant from his previous agreement and advice to commit suicide, unless the deceased led the defendant to believe that she also had abandoned such idea, and then killed herself of her own volition. It is a general principle of the criminal law that, although several parties conspire to do a criminal act, there is a place of repentance, a *locus penitentiae*, so that, before the act is done, either one or all of the parties may abandon their design and thus avoid committing the criminal act. *United States v. Britton*, 108 U. S. loc. cit. 205, 27 L. ed. 700, 2 Sup. Ct. Rep. 531. This principle is familiar in the law of homicide. Thus it is said: "Though a man should be in the wrong in the first instance, yet a 'space for repentance is always open; and where a combatant in good faith withdraws as far as he can, really intending to abandon the conflict,' and his adversary still pursues him, then, if taking life becomes necessary to save his own, he will be justified." *State v. Partlow*, 90 Mo. loc. cit. 627, 59 Am. Rep. 31, 4 S. W. 14; 1 Bishop, New Crim. Law, § 871; *Horrigan & T. Self-Defense*, 227; 4 Bl. Com. 184. The instruction seems to concede this principle of permitting the defendant to abandon his previous intention of committing suicide, and agreeing that the deceased should also do so at the same time; but this right is made dependent upon the fact that the deceased also abandoned her purpose to commit suicide, and led the defendant to believe in good faith that she had done so. It seems to us that this qualification of the right is not reasonable or based upon a sound principle. If there is anything in the doctrine of a space for repentance, it seems to us, when

the defendant abandoned his purpose of committing suicide, and endeavored to persuade the deceased to also abandon it, that he had done all that the law could exact of him. If, in spite of his announced intention to refuse to go further in the criminal purpose, and his persuasion and advice to also abandon such a purpose, the deceased proceeded to kill herself, then it was her own act, and one for which the defendant cannot, and ought not, in any way, in our opinion, be held responsible; and, under the circumstances, he could not properly be convicted of deliberately assisting her in the commission of self-murder. But the instruction is, in our opinion, also bad in that it places the burden on the defendant to show that the suicide of the deceased was committed of her own volition, and not under the influence of defendant's advice and counsel. We think this instruction violates the rule that, in a criminal prosecution, the burden is upon the state to establish the guilt of the defendant, and not upon the defendant to prove his innocence. *State v. Hickam*, 95 Mo. loc. cit. 329, 6 Am. St. Rep. 54, 8 S. W. 252; *State v. Hardelein*, 169 Mo. 579, 70 S. W. 130. In the last-cited case it is said: "Where a defendant pleads not guilty, and admits nothing against himself, as in the case at bar, the burden of proof is on the state to first make out a case against him which would entitle it to go to the jury; but this does not change the burden of proof, which remains with the state throughout the trial; and whether or not the evidence is sufficient to overcome the presumption of innocence of defendant, and to establish his guilt beyond a reasonable doubt, when all of the evidence on both sides, including the presumptions, is considered, is for the consideration of the jury. 1 Bishop, New Crim. Proc. 4th ed. § 1050; *State v. Darrah*, 152 Mo. 522, 54 S. W. 226." Our best judgment is that, upon both of these grounds, this instruction was erroneous, and should not have been given in this form. It denied the defendant the right to repent of his ill-considered promise to commit suicide with the deceased, and erroneously placed the burden upon him of proving his innocence, instead of requiring the state to prove his guilt beyond a reasonable doubt.

2. Error is also assigned upon the refusal of the court to give instructions A, B, C, and D, requested by the defendant. Instruction D is in these words: "If the jury believe from the evidence that the defendant procured a pistol with which he and the deceased intended to commit suicide, and afterwards changed his mind, and tried to escape from the consequences of such an agreement, but deceased refused to permit

him to escape therefrom, and, on account of physical weakness, he could not, by force, leave her, and that she did the shooting, then defendant did not deliberately assist her to commit self-murder, and is not guilty of manslaughter in the first degree." This instruction contains the substance of instruction C requested, and announces the opposite of the instruction 5 given by the court, which we have just held erroneous. In our opinion, this instruction D was a proper one, and should have been given, and instruction No. 5, given by the court, should have been refused. We think there is no error in refusing instruction B, requested by the defendant, as the court had fully covered that proposition in its own instructions, and the same can be said as to instruction A.

3. Counsel complains also of instruction No. 11, given by the court, which is the ordinary instruction in regard to the presumption arising against the defendant from statements made against himself. Counsel concede that this instruction is ordinarily a correct one, but that it should not have been given in the peculiar circumstances of this case, because the alleged statement made by the defendant to the coroner was made, if at all, when the defendant was in a very critical condition, suffering from a pistol shot wound near the heart, and weakened by disease, and was too weak to sign his name, and that the instrument itself indicates that the writer of it himself was incapable of correctly taking the statement, as indicated by the misspelled words, both medical and common. There is much force in this objection. The evidence shows that the defendant could write his own name, and yet he did not sign this statement himself, and it was signed by the coroner and attested only by the mark of the defendant. The defendant testified that he had no recollection whatever of ever having made the statement, and denies making it. We think that, under the circumstances of the case, if this instruction should have been given at all, a qualification should have been added thereto, requiring the jury to find that the defendant was in such a condition of mind and body as to have been able to have known the answers he was making, and to fully understand the questions propounded to him by the coroner, and that the same was read over to him, and that he understood the statements contained in it. While the instruction No. 11 has often received the approval of this court, it has often been assailed as a comment on the testimony. This court has often ruled that, while an instruction may be correct in the abstract, it should always be applicable to the facts in evidence; and we think that the qualification 20 L.R.A. (N.S.)

suggested by counsel, under the peculiar facts of this case, is one that should have been given along with the instruction, if given at all.

For the error in giving instruction No. 5 and the refusal of instruction D, the judgment should be, and is, reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

All of this division concur.

NEBRASKA SUPREME COURT.

JOHN A. LUTHER, Plff. in Err.,
v.

STATE OF NEBRASKA.

(— Neb. —, 120 N. W. 125.)

Intoxicating liquor — instruction — non-intoxicant.

1. The prohibition, by §§ 11 and 20 of chapter 50, Comp. Stat. 1907, of the sale, or keeping for the purpose of sale, of malt liquors, without a license so to do, applies to all malt liquors, sold or kept for sale, to be used as a beverage, whether intoxicating or not.

Same — illegal sale — prosecution — intoxicating qualities — proof.

2. In a criminal prosecution for the violation of such sections, or either of them, where the charge is of selling, or keeping for the purpose of sale, either "malt," "spirituous," or "vinous" liquors, and the

Headnotes by REESE, Ch. J.

Case Note. — Do statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor.

This note is confined to cases in which the liquor sold was in fact, or was assumed to be, a nonintoxicating liquor; and cases which merely involve the question, what are intoxicating liquors, have been excluded. Nor does this note include cases which involve the question, what liquors are malt, fermented, etc. Upon the general question, what liquors are within statutory restrictions as to the sale of spirituous, vinous, fermented, and other intoxicating liquors, see note to *Lemly v. State*, 20 L.R.A. 645.

As to constitutional right of state to declare certain liquor intoxicating, irrespective of its intoxicating character as a matter of fact, see case note to *State v. Frederickson*, 6 L.R.A. (N.S.) 186.

The majority of the cases upon this point hold with *LUTHER v. STATE*, that a statute which prohibits or regulates the sale of a certain class of liquors, without qualification, includes nonintoxicating liquors of that class.

Thus, in *State v. Spaulding*, 61 Vt. 509, 17 Atl. 844, it was held that, where the statute provided that "no person shall sell or furnish cider," the prohibition was absolute,

proof shows that either of said prohibited liquors was sold, or kept for sale, the state is not required to allege or prove that the liquors sold, or kept for the purpose of sale, are in fact intoxicating. It is sufficient to allege and prove the sale, or the keeping for the purpose of sale, of any of the prohibited liquors, in violation of the terms of said sections.

Criminal law — appeal — invited error.

3. The information alleged, in appropriate counts, that the accused kept for sale and sold "a certain malt and intoxicating liquor, to wit, malt tonic." The evidence showed that, upon analysis, the liquor was a malt liquor, containing 1 1/10 per cent alcohol, and that it belonged to the "class of beers." The trial court submitted to the jury the question of the intoxicating properties of the liquor by permitting the accused to call witnesses accustomed, in some degree, to the use of intoxicants, who testified that they had partaken of the bev-

erage, and that it had no intoxicating effect upon them, and was not intoxicating. The state called a witness who testified that he had purchased and used the drink, and that it had the same effect upon him as produced by drinking beer, but to a less degree. The court instructed the jury, in substance, that, in order to convict the accused, they must find him guilty of selling, or keeping for the purpose of sale, the liquors as charged and described in the information. Held: First, that this submitted to the jury the question of the intoxicating properties of the liquor; and second, that the action of the court, in submitting the question of the intoxicating properties of the liquor, was erroneous, but without prejudice, as it was upon the procurement of the accused.

(Letton and Barnes, JJ., dissent.)

(February 20, 1909.)

regardless of the stage of fermentation or the intoxicating quality of the cider.

And in *Eaves v. State*, 113 Ga. 749, 39 S. E. 318, under a statute making penal the sale of malt liquors without a license, the appellate court sustained the charge to the jury that the state did not have to prove that the malt liquors sold were intoxicating, and that it made no difference whether the liquors were intoxicating or not.

And in *Bradshaw v. State*, 76 Ark. 562, 89 S. W. 1051, it was held that where a statute forbade the sale of certain liquors or any mixture thereof, without a license, the sale of any compound of a forbidden liquor was unlawful, whether such compound be intoxicating or not.

So, in *Merkle v. State*, 37 Ala. 139, it was held that it was not necessary to the conviction of the defendant that the liquor sold, delivered, or given to a student or minor should be intoxicating, as the prohibition of the statute extended to any fermented liquor used commonly as a beverage.

And in *Eureka Vinegar Co. v. Gazette Printing Co.* 35 Fed. 570, which was an action for libel in publishing the statement that persons selling the plaintiff's product in the prohibition districts of Arkansas were amenable to the laws of the state, the court held that, to bring the product under the operation of the liquor laws of the state, it was not essential that it should be an intoxicating liquor, but it was enough that it was a "vinous or fermented" liquor.

Where the charter of a city in express terms gave the city power to prohibit the sale of beer, without defining its quality or character, it was held, in *Kettering v. Jacksonville*, 50 Ill. 39, that the court did not err in refusing to instruct the jury that the prosecution must prove the beer sold to be of an intoxicating character.

And in *People v. Adams*, 95 Mich. 541, 55 N. W. 461, where the statute, in terms, prohibited the sale of fermented cider, the court said: "The statute prohibits the sale

of fermented cider, and forecloses inquiry as to whether cider which is fermented is intoxicating, whatever the stage of fermentation." And to the same effect was the decision in *People v. Kinney*, 124 Mich. 486, 83 N. W. 147.

So, in *State v. Jenkins*, 64 N. H. 375, 10 Atl. 699, it was held that an indictment under a statute prohibiting the sale, or keeping for sale, of "lager beer or other malt liquors," need not allege that the malt liquor sold was intoxicating.

So there are numerous other decisions which hold that a statute prohibiting or regulating the sale of malt liquors includes both intoxicating and nonintoxicating malt liquors. *State ex rel. Guilbert v. Kauffman*, 68 Ohio St. 635, 67 N. E. 1062; *United States v. Cohn*, 2 Ind. Terr. 475, 52 S. W. 38; *Marks v. State* (Ala.) 48 So. 864; *State v. Gill*, 89 Minn. 502, 95 N. W. 449; *Dinkins v. State*, 149 Ala. 49, 43 So. 114; *Lambie v. State*, 151 Ala. 86, 44 So. 51; *Feibelman v. State*, 130 Ala. 122, 30 So. 384; *Com v. Goodwin* (Va.) 64 S. E. 54.

An indictment in the form prescribed by the statute, charging the accused with carrying on the business of a dealer in liquors, need not allege in terms that the liquors were intoxicating. *Ladson v. State* (Fla.) 47 So. 517; *Hallbeck v. State* (Fla.) 49 So. 153; *Brass v. State*, 45 Fla. 1, 34 So. 307; *Crabb v. State*, 47 Fla. 24, 36 So. 169; *Nussbaumer v. State*, 54 Fla. 87, 44 So. 712.

A number of decisions are to the contrary, but the greater number of these are clearly distinguishable, because of the terms of the statute.

In Texas, the law prohibits the sale of "spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication," and, in *Ex parte Gray* (Tex. Crim. App.) 83 S. W. 828, the phrase "capable of producing intoxication" was held to

ERROR to the District Court for Harlan County to review a judgment convicting defendant of the unlawful sale of intoxicating liquors. Affirmed.

The former opinion in this case, rendered by the commissioners of department No. 2. on December 18, 1907, 80 Neb. 432, 114 N. W. 411, is no longer of any importance, by reason of the action of the court in setting it aside. The district court instructed the jury, on its own motion, that the defendant was charged with selling malt liquors, omitting the word "intoxicating" in such instance. Under these circumstances, the defendant requested the following instructions: "(1) The court instructs the jury that one of the material allegations of the complaint is that the defendant sold malt and intoxicating liquors, and that the state must prove said allegations beyond any reason of doubt, before you would be justified in finding the defendant guilty of any one of the last four counts; that, unless you find from the evidence, beyond any reason of doubt, that the said malt tonic is intoxicating, you should acquit the defendant of said counts. (2) The court instructs the jury that, in the first count, the defendant is charged with keeping for sale certain malt and intoxicating liquors, to wit, malt

tonic; that, before you would be justified in finding the defendant guilty on said count, it is incumbent upon the state to prove, beyond any reasonable doubt, that the said malt tonic is intoxicating; that, if the state fails to prove that said malt tonic is intoxicating, it is your duty to acquit the defendant on said count." The refusal to so instruct is assigned as error.

The other facts and alleged errors are sufficiently stated in the opinion.

Messrs. M. H. Weiss and Berge, Morning, & Ledwith for plaintiff in error.

Messrs. W. T. Thompson, Attorney General, and Grant G. Martin, for defendant in error:

It is not necessary to submit to the jury the question as to whether malt liquor is intoxicating.

Kerkow v. Bauer, 15 Neb. 156, 18 N. W. 27; State v. Teissedre, 30 Kan. 476, 2 Pac. 650; Stout v. State, 96 Ind. 407; Briffitt v. State, 58 Wis. 39, 46 Am. Rep. 621, 16 N. W. 39; Peterson v. State, 63 Neb. 254, 88 N. W. 549; Sothman v. State, 66 Neb. 308, 92 N. W. 303.

Liquors need not necessarily be intoxicating to fall within a statute prohibiting the sale of malt liquors.

People v. Crilley, 20 Barb. 248; State v.

qualify the various liquors named, and not merely "medicated bitters."

Of course, under such a construction, mere proof of the sale of a malt liquor without proof of its capability of producing intoxication, would not be sufficient. Scales v. State, 47 Tex. Crim. Rep. 294, 83 S. W. 380; Reisenberg v. State (Tex. Crim. App.) 84 S. W. 585; Harris v. State (Tex. Crim. App.) 86 S. W. 763; Sullivan v. State, 48 Tex. Crim. Rep. 201, 87 S. W. 150.

But, in Hardwick v. State (Tex. Crim. App.) 114 S. W. 832, the statute under which the defendant was prosecuted merely provided as follows: "Any person or association of persons who shall engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, without having obtained a license therefor, etc.," and the court, upon the authority of Ex parte Gray, supra, held that it was essential to prove, before a conviction could be had, that such malt liquors were intoxicating. But it will be noted that the statute in Ex parte Gray, upon which the decision is based, contained a qualifying provision that the prohibited liquors should be capable of producing intoxication, while this qualifying provision is apparently lacking in Hardwick v. State.

The court, in Stoner v. State (Ga. App.) 63 S. E. 602, distinguishes between a statute which regulates the sale of liquor and one which entirely prohibits it, and holds that while, under a statute which merely regulates the traffic, it is not necessary to prove that the liquor is intoxicating, yet, as a statute which entirely prohibits the sale of liquors is intended as a crusade

against intemperance, there could be no violation of the law without proof that the liquor in question was intoxicating. The court said. "The Eaves Case, supra, is authority for the position that, where the statute requires a license for the sale of all malt liquors, the intoxicating character of such liquors is irrelevant and immaterial; but this decision is not authority for the position that, in a prohibition statute, intended to prevent the evils of intemperance, the property of the liquor as an intoxicant is not material. To so hold is to lose sight of the great distinction between the right of the state to regulate a business and the right of the state to prohibit a business. Counsel also refers to the statute which makes it unlawful to furnish spirituous and malt liquors to minors (Penal Code, 1895, § 444); and it is contended that the legislature intended to make it unlawful to furnish to minors any kind of malt liquor, regardless of its intoxicating character. We think this construction of the statute in question is unquestionably correct; but we do not think that it affords any support to a similar contention as to the meaning of the prohibition statute."

While this argument is very plausible, it is against the weight of authority, even in those states in which the purpose of the law is prohibitory within the district in which it is applicable, and there is apparently no other decision which distinguishes, in this respect, between the construction to be given to a statute which is intended to regulate the liquor traffic and a statute which is intended to prohibit the traffic.

Giersch, 98 N. C. 720, 4 S. E. 193; Atty. Gen. v. Bailey, 1 Exch. 281; Worley v. Spurgeon, 38 Iowa, 467; Adler v. State, 55 Ala. 24; Allred v. State, 89 Ala. 113, 8 So. 56; Blankenship v. State, 93 Ga. 814. 21 S. E. 130; 23 Cyc. Law & Proc. pp. 57, 60, 299; State v. Certain Intoxicating Liquors, 76 Iowa, 243, 2 L.R.A. 408, 41 N. W. 6; Com. v. Timothy, 8 Gray, 480; State v. Wittmar, 12 Mo. 407; State v. Ely (S. D.) 118 N. W. 687; Com. v. Anthes, 12 Gray, 29; State v. Guinness, 16 R. I. 401, 16 Atl. 910; State v. Gravelin, 16 R. I. 407, 16 Atl. 914; Com. v. Brelsford, 161 Mass. 61, 36 N. E. 677; State v. O'Connell, 99 Me. 64, 58 Atl. 59; Eaves v. State, 113 Ga. 757, 39 S. E. 318; Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; State v. Gill, 89 Minn. 503, 95 N. W. 449; People v. Kinney, 124 Mich. 486, 83 N. W. 147; State v. Blaisdell, 33 N. H. 388; Com. v. Dean, 14 Gray, 99; Com. v. Chappel, 116 Mass. 7; 1 Bishop, Crim. Proc. 612; Bishop, Statutory Crimes, § 1038; State v. Thornton, 63 N. H. 114; Hatfield v. Com. 120 Pa. 395, 14 Atl. 151; State v. Jenkins, 64 N. H. 375, 10 Atl. 699.

Reese, Ch. J., delivered the opinion of the court:

This case was decided at the September term, 1907, of this court, and the opinion is reported in 80 Neb. 432, 114 N. W. 411. The attorney general filed a motion for rehearing, which was sustained, and the case has been submitted to the court upon carefully prepared briefs and able oral arguments by counsel. The contention of the attorney general is: First, that the proof upon the trial was conclusive that the liquor sold and kept for sale was "malt liquor," and, therefore, the selling and keeping for sale of the liquors described was a violation of law, and the conviction should be sustained without any inquiry as to the intoxicating or nonintoxicating properties of the liquor. Second, that, should the court hold otherwise, the question of the intoxicating quality of the liquor kept for sale and sold was sufficiently submitted to the jury, and that, in that event, the judgment should be affirmed. It is contended by plaintiff in error: "First, it is not a violation of our liquor law to sell a malt extract, unless the same is shown to be of such an intoxicating character that it may be used as a beverage, and that, when used in practicable quantities, it will produce intoxication. Second, that the court will not take judicial notice that malt extract is an intoxicating liquor, but this question is one of fact to be submitted to the jury. Third, that the instructions requested by the defendant should have been given, and that the court erred in omitting from the instructions given the

element of the intoxicating character of malt extract as one of the material issues to be tried." It is charged, in the first count of the information, that plaintiff in error unlawfully kept, for the purpose of sale, "certain malt and intoxicating liquor, to wit, malt tonic," with intent to sell the same; and, in the second count, that he unlawfully sold, to a person named, "certain malt and intoxicating liquor, to wit, malt tonic;" and, in the third count, that he sold of said liquor to another person, and, in the fourth count, that he sold the same to a person named, and, in the fifth count, that he sold the same to yet another person named. The jury returned a verdict finding plaintiff in error guilty on all the counts of the information. The court imposed a fine of \$100 upon each count.

It was shown upon the trial that, upon the filing of the complaint before the magistrate, a search warrant was issued, and the sheriff, in making a search of the premises of plaintiff in error, found "four full barrels and about a half barrel" of the liquor. There was ample proof that the liquor was kept for sale, and sold to be drunk as a beverage, and that a considerable quantity of it had been sold and consumed. The liquor was in bottles, each bottle bearing an illuminated label, as follows, omitting names and locality of the brewing company: "—— Brewing Company's Non Intox. A nonintoxicating malt tonic. Guaranteed to contain less than 2 per cent of alcohol. Brewed and bottled by the —— Brewing Co., ——, Illinois. Western Branch ——, Mo." The state chemist was called as a witness on the part of the state, and testified: That samples of the liquor had been sent to and analyzed by him, and that the liquor was malt liquor; that all liquors that were brewed from malt were necessarily malt liquors; that the liquor contained in the bottles is classed "in the class of beers;" that the quantity of alcohol contained in the liquor was $1\frac{1}{10}$ per cent; that the quantity of alcohol usually contained in the lager beer of commerce is, on average, "around 3 per cent." There is no controversy as to the possession and sale of the liquors by plaintiff in error. nor that they were sold, and to be sold, to be drunk as a beverage. The only contentions are as outlined above. There was no effort to contradict the testimony of the state chemist to the effect that the liquor was a malt liquor, that it contained a percentage of alcohol named, and that it is classed as and among "the class of beers."

It is contended by the state that, under our statutes, it was not essential that the prosecution should go further with its proof, and that, if the liquor was a "malt liquor,"

and belonged to the class known as "beer," the statute having prohibited the sale of "malt liquor," and this court having so often decided that the courts will take judicial notice that beer is an intoxicant, the verdict was right and should be sustained. Chapter 50, Comp. Stat. 1907, commonly known as the "Clobum law," provides, in the first section, that licenses may be issued for the sale of "malt, spirituous, and vinous liquors." In § 6, the issuance of a license to sell "malt, spirituous, and vinous liquors" is prohibited, unless the applicant gives the bond required by the section. Section 10 prohibits any licensed person from selling intoxicating liquors to the classes of persons named therein. Section 11 provides that "all persons who shall sell, or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks," without having first complied with the provisions of the act and obtained a license, shall be deemed guilty of a misdemeanor and punished as prescribed in the section. Section 13 makes it a crime for any licensed person to sell or give away, either by himself or another in his employ, any "malt, spirituous, or vinous liquors" which shall be adulterated. Section 14 makes it a crime to sell or give away "any malt, spirituous, and vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday." Section 20 renders it unlawful for any person to keep, for the purpose of sale without a license, "any malt, spirituous, or vinous liquors," and "any person or persons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same without license," shall be deemed guilty of a misdemeanor. Section 25 confers upon the corporate authorities of cities and villages the power to license, regulate, and prohibit "the selling or giving away of any intoxicating, malt, spirituous, and vinous, mixed, or fermented liquors within the limits of such city or village." Section 29 renders it "the duty of all vendors of malt, spirituous, or vinous liquors" to keep the windows and doors of their places of business unobstructed.

We have thus quoted from the different sections of the law for the purpose of seeking light upon the legislative intent in the passage of the act under consideration. It is contended by counsel for plaintiff in error that it was the legislative intent to suppress the sale of intoxicating liquors, and that, although the term "malt liquors" is used in the act, yet it was not the purpose to prevent the sale of malt liquors or liquids, unless they contained a sufficient quantity of alcohol to produce intoxication; or, 20 L.R.A. (N.S.)

stated differently, that the language used in §§ 11 and 20 must be construed to mean as if it read "intoxicating malt liquor." I cannot read the statute in that light. As well might we apply the adjective to the words "spirituous" and "vinous." It is my opinion that the legislature realized and appreciated the fact that malt, spirituous, and vinous liquors are equally largely used as a beverage, and are alike injurious to the consumer, if not by producing immediate intoxication when taken in small quantities, by producing the same effect when more is taken, and, at the same time, creating an abnormal appetite which leads to dissipation and inebriety. At any rate, the law prohibits the sale of "malt liquors" without a license, and we must obey its plain mandate. Alcoholic beverages are under the ban of the law, in some form or other, in most civilized countries. They are known to be the cause of crime, destitution, and pauperism. Malt liquors used as beverages are known to contain that destructive ingredient. It was proven, upon the trial of this case, that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law. The title of the act is "An Act to Regulate the License and Sale of Malt, Spirituous, and Vinous Liquors," etc. Laws 1907, chap. 82, p. 297. The whole act is built upon that title. Malt liquors are as much within both the letter and spirit of the law as either of the other classes named. To say that the legislature intended to provide for the regulation and license of intoxicating malt liquors would require the same word to be used as defining the other classes, and would be legislating and reading into the statute a word which the legislature clearly intended should not be there. This is not the province of the courts. We are sustained in this view by many adjudicated cases, some of which we cite without quoting: *Kerkow v. Bauer*, 15 Neb. 150, 18 N. W. 27; *Sothman v. State*, 66 Neb. 302, 92 N. W. 303; *Peterson v. State*, 63 Neb. 251, 88 N. W. 549; *State v. Teissedre*, 30 Kan. 476, 2 Pac. 650; *Stout v. State*, 96 Ind. 407; *Briffitt v. State*, 53 Wis. 39, 46 Am. Rep. 621, 16 N. W. 39; *Com. v. Timothy*, 8 Gray, 480; *Com. v. Anthes*, 12 Gray, 29; *Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *State v. Gill*, 89 Minn. 502, 95 N. W. 449; *Com. v. Dean*, 14 Gray, 99; *State v. Jenkins*, 64 N. H. 375, 10 Atl. 699; *Hatfield v. Com.* 120 Pa. 395, 14 Atl. 151; *Com. v. Reyburg*, 122 Pa. 299, 2 L.R.A. 415, 16 Atl. 351; *Kettering v. Jacksonville*, 50 Ill. 39; *State v. Yager*, 72 Iowa, 421, 34 N. W. 188; *State v. O'Connell*, 99 Me. 61, 58 Atl. 59; *State v. Certain Intoxicating Liquors*, 76 Iowa, 243, 2 L.R.A.

408, 41 N. W. 6. "But if the statute specifically forbids the unlicensed sale of 'malt liquor,' the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor." 23 Cyc. Law & Proc. p. 60. "Any liquor which is named or plainly included in the statute must be held intoxicating as a matter of law, without inquiry into its actual properties, and even though, as a matter of fact, it is not capable of producing intoxication." 23 Cyc. Law & Proc. p. 57.

It is claimed that the words "malt, spirituous, and vinous liquors" and "intoxicating drinks," as used in § 11, and "intoxicating liquors," as used in § 20, are used interchangeably, and all mean the same. To this we cannot agree. As we have seen, the statute prohibits the sale of either "malt," "spirituous," or "vinous" liquors, in specific term, by name. As said in many of the cases above cited, this is a specific and direct prohibition, but the legislature, recognizing the fact that there are other intoxicants which do not come strictly within the classes named, the words "or any intoxicating drinks," as in § 11, and "any intoxicating liquors," as in § 20, were used to cover all kinds not within the classes named. That, if the charge and proof are that any one of the classes were sold or kept for sale, no proof of the intoxicating property of the liquor was necessary, and that it is only necessary to prove that the liquor sold or kept for sale is one of the classes forbidden. But should the accusation refer to any other kind of liquor, it should be alleged and proven that the article was intoxicating. This, I think, is the correct interpretation of the statute, and, without further inquiry, the judgment of the district court should be affirmed.

However, there is another feature of this case upon which we all agree, and that is, whether correctly or incorrectly, the district court did submit the question of the intoxicating quality of the liquor to the jury, and that by their verdict the jury answered the question. The averments of the information are that, at the time and place named in the several counts, plaintiff in error kept for sale and sold "certain malt and intoxicating liquor, to wit, 'malt tonic,'" etc. The same language, descriptive of the article sold or kept for sale, is used in each of the five counts in the information. The widest latitude was allowed plaintiff in error in his efforts to prove that the drinks sold and kept for sale were not intoxicating. A number of witnesses who had partaken of the beverage were called, and testified to the fact of drinking the same, and that no intoxicating effect was felt by them, and that

20 L.R.A. (N.S.)

the drink was not intoxicating. One witness who was called by the state testified that he drank of the liquor, and it had the same effect upon him as beer, but in a less degree. The state chemist testified that the intoxicating ingredient was alcohol, and the effect depended upon the individual drinking the liquor, and the lower grade or per cent of alcohol would produce intoxication in a person who was not accustomed to drinking, while a higher grade would be necessary to intoxicate the individual who was in the habit of drinking the stronger liquors.

The court instructed the jury that the material allegations which the state must prove were that the plaintiff in error kept or sold liquors "as charged in the information," and that, in order to convict, it was necessary that the proof show that plaintiff in error had the liquors "described in the information," and sold the same. It is not deemed necessary to further refer to the instructions. It is sufficient to say that the instructions; while not as explicit as they might have been, had any upon that point been necessary, yet, when taken in connection with the evidence, were sufficient to submit the question of the intoxicating properties of the liquor to the jury. We are of the opinion, however, that the question was improperly submitted, and that no evidence should have been received upon that subject. The error, however, having been by the procurement of plaintiff in error, and in no sense to his prejudice, he cannot complain.

The judgment of the District Court is affirmed.

Rose, J., not sitting.

Letton, J., dissenting:

I cannot agree to the main holding in the opinion. It seems to hold that the selling of all malt liquids or liquors, regardless of whether they contain intoxicating properties, is prohibited. I think that a holding that the sale of malt beverages, nonintoxicating in character, is a crime, unless a license has first been obtained under the provisions of the liquor law, is an entirely new doctrine in this state, and gives to the law such a new and radically changed interpretation from that which has been followed by administrative, executive, and judicial officers of the government for nearly forty years as to partake of the character of judicial legislation. I venture to say that it has been the uniform practice of public prosecutors, in liquor cases, ever since the law was enacted, to prove, or endeavor to prove, the intoxicating quality of malt beverages, other than beer, ale, or such liquors that are of such well-known

ingredients and qualities that the court will take judicial notice that they are within the prohibition of the statute. When the legislature prohibited the sale of malt, spirituous, or vinous liquors, I think the word "liquors" was used in the ordinary acceptation of the term. The Century Dictionary defines "liquors:" (1) A liquid or fluid substance, as water, milk, blood, sap, etc. (2) A strong or active liquid of any sort, specifically an alcoholic or spirituous liquor, either distilled or fermented; an intoxicating beverage, especially a spirituous or distilled drink, as distinguished from fermented beverages as wine and beer. (b) A strong solution of a particular substance used in the industrial arts. Webster: (1) Any liquid or fluid substance, as water, milk, blood, sap, juice, and the like. (2) Especially alcoholic or spirituous fluid either distilled or fermented. A decoction, solution, or tincture.

There are many tonic preparations of malt combined with ingredients such as iron, phosphates, or other drugs, and other and nourishing preparations of malt combined with ingredients of food value, for the use of convalescents, which are in constant use by the medical profession, and which are sold in drug stores. This opinion, construed strictly, would drive all this class of preparations from the market, which I think was never intended by the legislature. The object of the law was to regulate the sale of malt "liquors," not malt "liquids." An examination of the liquor laws of this state, as a whole, confirms me in the belief that this is the reasonable and proper construction of the statute. The phraseology used in describing the liquors varies with the various sections of the liquor law. In the first section the county board is authorized to license the sale of "malt, spirituous, and vinous liquors." The word "intoxicating" does not appear in this section. Section 5 speaks of the thing to be licensed as "the liquor." It uses no other qualifying words. The form of the license prescribed by this section names "malt, spirituous, and vinous liquors," but does not contain the word "intoxicating." The 6th section says that no person shall be licensed to sell malt, spirituous, and vinous liquors by the county board, etc., unless a bond is given, and provides that a bond shall be given for the benefit of anyone who may be injured by the sale of "any intoxicating liquor." No one could recover damages under bond for sale of liquors unless they were intoxicating liquors. Section 8 prohibits the sale to any minor, apprentice, or servant under twenty-one years of age, of any "malt, spirituous, and vinous liquors or any intoxicating drinks." The 10th section pro-

hibits the sale of "any intoxicating liquors" to any Indian, insane person, idiot, or habitual drunkard. Section 15 provides that the person licensed shall pay damages that result in consequence of "such traffic" and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, this traffic in intoxicating drinks, so that the words "such traffic" relate to the traffic forbidden in the chapter, and this section construes it to be traffic in intoxicating drinks. Section 16 gives an action to a married woman for damages on account of "such traffic," which we have seen by § 15 is characterized as being traffic in intoxicating drinks; and § 17 gives an action, by the county or city, on the bond of the person licensed, when a person shall become a county or city charge by reason of intemperance, against "any person licensed under this act who may have been in the habit of selling or giving intoxicating liquors" to such persons, and, in the proviso to this section, any person against whom a judgment shall be rendered under the provisions of the section, may recover from any other person who has "sold or given liquor to such person becoming a public charge." Section 18 provides that, in the trial of suits the cause or foundation of which shall be the acts done or injuries inflicted by a person "under the influence of liquor," it only shall be necessary, to sustain the action, to prove that the defendant sold or gave liquor to the person so intoxicated. Plainly the word "liquor" here, as in all places in the statute, should be read "intoxicating liquor." In the last part of § 18, the words "intoxicating drinks" are used as an exact equivalent of the word "liquor" where it twice occurs in the same section. Section 20 prohibits the keeping of any "malt, spirituous, or vinous liquors" for the purpose of selling without license, and it provides that anyone who is found in possession of "intoxicating" liquors with intention of disposing of the same, without license, shall be deemed guilty.

Unless we consider that the liquors kept for sale must be intoxicating liquors in order to make the act of keeping them unlawful, we have to presume that the legislature would forbid the keeping of inoffensive liquors, and, in the same section, provide that the person who was found keeping intoxicating liquors should be punished, without providing that the person keeping the other forbidden liquors should be punished; in other words, that the legislature would prohibit the keeping of liquors, but provide no punishment therefor, and then provide punishment for keeping intoxicating liquors, which it had not specifically prohibited. In this same section, the word "liquor" is used

seven or eight times without any qualifying word, and twice used qualified by the word "intoxicating," and so, as in other places in the statute, the word "liquor" is used as meaning "intoxicating liquor." In § 21, the word "liquors" is used five times without any qualifying word, and in § 22, at least five times. In § 24, a permit is authorized to druggists to sell "liquors," without any qualifying word, but I think it clear that "intoxicating liquors" is meant. It is also provided further that no license shall be granted by a village for the sale of any "liquor," within $2\frac{1}{2}$ miles of a military post. By § 26, druggists who have permits are required to keep a register of "all liquors sold or given away by him." This is not limited to malt, spirituous, and vinous liquors, and the word "intoxicating" is not used. If the word "liquors" is to be construed in this section, as it is in the opinion, the report required of a druggist is much greater than anybody ever supposed, and all medicinal preparations of malt would have to be reported. Section 30a, chap. 50, Comp. Stat. 1907, being a part of the act of 1907, speaks of the liquor license authorized under the liquor law as "a license for the sale of intoxicating liquors," and the next section of the same act says that it shall be unlawful for any person engaged in the manufacture of malt, spirituous, or vinous liquors to aid or assist in procuring a license, for any person, for the sale at retail of malt, spirituous, or vinous liquors, and then speaks of these liquors so defined as "said intoxicating liquors," thereby expressly stating that the malt, spirituous, and vinous liquors named in the liquor law are intoxicating liquors, and, in § 30g (§ 7) of the same act, it speaks of all of the other acts as "acts relating to intoxicating liquors." The act against treating forbids the giving away of any intoxicating drink. Section 1 of the act of 1907, regulating the transportation of intoxicating liquors, makes it unlawful to consign intoxicating liquors from one point in the state to another. If the sale of malt liquors not intoxicating is forbidden by the statute, that should have been included in this provision, and § 4 of the same act forbids the bringing of any malt, spirituous, vinous, or intoxicating liquors into any city or incorporated village in which a license has not been granted, etc. It is manifest that the word "liquor" is used in this act also with the meaning of "intoxicating liquors," and that a malt preparation that is not intoxicating would not be included in the meaning given to the word "liquors." If this case had been presented nearly fifty years ago, as it might have been, since the main provisions of the statute were enacted in 20 L.R.A. (N.S.)

1858 (see *Re Hastings Brewing Co.* (Neb.) 119 N. W. 27), a holding that the sale of any malt liquor was prohibited unless the seller was licensed might perhaps have been justified, though this is questionable; but, after half a century of liquor legislation and official construction, it seems to me too late to take this view, and I am firmly of the opinion that the change, if made at all, should be made by the legislature.

Cases from other states throw but little light upon the question, since, in order to reach the true meaning of each opinion, the whole statute must be considered and compared with the statute in this state; but the courts of other states are not in harmony, the holding of the different states depending upon the interpretation and construction of the respective statutes. In Pennsylvania, Illinois, and Maine, the cases cited by Judge Reese hold specifically that proof of the intoxicating quality of malt liquor is unnecessary. In Minnesota, it seems to be held that a charge of selling malt liquor implies that the liquor has intoxicating qualities. It is said in *State v. Gill*, 89 Minn. 502, 95 N. W. 449, cited in the majority opinion, that whether or not the liquor was really intoxicating is a question of fact for the jury. See also *State v. Story*, 87 Minn. 5, 91 N. W. 26. If I understand the Minnesota holdings correctly, they are exactly in line with what is and has heretofore been considered to be the law in this state, and are not in harmony with the majority opinion here; but I think the cases cited from other states do not all support the opinion. The Massachusetts case cited in the opinion merely holds that, where a statute declares that lager beer shall be deemed intoxicating, it cannot be proved not to be intoxicating in a prosecution for selling intoxicating liquors. The Kansas and Wisconsin cases merely hold, as does this court, that the courts will take judicial notice that beer is a malt liquor and intoxicating.

Further, the defendant was charged with selling "a malt and intoxicating liquor, to wit, malt tonic." To charge a sale of intoxicating malt liquor and prove nonintoxicating would be, I think, a fatal variance between the pleadings and the proof. The defendant requested instructions, which are set out in the original opinion (80 Neb. 432, 114 N. W. 412), that the state must prove that the malt tonic was intoxicating. Each side introduced testimony concerning the intoxicating character of the liquor in controversy, so that the state concluded that the intoxicating quality of the liquor was a material allegation necessary to be proved to entitle it to a conviction. The trial court therefore erred in refusing to

give instructions 1 and 2 requested by the defendant. Perhaps inferentially the jury might conclude, from the 9th instruction given by the court, that "malt liquor" referred to intoxicating liquor, but it did not supply the instructions asked by defendant.

Under the charge, it was error to refuse these instructions, and the original judgment should be adhered to.

Barnes, J., concurs in this dissent.

NEW YORK COURT OF APPEALS.

GRACE GEORGETTE DICKINSON, Appt..

v.

WILLIAM I. SEAMAN, Impleaded, etc.,
Resp't.

(193 N. Y. 18, 85 N. E. 818.)

Antenuptial contract—gift in violation.

1. A provision in an antenuptial contract, that the husband would adopt a child of the wife, and make her his heir, and bequeath and devise all his property to her, does not prevent his giving, in good faith, to his relatives, before death, a policy of

Case Note.—Gift as a fraud on contract to will property.

This note is confined to cases involving gifts made during the lifetime of the contractor or covenantor, and therefore does not include testamentary dispositions or uses of fraudulent conveyances.

DICKINSON v. SEAMAN appears to be the only case in which the question involved has been discussed from the viewpoint of the reasonableness of the gift, in view of the entire property possessed by the contractor. However, in *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415, the contention was raised that the promisee was the owner of all the property owned by the promisor after the making of an agreement to will all his property in consideration of support for life, and therefore entitled to an accounting therefor; but the circuit judge before whom the point was raised refuted this contention, holding that the promisor was restricted only to a reasonable use, and denied the extreme relief demanded. The point was not raised on appeal, but the opinion of the circuit judge is reported and approved by the supreme court, as above cited.

The other decisions involving the validity of a gift made by a person under contract or covenant to will all his property to a certain person are practically uniform in holding that such an agreement does not prevent the making of absolute bona fide gifts during the lifetime of the contractor or covenantor. However, the gift must be absolute, and not in effect testamentary, and must not be made for the express purpose of defeating the contract or covenant.

20 L.R.A. (N.S.)

insurance upon his life, which amounts only to a reasonable gift, in view of the property possessed by him.

Judgment—specific performance—scope.

2. A judgment enforcing specific performance of a contract to devise all one's property to a particular person, so far as it relates to money or other property owned and left by the promisor at the time of his death, does not include the proceeds of a policy of insurance on his life, which he had given away in his lifetime.

(October 6, 1908.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term, Part 3, for New York County, sustaining a demurrer to a complaint filed to recover the proceeds of a life insurance policy. Affirmed.

Statement by Vann, J.:

The facts alleged by the plaintiff in her complaint are in substance as follows: In 1875 George W. Kidd entered into an antenuptial agreement with Anna Estelle Slo-

The few cases revealed by an extended search follow:

In *Logan v. Wienholt*, 7 Bligh. N. R. 1, in construing a marriage bond whereby a person covenanted to give or bequeath so much of his estate to a certain beneficiary as he should by such will give or bequeath to any other person, and several gifts were made in alleged fraud of the beneficiary's rights under such agreement, the Lord Chancellor said: "If a person covenants or agrees, or in any manner validly binds himself, to give to A by his will as much as to any other, he may put it out of his power to do so by giving all in his lifetime; or, if he binds himself to give A as much as B by his will, he may, in his lifetime, give B what he pleases, so as his will shall give A as much as his will gives B; but then, the gifts which he makes in his lifetime to B must be out and out; for if, to defraud or to defeat the obligation which he has entered into, he gives to B any property, real or personal, over which he retains a control, or in which he reserves an interest to himself, then, in order to protect the agreement or obligation which he has entered into, and to defeat the fraud attempted upon that obligation, and to prevent his escaping, as it were, from his own contract, this gift to B shall be taken as testamentary.—shall be taken as if included in the will.—and the subject-matter of it shall be brought back and made the fund out of which to perform the obligation: at all events, it shall be made the measure for calculating and ordering the performance of, or dealing with the claim arising under, that obligation."

So, in *Vanduyne v. Vreeland*, 12 N. J.

cum. whereby, in consideration of the sum of \$40,000 advanced to him by her, to be used in the business he was then carrying on, he agreed to marry her, and to adopt her daughter, the plaintiff in this action. As the complaint continues, he also agreed to make said daughter "his heir, and that, in case there should be issue of said marriage, he would by will bequeath and devise all his property equally to and among the said child and his other children, and in case there should be no issue of said marriage, then, in that case, he would bequeath and devise all his property" to the plaintiff herein. This contract was followed by the marriage of Mr. Kidd and Mrs. Slocum, the surrender by the latter to the former of the possession of the plaintiff, her daughter, and the payment of said sum of \$40,000 to him, by the use of which in his business he "accumulated a large fortune, consisting of real and personal property, which he had at the time of and left at his death." "Among such property was a policy of life insurance" for \$10,000 on his life, dated December 22, 1873, the premiums on which had all been paid by him. On the 22d of November, 1897, while said contract was in full force, and in

due course of performance by his wife, he "attempted by an instrument purporting to be an assignment to transfer" said policy of insurance to "his brothers and sisters and a niece," who are defendants in this action, purely as a gift, and without other consideration than mutual love and affection. Said instrument contained a guaranty as to "the validity and sufficiency" thereof, and a covenant to warrant and defend the title of the assignees to said policy. The amount of the policy has been paid into court, and is now in the hands of the chamberlain of the city of New York, one of the defendants. After the death of Mr. Kidd, and on May 11, 1905, the plaintiff recovered judgment in the supreme court against his executors, the other defendants herein being also parties defendant to that action, requiring them to specifically perform said contract, and adjudging that the plaintiff was entitled to all his property and estate, subject only to the right of his wife to dower, and under the statute of distributions. The complaint herein contains no allegation that said assignment was made from evil motives, or with intent to defraud the plaintiff, and fraud is not alleged as a fact in connection

Eq. 142, it was held that a person who had agreed that all his property should belong to an adopted child at the time of the decease of himself and wife was under no restraint as to free and unrestricted use of his property during life, and that he could give it away while he lived; but that he could not make a testamentary disposition inconsistent with the agreement.

In *Fortescue v. Hennah*, 19 Ves. Jr. 67, where a father was under covenant for an equal division, at his death, of all the property he should die seised or possessed of, between his two daughters, it was held that during his lifetime he had full liberty to dispose of any personal property by absolute gift, but that he could not defeat the covenant by a disposition which reserved to himself an interest for life, as that would, in effect, be a testamentary disposition in fraud of the covenant.

In *Jones v. Martin*, 3 Anstr. 882, where a father covenanted on his daughter's marriage to leave her, at his death, a share of all his personalty equal with that of his son, it was held that an absolute and irrevocable gift of bank stock to the son, made during his life, did not constitute a breach of the covenant, even though he reserved to himself the annual dividend for his own life.

In *Gregor v. Kemp*, 3 Swanst. 404, note, in holding that a gift of 1,000 £, made three days before the death of a mother who had covenanted in marriage articles to give at her death a fourth part of all her real and personal property to a certain son, or his executor or administrator, which gift constituted nearly her entire estate, and which was made for the express purpose of

preventing such a large portion of her estate from passing to strangers, constituted a disposition in fraud of the covenant, the Lord Chancellor said: "Notwithstanding the articles, Mrs. Kemp was not restrained from disposing of her estate any way in her lifetime, and had a full power over it, but with this single exception: viz., she was restrained from making a distribution on purpose to defeat the covenant, which it is here fully proved she did; for she was unwilling her estate should go to strangers; and the disposition is a plain fraud; it was the intent of the articles that it should be for strangers, for it is to him, his executors, etc.; therefore, if he should think proper to make his wife executrix, as he did, it was designed for her benefit."

And in *Austin v. Davis*, 128 Ind. 472, 12 L.R.A. 120, 25 Am. St. Rep. 456, 26 N. E. 890, it was held that a person is not prevented from transferring his property by gift by an agreement to leave all his property, at his death, to an adopted child, if the transfer is not made for the purpose of defrauding the latter.

And in *Quinn v. Quinn*, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808, where A, on adopting B, agreed that B should inherit and be entitled to a certain portion of A's property provided that B remained in A's family until B's majority, which contract was performed by B, it was held that A could not deprive B of his rights under the agreement by a gift of his property in his lifetime, or by will made for the express purpose of defeating B's right to share in the property.

therewith, although it is alleged, as a conclusion of law, that the assignment "was executed in derogation, in violation, and fraudulently as to the contract." The relief demanded was a judgment that the assignment is a violation of the antenuptial contract, and void as to the plaintiff; that she recover from the chamberlain the entire proceeds of the policy; and that he be enjoined from making payment thereof to anyone else. The defendant William I. Seaman demurred to the complaint upon the ground that it fails to state facts sufficient to constitute a cause of action. The demurrer was sustained by the supreme court at special term, and final judgment was rendered against the plaintiff accordingly, which, on appeal to the appellate division, was unanimously affirmed. A further appeal was then taken by her to this court.

Mr. H. D. Luce, with Mr. Charles C. Dickinson, for appellant:

Specific performance will be decreed of a contract made before marriage, and in contemplation of it.

2 Parsons, Contr. 5th ed. p. 71; 2 Kent, Com. 14th ed. p. 165; Schouler, Dom. Rel. 5th ed. 176; Pom. Eq. Jur. § 1297; Bright, Husband & Wife, p. 471; Tooke v. Hastings, 2 Vern. 97; Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. Supp. 129; Borland v. Welch, 162 N. Y. 104, 56 N. E. 556; Todd v. Weber, 95 N. Y. 189, 47 Am. Rep. 20; Merritt v. Scott, 6 Ga. 563, 50 Am. Dec. 365; Stilley v. Folger, 14 Ohio, 610; Cartledge v. Outlift, 29 Ga. 758; Smith v. Chapell, 31 Conn. 589; Tarbell v. Tarbell, 10 Allen, 278; Hunter v. Bryant, 2 Wheat. 32, 4 L. ed. 177; Snyder v. Webb, 3 Cal. 83; Albert v. Winn, 5 Md. 66; English v. Foxall, 2 Pet. 595, 7 L. ed. 531; Vason v. Bell, 53 Ga. 416; Michael v. Morey, 26 Md. 239, 90 Am. Dec. 106; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603; Roberts v. Roberts, 22 Wend. 140; Re Demers, 41 Misc. 470, 84 N. Y. Supp. 1109; Re Baker, 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed on opinion below in 178 N. Y. 575, 70 N. E. 1094; Re Craig, 97 App. Div. 289, 89 N. Y. Supp. 971, affirmed on opinion below in 181 N. Y. 551, 74 N. E. 1116; Re Miller, 77 App. Div. 473, 78 N. Y. Supp. 930; Phalen v. United States Trust Co. 186 N. Y. 178, 7 L.R.A.(N.S.) 734, 78 N. E. 943, 9 A. & E. Ann. Cas. 595.

The antenuptial contract having been fully performed, it amounts to an actual purchase by the mother, for the benefit of her daughter, of all of the property which the deceased should accumulate during his lifetime; and a trust was thereby created in favor of the plaintiff, to the extent that he

could not give it away during his lifetime or by will after his death.

3 Parsons, Contr. 5th ed. p. 362; 2 Kent, Com. p. 165; Re Young, 27 Hun, 54, affirmed in 92 N. Y. 235; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753; Brown v. Wadsworth, 168 N. Y. 225, 61 N. E. 250; Poston v. Gillespie, 58 N. C. (5 Jones, Eq.) 258, 75 Am. Dec. 437; Bank of Greensboro v. Chambers, 30 Gratt. 202, 32 Am. Rep. 661.

The instrument purporting to be an assignment was not a gift *inter vivos*, but a gift *causa mortis*.

Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116; Wills v. Evans, 8 N. Y. Week Dig. 368; Phelps v. Phelps, 28 Barb. 131; Wilson v. Baptist Education Soc. 10 Barb. 308; Hamer v. Sidway, 57 Hun, 229, 11 N. Y. Supp. 182; Dodge v. Pond, 23 N. Y. 69; Dimon v. Keery, 31 Misc. 231, 64 N. Y. Supp. 1091, affirmed 54 App. Div. 318, 66 N. Y. Supp. 817; Donovan v. Middlebrook, 95 App. Div. 365, 88 N. Y. Supp. 607; Re Bolin, 136 N. Y. 177, 32 N. E. 626.

Messrs. Baldwin, Wadhams, Bacon, & Fisher, for respondent:

The contract referred to property which decedent owned at the time of his death, only.

Re Kidd, 188 N. Y. 274, 80 N. E. 924; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Johnston v. Spicer, 107 N. Y. 195, 13 N. E. 753; Austin v. Davis, 128 Ind. 472, 12 L.R.A. 120, 25 Am. St. Rep. 456, 26 N. E. 890; Phalen v. United States Trust Co. 186 N. Y. 178, 7 L.R.A.(N.S.) 734, 78 N. E. 943, 9 A. & E. Ann. Cas. 595.

Deceased could dispose of his property by assignment or by gift during his lifetime.

Jones v. Martin, 3 Anstr. 882; Randall v. Willis, 5 Ves. Jr. 266; Gall v. Gall, 64 Hun, 600, 19 N. Y. Supp. 332; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753; Austin v. Davis, *supra*.

The assignment was not a testamentary disposition of property, but passed a present right to the policy of insurance.

Lane v. Equitable Life Assur. Soc. 102 App. Div. 625, 92 N. Y. Supp. 1131; Lane v. Equitable Life Assur. Soc. 115 App. Div. 902, 100 N. Y. Supp. 1125; Matson v. Abbey, 70 Hun, 475, 24 N. Y. Supp. 284, affirmed in 141 N. Y. 179, 36 N. E. 11; Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359; Re Parsons, 117 App. Div. 321, 102 N. Y. Supp. 168; Hurlbut v. Hurlbut, 49 Hun, 189, 1 N. Y. Supp. 854; Conyne v. Jones, 51 Ill. App. 17; Grafing v. Heilmann, 1 App. Div. 260, 37 N. Y. Supp. 253, affirmed in 153 N. Y. 673, 48 N. Y. Supp. 1104; 19 Am. & Eng. Enc. Law, 2d ed. p. 88; Bohleber v. Waelden, 150 N. Y. 405, 44 N. E. 1041; Elsberg v. Sewarda, 66 Hun, 28, 21 N. Y. Supp. 10.

Vann, J., delivered the opinion of the court:

The complaint does not rest upon actual fraud, alleged as matter of fact, but on constructive fraud alleged as a conclusion of law. The theory of the pleader was that the plaintiff, by means of the antenuptial contract made between her mother and the decedent, became entitled to all the property of the latter at his death, without any reduction through gifts made in his lifetime; that, in the words of her counsel, "there was no option given to the decedent as to the sum or sums which he might give away," either in his lifetime or by last will and testament; and that he held his property as a quasi trustee, with power to use for the support of himself and family, but with no power to make a donation of any substantial amount to any person, or for any purpose. This construction of the contract is not required by the words used, and it would lead to such absurd results as to show that it was not within the intention of the parties. It would have prevented the decedent from dropping a "ten-dollar bill" in the contribution box as it was passed to him in church on Sunday; from giving a few dollars to relieve want or assuage pain; from making a Christmas present to a friend; and, regardless of the extent of his estate, from helping to build a church or support a hospital. What was the contract? The decedent agreed to adopt the plaintiff and make her his heir; to give her all his property by will, unless he should leave a child or children of his own, and, in that event, to divide his property equally between all the children, herself included. What was the effect of the contract, construed, as it should be, in the light of the circumstances surrounding the parties when it was made, with reference to the use by the decedent of his property while he lived? The answer to this question is not to be found in his promise to "bequeath and devise all his property" to the plaintiff, read by itself, but read in connection with the context, that he would adopt her and make her his heir. When thus read, the reasonable construction is that he intended to treat the plaintiff as his own child, and, when he died, to leave his property to her, or to her and his own children, if he had any. He did not intend to create a trust in her favor, or to deprive himself throughout his life of power to use his property as men with wife and children depending upon them ordinarily use their property. He intended to give the plaintiff the legal status of a child of his body, and to leave her his property after he was through with it. He did not intend to so fetter his estate for all time that he could not hold up his head among

men, and do what others do with the property they accumulate. The lady whom he was about to marry, as in the nature of things, it must be presumed, could not have intended to belittle and humiliate him in advance by depriving him of power, as long as he lived, to make a gift to charity or a present to a friend, even if it was reasonable in amount, when the size of his estate was taken into account. Such a debasing covenant would dishonor both parties, and is inconceivable under such circumstances as the complaint discloses.

The intention of the plaintiff is not to be sought for, as she was not a party to the agreement except by indirection; but that of the two persons on the threshold of marriage, and presumed to be deeply attached to each other. The lady had been married before. She had a child and a substantial sum of money. In lending that money to her prospective husband, to use in his business, she made the same provision for her child as if it were a child of the marriage about to take place. By that provision her child was to be adopted by her husband as his own, and made his heir, and he was to leave it his property when he died. It would be unreasonable to hold that either party, by such an agreement, made under such circumstances, and for such a purpose, intended that the head of the family, although he might live to be an old man, and be worth millions, could never consider an application for charity without a blush, because, by agreement with his own wife, he could not give any substantial sum even to the most noble object. The intention of the parties may be doubtful when particular words used by them are considered by themselves, but it is clear when all their words are read together in the light of their mutual promises to marry. Regard must be paid, not only to their language, but also to what the law implies therefrom in view of their situation.

It is asked, however, whether the decedent could give away all his property to his own relatives, and thus defeat the antenuptial contract altogether. And, assuming that he could not do this, because it would be unreasonable, it is further asked where the line is to be drawn between the power to give away all and to give away nothing. That line is to be drawn where the courts always draw it when they can,—along the boundary of good faith. If the decedent had given away property with furtive intent, for the purpose of defeating the antenuptial contract, and of defrauding the plaintiff, the gift would have been void. No such fact is alleged in the complaint. No case of fraudulent intent or fraud, in fact, is presented by the plaintiff. Her

theory is that any gift, or, at least, that any substantial gift, by the decedent, even if made with the best of intentions, was unauthorized and void. We do not so read the contract. Any gift made with actual intent to defraud would be void, but none made without such intent, unless so out of proportion to the rest of his estate as to attack the integrity of the contract, when it would be fraudulent as matter of law. The gift might be so large that, independent of intent or motive, fraud upon the contract would be imputed, or arise constructively by operation of law. Reasonable gifts were impliedly authorized. Unreasonable gifts were not, even if made without actual intent to defraud. In the absence of intentional fraud the question is one of degree, and depends upon the proportion that the value of the gift bears to the amount of the donor's estate. The plaintiff alleges that the decedent accumulated a large fortune, and had it at the time of his death; and, if so, a gift of \$10,000, made in his lifetime to his brothers and sisters, would not be a fraud upon the contract as matter of law, for it would not be unusual or unreasonable for a man so situated to make a gift of that amount to near relatives.

The plaintiff can take nothing in this action by virtue of her judgment in the former action, for, as she expressly alleges, the decree for specific performance is confined to the "money or other property owned and left by the said George W. Kidd at the time of his death." The policy in question was property, but it was neither owned nor left by Mr. Kidd when he died, for, by his lawful act, it had become the property of others.

We think that the action of the courts below in sustaining the demurrer to the complaint was proper, and that the judgment appealed from should be affirmed, with costs.

Cullen, Ch., J., Haight, Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur.

OREGON SUPREME COURT.

JACK RODMAN

v.

WILLIAM P. MANNING et al., Appts.

(— Or. —, 99 Pac. 657.)

Broker — purchase — suppression of knowledge.

A real estate broker cannot, after accepting, in response to his request for price, the owner's offer to sell at a certain price less a commission to himself, enforce a conveyance to himself, if, to his knowledge, 20 L.R.A. (N.S.)

the property was worth more than the price named, of which fact he failed to inform the owner.

(February 9, 1909.)

Case Note. — Right of broker to purchase real estate listed with him for sale.

It is not intended to cover herein the right of agents generally to sell real estate to themselves. So far as possible, the cases are limited to sales by brokers, although some cases are included in which the character of the agent in this respect is not clear.

Where agent's interest in purchase is concealed.

It is the general doctrine, to which there are but few exceptions, that a real estate broker, with whom real estate has been listed for sale, cannot become the purchaser of it, or be interested in the purchase of it, unless his interest is disclosed to the principal.

Thus, in *Curry v. King*, 6 Cal. App. 568, 92 Pac. 662, in referring to the rule applicable to such a sale, the court said that the animating principle of the proposition that such an agent was charged in full measure with the duty of good faith in his dealings with his principal touching the subject-matter of his authority as agent, was that no one should or would be permitted to enjoy the fruits of an advantage taken of a fiduciary relation, whose dominant characteristic was confidence reposed by one in another. That "the act of an agent, within the scope of his authority, is the act of his principal, and hence the authority of an agent is so fraught with responsibility and grave concern to his principal, dealing as it does with the property rights of the latter, that it proceeds out of the highest considerations of confidence, which the principles of equity demand, must be preserved to its utmost in transactions involving the exercise of such authority. Therefore an agent will not be allowed to deal in his own behalf with his principal with reference to the subject-matter of the agency, unless he makes full, complete, and honest disclosure of the truth of the transaction. He is bound to treat with his principal concerning the property over which he has been vested with authority in the utmost good faith; and so religiously does equity require adherence to this rule that a transaction between them as to the property whereby the agent acquires the ownership thereof is, upon its face, deemed by the law to be fraudulent."

And in *Rich v. Black*, 173 Pa. 92, 33 Atl. 880, Justice Sterrett, considering the relation created by listing property with a real estate agent for sale, remarked that the rule of public policy avoided, at the instance of the *cestui que trust*, all purchases made by such agents; and added that "courts of equity view such transactions with jealous eye; and it is only under special circumstances amounting to a dissolution of the

A PPEAL by defendants from a judgment of the Circuit Court for Lane County in complainant's favor in a suit to compel the specific performance of a contract to convey certain real property. Reversed.

The facts are stated in the opinion.

Mr. G. W. Stapleton for appellants.

Mr. John M. Williams for respondent.

Moore, Ch. J., delivered the opinion of the court:

This is a suit to enforce the specific performance of a contract to convey real property. The facts are that the defendants William P. Manning and Mary, his wife, were the owners of 320 acres of timber land in Lane county, Oregon and while residing at Roy, Washington, received a telegram

trust relation, when the parties have dealt at arms length, that their validity is recognized. . . . And the reasons are obvious. On the one hand, the relation which such agents bear is confidential, and disarms the vigilance of their principals; it affords peculiar facilities for obtaining exclusive information in respect of the property intrusted to them for sale; their employment implies that they have superior advantages for making sales, and that they will use every effort and means to obtain the highest price for the benefit of their principal. On the other hand, their individual interest is to purchase at the lowest price, and places them in a position which is inconsistent with the faithful and proper discharge of the duties of the trust."

Agents employed to sell real estate cannot themselves become purchasers, unless it appears that, with full knowledge of all the facts, the principal previously consented to, or subsequently ratified, the sale; as it is an inflexible rule, founded on public policy, that, where the interest of the agent is concealed from the principal, the transaction is voidable at his option; or, if the property has been subsequently sold by the agent, he may be held accountable to the principal for the profits he derived therefrom. *Tilleny v. Wolverton*, 46 Minn. 256, 48 N. W. 908; *Forrester-Duncan Land Co. v. Evatt* (Ark.) 119 S. W. 282.

Listing real estate with an agent to sell at a minimum price implies an expectation on the part of the principal, and an engagement on the part of the agent, that he will make an honest endeavor to obtain a higher price. And, where he makes no bona fide effort to perform this duty, and purchases the property at the minimum figure in the name of another, concealing his interest therein from the principal, equity will cancel the conveyance, or hold him for all profits derived by him from subsequent sales. *Rich v. Black*, supra.

In *Clark v. Bird*, 66 App. Div. 284, 72 N. Y. Supp. 769, the question as to the validity of a sale of land by a principal to her agent seemed to turn upon the question of whether the principal knew that she was selling to

November 17, 1906, from the plaintiff, Jack Rodman, who, the defendants knew, was engaged in the real estate business at Eugene, inquiring if they owned such property, and, if so, what was the price thereof. Manning, not knowing the value of the land at that time, in reply to the message, wired as follows: "Yes; price \$4,000 less 5 per cent commission." The plaintiff immediately telegraphed to Manning as follows: "Will take it; send deed to me, First Nat'l Bank." The deeds were made out and sent to the defendant bank as requested, with instructions that they be delivered upon the receipt of \$3,800. Rodman on November 23, 1906, wrote Manning as follows: "Will you kindly instruct the First National Bank to accept a deposit of \$200

the agent with whom she had listed the property. The holding of the lower court, that the principal did not understand that the sale was to her agent, and that it was therefore void and would be canceled, was held supported by evidence that the principal was a woman, advanced in years, physically weak, and of inferior mental capacity, and that the consideration for the sale was grossly inadequate, together with the fact that the agent seemed to act in the role of agent to the extent of charging commissions for investing himself with the ownership of the property.

The doctrine that an agent to sell cannot sell to himself was also applied in *White v. Leach* (Iowa) 96 N. W. 709, wherein the rescission of an exchange of land with an agent was granted where the exchange was procured through fraudulent representations by the agent as to the value of the land exchanged, and concealment of the fact that he and his partner were the real parties to the exchange, it having been made in the name of a third person.

And in *Anderson v. Lawler*, 46 Wash. 543, 90 Pac. 913, rescission was granted of a contract to sell real estate, made through a real estate agent interested in the purchase, where that fact was concealed from the owner.

Similar relief was given in *Clark v. Bird*, supra, where the interest of the agent in the purchase was concealed.

And in *Curry v. King*, supra, a sale by a real estate agent to himself through a "dummy" was canceled upon the application of the principal.

Also in *Webb v. Marks*, 10 Colo. App. 429, 51 Pac. 518, where an agent misrepresented the value of land listed with him for sale, and purchased it in the name of his mother-in-law, who was a member of his family, of which fact the principal had no knowledge.

In *Leonard v. Omstead* (Iowa) 119 N. W. 973, the principal was allowed to recover the profits made by his agent from a subsequent sale, where, unknown to his principal, he was interested in the original purchase negotiated by him.

So, where a purchaser of land by a con-

as evidence of good faith, and to hold your deeds to me for two weeks, so as to give me a little time to get together some other pieces which I am endeavoring to collect, in order to make a sale of it all together? If this will not inconvenience you it will be an accommodation to me, and I will make the deposit as soon as I get word from you that you have so instructed the bank." Manning, in reply thereto, sent the plaintiff a postal card, stating that he had directed the bank as requested; but on November 26, 1906, he countermanded the order, and notified the bank not to deliver the deeds. Thereafter Rodman tendered to the bank \$3,800, and demanded the deeds, but failed to obtain them. Prior to such tender, the plaintiff had agreed with certain per-

sons to sell and convey to them the defendants' lands, for which he was to receive \$6,500. The complaint herein is in the usual form. The answer alleges that the plaintiff was the defendants' agent in negotiating the sale of their property, and that, having concealed from them the value of the premises, they are not bound by their contract. The reply put in issue the allegations of new matter in the answer, and, the cause having been tried, resulted in a decree as prayed for in the complaint; and the defendants appeal.

The important question to be considered is whether or not the plaintiff was employed by the defendants to negotiate a sale of their real property. "A broker," says Mr. Hammon, "is one who is engaged for oth-

tract, through real estate agents representing the owner, went to the agents before the completion of the purchase, and expressed regret at making the purchase, and offered to release the owner therefrom, which fact the agents concealed from their principal, and completed the contract in their own behalf, but in the name of such purchaser, such conduct on their part was a fraud upon the owner, which entitled him to recover from them the profits realized from a subsequent sale of the property. *Moore v. Petty*, 68 C. C. A. 306, 135 Fed. 688.

And where an agent to sell pilot warrants at the best price obtainable negotiated a sale to a partner in such deals, which fact was unknown to the principal, he was held accountable to him for his share of the profits derived from a subsequent sale. *Segar v. Edwards*, 11 Leigh, 213.

In *Morgan v. Hardy*, 16 Neb. 427, 20 N. W. 337, specific performance of a contract for the sale of real estate made through an agent to his stepdaughter, a member of his family, was refused where it appeared that the principal did not know that the agent was selling to one related to him, and supposed he was acting entirely in his interest. The court said that, when a professional land agent acted as agent for both the seller and the buyer, with knowledge on their part of that fact, the law exacted the most perfect good faith, honesty, and fairness on his part, and would not adjudge a specific performance of the contract thus made, unless it was entered into with perfect fairness, without misapprehension or misrepresentation; and the rule would be more strictly observed in a case like the one before the court, where the vendor believed, and had the right to believe, that the agent was acting for him and in his interest alone, and added: "No one who reads the above correspondence can doubt that the agent was acting alone in the interest of his stepdaughter. Indeed, in all matters where her interest was at stake, it was his duty to protect it. Hence, in the transaction now being considered, he was morally, if not legally, incompetent to act as the agent of the defendant." 20 L.R.A. (N.S.)

So, a contract to sell real estate will not be specifically enforced where made by an agent with his partner, the owner having no knowledge of the partnership, or of any interest of his agent in the purchase. *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781.

And in *Foss Invest. Co. v. Ater*, 49 Wash. 446, 95 Pac. 1017, specific performance of a contract to sell real estate was denied where the contract sought to be enforced was made by an agent with a corporation as purchaser, the stock of which was substantially all owned by him, although no representations as to the identity of the purchaser were made, and the agent's authority to sell was at a price net to the vendor.

Where the agent is interested in the purchase, and conceals his interest from the principal, he cannot recover his commission. This rule applies even where the employment is to sell at a fixed price; for it springs from the prohibitory policy of the law, adopted to prevent the abuse of confidence, and to remove temptation to duplicity. It requires a man to put off the character of agent when he assumes that of principal. *Ruckman v. Bergholz*, 37 N. J. L. 437.

The right of an agent to a commission was also denied in *Salomons v. Bender*, 3 Hurlst. & C. 639, on the ground that the agent negotiated the sale to third persons for the benefit of a company then being formed, for which the agent was then employed as an architect, and in which he intended to take shares of stock.

Real estate agents authorized to sell real estate at a stipulated price are not entitled to recover damages for an alleged breach of an agreement by the principal to convey to a purchaser when found by them, where the breach consists of a refusal to execute a deed to the agents. *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246. This case involved an attempt by certain real estate agents to construe an authority to sell real estate located in Fredericksburg as covering the grave, monument, etc., of Mary, mother of Washington; and it contains an interesting account of that transaction, which at the time caused much comment.

ers on a commission negotiating contracts relative to property with the custody of which he has no concern." 19 Cyc. Law & Proc. p. 186. The chief feature which distinguishes a broker from other classes of agents is that he is an intermediary or middleman, who, in effecting a sale or exchange of property, acts, in a certain sense, as the agent of both parties to the transaction. *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *Saladin v. Mitchell*, 45 Ill. 79; *Higgins v. Moore*, 34 N. Y. 417. A person who is a salaried agent and not acting for a fee or rate per cent, for others, is not a broker. *Portland v. O'Neill*, 1 Or. 218. "When a broker," says Mr. Commissioner King, in *Wolverton v. Tuttle* (Or.) 94 Pac. 961, 963, "is notified by the vendor

that he will pay no commissions, and, after receipt of such notice, the broker continues the negotiations for the sale, it is presumed that he is agent of the purchaser, and looking to him for his compensation." The converse of the legal principle thus asserted must be true, from which it follows that, when the owner of property offers to pay a person a commission for negotiating a sale or exchange thereof, the acceptance of the proposition necessarily creates the relation of agency between them. The defendants were aware that the plaintiff was engaged in the real estate business, and, when they received his first message, they had the right to infer, from the nature of his occupation, that he was acting as the agent of some person unknown. *Baxter v.*

The agency of a real estate broker for the sale of certain real estate, together with its sale by the broker to another, but for his benefit, virtually to himself, is sufficient to show that a contract between such broker and the nominal vendee, by which the vendee is to account to the broker for a share of the profits derived from the transaction, is violative of law, contrary to public policy, and unlawful under the Code, and hence will not be enforced in behalf of the broker. *Butler v. Agnew* (Cal.) 99 Pac. 395.

A distinction was made in *Merriam v. Johnson*, 86 Minn. 61, 90 N. W. 116, between a contract with a real estate agent to sell land at a given price net to the vendor, with full discretion as to the purchaser, with authority to sell even to himself, and also as to the price, so long as the net price was realized, and a contract by which the agent was to sell at the best price obtainable, with a reasonable commission to be paid by the purchaser. The court said that a sale of land by the agent to himself, under a contract of the first description, would be valid, although, at the time, the agent was concealing his interest in the purchase, and was selling to a third person at a greatly enhanced price; but a sale under such circumstances, if made by virtue of a contract of the latter description, the court said, would be voidable, to the extent, at least, that the owner would be entitled to recover from the agent the amount he received in excess of what he paid for it.

Spinks v. Clark, 147 Cal. 439, 82 Pac. 45, held the fact that real estate brokers were agents for the sale of a particular parcel of land, did not amount to a constructive fraud, authorizing a rescission of a contract made in their own behalf, with the owner, for its exchange for stock in a corporation, although the owner believed, and was led to believe, that the stock was not their property, and that the transaction was with a third person, where the transaction was a separate one, originating in the owner's offer to exchange, based upon his own investigations as to the value of the stock, and where the court found as a fact that, in making the exchange, the owner did not

rely upon or believe the brokers were his agents, or that they were acting in his behalf in making the exchange.

A sale by a broker to himself is only voidable, and may be waived by laches or conduct tending to affirm the fraud. Thus, in *Bassett v. Brown*, 105 Mass. 551, the court, while recognizing that a principal may avoid a deed of land obtained from him by a real estate broker, with whom he had listed it for sale, and who, by fraudulent representations as to the value of the stock, induced him to exchange the land for stock, concealing his ownership in the stock, said that it was the duty of the principal to act with reasonable promptness upon learning of the fraud practised upon him; and a delay of over two years in taking steps to rescind, after full knowledge of the fraud, during which time he had disposed of a large portion of the stock, amounted to an affirmation of the fraud, and precluded a rescission.

Purchases by subagents, etc.

The rule that a real estate agent cannot purchase real estate listed with him for sale, applies with equal force to his clerks who obtained information in reference thereto through their employment, and a sale to them, where the principal has no knowledge of their identity and connection with his agent, will be canceled at his option. *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192.

A subagent's duties and obligations to the principal are of the same nature and extent as those of the agent; and a sale of the principal's real estate by the subagent to himself, without the consent of the principal, with knowledge of all the facts, is therefore voidable, and will be set aside at the option of the principal. *Burke v. Bourne*, 92 Cal. 108, 28 Pac. 57.

So, an agreement by a third person with a real estate dealer, with whom property had been listed for sale, whereby the former was to receive a part of the commissions in case he effected a sale of the property, makes him an agent of the principal, and hence, with

Duren, 29 Me. 434, 50 Am. Dec. 602. When, under such circumstances, the defendants proposed to pay the plaintiff a stated commission for effecting a sale of their real property, the acceptance of such offer made him their agent. This seems to be the construction he first placed on the contract; for it will be remembered that in his letter written to Manning, November 23, 1906, he stated that he desired an extension of time in order that he might make a sale of other tracts of land at the same time. "An agent to sell land," says Mr. Justice Jaggard, in *Kingsley v. Wheeler*, 95 Minn. 360, 362, 104 N. W. 543, 544, "does not fulfil the measure of legal requirements by merely carrying out his specific instructions. He owes the duty of making a full, fair,

and prompt disclosure of all facts affecting the principal's rights or interests, or pertaining to the sale of land by him. He is denied the right to profit at the expense of his principal by concealment of facts which he ought to have revealed." When an agent employed to sell land becomes himself the purchaser by making a contract with his principal, from whom he conceals the fact that a greater price may be obtained from another person, he is guilty of such fraud as will justify a violation of the agreement.

Believing that the facts hereinbefore stated bring the case within the principle adverted to, it follows that the decree should be reversed and the suit dismissed; and it is so ordered.

out a full disclosure of his interest and connection with the agent, precludes him from acquiring the property, and an agreement with the principal to purchase will not be specifically enforced in his behalf. *Fisk v. Waite* (Or.) 99 Pac. 283.

Subsequently acquired interest.

The mere fact that the relation of agency once existed between the parties does not disable them from dealing with each other in reference to the subject-matter of the agency, or from dealing with third persons in reference to the subject-matter of the agency, after the termination of the relation of principal and agent. This doctrine was in substance enunciated in *Oberlin College v. Blair*, 45 W. Va. 812, 32 S. E. 203, which held that the fact that an agent to sell real estate purchased an interest therein four days subsequently to the consummation of the sale thereof in behalf of his principal would not invalidate the sale, where the court was unable to find, from the evidence, that the agent had any understanding or agreement with the vendee before the sale was made, that he was to become the owner of any interest in the subject-matter of the sale after the sale. It was further held that, under such circumstances, the *onus probandi* was on the principal who alleged fraud, and, if the fraud was not strictly and clearly proved as alleged, relief would not be granted, although the party against whom relief was sought was not perfectly clear in his dealings.

So, in *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068, the court said that the fact that real estate agents had been engaged to act for the owner of land in negotiating its sale would not estop or preclude them from making an advantageous purchase of the property after they had effected a sale in behalf of the principal. It was also said that, where the principal attacked the sale on the ground of fraud, in that the original sale was secretly for the benefit of the agent, it devolved upon him to prove that fact. It was, however, admitted that a subsequently executed instrument for the sale of the premises, containing a state-

ment that it was executed in consummation of an agreement between the vendee in the original sale and the agents, made at the time of the original sale, *prima facie* established fraud; but that this presumption was overcome by an explanation on the part of the agents, that the instrument did not correctly show the date of the oral agreement which it consummated, but that the date of the original sale had been fixed upon simply as a matter of convenience. This explanation, the court said, must be accepted as true.

And where the agent is not interested in an offer to purchase, made by the purchaser, and the latter purchases on his own account exclusively, without any understanding that the agent is to become interested with him or take his place in the purchase, a subsequent purchase by the agent will not be avoided. *Robertson v. Chapman*, 152 U. S. 683, 38 L. ed. 596, 14 Sup. Ct. Rep. 741.

To the same effect, also, is *Bookwalter v. Lansing*, 23 Neb. 291, 36 N. W. 549, which held that it did not invalidate a sale for the agent, upon the failure, of the purchaser in a sale negotiated by him to make the payments, to himself advance the money and have the purchaser transfer the property to him, where the original purchase was found not to have been made for his own use, and the sale to the third person was not a device or means for the agent to obtain title to the property without the principal knowing the real nature of the transaction.

The fact that the agent's wife, some years after, became the owner of land with reference to which her husband had, at a prior time, been an agent in negotiating a sale to his brother-in-law, is not sufficient to invalidate the sale, where its validity was not attacked for over twenty years, and an explanation of the wife's title was made, which, at least, was as consistent with honesty on the part of the agent as with dishonesty, and it did not appear that the property sold was worth substantially more at the time of the original sale than the principal received for it. *Walker v. Carrington*, 74 Ill. 446.

Where interest disclosed.

Where the fact is disclosed that the agent is either purchasing for himself, or is interested in the purchase, and the purchase is otherwise free from all fraud, concealment, misrepresentation, or undue influence on his part, it will be sustained.

This doctrine finds support in *Stewart v. Mather*, 32 Wis. 344, which held that an agent was entitled to his commission for finding a purchaser of certain land, even though he purchased the land himself, if the purchase was made with full knowledge of all the facts on the part of the principal, and with an understanding that he was to have a commission. Referring to the right of an agent to buy of his principal, the court said: "The general principle will at once be acknowledged, that a person cannot, at the same time, be both agent for the seller to make the sale, and purchaser of the property to be sold. The relations are wholly incompatible with each other, and cannot be combined in the same person. The law will not permit it. Assuming the character of purchaser, the person so acting necessarily abandons that of agent, and can claim nothing in the latter capacity in his negotiations with his former principal. Such is the undoubted general rule. But the question presents itself, whether there may not be exceptions growing out of the peculiar nature of the agency, or certain special or limited agencies not falling within the reason of the rule, and so not within the rule itself. The reason of the rule is very plain. It is, that the interest of the party as purchaser, being adverse to that of his principal, supposing the agency still to continue, might and most naturally and ordinarily would lead to a violation of his duty as agent. If a case can be presented, however, not within the reason of the rule, as of an agency limited to a time anterior to the purchase, or where the agency may be said to have expired, or the duties to have been performed, before the purchase takes place, to such a case it is presumed the rule would be held inapplicable."

Rathke v. Tyler, 136 Iowa, 284, 111 N. W. 435, sustained a sale of land by a principal to his agent, although on the following day he sold the land to another for a substantially larger amount. It appeared, however, that he had never met the subsequent purchaser until the day following his purchase of the land from his principal.

And where a real estate agent is given no discretion, and no special confidence is placed in him, and there is no reliance upon his judgment or skill, and no authority is vested in him to bind his principal, and there is no obligation on his part to advise, the mere existence of an agency to sell does not, in the absence of actual fraud on his part, disable the parties from dealing with each other with reference to the subject-matter of the agency; and if the principal, with full knowledge of all the material facts concerning the transaction, enters into negotiations with the agent and

consummates a deal with him, the transaction is valid, and will not be set aside. *Pomeroy v. Wimer*, 167 Ind. 440, 78 N. E. 233, 79 N. E. 446.

But if the broker in making a sale is given a discretion as to the terms of sale, or the price, or if he procures the sale to himself by fraud, misrepresentation, concealment, or undue influence, the sale may be avoided by the principal, although entered into by him with knowledge that the agent was an interested party in the purchase.

Thus, in *Kingsley v. Wheeler*, 95 Minn. 360, 104 N. W. 543, in holding that the owner of land, who sold it to real estate brokers, with whom he had previously listed it for sale, could recover their profits from a subsequent sale, the court said: "Real estate agents enjoy no exemption from the ordinary rules which govern the relationship of principal and agent. An agent owes a high degree of faithfulness for the protection and advancement of the interest of his principal. He must act solely for that interest, and not for his own or another's benefit; and must not, and is not allowed to, put himself in a position of conflicting interest with his principal. The principal has a right to repose confidence in the most perfect good faith of his agent, and to rely upon his consistent loyalty. The agent is not entitled to enjoy the fruits of any abuse of his position, or failure in consistent performance of legal duties. An agent to sell land does not fulfil the measure of legal requirements by merely carrying out his specific instructions. He owes the duty of making a full, fair, and prompt disclosure of all facts affecting the principal's rights or interests, or pertaining to the sale of land by him. He is denied the right to profit at the expense of his principal by concealment of facts which he ought to have revealed. Whatever advantage accrues to him by violation of his duties, he must make good to his principal whom he has wronged."

An agency to sell real estate gives rise to a duty on the part of the agent to disclose all facts known to him in reference to the value of the land before buying it himself, and, although he may not be guilty of any false or fraudulent statements in procuring the property, yet if he conceals facts affecting its value, as the fact that he had a better offer from a third person, the conveyance to him will be rescinded at the election of the principal. *Van Dusen v. Bigelow*, 13 N. D. 277, 67 L.R.A. 288, 100 N. W. 723.

So, in *Cornwell v. Foord*, 96 Ill. App. 366, the vendors in a contract to sell real estate to their agent were allowed the amount subsequently received by the agent for the property, in excess of the amount paid by him, although the sale was made directly to him, where, however, he concealed from his principals the fact that he had received other offers larger than the amount that he had paid them for the property.

Rescission of a sale of land to an agent was also granted in *Green v. Peeso*, 92 Iowa, 261, 60 N. W. 531, where the agent concealed the fact that he had received offers

from third persons for a larger amount than he paid.

So, where a real estate agent, employed to sell certain real estate, concealed from his principal information gained by him in the course of his employment, which would have been of value to the principal before parting with his title, and took advantage of this knowledge to procure a conveyance to himself, the conveyance is voidable, and will be canceled at the instance of the principal, or his subsequent vendee. *Prince v. Dupuy*, 163 Ill. 417, 45 N. E. 298.

A mere proposition by the owner of land residing some distance therefrom, to a person residing near it, to act as his agent in selling it, although the relation of principal and agent is not consummated, places the parties in such a relation each to the other as to demand open and fair dealing; and a court of equity will not enforce a contract made between the parties for the sale of the land, where the purchaser suppresses facts which materially affect the present and prospective value of the land. *Byars v. Stubbs*, 85 Ala. 256, 4 So. 755.

UTAH SUPREME COURT.

STATE OF UTAH, Resp.,
v.

JAMES DONALDSON, Appt.

(— Utah, —, 99 Pac. 447.)

Larceny—card game—fraud—amount.

1. One who obtains from another a sum of money by a fraudulent use of cards is guilty of larceny of the whole amount, although he intends to divide it with others who are confederated with him in the transaction.

Case Note.—Larceny by fraudulent race or game.

The earlier cases upon this subject are treated in a note to *State v. Ryan*, 1 L.R.A. (N.S.) 862, or are sufficiently set out in that opinion. A number of decisions upon this subject have been handed down since the preparation of that note.

Some authorities divide the cases of this character into two classes: First, those in which the complainant intended to part with title to the money or property which he put into the game, although, by some trick or device, he had no possible chance of winning; second, cases in which the complainant had no intention to part with title to his money or property. This distinction is clearly set out in *Johnson v. State*, 75 Ark. 427, 88 S. W. 905, where the complainant gave the defendant an amount of money to bet upon a race which was alleged to be a "sure thing," the money to be returned, together with a share of the winnings. The court held that these facts brought the case within the authority of *Hindman v. State*, 72 Ark. 516, 81 S. W. 838 (which is cited in the earlier note), where the court laid down the following L.R.A. (N.S.)

Same—guilt.

2. If one takes from a card table, without consent of his opponent, money belonging to the latter, under the pretense that he has won it in the game, which was in fact fraudulently conducted by him, so that the owner of the money had no chance to win, and was the only one who risked anything, with intent to appropriate it to his own use, he is guilty of larceny.

Evidence—erroneous admission—absence of prejudice.

3. It is not prejudicial error to permit a witness by whom the defendant in a criminal case is attempting to prove good character to be asked if witness and defendant had not smoked opium together in a disreputable resort, if the answer is no.

(January 6, 1909.)

A PPEAL by defendant from a judgment of the District Court for Salt Lake County convicting him of grand larceny. Affirmed.

The facts are stated in the opinion.

Mr. S. A. King for appellant.

Messrs. M. A. Breeden, Attorney General, and A. R. Barnes, for respondent:

Where one is induced, by means of a game where he has no chance to win, to part with his property, he does not part with the title to his property, but merely parts with the possession; and larceny may be maintained for such unlawful taking.

Hall v. State, 6 Baxt. 522; *United States v. Murphy*, MacArth. & M. 375, 48 Am. Rep. 754; *R. v. Robson*, Russ. & R. C. C. 413; *State v. Skilbrick*, 25 Wash. 555, 87 Am. St. Rep. 784, 66 Pac. 53; *People v. Shaw*, 57 Mich. 403, 58 Am. Rep. 372, 24

ing rule: "Where persons conspire to cheat a man under color of a bet, and he simply deposits his money as a stake with one of them, not meaning thereby to part with the ownership therein, they, by taking the money, commit larceny; and not the less so though afterwards they are by fraud made to appear to win." The court, however, upheld the charge of the trial judge to the effect that, no matter how fraudulent or dishonest the inducements might have been, if the complainant bet his money intending to part with its title and possession, the taking of it, so fraudulently acquired, would not constitute larceny.

So, in *Glasgow v. State*, 50 Tex. Crim. Rep. 635, 100 S. W. 933, where the facts were very similar, the transaction was held to be a theft. The court said: "The evidence of the witness Guess, as above detailed, and other portions of same in the record, shows that he did not intend to part with his money; that he was to receive it back at all hazards,—either the exact money, or the exact amount of money. This being true, the facts constitute theft, and there was no error in the court so charging."

N. W. 121; *State v. Smith*, 82 Minn. 345, 85 N. W. 12; *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *People v. Miller*, 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418; *Defrese v. State*, 3 Heisk. 53, 8 Am. Rep. 1; *Crum v. State*, 148 Ind. 401, 47 N. E. 835; *Fleming v. State*, 136 Ind. 149, 36 N. E. 154; *People v. Rae*, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1; *People v. Frigerio*, 107 Cal. 152, 40 Pac. 107; 25 Cyc. Law & Proc. pp. 40, 57; *People v. Shaughnessy*, 110 Cal. 602, 43 Pac. 2.

All acts done by the conspirators or any one of them, in furtherance of the common design, including the attempt to escape detection and the division of the fruits of the crime, were admissible.

3 Enc. Ev. 432; *People v. Leong Quong*, 60 Cal. 107; *People v. Smith*, 112 Cal. 333, 44 Pac. 663; 6 Am. & Eng. Enc. Law, 2d ed. p. 866; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; 8 Cyc. Law & Proc. p. 679; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Kent* (*State v. Pancoast*) 7 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

Frick, J., delivered the opinion of the court.

The defendant was charged, tried, convicted, and sentenced for the crime of grand larceny, and now presents the record on appeal.

The evidence, stated in condensed form, tended to establish the following facts:

That the alleged crime arose out of an alleged conspiracy entered into by several

individuals, hereafter referred to, by means of which two young Scotchmen, while on their way from Scotland to Los Angeles, on the day of the alleged crime, while stopping off at Salt Lake City, were deprived of \$10,423. In passing along the streets of the city, they met a stranger of whom they made some inquiry with regard to the location of some point in the city, when he informed them that he was likewise a stranger in the city, but at once seemed to take an interest in them. He introduced himself as "Mr. Morris," and, after giving them somewhat of his history, invited them to go with him to a certain room where he said he expected to meet a friend of his uncle. The two brothers went with him, and, when they arrived at the room, Morris knocked at the door, and, after some delay, both he and the two young men were admitted into the room in which the defendant and another (as they said) had been engaged in a game of cards. Morris introduced the two brothers by their names to the other two who were in the room, but gave these two fictitious names. The defendant was titled "Doctor," and the other, who was in fact a brother of Morris, was introduced as a mining expert. The mining expert entered into a conversation with the two brothers about mines and precious ores for a short time, after which he and the defendant asked permission to continue their game of cards, which was given. Morris soon joined the game. After he had played some time, he asked the elder of the two brothers to take his (Morris's) place in the game. The Scotchman declined to play, protesting that he knew nothing about the game. Morris, however, urged

And in *State v. Copeman*, 186 Mo. 108, 84 S. W. 942, where the defendant and his accomplice obtained possession of the prosecutor's money while discussing the proposed bet, but the prosecutor did not intend to part with title thereto, the court said: "If, by deception and fraud, or any trick or confidence game, a party should part with the absolute title as well as the possession of his property, it may well be said there was no trespass in the taking and conversion of the property, for the reason that the victim consented to the taking of the title and possession, as well as the conversion; and hence there would be no larceny, for the reason there was no trespass. . . . In other words, where the ownership of the property is not parted with, and, by a fraud or trick, the possession of the property alone is obtained, and is converted to the use of the taker without the consent of the owner, and, at the time of resorting to the trick or fraud to obtain the possession, it was intended to convert the property, and permanently deprive the owner of it, this would constitute larceny at common law, as well as under the statute."

20 L.R.A. (N.S.)

And the same rule was applied in *Williams v. State*, 34 Tex. 558, where the prosecutor was a willing party to a wager upon a fraudulent device by which he could not win, and the court held that, as the defendant secured possession of the money with the consent of the owner, one of the essential elements of larceny was lacking.

In *People v. Simmons*, 125 App. Div. 234, 109 N. Y. Supp. 190, a judgment of conviction of larceny was sustained where the evidence offered by the people showed that two or more confederates, by gaining the confidence of a stranger on the ground of professed acquaintance with him or his friends, lured him to a place where he was afterwards fleeced at some game.

And in *Defrese v. State*, 3 Heisk. 53, 8 Am. Rep. 1, the prosecutor was induced to hand his watch to the defendant as a wager upon a fraudulent card trick. It did not appear that any money was wagered against it, but the defendant's confederate claimed that he won, snatched the watch, and walked away with it, and the defendant was held guilty of larceny for his part in the transaction.

him to play, stating that he (Morris) would show him how, and for that purpose offered the Scotchman the "chips" which Morris claimed he had won, amounting, as he said, to the value of \$40. The elder brother thus entered the game. He was asked to deal the cards, and did as directed by dealing one card at a time to each player, and, as soon as the first card had been dealt, the betting was started by the defendant. Neither the defendant nor the mining expert displayed any money, and, when the bets had exceeded the amount of the chips which Morris had given to the elder brother, he was urged by Morris to meet the bets of the defendant and the mining expert by putting up money. When the Scotchman demurred to this, he was told by Morris that this was necessary in order to avoid losing the amount that had been staked, and that, if it were not done, Morris's winnings would be taken up by the other two players. When the Scotchman further demurred, because he alone was required to put up money, Morris pretended that he would put up his own money. To this the others objected, insisting that, inasmuch as the Scotchman played the hand, he should put up his own money.

He was finally persuaded to do so upon the assurance by Morris that it was necessary in order to protect what was already at stake, and that the Scotchman in all events would win in the end if he continued to meet the bets as made by the other two, since he held the winning hand. In this way the bets were raised from time to time until the Scotchman had \$2,050 on the table. After that amount of money was on the table, and five cards had been dealt to each player, the defendant claimed that he had won, and took the money from the table and put it in his pocket. The Scotchman protested, and claimed that he was being robbed of his money, and asked his brother, who was in the room all of the time, to call a policeman. Morris at once said that he himself would go for a policeman, and left the room. Within a few minutes thereafter he came back with two others, who represented themselves to be policemen. As soon as the alleged policemen arrived in the room, the Scotchman told them his troubles, and claimed that he was being robbed. After some parley, the alleged policemen pretended that it was necessary for them to search the players, and all who were engaged in the game, including the Scotchman, were searched. The \$2,050 was given up by the defendant to one of the alleged policemen, who also demanded from the elder brother the balance of his money, which, after some protest, was given to the alleged policeman, amounting to \$8.373, and which had been displayed by the Scotchman in 20 L.R.A. (N.S.)

making the bets as aforesaid. The alleged policeman gave the Scotchman a receipt therefor, stating at the time that the money so taken, including the \$2,050, would all be accounted for when they should arrive at the police station, where all were to be taken forthwith. This receipt was produced at the trial and introduced in evidence. The two alleged policemen, however, did not take any of the parties to the police station, but the two brothers were placed in charge of a so-called deputy policeman, who trailed them around the city, first under one and then under some other pretext, while the others went with the alleged policeman who had the money, and the defendant and the mining expert were not seen thereafter by the two Scotchmen. After this plans were at once adopted to get the two brothers out of the city, which, after considerable parley was accomplished, after returning to them \$1,000 out of the \$10,423 all of which had been taken from the Scotchman, as aforesaid. The two brothers then took the train and went on their way to Los Angeles, from whence they thereafter returned to Sale Lake City. The \$9,423 was afterwards divided among the two alleged policemen, the defendant, and the mining expert. The division, however, was not made in equal proportions, but this fact is not deemed material.

It further appeared from the evidence that, if the three players had risked equally in the game, the whole amount of money staked would have amounted to \$6,150, all of which the defendant claimed to have won. He, however, never asked for nor received any amount from the mining expert, who, like the Scotchman, would have been loser in the game to the amount of \$2,050. It further appeared that the defendant, the mining expert, Morris, and the two alleged policemen were all gamblers, following that vocation for a livelihood. The defendant, however, claimed that he only knew Morris and the mining expert, and that he did not know the two alleged policemen, and did not know that they were coming to the room, or know anything with regard to what was contemplated by them. The two brothers also testified that, out of the whole amount of money taken as aforesaid, upwards of \$1,200 belonged to the younger brother, but that the older one was the custodian of all of it, and that it was all kept together as one entire sum.

We have omitted very many details from the evidence from which inferences might be deduced, some of which could be said as being favorable to, while others might be taken as making strongly against, the defendant. Other inferences tended strongly to establish the alleged conspiracy.

It is asserted by appellant that the evidence is insufficient to sustain a conviction for the crime of grand larceny, and that it is likewise insufficient to establish the conspiracy which the state claimed existed between the defendant and the other four individuals to whom we have referred. The entire evidence is preserved in the bill of exceptions, and covers over 870 pages of typewritten legal cap. We cannot set it forth even in condensed form, and shall not attempt to do so any further than we have already done. From a careful perusal of the record, we are convinced that there was ample evidence to sustain every element of the crime charged. The jury were authorized to infer from the facts and circumstances proved that the defendant obtained the \$2,050, which he claimed to have won either by fraud, trick, device, or artifice, with the intention, at the time he obtained the money, to appropriate it to his own use, and to deprive the owners permanently of the money. But, if it were true that he did not intend to keep all of it, and to divide with those who were connected with him in the alleged game, it would still be larceny of the whole amount. The jury were further justified in finding that the right to the money never passed to the defendant, for the reason that the consent of the owners that it should pass was lacking; but rather that the defendant obtained and took it against their consent. Under such circumstances it is elementary that money, or any other thing of value thus obtained, constitutes larceny at common law. While the authorities are very numerous, we shall cite but a few in which the principle involved is illustrated, namely: *People v. Shaw*, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121; *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2; *People v. Berlin*, 9 Utah, 383, 35 Pac. 498; *People v. Miller*, 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418. In the latter case the authorities are in part collated. Our statute (§ 4355, Comp. Laws 1907) is, in effect, no more than a definition of larceny at common law. In view of the authorities, the jury were also justified in finding that there was a conspiracy entered into among the five individuals who were concerned in the taking of the money belonging to the brothers. 4 Elliott, Ev. §§ 2937, 2938, and 3 Enc. Ev. 427-432. While we cannot devote the space to refer specifically to the multiplicity of facts bearing upon the alleged conspiracy, we have no hesitancy in stating that, in view of the whole evidence, no other conclusion than that of the guilt of the defendant could well have been arrived at by any impartial jury; nor could they, for the same reasons, have arrived at any other con-

clusion than that a conspiracy existed. To say that the taking of the money, under the circumstances of this case, does not constitute larceny, would be to say that the commandment "thou shalt not steal" is a delusion, and our statute upon the subject a farce. As was said by Mr. Justice Campbell in a similar case, namely, *People v. Shaw*, 57 Mich. 406, 58 Am. Rep. 372, 24 N. W. 122: "We do not think it profitable to draw overnice metaphysical distinctions to save thieves from punishment. If rogues conspire to get away a man's money by such tricks as those which were played here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking, and so make the conversion felonious." So, in this case, we would, indeed, lose sight of substance, and follow a mere shadow, if we held that the money was won by the defendant at a game of cards in which all the players risked their money and the best hand won. It is clear to us that the Scotchman never had a chance to win, that it was not intended that he should win; and that he was the only one of all the players that actually risked anything or could lose a farthing. To hold, therefore, that such a game constitutes merely gambling, and that the offenders are punishable only for that offense, would be to hold that the intent with which an act is done is not to be looked to to determine its criminality, but that the name by which it is known alone controls. We are not prepared to hold any such doctrine. The objection that the acts proved did not constitute the crime of grand larceny, and that no conspiracy was proved to have existed between the gamblers, cannot be sustained.

In addition to the foregoing, there are 169 other errors assigned. While we always endeavor to pass upon all the errors that are assigned and argued, and to comply with the constitutional requirement of giving the reasons for our conclusions, we nevertheless must limit the discussion to assignments that contain merit. After a careful perusal of the record, we are fully convinced that, while a very few of the assignments may constitute what is termed as technical errors, not a single one of all those that are assigned, in view of the whole record, constitutes prejudicial error. The defendant was in no way prejudiced in any substantial right by any of the court's rulings upon the trial, nor by any instruction given or refused, nor by the conduct of the attorney general, of which complaint is made. As an illustration of one of the numerous rulings of the court in admitting evidence, the admission of which it is now strenuously insisted constituted error, both with regard to the evidence admitted and as to the mis-

conduct of the prosecuting attorney in propounding a question, the following will serve as a sample: At the trial the defendant put in issue his general reputation for honesty, integrity, and fairness as a gambler. To prove such reputation, he called another gambler, who testified of his acquaintance and long association with the defendant, and that the defendant's reputation as an honest and fair gambler among his associates and the gambling fraternity generally was good. On cross-examination the witness was questioned at some length with regard to his association with the defendant, and was, among other things, in substance, asked the following question, which was permitted to be answered over defendant's objections, namely: Whether it was not true that the only association the witness had with the defendant for the three months preceding the acts in question was that they smoked opium together in Plum alley, a disreputable resort in Salt Lake City. To this the witness answered "No." The question was again asked in another form, and the objection thereto was sustained. It will be observed that the only fact inquired about by the prosecuting attorney was thus said not to exist; that is, instead of establishing the fact, the testimony was to the effect that such fact did not exist. Suppose the witness had been asked whether it were not true that the defendant was a thief, and the answer had been "No," would it have been prejudicial error to have admitted the answer? No one would so seriously contend, although it were conceded that the question was wholly improper; but we cannot pause to give further illustrations, and will not devote either time or space to a further discussion of the errors assigned. We will add, however, that the instructions were fair, and covered every phase of the case, and the defendant's rights were guarded at all points. In the trial of the case, if any errors were committed in the admission or exclusion of evidence, the state had far more grounds for complaint than the defendant. The rulings upon material points of the evidence were all in favor of the defendant where there was any question at all with regard to the admissibility of the proffered evidence. If the objection was to the form of the question, the defendant's objection usually prevailed, as well as when it related to the substance, unless the objection was wholly without merit. The state, in many instances, was not permitted to ask leading questions when nothing was sought by them except to establish a negative.

The whole record satisfies us that the defendant has had a full and fair trial, that 20 L.R.A. (N.S.)

he has not been prejudiced in any substantial right, and that the judgment of conviction ought to be, and accordingly is, affirmed.

Straup, Ch. J., and McCarty, J., concur.

ARKANSAS SUPREME COURT.

J. H. MOORE, Appt.,

v.

D. C. IRVIN.

(— Ark. —, 116 S. W. 662.)

Broker — commission — inability of customer.

The financial inability of the purchaser to perform his contract to purchase real estate does not deprive the broker of his commission where a binding contract for sale is effected through his agency, in the absence of fraud or warranty, on his part, of the customer's financial ability.

(February 8, 1909.)

Case Note. — Broker's right to commission where purchaser procured by him is financially unable to perform his contract.

This note is limited to cases wherein the question is presented as to the validity of the defense that a purchaser produced by a broker to sell real estate has, because of financial inability, failed to complete the contract of purchase, where such default is offered as a defense to an action by the broker for his stipulated commissions for procuring the sale. Among other cases which this limitation excludes are those wherein the broker has sued for his commission because the vendor failed to carry out his agreement to sell, and the defense was made that the purchaser produced by the broker was financially unable to complete his purchase. Although not always recognized, there is a valid distinction between the two classes of cases.

The distinction between this defense in an action by a broker for his commissions where the contract of sale fails for some fault of the vendor, and an action by him for his commissions where the contract of sale fails because of the financial irresponsibility of the purchaser, is clearly pointed out in *Alt v. Doscher*, 102 App. Div. 344, 92 N. Y. Supp. 439, affirmed on opinion of the lower court in 186 N. Y. 566, 79 N. E. 1,100, wherein, in considering this distinction and referring to the rule requiring a broker, suing for his commissions, to show that he produced a purchaser ready, able, and willing to purchase, where the sale fails for some fault on the part of the vendor, the court said: "The reason for requiring proof of the responsibility of the intending purchaser, in such a case, as a condition of re-

APPEAL by defendant from a judgment of the Circuit Court for Howard County in plaintiff's favor in an action brought to recover back a commission paid defendant for selling certain real property, which was alleged to have been unearned. Reversed.

Statement by Wood, J.:

Appellee and appellant entered into a contract whereby the latter, who was a real estate broker, should have the exclusive sale, for the former, of a certain tract of land, on certain terms. Appellee was to give appellant, "in consideration of his services in making a sale or transfer," sending appellee "a buyer, or being instrumental in any manner whatever in selling or transferring the property," a certain per cent commis-

sion, to be paid "out of the first money collected." No change in the price or terms of sale made by appellee should work a forfeiture of appellant's commission. Appellee entered into a contract with one Humphries for the sale of the land. Humphries paid to appellee \$200 on the purchase money, and executed his note for a balance, payable at a future date. Time was of the essence of the contract of sale, and, in the event of a failure to pay or perform other conditions named, "strictly and literally" all the rights of the purchaser ceased. In case of default to comply with the condition as to payment, the relation of landlord and tenant was to exist from the first of January preceding to the date of the default. Upon compliance with the conditions by Hum-

phries, is plain, and rests not upon the proposition that the broker undertakes to guarantee the responsibility of the purchaser, but because his contract is to effect a bargain, and, if he produces a responsible purchaser, ready to contract, his principal cannot defeat his right to commissions by capriciously refusing to make the contract. Such proof is required, not because he contracts to guarantee responsibility, but because he must prove, before he can recover, that the failure to make a contract was the fault of his principal and not his own."

Reverting to the question under consideration, it may fairly be said that the weight of authority supports the doctrine of *MOORE v. IRVIN* that, in the absence of fraud on the part of the broker, he is entitled to his commissions for the sale of real estate where, through his instrumentality, a valid, enforceable contract of sale has been entered into between his principal and a person produced by him, without reference to the solvency or financial ability of the purchaser to complete his contract of purchase. There are, however, well-considered cases which refuse to adhere to this doctrine, but require a contract of sale to be merged into an actual sale to entitle a broker to his commissions. These cases hold that, if a purchaser fails to perform his contract to purchase because of financial inability to do so, the broker is not entitled to his full commission unless it appears that the owner did not expressly or impliedly rely on the judgment of the broker as to the financial ability of the purchaser to perform his contract. These two doctrines are based on different views as to the nature of the relation existing between principal and broker and the duty of the broker to his principal. In the class of cases which hold that a broker employed to secure a customer for real estate earns his commission upon bringing the buyer and seller together, with a resultant, valid, and enforceable contract of sale, a broker is regarded merely as an agent to make bargains. *Alt v. Doscher*, *infra*.

Thus, in *Travis v. Graham*, 23 App. Div. 214, 48 N. Y. Supp. 736, in holding that an owner of real estate who employed a real

estate broker to negotiate a sale of his land could not escape paying the agreed commission, on the ground that the customer produced by the broker was not able to pay for the premises, where he had accepted the purchaser as satisfactory, and conveyed the premises to him. The court said that a broker undertakes to bring the minds of the seller and buyer together in an agreement to sell and purchase wherein the price and terms should be satisfactory to both. There can be no more conclusive evidence that he has done this than the execution and delivery of a deed of the land by the seller to the purchaser.

Following this doctrine, it has been held that a broker, under a general contract of employment for the sale of real estate, is entitled to his commission where he obtains a purchaser satisfactory to his principal, and with whom the principal makes an enforceable contract of purchase and sale without being induced so to do by any representations of the broker as to the ability of the proposed purchaser to perform the contract, and without any bad faith on the part of the broker, although, without any fault of the principal, the vendee fails to perform this contract solely because of the lack of financial responsibility at the time of making the contract. *Alt v. Doscher*, 102 App. Div. 344, 92 N. Y. Supp. 439, affirmed on opinion of lower court in 186 N. Y. 566, 79 N. E. 1100.

To the same effect is *Brady v. Foster*, 72 App. Div. 416, 75 N. Y. Supp. 994.

And where, after negotiations for the sale of land had been entered into between the broker employed to sell it and the prospective purchaser; the latter was turned over to the owner for the completion of the trade, and the owner entered into an agreement with him for the sale of the land, with as full knowledge of his financial condition as had the broker, it is no defense to the broker's claim for commission on the sale, that the purchaser produced by him was not financially able to buy. *Leuschner v. Patrick* (Tex. Civ. App.) 103 S. W. 664.

So a commission will accrue under a writ-

20 L.R.A. (N.S.)

phries, appellee was to make him a warranty deed to the land. Appellee testified that, when the \$200 was paid him by Humphries, appellant demanded his commission. Appellee told him that, "if he thought the other (money) was safe and all right, he could have his commission." He said it would be perfectly all right; that he had arranged to borrow the money for Mr. Humphries; that all Humphries would have to do was to sign a mortgage. Appellee says he let appellant have the \$150, which he "would not have done without this representation." Appellee further testified that he "accepted this Humphries contract and signed this agreement upon defendant's [appellant's] judgment," that "his representations caused plaintiff [appellee] to believe that it was all right."

The testimony of appellant tended to show that he had made a contract to sell appellee's place to one Barefield, for cash; that the trade was not closed on account of the sale by appellee to Humphries; that appellee and Humphries had reached an agreement as to the terms of payment, and he, appellant, wrote the contract for them; that, when Humphries paid appellee the \$200 and appellant received \$150 commission, his contract with appellee terminated. Appellant denied that the commission was paid him upon the understanding that the balance of the purchase money would be paid by Humphries, also denied that he represented to appellee "that Humphries was all right," said that he knew nothing of Humphries' financial standing, and that he did

ten contract to pay a commission to a broker on his finding a purchaser for a tract of land, or upon a sale by the owner during the life of the contract, where a contract of sale is made by the owner by which it is placed beyond his power to make any other transfer of the property for a period of three years, during which time the buyers may sell, and where a portion of the purchase price is paid down and the purchaser enters into possession, although he thereafter fails to meet deferred payments and surrenders possession to the owner. *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101.

Where a sale of land to a purchaser produced by a broker is actually completed, the owner will be held to have considered, and favorably determined, the purchaser's financial responsibility, and the broker is entitled to his commission, even though it may afterward transpire that the purchaser is financially unable to meet deferred payments as they fall due. *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248.

But, where land was listed with a broker for sale, and he introduced a purchaser who entered into a contract for the purchase of the land, and made a deposit thereon, and a deed was executed and placed in escrow, to be delivered on payment of the balance, which, however, the purchaser failed to pay, and forfeited the deposit, and left the state, leaving no property therein subject to execution, the broker was held not entitled to a commission. *Hildenbrand v. Lillis*, 10 Colo. App. 522, 51 Pac. 1008.

A mining broker, employed to secure purchasers for mining claims, for which he is to receive a lump sum as a commission, is entitled to the commission where he procures and introduces to his principal a purchaser with whom a sale is, in fact, consummated, even though such purchaser should thereafter fail to meet deferred payments. *Hallack v. Hinckley*, 19 Colo. 38, 34 Pac. 479.

A person, not a broker, employed to find a customer for real estate, is entitled to the stipulated compensation upon finding a customer who enters into a contract with 20 L.R.A. (N.S.)

the owner; and it is not error to exclude evidence that the purchaser thereafter defaulted on some of his payments where it is offered as a defense to the claim for the commission. *Coles v. Meade*, 5 Pa. Super. Ct. 334.

In *Parker v. Eastabrook*, 68 N. H. 349, 44 Atl. 484, it was said that, when a vendor accepted a purchaser produced by a broker, and entered into a contract with him for the sale of the real estate the broker was employed to sell, the solvency of the purchaser was to be presumed in the absence of proof to the contrary.

In *Stewart v. Fowler*, 37 Kan. 677, 15 Pac. 918, it was held that, if a broker agreed and undertook to sell land for a commission on the price realized, the commission was not earned by merely procuring a person to enter into a contract with the owner to purchase, unless such person was ready, willing, and able to purchase according to the terms of the contract entered into by him with the vendor, by which he was to make an immediate cash payment, and also a further payment in cash, and execute a mortgage for the balance, when he was to be given possession of the land; and that, if the purchaser was not financially able to carry out this contract, and did not carry it out, although making a cash payment, the commission was not earned, even though the owner never made any effort to enforce the contract, but exercised an option, contained therein, to forfeit it and retain what he had received thereunder. A distinction was made between a contract to sell and a sale, and a contract of the character of the foregoing was said to be a mere contract to sell, and the production by a broker of a person who entered into such a contract was said not to be a sufficient compliance with his contract of employment to entitle him to his commission where the person afterward failed to perform.

But this doctrine was disapproved when the case was again before the court in 53 Kan. 537, 36 Pac. 1002, wherein the court treated the contract of employment as an ordinary contract to pay a commission for the sale of land when the brokers had pro-

not guarantee appellee that Humphries would pay for the place. There was nothing to show that the farm was not worth the money that Humphries agreed to pay for it. This suit was begun by appellee, in justice court, against appellant, to recover the \$150. Appellee, among other things, alleged that appellant sold the land to Humphries, and that appellee allowed appellant to take the sum of \$150 as his commission, relying upon appellant's representation that Humphries was able to and would consummate the purchase; that Humphries had failed to do so, and that he was insolvent, and therefore appellant had not earned the commission. Appellant denied orally all the material allegations of the complaint. The testi-

mony, at the trial, developed substantially the above facts.

The court, at the request of appellee, in effect, instructed the jury, that appellant, under the contract with appellee, would not be entitled to any compensation for his services in procuring a purchaser, unless there was a consummation of the contract of purchase made by such purchaser with the appellee, i. e., unless the purchase money was paid by the purchaser, and the title transferred to him. The court further instructed the jury that, if appellant made the representation to appellee that Humphries would perform his contract of purchase, and that appellee acted upon such representation in paying over the money in suit to appellant,—in such case, if Hum-

cured an acceptable purchaser, who was then willing and able to buy the property upon the terms fixed by the owner. Under such a contract, a broker was held to be entitled to his commission when he produced a purchaser who entered into the contract as set forth, and who, at that time, was ready, willing, and able to carry it out, although after its execution the purchaser made default, and the contract was forfeited by the vendor.

The doctrine that, where a broker introduces a purchaser who enters into an enforceable contract with the vendor, his commission is earned in the absence of fraud on his part in inducing the acceptance of the purchaser, although the purchaser afterward turns out to be financially unable to complete his contract of purchase, was also stated in *Greene v. Hollingshead*, 40 Ill. App. 195, and *Jenkins v. Hollingsworth*, 83 Ill. App. 139. The court, however, in these cases, was not considering the question as here presented.

It is to be noted, however, that the foregoing cases sustaining this doctrine were all cases wherein it appeared that the contract of sale was executed directly between the principal and the vendee. This doctrine does not apply where the broker, as a part of his employment, assumes to execute for his principal an executory contract of sale. Under such circumstances, he is not entitled to his commission unless the other contracting party is able to perform the contract on his part. *Inge v. McCreery*, 60 App. Div. 557, 69 N. Y. Supp. 1052.

As already stated, there are well-considered cases wherein the doctrine is enunciated that a broker is not entitled to his commissions where a contract to sell procured through him, although made by his principal, fails because of the financial inability of the purchaser produced by him to perform his contract. Thus, in *Butler v. Baker*, 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019, the doctrine was enunciated that it was not enough to entitle a broker to his commission that he has produced a person as a purchaser of an estate who was ready and willing to purchase upon the seller's

terms, and the contract has been entered into to that effect between the seller and the person produced, but it must also appear that the person produced is of sufficient pecuniary ability to make the purchase, and the mere signing of a receipt by the vendor's agent, setting forth the terms of the sale, is not a sufficient acceptance of the purchaser by the vendor to entitle the broker to his commissions without reference to the purchaser's ability to perform the contract of purchase. In reaching this conclusion, the court said that the production of a person as a purchaser was an implied representation by the broker to the vendor that the purchaser was able financially, as well as ready and willing, to purchase, and added that the case did not show that the vendor had any previous knowledge of the purchaser, or exercised any independent judgment of his own concerning the purchaser's ability to purchase, but rather that, in signing the receipt and thereby accepting the person produced as purchaser, he relied, as he had a right to rely, upon the implied representation arising out of the plaintiff's duty under the contract.

One of the leading cases supporting this view is *Riggs v. Turnbull*, 105 Md. 135, 8 L.R.A. (N.S.) 824, 66 Atl. 13, 11 A. & E. Ann. Cas. 783, which holds that, to entitle a broker to his commission, he must produce a party capable of becoming, and who ultimately becomes, the purchaser; and it is not sufficient that a contract of sale is executed between the principal and such party, and a small portion of the purchase price paid thereon, where the contract is afterward forfeited by the purchaser because of his financial inability to carry it out. Among the cases cited as authority for this conclusion, which the court regarded as against the weight of authority, was *Kimberly v. Henderson*, 29 Md. 512, which held that a broker was not entitled to his commission where the vendee was financially unable to perform a contract of purchase which provided that the vendee could relieve himself of the obligation to complete the purchase by paying a stipulated amount.

The English cases seem also to support

phries failed to perform his contract, appellee should recover.

The following instructions asked by appellant were modified by inserting the words in italics.

"(2) The court instructs the jury that, if they believe, from the evidence, that the plaintiff, Irvin, employed the defendant, Moore, to sell his farm for him, at a designated price, and the defendant procured a purchaser who was willing and ready, *acceptable to Irvin, replying upon his own judgment*, to purchase upon the terms of plaintiff, and who did enter into a written contract with plaintiff, expressing the terms of the sale, defendant, Moore, was then entitled to his commission, although the purchaser may afterwards refuse to perform

his part of the contract, without any fault on the part of the plaintiff; and your verdict will be for defendant.

"(3) The court instructs the jury that, if they believe, from the evidence, that the plaintiff, Irvin, employed the defendant, Moore, to sell his farm for him, under written contract whereby defendant's commissions were to be paid out of the first money paid by the purchaser, and the defendant did procure a purchaser who made a cash payment, and then entered into a written agreement with the plaintiff for the purchase of his farm, and that plaintiff paid the defendant his commission and took up the option given the defendant for the sale of said land, your verdict will be for the defendant, *provided Irvin relied upon his own*

this doctrine, although no English case has been found wherein it has been squarely applied. In *Passingham v. King*, 14 Times L. R. 392, although a broker was held entitled to his commission to be paid him if he found a purchaser for a public house, even though the purchaser, after having entered into the contract of purchase with the principal, made default in his payments and did not complete the contract of purchase, yet, in so holding, it was said that the plaintiff had not done everything to entitle him to a commission, but that the owner, by dealing directly with the purchaser, with equal knowledge as to his financial condition as had the broker, and by extending the time to him in which to complete his purchase, in consideration of an additional deposit, had waived the right to call upon the broker to produce a purchaser who would complete his purchase as a condition precedent to his commission becoming payable.

And in *Beale v. Bond*, 84 L. T. N. S. 313, where the owner agreed to pay an agent all over a stipulated amount for which he might be able to sell certain premises, the commission was held not earned where the purchaser with whom the agent contracted in behalf of his principal made default in completing the purchase, after having made a deposit thereon. This decision was, however, based on the ground that the principal had never agreed to personally pay the agent a commission, but it was to be paid by the purchaser paying more than a stipulated amount for the property.

The tendency of the English cases to require full performance by the purchaser as a condition precedent to the accrual of a commission to the broker, is also illustrated in *Chapman v. Winson*; *Lott v. Outhwaite*; and *Beningfield v. Kynaston*, —*infra*. (See right to compensation as affected by the terms of employment.)

A broker to sell street railway bonds does not earn his commission where the purchaser produced by him made the contract to purchase for the purpose of speculation, and did not intend to take the bonds and pay for them unless he could negotiate a sale, to other parties, for a price greater than he

contracted to pay, although the refusal to carry out the contract of purchase was based on the invalidity of the bonds rather than on the inability to meet the payments. *Berg v. San Antonio Street R. Co.* (Tex. Civ. App.) 49 S. W. 921.

But, where the terms of employment provide for a sale of land partly on time and partly for cash, it is sufficient, to entitle the broker to his commission, if he produces a purchaser able to make the required cash payment; and it is not necessary that the purchaser should be of such financial responsibility that his notes for the balance would be good and collectable, irrespective of the vendor's lien on the land. *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627.

Right to compensation as affected by terms of employment.

In the foregoing cases, the question was raised where the contract of employment was the ordinary contract, by which a broker was to be paid a stipulated commission for effecting a sale of real estate listed with him for sale. It is, of course, possible for a broker, by special contract, to make his compensation contingent upon the actual payment of the purchase price. Thus, where, by special contract a broker's commission depends upon fulfillment by the purchaser of his contract to purchase, he cannot recover his commission where the purchaser does not perform because of financial inability, although, after his default, the contract was canceled by mutual agreement of the parties. *Seymour v. St. Luke's Hospital*, 28 App. Div. 119, 50 N. Y. Supp. 989.

And where, by the terms of a contract of employment, a broker's commission for the sale of land is to be partly paid when a purchaser produced by him pays a certain portion of the purchase price, and the balance when one half is paid, a contract of sale by which the owner accepts a note for a smaller amount in lieu of a cash payment, and two notes for the balance, is not such a sale as will entitle a broker to his commission where the purchaser failed to pay

judgment as to the ability of the purchaser to comply with his contract of purchase."

The appellant saved his exceptions to the modifications, and the giving of the instructions as modified. A verdict was returned in favor of plaintiff for the sum of \$150, and judgment was entered accordingly. A motion for new trial assigning, as error, the rulings to which exceptions were saved, and the further assignment, that the verdict was contrary to the evidence, was made and overruled. This appeal was duly prosecuted.

Messrs. Sain & Sain and T. D. Crawford, for appellant:

If the principal and the customer found by the broker enter into a valid contract, and the broker acts in good faith, the broker is not deprived of his right to a commission

any of the notes, and was irresponsible, although the owner received a cash consideration for releasing the purchaser from the contract after, however, he had made diligent effort to enforce it. *Boysen v. Frink*, 80 Ark. 254, 96 S. W. 1056.

So, where the contract of employment makes the payment of the purchase price the ultimate object to be obtained, and compensation is made dependent and contingent thereon, the insolvency of the purchaser without completing his purchase is a defense to an action by the broker for any part of the agreed compensation, although a valid contract for the sale of the land which the broker was employed to sell was executed, and a portion of the purchase price was paid. *Cobb v. Kenner* (Tenn. Ch. App.) 42 S. W. 277.

Van Norman v. Fitchette, 100 Minn. 145, 110 N. W. 851, also holds that, where a contract of employment expressly provides that the commission should not be paid until deferred payments were made, the vendor does not become liable to pay same by exercising an option, contained in the contract, to forfeit it, and retain the payments made thereon, where the vendee is in default in making further payments.

So, where the contract employing a broker to sell real estate provides that he is to be paid his commissions as payments are made on the purchase price of the lands sold by him, he is not entitled to his entire commission where the purchaser paid a portion of the purchase price and executed a trust deed to secure the balance, which he failed to pay, and from which he was afterward released by the owner, at a time, however, when he was insolvent, and where the contract of sale provided that, upon default in payment, he could forfeit the amount, and by surrendering the premises, be entitled to the return of the obligation for the payment of the balance. *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871.

And in *Chapman v. Winsor*, 91 L. T. N. S. 17, it was held that an agreement to pay an agent a commission if a party introduced by the agent became the purchaser of certain real estate, the commission to be paid 20 L.R.A. (N.S.)

by the fact that the customer fails to carry out the contract by reason of financial inability.

19 Cyc. Law & Proc. p. 270; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Conkling v. Krakauer*, 70 Tex. 739, 11 S. W. 117; *Friestedt v. Dietrich*, 84 Ill. App. 604; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Rice v. Mayo*, 107 Mass. 550; *Coleman v. Meade*, 13 Bush, 358; *Burns v. Oliphant*, 78 Iowa, 459, 43 N. W. 289; *Glentworth v. Luther*, 21 Barb. 145; *Bach v. Emerich*, 3 Jones & S. 548; *Seabury v. Fidelity Ins. Trust & S. D. Co.* 205 Pa. 234, 54 Atl. 898; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; *Hallack v. Hinckley*, 19 Colo. 38, 34 Pac. 479; *Brady*

"when and if the purchase is completed by a private treaty," was not sufficiently performed by the agent, to entitle him to the commission, until the purchase money was actually paid, and the court said it was not sufficient that a contract of sale was executed between the parties, and a deposit made, where the purchaser made default in further payments because of insolvency.

To the same effect also is *Lott v. Outhwaite*, 10 Times L. R. 76, where commission was to be paid "on completion of the purchase." Also *Beningfield v. Kynaston*, 3 Times L. R. 279, where the agreement was to pay a commission out of the purchase money.

But in *Bush v. Abraham*, 25 Or. 336, 35 Pac. 1066, a broker who was to be paid a commission for procuring a purchaser for a tract of land was held entitled to recover on a note given him by the vendor for a portion of his commissions, which contained a condition that it was to be null and void unless a certain note, covering a portion of the purchase price of the land which the broker had sold, was actually paid, although the purchaser was unable to pay the note when due, and settled a foreclosure proceeding thereon by reconveying the land upon a surrender of the note. This conclusion was reached on the theory that the surrender of the note, under these circumstances, was a payment within the meaning of the condition in the note.

In *Holbrook v. Investment Co.* 30 Or. 259, 47 Pac. 920, the doctrine of the *Bush Case* was said to have no application where the contract employing the brokers to sell real estate impliedly stipulated for a forfeiture of sales made by the brokers, and provided that their commissions were not to be paid except as payments were collected from purchasers. Under such circumstances, the court said that actual payment, unless waived by the vendor, was necessary before the commission was earned.

In *Webber v. Holmes*, 174 Mass. 410, 54 N. E. 872, a note given brokers as a payment of their commissions for selling real estate was held to be enforceable, although it contained a clause that it would be void if

v. Foster, 72 App. Div. 418, 75 N. Y. Supp. 994; Hipple v. Laird, 189 Pa. 472, 42 Atl. 46; Kalley v. Baker, 132 N. Y. 1, 28 Am. St. Rep. 542, 29 N. E. 1091; Gilder v. Davis, 137 N. Y. 506, 20 L.R.A. 398, 33 N. E. 599; Pearson v. Mason, 120 Mass. 53; Willson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; Micks v. Stevenson, 22 Ind. App. 475, 51 N. E. 492; Greene v. Hollingshead, 40 Ill. App. 198; Ward v. Cobb, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174; Folinsbee v. Sawyer, 15 Misc. 293, 36 N. Y. Supp. 405; Alt v. Doscher, 102 App. Div. 344, 92 N. Y. Supp. 439; Story, Agency, 9th ed. § 28; Sibbald v. Bethlehem Iron Co. 83 N. Y. 381, 38 Am. Rep. 441; Mooney v. Elder, 56 N. Y. 238; Travis v. Graham, 23 App. Div. 214, 48 N. Y. Supp. 736; Leete v. Norton, 43 Conn. 219; McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Barnard v. Monnot, 1 Abb. App. Dec. 108; Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. 790; Simonson v. Kissick, 4 Daly, 145; Davis v. Morgan, 96 Ga. 520, 23 S. E. 417; Hart v. Hoffman, 44 How. Pr. 168; Goss v. Broom, 31 Minn. 484, 18 N. W. 290; Grosse v. Cooley, 43 Minn. 188, 45 N. W. 15.

Messrs. W. P. Feazel and W. C. Rodgers, for appellee:

A broker does not earn his commission when he procures a purchaser whom his principal accepts only upon the assurance of the broker that he could make the payment, where it turns out that the customer could not.

Butler v. Baker, 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019; Boyson v. Frink, 80 Ark. 258, 96 S. W. 1056; Cook v. Forst, 116 Ala. 395, 22 So. 540; Runyon v. Wilkinson, G. & Co. 57 N. J. L. 420, 31 Atl. 390; 19 Cyc. Law & Proc. pp. 246, 267.

Wood, J., delivered the opinion of the court:

The parties as indicated by the requests for instructions, treated appellant as the procuring cause of the contract, between appellee and Humphries, as to the sale of the land; but appellee contends appellant was not entitled to his commission under the contract with appellee until the executory contract of sale and purchase had been completed by the payment of the purchase money and the transfer of the title. He also contends that he paid the commission to appellant, relying upon certain representations made by him which were not true, and were not carried out by appellant, and

the sale fell through before a specified date, where default was made prior to that time, and the claim of the vendor was thereafter foreclosed because of such default. The court said that the vendors had either collected the purchase price by the foreclosure of a mortgage for the same, or they had collected part of it and held a claim for the balance as a personal debt of the mortgagor.

Crane v. Eddy, 191 Ill. 645, 85 Am. St. Rep. 284, 61 N. E. 431, also holds that a broker may recover on notes given him in payment of his commission for effecting a sale of real estate, although they contained a provision that they were to be paid out of the purchase price *pro rata* as paid to the vendor, and the only manner of payment was the foreclosure of a deed of trust securing the purchase price notes, and the bidding in of the property, on such foreclosure, by the vendor.

Necessity of good faith on part of broker.

Many of the cases already considered recognize the doctrine that a broker must deal fairly with his principal in presenting to him a purchaser, and, if he presents a person whom he knows or has reason to believe cannot perform his contract of purchase, he is not entitled to his commissions. This rule was applied in Burnham v. Upton, 174 Mass. 408, 54 N. E. 873, where a broker was denied his commission for a sale and exchange of property to a person produced by him whom he knew was unable to perform his contract.

The relation existing between a broker
20 L.R.A. (N.S.)

and his principal was said, in Butler v. Baker, 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019, to be of a confidential nature, requiring the utmost good faith on the part of the former to the latter, and entitling the latter to the benefit of the former's skill, knowledge, and advice. The court said that the duty of a broker to his employer requires him to give to his principal, before his principal enters into a contract with the person produced by him as a purchaser, such knowledge as he may possess in relation to the proposed purchaser's financial responsibility; and, if he has no knowledge concerning it, it is his duty to, at least, notify his principal in order to give him an opportunity to investigate the matter for himself. If he fails to do either, he is not entitled to compensation if the purchaser proves to be irresponsible financially, notwithstanding the fact that the principal entered into a valid contract with the purchaser for the sale of the property.

The good faith which the court requires a broker to exercise towards his principal is well illustrated in the case of Little v. Herzinger, 34 Utah, 337, 97 Pac. 639, where in the court denied the right of brokers to their commission for the sale of real estate where the purchaser did not actually purchase in accordance with the terms of a written option, although he made a so-called tender to the brokers for the balance due under the option, and demanded a deed. But this "tender," however, the court found to have been colorable merely.

therefore (appellee) was entitled to recover the commission. Appellant on the other hand, contended that he was entitled to his commission as soon as he had procured a purchaser who entered into the contract for the purchase of the land upon the terms expressed therein, as prescribed by appellee, and who paid a part of the purchase money.

In *Rice v. Mayo*, 107 Mass. 550, it is held that: "A written contract for the purchase of an estate, binding both vendor and purchaser, is a sale, within the meaning of an agreement to pay a commission to a broker upon sale of the estate." In note to *Lunney v. Healey*, 44 L.R.A. 593, it is said: "The business of a real estate broker or agent generally is only to find a purchaser; and the settled rule, as stated by the courts is that, in the absence of an express contract between the broker and his principal, the implication generally is that the broker becomes entitled to the usual commissions whenever he brings to his principal, a party who is able and willing to take the property, and enter into a valid contract upon the terms then named by the principal, although the particulars may be arranged, and the matter negotiated and completed between the principal and the purchaser directly." In *Pinkerton v. Hudson*, 87 Ark. 506, 113 S. W. 35, we quoted the above and the syllabus, that, "where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, and with whom the owner actually makes an enforceable contract of sale. The failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commissions." Appellee relies upon this case to sustain his contention that the broker must present a purchaser financially able to carry out his contract of purchase. But the question here did not arise in that case, nor in any case (and they are numerous) where the financial ability of the purchaser is not questioned. In the absence of an express contract by which the broker warrants the financial ability of the purchaser procured by him, or in the absence of fraud on his part, he does not lose his commission where a binding contract of sale is effected through his agency, because the purchaser procured by him is financially unable, or, for any other reason, fails to carry out his contract of purchase. The broker, having presented a proposed purchaser who is capable of entering into a contract of purchase, and willing to do so, has earned his commission when the vendor accepts him, and enters into a valid contract with him, for the sale of his land, even though the sale is never, in fact, consummated, by reason of the failure of the proposed purchaser

to perform his part of the contract. Where the broker does not expressly warrant the financial ability of the purchaser procured by him, nor agree to see that the purchase money is paid, and is guilty of no fraud upon his principal, the latter takes the responsibility of accepting the proposed purchaser. If he does, and enters upon an executory contract for the sale of the land upon his own terms, the broker is entitled to the commissions agreed upon, whether the contract is ever fully executed or not. In the absence of contract, it is not the business of the broker to see that the purchase money is paid, or to enforce the contract of sale. That is the business of his principal, the vendor. These principles are sound, and, we think, are supported by the weight of authority. 19 Cyc. Law & Proc. title "Factors and Brokers," p. 270, and cases cited in note. See also *Pinkerton v. Hudson*, supra; *Coleman v. Meade*, 13 Bush, 358; *Glentworth v. Luther*, 21 Barb. 145; *Alt v. Doscher*, 102 App. Div. 344, 92 N. Y. Supp. 439.

There is nothing in *Boysen v. Frink*, 80 Ark. 254, 96 S. W. 1056, in conflict with the doctrine here announced. There the commission was "conditioned on payment of the price." It follows that, under the contract between appellee and appellant, the rulings of the court in modifying appellant's requests for instructions were erroneous. The requests as asked were correct. The court should not have left it to the jury to determine whether appellee relied on his own judgment, as to the financial ability of Humphries, in ascertaining whether or not Humphries was an acceptable purchaser. The court should have declared this to be his duty under the evidence in this case as matter of law. The allegations and the proof were not sufficient to sustain a recovery for deceit. See *Louisiana Molasses Co. v. Ft. Smith Wholesale Grocery Co.* 73 Ark. 542, 84 S. W. 1047.

No exceptions were saved to the rulings of the court in giving or refusing other requests for instructions. For the error indicated the judgment is reversed, and the cause is remanded for new trial.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN EX REL. WILLIAM McMANUS, Resp't.,

v.

BOARD OF TRUSTEES OF POLICEMEN'S PENSION FUND

and

MARY T. SULLIVAN et al., Appts.

(— Wis. —, 119 N. W. 806.)

Police — pension — disease.

1. Pneumonia contracted by a policeman

in the line of his duty is an injury within the meaning of a statute providing for a police pension fund, notwithstanding the legislature, in amending a former statute, omitted the words, "or any disease contracted by reason of his occupation."

Certiorari — police commissioners — determination of fact.

2. The determination of trustees of a police pension fund that an injury was contracted by a policeman in the line of his duty is one of fact, which cannot be reviewed by the courts on certiorari.

(Marshall, J., dissents.)

(February 16, 1909.)

APPEAL by defendants Mary T. Sullivan et al., from a judgment of the Circuit Court for Milwaukee County in relator's favor upon a writ of certiorari brought to review the action of the Board of Trustees of the Policemen's Pension Fund in awarding a certain pension. Reversed.

Statement by Dodge, J.:

Certiorari brought by relator, who had long been a contributor to the policemen's pension fund of Milwaukee, and, at the time

of the relation, was retired and pensioner thereon, to review the action of the board of trustees in awarding a pension to the appellant Mary T. Sullivan and her children, as the widow and children of the deceased, William L. Sullivan, at the time of his death a member of the police force. The board made due return, from which it appears that the pension was claimed on the ground that Policeman Sullivan contracted pneumonia by reason of exposure to which he was subjected in the course of a trip to New York to make an arrest. The return presents the record, which merely mentions the names of certain witnesses on behalf of the applicant, and specifies the subjects on which they testified, but fails to contain such testimony. The testimony of certain other witnesses, apparently called in opposition to the application, is set forth in full, and the return shows a decision by the board, by majority vote, that the applicants are entitled to the pension, according to the statute. After the return an application was made by the three appellants to be admitted as parties defendant, because a reversal of the board's action would affect their interests, and they were so admitted, and attempted to raise various objections

Case Note. — Nature and circumstances of injury as affecting right to share in pension or insurance fund for policemen and firemen.

In *Slevin v. Police Fund Comrs.* 123 Cal. 130, 44 L.R.A. 114, 55 Pac. 785, it is held that death caused by accident is not from natural causes, within the meaning of a statute providing an insurance fund for families of policemen who die from natural causes.

In *Hutchens v. Covert*, 39 Ind. App. 382, 78 N. E. 1061, it was held that a policeman who, while on duty, committed suicide because of insanity, did not lose his life "while in the line of duty," within the meaning of that phrase as used in a statute providing for a pension for members of the family of a policeman, upon his death, "while in the line of his duty, or from natural causes," where it is not shown that the insanity was the result of the performance of any duty.

In *McAuliffe v. Policemen's Pension Fund* (Ky.) 115 S. W. 808, it was held that where a policeman, while at his home, and not on duty, undertook to clean his pistol, and in so doing accidentally killed himself, his widow was not entitled to a pension under a statute providing for pensioning the widow or children of any officer, member, or employee of the police department who "shall, while in the performance of his duty, be killed or die as the result of an injury received in the line of his duty."

In *Scott v. Jersey City*, 68 N. J. 689, 54 Atl. 441, it was held that the widow of a fireman killed by falling from a trolley car 20 L.R.A. (N.S.)

while on his way home to supper, under leave for that purpose, was not entitled to a pension under a statute providing for the allowance of a pension to the widow of any officer or man permanently employed in the fire department, who should be fatally injured while in the performance of, or attempting to discharge, his duty. A preceding section of the act provided for a like pension to a fireman "whose duty requires active service in the extinguishment of fires," and who should become incapacitated for further duty as the result of injury received or sickness contracted in the discharge, or attempt to discharge, such duty. The two sections, read in conjunction, were held clearly to show that what the legislature intended was that the principle upon which the municipal body should dispense its bounty should be the same under both sections,—and that was the recognition of the extra hazard that comes to the members of the department while discharging, or attempting to discharge the duties required in the active service of extinguishing fires.

In *Gummerson v. Toronto Police Benefit Fund*, 11 Ont. L. Rep. 194, it was held that an injury sustained by a policeman while vaulting over a wooden horse in a gymnasium, this being part of a manual exercise prescribed by an inspector in the police force, was received while engaged in the execution of his duty, within the meaning of a rule of a police benefit fund, providing for pensioning policemen who receive injuries in the execution of duty.

to the right of the relator to question the action of the board by certiorari. Such objections were overruled, and the trial court held that, even though it appeared by the record that the board had found that Sullivan died as the result of pneumonia contracted by him by reason of exposure to which he was subjected in the actual and active performance of duty as a policeman, the board were not authorized by law to grant him a pension, and accordingly entered judgment reversing their decision, from which judgment Mary T. Sullivan and her two children bring this appeal.

Messrs. John Toohey and Walter H. Bender, for appellants:

Pneumonia is an injury within the meaning of the statute.

Eddy v. People, 218 Ill. 611, 75 N. E. 1073; Cary v. Preferred Acci. Ins. Co. 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 A. & E. Ann. Cas. 484; Kortendick v. Waterford, 135 Wis. 77, 115 N. W. 331.

Mr. J. L. O'Connor also for appellants.

Messrs. Doe & Ballhorn for respondent.

Dodge, J., delivered the opinion of the court:

Brushing aside various obstacles of practice or procedure which are urged by the interveners to maintenance of this action as between the original parties, we proceed at once to a consideration of the real question involving the merits of the action; that is, whether pneumonia suffered and contracted in the line of, and by reason of, the active performance of duties assigned to a policeman, is such an injury as entitles his widow to a pension if death results therefrom. The answer must be found by construction of §§ 8 and 9, chap. 397, pp. 642, 643, of the Laws of 1903. That act, after making provision for the creation of a fund, partly by deduction from policemen's salaries and partly from other sources, and creating a board of trustees for the administration thereof, provides, in §§ 8 and 9:

"Sec. 8. If any member of the police department, while engaged in the performance of his active duty as such policeman, be injured, and found, upon an examination by a medical officer, ordered by said board, to be physically or mentally permanently disabled by reason of such injury, so as to render necessary his retirement from service in such department, such board shall retire such disabled members from service; provided no such retirement on account of disability shall occur unless the member has contracted such disability within the hours of each day or night when he is required to be on active duty by the rules of the de-

partment, or while he is engaged in the performance of 'emergency duty' during his regular 'off hours.' . . .

"Sec. 9. If any member of the police department shall, while in the performance of his duty, be killed, or die as the result of an injury received while in the line of his duty, as described in the preceding section, . . . his widow and minor children, if any, shall receive a pension.

It will be observed that the right to retirement, under § 8, and the right to a pension in case of death, under § 9, are dependent on the condition, under § 8, that the policeman "be injured," and, under § 9, that he die as the result of "an injury;" and the question raised by relator is whether the contracting of disease is being injured and is the suffering of an injury within the meaning of this act. Section 9, by the italicized words, evidently refers back to § 8 for whatever of definition of "injury" may there be found. The word "injury," in ordinary modern usage, is one of very broad designation. In the strict sense of the law, especially the common law, its meaning corresponded with its etymology. It meant a wrongful invasion of legal rights, and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar phrase, *damnum absque injuria*. In common parlance, however, it is used broadly enough to cover both the *damnum* and the *injuria* of the common law, and, indeed, is more commonly used to express the idea belonging to the former word; namely, the effect on the recipient in the way of hurt or damage; and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by anyone. Hence, unless some reason to the contrary is presented, it should be so understood in these statutes. Section 4971, subd. 1, Stat. 1898. The respondent contends that, nevertheless, the word should be limited to the results of external violence. By itself the word "injury" or "injure" has no more application to the result of violence than to the result of any other injurious influence. A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment or external violence. Therefore there is nothing inherent in the word to limit the injuries to which this statute applies to those from physical or external violence. If one be tortiously exposed to extreme cold, he may suffer the freezing and consequent loss of a limb, or the chill of an internal membrane or tissue, and resultant congestion or disease. No reason is apparent why either

is more or less an injury than the other. In examining § 8 we find some suggestions in the context of the mental conception of the legislators in the use of the word "injured." In one phrase it is used in context and collocation with physical or mental permanent disability, and in another the legislators speak of such disability as one to be "contracted." These both point strongly to a conception of something other than external violence, which would ordinarily be said to be suffered or inflicted rather than contracted. The purpose of the act, too, would seem to require the broader meaning of the word. Why is not the policeman who, in the faithful performance of his duty, exposes himself to a danger like smallpox or diphtheria infection, as worthy of provision for his disability or for his widow as one who exposes himself to the knife or the club of a lawbreaker? Why is it not as promotive of the efficiency of the force for the protection of public welfare that he be encouraged in the one case as in the other? These considerations, and many others like them, which might be mentioned, constrain us to the conclusion that the word "injury" is used in this statute in a sense broad enough to include the contracting of a disease; provided, of course, that such injury is suffered in the course of and by reason of the performance of the distinctive duties imposed upon the sufferer as a policeman (*Hutchens v. Covert*, 39 Ind. App. 382, 78 N. E. 1061),—a fact which we deem to have been ascertained and decided upon sufficient showing by the board of trustees, although their record is not as full as it might be in its disclosure of the class of evidence which was submitted for their consideration. A provision in § 9 for a pension upon death for any cause after fifteen years' service marks a contrast or antithesis to this last requirement of causal connection between the active service and the injury, and does not signify a limited meaning in the word "injury" caused by the service.

In reaching the conclusion that disease is included, we have not overlooked the fact, urged by relator, that an earlier statute (chapter 265, p. 443, Laws 1899, of which the law of 1903 was in effect an amendment) contained, in § 9, both expressions, "an injury received in the line of his duty" "or any disease contracted by reason of his occupation;" and that the latter words were eliminated in the law of 1903, having substituted therefor the words "as described in the preceding section." Notwithstanding this change, which doubtless is of some significance, it still seems to us that the injury described and provided for in § 8 was intended to include the inoculation with or

contraction of disease; and that the new expression in § 9 was inserted in the act of 1903 for the purpose of perpetuating that meaning for the word "injury" in the latter section. Our view as to the legislative intent results in the conclusion that it was within the power of the board of trustees to award the pension in question if they found that the pneumonia from which Sullivan died was contracted in the actual performance of his duties, and caused thereby. Their resolution of that question of fact from the evidence before them was within their jurisdiction, and cannot be reviewed upon certiorari. *State ex rel. Manitowoc v. County Clerk*, 59 Wis. 15, 20, 16 N. W. 617; *State ex rel. Cook v. Houser*, 122 Wis. 534, 561, 100 N. W. 964.

Judgment reversed, and cause remanded, with directions to affirm the action of the board of trustees in granting pension to appellants.

Marshall, J., dissenting:

I cannot bring myself to concur in the decision of this case, and will state briefly my reasons therefor.

The right result of the controversy here presented depends upon the familiar principles for statutory construction:

First. A legislative enactment should not be construed where there is no need for construction.

Second. There is no need for construction when the meaning of the enactment, in its plain, every-day sense, looking to words therein used, or looking at them in the light of the subject dealt with, is not involved in uncertainty.

Third. Where the meaning of an enactment is evident, and leads to no absurd conclusion, there can be no reason for refusing to attribute the meaning which the words signify; to go elsewhere in search of conjecture, in order to restrict or extend the act, would be to attempt to elude it. Such a method, if once admitted, would be extremely dangerous, for there would be no law, however definite in its language, which might not, by interpretation, be rendered useless.

Fourth. Judicial construction takes hold only when there is obscurity of meaning. So we must look first for uncertainty, not commencing to construe in advance of uncertainty appearing.

Fifth. All the words of an enactment should be regarded as having been used in respect to some particular purpose.

Sixth. The plain, ordinary meaning of words should be regarded as having been the one intended, unless it appears reasonably

certain from the enactment that some other meaning was intended.

Seventh. The legislative purpose, when discovered, expressed within the reasonable scope of the language in an enactment, must prevail regardless of consequences, and must be taken to be a part of the enactment, the same as if expressed in the ordinary sense of words.

Let us now apply those rules to the enactment in question.

The original law is chapter 265, p. 413, Laws 1899. Section 8 was as follows:

"If any member of the police department, while engaged in the performance of his active duty as such policeman, be injured, and found upon examination by a medical officer, ordered by said board, to be physically or mentally permanently disabled by reason of such injury, so as to render necessary his retirement from service in such department, such board shall retire such disabled member from service; provided no such retirement on account of disability shall occur unless the member has contracted such disability while in the active service of such department."

That was changed by chapter 397, p. 640, Laws 1903, by dropping these last of the quoted words, "while in the active service of such department," and in place thereof adding the words, "within the hours of each day or night when he is required to be on active duty by the rules of the department, or while he is engaged in the performance of 'emergency duty' during his regular off hours."

Section 9 of the original enactment was this:

"If any member of such police department shall, while in the performance of his duty, be killed or die as a result of an injury received in the line of his duty, or any disease contracted by reason of his occupation, or if any member of such department, after fifteen years' service in such department, shall die from any cause whatever while in said service, or if any member of such department shall die from any cause whatever after having been retired upon a pension under the provisions of this act, and shall leave a widow or minor child or children under sixteen years of age surviving. . . ."

Note particularly that this section provides only for death while in the performance of his duty (a) by injury so received in the line of his duty, (b) disease contracted by reason of his occupation, (c) death in the service from "any cause," or (d) death from "any cause" after retirement upon a pension, leaving a widow or minor child or children under sixteen years of age.

The section was changed, in the Laws of 1903, to this:
20 L.R.A. (N.S.)

"If any member of such police department shall, while in the performance of his duty, be killed, or die as a result of an injury received in the line of his duty, as described in the preceding section, or if any member of such department, after fifteen years' service in such department, shall die from any cause whatever while in said service, or if any member shall die from any cause whatever after having been retired upon a pension under the provisions of this act, and shall leave a widow or minor child or children under the age of sixteen years surviving, the said board shall direct the payment from said pension fund of the following sums, monthly, to-wit: . . ."

It will be noted that the changes were, first, by striking out after the words "in the line of his duty" the words "or any disease contracted by reason of his occupation;" and second, by interpolating in place thereof the words "as described in the preceding section."

Thus, the later act, unmistakably radically restricts the original laws. Whereas, formerly, relief was afforded for disability occurring during the official term while the officer was in a service, on or off actual duty, unless on a vacation for some reason, now it is restricted to disability occurring within hours, when, under the rules of the department, he is required to be actually on duty, or in case of an emergency. Formerly a pension was grantable to a dependent widow in case of death of the officer, her husband, from an injury in the line of duty as well as from death by disease contracted by reason of his occupation. Now the latter is not possible, the condition giving competency to the dependent for a pension being confined to death of the officer resulting from an injury occurring in the line of his duty, as prescribed in § 8. The elimination of death from disease as creating such competency would seem to leave no reasonable ground whatever for holding that death from pneumonia, the circumstance relied on in this case, is retained.

I will not pay so little heed to what I believe to be ordinary understanding of ordinary persons, as to spend time demonstrating that, while a disease as well as an injury may create damage, it is false logic to urge that an injury, in the ordinary sense, is a disease, or a disease is an injury in any other sense than that it injuriously affects the afflicted one, causing damage.

It would seem that the mere fact of legislative dropping out of "disease" as a cause of death creating competency of a dependent for a pension, under one of the rules for construction we have named, precludes the court from resorting to construction for the

purpose of retaining it. It further would seem that such resort flies in the face of rule 3, that to construe that which has no need for construction is to use the function to construe to defeat the legislative intent, rather than to discover and give effect to it.

Again, since the amended section only leaves death from injury sufficient to create competency of a dependent for a pension an "injury" as that term is used in § 8, there can be no fair question but that it means a physical hurt, such as is commonly understood by the term "injury" when it is applied to a misfortune to a person engaged in an occupation involving extraordinary hazard as to receiving bodily wounds.

When we speak of a person as having been injured in the army or in railroad employment, or in the performance of duty of keeping the peace, or protecting society from criminal offenders, or apprehending such offenders, or in any other occupation exposing one to peculiar dangers as to bodily injuries, what do we mean by the term "injury?" In other words, what is its plain, ordinary meaning as applied to such situations? I venture to say the universal answer must be a physical hurt,—a wounding of the body.

If the preceding be correct, to go beyond such common meaning into the field of broad general, or that of technical, sense, violates the first, second, third, and fourth rules, and particularly the sixth that the plain, ordinary meaning of words should be taken unless it appears reasonably certain some other was intended; and also the fifth, that all words of an enactment should be regarded as having been used in respect to some particularly indicated purpose. The latter, because the element of elimination of the cause "disease" shows, manifestly, a purpose to exclude it, and restrict the term "injury" to the particular purpose of providing relief to the dependent or dependents in case of death from "injury" as distinguished from death by "disease," as death from pneumonia.

The striking feature of the elimination of "disease" as a cause of death creating competency for a beneficial participation of a dependent in the pension funds seems to me to have been entirely nullified by the result of this case, rendering the whole manifest purpose of the amendatory act nugatory.

True, the term "injury" is broad enough to include anything which causes damage, but is that a warrant for departing from the common-sense, ordinary meaning as applied to the particular situation? The broad sense includes injury to reputation, injury to property, and injury to rights, as well as injury to the person in the sense of a bodily wounding; but cannot one see, very clearly, 20 L.R.A. (N.S.)

that only in the latter sense is the term "injury" to a policeman in the course of his active duties as such contemplated when the term is used in regard to such a person engaged in such service? If so, by what warrant can the court, merely because of the broader signification of the word, go into the boundless field, especially in view of there not only being nothing in the situation to suggest it, but such a purpose being expressly negated by the legislative restriction by elimination of the very words which formerly included circumstances somewhat within such broad field? In my judgment there is no such warrant; and so, in my opinion, the death involved here by "disease" should be regarded not only as not being within the act, but as being expressly excluded from it, and so the order appealed from should be affirmed.

Winslow, Ch. J., took no part.

WISCONSIN SUPREME COURT.

JOSEPH RANKEL, Appt.,

v.

BUCKSTAFF-EDWARDS COMPANY,
Respt.

(— Wis. —, 120 N. W. 269.)

Master — independent contract — existence.

1. An independent contract for the erection of a building, so as to relieve the owner from liability for negligent injuries to workmen, is not shown by the employment of one at a certain salary to attend to its construction and hire the men, where the owner pays them and furnishes the ma-

Case Note. — Common laborers and persons engaged in blasting as fellow servants.

This note does not assume to include cases in which the plaintiff was employed in drilling, or other work immediately connected with the preparation and firing of blasts, but is limited to decisions in which the person injured was engaged, as in the case reported, in some unrelated form of labor.

In *Ongaro v. Twoby*, 49 Wash. 93, 94 Pac. 916, an action for personal injuries by one employed in the construction of a railway cut as a laborer in shoveling rock and earth into cars, who was injured by an explosion of dynamite while being tamped into place by persons in charge of the work of blasting, it was held that the question of fellow servant was properly for the jury, the court saying: "In the first place, the powder man and the shift boss, who had charge of the blasting and drilling operations, and who were claimed by appellants to have been fellow servants with the respondent, were en-

terials, directing the progress, course of procedure, and general management of the work.

Same — employment of servant — negligence.

2. A master is not negligent towards his servants in employing one to do blasting, if he secured him upon recommendation as to his competence of the owner of a quarry where he had been employed in such duties.

Same — fellow servants — blasting.

3. An employee engaged in removing earth for the foundation of a building is not a fellow servant of an expert employed for a short time to break up frozen ground by blasting, where the former has nothing to

do with the placing, packing, or discharging of the explosives, although he drills the holes to contain them.

Same — assumption of risk.

4. A servant engaged in removing earth for the foundation of a building does not assume the risk of injury from unexploded dynamite used in breaking up a frozen crust, where he had no reason to apprehend that explosives would be left in the earth which he was required to remove, and which he had been led to believe was safe.

(Marshall, J., dissents.)

(March 9, 1909.)

gaged in an entirely different class of work from the respondent. They were handling an extremely dangerous agency, viz., dynamite, requiring skill and great care, while the respondent was in the cut below, engaged as a common laborer shoveling earth into cars. In the next place, it was the special duty of the shift boss and the powder man to keep the place safe so as to protect the respondent, who had no means of knowing what they were doing and no means of guarding against their acts. Under these circumstances, it seems clear that the respondent was not a fellow servant with either the shift boss or the powder man, but that these two men necessarily represented the master, and were bound to notify laborers in places made dangerous by their work."

In the greater number of cases, however, persons engaged as common laborers in the work of excavation have been held to be fellow servants of other employees engaged in blasting.

Thus in *McMahon v. Bangs*, 5 Penn. (Del.) 178, 62 Atl. 1098, the relation of fellow servant was held to exist between an employee whose negligence in discharging a blast in a stone quarry resulted in injury, and the person injured, who was engaged in hauling away soil cleared from the top of the rocks.

One engaged in hauling rock, by means of a team, out of a railway cut, is a fellow servant of persons engaged in blasting rock in the cut, being engaged, although in a different branch, in the same general undertaking. *Bogard v. Louisville. E. & St. L. R. Co.* 100 Ind. 491.

One employed in a gypsum mine to do blasting is a fellow servant of one employed to remove the rock, both being engaged on an equal footing in doing the master's work. *Hendrickson v. United States Gypsum Co.* (Iowa) 105 N. W. 503.

One employed in charging and exploding blasts in laying a car track is, in doing such work, a fellow servant of employees working with pick and shovel on the mass of earth and rocks dislodged for the blast; though he is not such in determining whether any part of the charge remains unexploded. *Hoe v. Boston & N. Street R. Co.* 187 Mass. 67, 72 N. E. 341.

One employed to do the blasting required

to be done in excavating a railway cut in a fellow servant of one employed to haul away the materials excavated, he being as much engaged in the same general service when blasting as he would have been in detaching the material to be removed with a pick and shovel. *Marshall v. Schricker*, 63 Mo. 308.

A member of a gang of workmen employed to remove from a trench material dislodged by a blast is a fellow servant with those engaged in blasting, being engaged in effecting a common purpose, though the work is done in successive stages, different parts thereof being devolved upon different persons, and the labor performed by one set of employees being prior in time to that performed by another set. *Citrone v. O'Rourke Engineering Constr. Co.* 188 N. Y. 339, 19 L.R.A. (N.S.) 340, 80 N. E. 1092.

A laborer engaged in digging at the bottom of a caisson is a fellow servant with one engaged in blasting. *Gallagher v. McMullin*, 25 App. Div. 571, 49 N. Y. Supp. 734.

Persons engaged in a quarry in blasting stone off the ledges, and one employed in breaking up that blasted off, neither being in a position of subordination to, and subject to the order and control of, the other, but being under the immediate control and authority of the same foreman, are fellow servants, since, although working in different parts of the same quarry, their work is in connection with each other and has relation to the same common end,— that of getting out the stone. *Kelley Island Lime & Transport Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706, 69 N. E. 988.

Persons engaged in breaking down the ore in a mine by blasting, and those engaged in hauling it away, are fellow servants, being engaged in a common employment, and a work tending to a common object, one common end, and in connection with each other, each having a relation to the object, and to the common end. *Kieley v. Belcher Silver Min. Co.* 3 Sawy. 500, Fed. Cas. No. 7,761.

As to duty to warn a servant engaged in blasting of the dangers therefrom, see case note to *Hardy v. Chicago, R. I. & P. R. Co.* 19 L.R.A. (N.S.) 997.

Other recent decisions upon the question, Who is an independent contractor? may be found in a case note to *Knically v. West Virginia Midland R. Co.* 17 L.R.A. (N.S.) 370.

APPPEAL by plaintiff from a judgment of the Circuit Court for Winnebago County upon a verdict directed by the court in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Siebecker, J.:

This is an action for the recovery of damages for personal injuries alleged to be due to the negligence of the defendant.

The defendant conducts a manufacturing plant for the production of chairs, caskets, etc. In 1907 it was determined to add a sawmill to the defendant's plant. The mill was to be built upon a marshy ground into which spiles were to be driven as a foundation for the structure. The construction of the sawmill required the removal of certain old structures as well as the building of the new one. The defendant company negotiated with one Heidlinger for the removal of the old structures and the construction of the new mill. Heidlinger stated that he could not figure upon the work and undertake it, because it involved the destruction of the old and the construction of the new structures; and they arranged that Heidlinger was to receive \$5 per day for his time and services. He was to procure whatever workmen might be needed, keep account of their time and their wages, present defendant with a statement showing the amount of money needed to pay the wages of such workmen, receive this amount, with his own wages, from the defendant, and therefrom pay the men. All the materials to be used in the construction were to be furnished by the defendant. Heidlinger prepared the plans for the mill. The work was started in the early part of the year, when the surface of the ground was frozen to the depth of about 2 feet. It was necessary to remove the frozen earth in order to be able to drive the spiles for the foundation. Heidlinger procured laborers to excavate and remove the frozen earth, among them the plaintiff. For a few days they worked with crowbars, picks, and shovels. To expedite the work, Heidlinger consulted with an officer of the defendant, and suggested that the frozen earth might be removed more rapidly and easily if it were broken with dynamite. The officer desired to send for dynamite, but Heidlinger stated that he did not know anything about dynamite, and how to set and explode it. He was then directed to consult the owner of a stone quarry outside the city of Oshkosh, in order to procure a competent man to do the blasting. Heidlinger consulted the owner of the quarry, and, on his recommendation, engaged a man in his employ, one Span-

20 L.R.A. (N.S.)

bauer, to do the blasting. Spanbauer had worked for the owner of the quarry for five or six years at breaking stone. He had observed the way in which blasting was done at the quarry, and had done some blasting there.

Preparatory to the blasting of the frozen earth, the workmen engaged in breaking up the ground drove an iron bar into the ground with a sledge hammer. When the iron had been driven into the ground to the desired depth, the bar was withdrawn, and the workmen retired and took no part in the blasting operation. Spanbauer was the only man at work on the grounds of the defendant who had had any experience with dynamite, and, when the hole had been made, he charged it by placing the dynamite in the hole, placing the exploding cap on it, making the necessary electrical connections, filling the hole with earth, and tamping it down, and he then exploded the charge. Several charges of dynamite were exploded at the same time by having a series of charged holes connected with the one electrical instrument used to discharge the exploding caps. Four charged holes were connected for the last blast made by Spanbauer. About one of the holes the earth was not thrown up as about the other three, and Spanbauer then again connected the wires from this hole with his electrical apparatus, and ran a current through the wires. No explosion followed, and Spanbauer made an examination of the ground in the vicinity of the hole and saw a crack about 1½ feet from the hole. He attributed the crack to the supposed explosion of the charge in the hole, and told the men to proceed with the digging, that everything was all right. Subsequently plaintiff, while working in this vicinity, struck the unexploded charge of dynamite with a pick, and, by the ensuing explosion, lost the sight of both his eyes and suffered other injuries.

There was evidence in the case that a careful workman, with a knowledge of how to blast in frozen ground, in case of doubt as to whether or not a charge had been exploded, with a wooden spoon, would carefully remove the earth which had been tamped into the hole, and thus assure himself that the charge had been exploded. When several charges of dynamite are discharged by the same electrical discharge, the several explosions occur simultaneously, and it is impossible to tell from the sound whether all have been exploded. At the conclusion of the plaintiff's evidence, the court refused to grant a nonsuit; but, at the conclusion of the defendant's testimony, the court directed a verdict for the defendant on the ground that the plaintiff was not in the employ of the defendant at the

time of the injury, and because the plaintiff was a fellow servant of the blaster, Spanbauer. This is an appeal from the judgment on the verdict as directed.

Mr. H. B. Jackson, with Messrs. **Eaton & Eaton**, for appellant:

Heidlinger was not an independent contractor.

Thomp. Neg. § 39; 1 Shearm. & Redf. Neg. 5th ed. § 167; Blake v. Thirst, 2 Hurlst. & C. 20; Morgan v. Bowman, 22 Mo. 538; Charles v. Taylor, L. R. 3 C. P. Div. 492; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Hughbanks v. Boston Invest. Co. 92 Iowa, 267, 60 N. W. 640; Walker v. Simmons Mfg. Co. 131 Wis. 542, 111 N. W. 694; Cunningham v. International R. Co. 51 Tex. 503, 32 Am. Rep. 632; Neimeyer v. Weyerhaeuser, 95 Iowa, 497, 64 N. W. 416; Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; Northwestern Union Packet Co. v. McCue, 17 Wall. 508, 21 L. ed. 705.

The employee had no knowledge of the danger, and did not assume the risk.

Holloway v. H. W. Johns-Manville Co. 135 Wis. 629, 116 N. W. 635; Denning v. Gould, 157 Mass. 564, 32 N. E. 862; Burnside v. Novelty Mfg. Co. 121 Mich. 115, 79 N. W. 1108; Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53; Polaski v. Pittsburgh Coal Dock Co. 134 Wis. 259, 14 L.R.A.(N.S.) 952, 114 N. W. 437; Rummell v. Dilworth, P. & Co. 111 Pa. 350, 2 Atl. 355, 363; Cooley, Torts, 661.

Defendant negligently failed to warn the employee of the dangers attending such a use of dynamite, and to avoid them.

Luebke v. Chicago, M. & St. P. R. Co. 59 Wis. 128, 48 Am. Rep. 483, 17 N. W. 870; Boelter v. Ross Lumber Co. 103 Wis. 324; 79 N. W. 243; McMahon v. Ida Min. Co. 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; Western Coal & Min. Co. v. Ingraham, 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; Western Coal & Min. Co. v. Berberich, 36 C. C. A. 364, 94 Fed. 329; Froeber v. Smith, 106 Minn. 72, 118 N. W. 57; Bjorklund v. Gray, 106 Minn. 42, 118 N. W. 59; Myham v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L.R.A. 172, 17 Am. St. Rep. 436, 6 So. 799; Blackwell v. Lynchburg & D. R. Co. 111 N. C. 151, 17 L.R.A. 729, 32 Am. St. Rep. 786, 16 S. E. 12; Newark Electric Light & P. Co. v. Garden, 37 L.R.A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74; Peters v. George, 83 C. C. A. 408, 154 Fed. 639; Bertha Zinc Co. v. Martin, 93 Va. 791, 70 L.R.A. 999, 22 S. E. 869; Zoesch v. Flambeau Paper Co. 134 Wis. 270, 114 N. W. 485; Kiser v. Suppe, 133 Mo. App. 19, 20 L.R.A.(N.S.)

112 S. W. 1005; Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; 1 Shearm. & Redf. Neg. 185; Anderson v. Chicago Brass Co. 127 Wis. 273, 106 N. W. 1077; Yess v. Chicago Brass Co. 124 Wis. 414, 102 N. W. 932; Smith v. Chicago, M. & St. P. R. Co. 42 Wis. 525; Hocking v. Windsor Spring Co. 125 Wis. 581, 104 N. W. 705; Welch v. Bath Iron Works, 98 Me. 361, 57 Atl. 88; Hamann v. Milwaukee Bridge Co. 136 Wis. 39, 116 N. W. 854; Burke v. Anderson, 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814; Wheeler v. Mason Mfg. Co. 135 Mass. 294; Cincinnati, N. O. & T. P. R. Co. v. Gray, 50 L.R.A. 47, 41 C. C. A. 535, 101 Fed. 623; Euting v. Chicago & N. W. R. Co. 116 Wis. 13, 60 L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358; Baumann v. C. Reiss Coal Co. 118 Wis. 330, 95 N. W. 139; Sherman v. Menominee River Lumber Co. 72 Wis. 122, 1 L.R.A. 173, 39 N. W. 365; Grant v. Keystone Lumber Co. 119 Wis. 229, 100 Am. St. Rep. 883, 96 N. W. 535; Kroeger v. Marsh Bridge Co. 138 Iowa, 376, 116 N. W. 125; Boyce v. Wilbur Lumber Co. 119 Wis. 642, 97 N. W. 563; Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464; Schultz v. Chicago, M. & St. P. R. Co. 48 Wis. 379; 4 N. W. 399; Grams v. C. Reiss Coal Co. 125 Wis. 1, 102 N. W. 586; Leary v. Boston & A. R. Co. 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; O'Connor v. Adams, 120 Mass. 427.

Spanbauer was the defendant's representative, and not a coemployee of plaintiff.

Schultz v. Chicago, M. & St. P. R. Co. and Grams v. C. Reiss Coal Co. supra; Smith v. Chicago, M. & St. P. R. Co. 42 Wis. 520; Promer v. Milwaukee, L. S. & W. R. Co. 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90; Cadden v. American Steel Barge Co. 88 Wis. 409, 60 N. W. 800; McMahon v. Ida Min. Co. 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Salmons v. Norfolk & W. R. Co. 162 Fed. 722; Paine v. Eastern R. Co. 91 Wis. 340, 62 N. W. 1005; Goodrich v. New York C. & H. R. R. Co. 116 N. Y. 398, 5 L.R.A. 750, 15 Am. St. Rep. 410, 22 N. E. 397; Euting v. Chicago & N. W. R. Co. supra; Wood, Mast. & S. 681, 738, 739, 749, 751, 763; Thomp. Neg. 975; Burke v. Anderson, 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814; Western Coal & Min. Co. v. Ingraham, supra.

Messrs. **Barbers & Beglinger**, with Messrs. **Williams & Williams**, for respondent:

Where one person employs another to do a specific job of work, as an independent contractor, and retains no control over the petty details thereof, such employer does

not become liable for injuries caused by the sole negligence of such contractor or his servants.

Hailey v. Jump River Lumber Co. 81 Wis. 412, 51 N. W. 321, 956; *Hackett v. Western U. Teleg. Co.* 80 Wis. 187, 49 N. W. 822; *Smith v. Milwaukee Builders' & T. Exchange*, 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Bauer v. Richter*, 103 Wis. 412, 79 N. W. 404; *Hiroux v. Baum (Wis.)* 19 L.R.A. (N.S.) 332, 118 N. W. 533; 2 *Thomp. Neg.* 892, 909, §§ 12, 35, 1 *Shearm. & Redf. Neg.* 5th ed. pp. 240-248, §§ 164, 169, 181; *Michael v. Stanton*, 3 Hun, 462; *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148; *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Felton v. Deall*, 22 Vt. 171, 54 Am. Dec. 61; *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; *Bailey v. Troy & B. R. Co.* 57 Vt. 252, 52 Am. Rep. 129; *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Cunningham v. International R. Co.* 51 Tex. 503, 32 Am. Rep. 632; *Robinson v. Webb*, 11 Bush, 464; *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329; *Du Pratt v. Lick*, 38 Cal. 691; *Forsyth v. Hooper*, 11 Allen, 419; *Martin v. Tribune Assn.* 30 Hun, 391; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808; *Bauer v. Richter*, 103 Wis. 418, 79 N. W. 404.

The retention by defendant of the right to inspect the work, and to see that it was being done according to the plan, and the fact that he would have had the right to stop it, if it did not conform to the plan, or, if any changes in the plan had been made, to the altered plan, was consistent with *Heidlinger's* status as an independent contractor.

Casement v. Brown, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; *Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Kelly v. New York*, 11 N. Y. 432.

In order that one may be held to be a servant, the contract of employment must give the employer the right to dictate the details as to the mode and manner of performing the work.

Forsyth v. Hooper, 11 Allen, 419; 1 *Shearm. & Redf. Neg.* pp. 248, 249; *Kuehn v. Milwaukee*, supra.

One hired for a specific job, even though paid by the day, is an independent contractor.

Geer v. Darrow, 61 Conn. 220, 23 Atl. 20 L.R.A. (N.S.)

1087; *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Felton v. Deall*, 22 Vt. 171, 54 Am. Dec. 61; *Sadler v. Henlock*, 4 El. & Bl. 570.

Blasting is not *per se* an unlawful or injurious operation, and the failure of the contractor or his servants to give warning does not make the defendant liable.

Herrington v. Lansingburgh, 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267.

Rankel, Spanbauer, and Heidlinger were all in the employ of defendant, and were fellow servants.

Wiskie v. Montello Granite Co. 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *Okonski v. Pennsylvania & O. Fuel Co.* 114 Wis. 448, 90 N. W. 429; *Hamann v. Milwaukee Bridge Co.* 127 Wis. 550, 106 N. W. 1081, 7 A. & E. Ann. Cas. 458; *Gereg v. Milwaukee Gaslight Co.* 128 Wis. 35, 7 L.R.A. (N.S.) 367, 107 N. W. 289; *Dahlke v. Illinois Steel Co.* 100 Wis. 431, 76 N. W. 362; *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269; *Williams v. North Wisconsin Lumber Co.* 124 Wis. 328, 102 N. W. 589; *Alaska Treadwell Gold Min. Co. v. Whalen*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. St. Rep. 40; *Petaja v. Aurora Iron Min. Co.* 106 Mich. 463, 32 L.R.A. 435, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951.

Defendant was not bound to warn his servants of the unexpected and unforeseen danger, and is not liable for the injuries caused by the explosion of the dynamite.

Dahlke v. Illinois Steel Co. 100 Wis. 431, 76 N. W. 362; *Deisenrieter v. Kraus-Merkel Malting Co.* 92 Wis. 164, 66 N. W. 112; *Andrews v. Chicago, M. & St. P. R. Co.* 96 Wis. 357, 71 N. W. 372; *Block v. Milwaukee Street R. Co.* 89 Wis. 378, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 144, 50 Am. Rep. 352, 18 N. W. 764; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Sladky v. Marinette Lumber Co.* 107 Wis. 250, 83 N. W. 514; *Musbach v. Wisconsin Chair Co.* 108 Wis. 67, 84 N. W. 36; *Wiskie v. Montello Granite Co.* 111 Wis. 449, 87 Am. St. Rep. 885, 87 N. W. 461.

The situation was changing as the work progressed, and plaintiff knew the dangers, as well as defendant, and, under such circumstances, they were ordinary incidents of the service.

Showalter v. Fairbanks, M. & Co. 88 Wis. 377, 60 N. W. 257; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Mielke v. Chicago & N. W. R. Co.* 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; *Paule v. Florence Min. Co.* 80 Wis. 350, 50 N. W. 189; *Capas-*

so v. Woolfolk, 163 N. Y. 472, 57 N. E. 760; Cullen v. Norton, 126 N. Y. 1, 26 N. E. 905; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021; Minneapolis v. Lundin, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; Corneilson v. Eastern R. Co. 50 Minn. 23, 52 N. W. 224; Houston v. Culver, 88 Ga. 34, 13 S. E. 953.

Stebecker, J., delivered the opinion of the court:

The plaintiff challenges the correctness of the trial court's ruling as to all the questions involved, in directing a verdict for the defendant. We will examine them as presented.

The first contention is that the plaintiff was in the employ of the defendant as its servant at the time of the accident. This is denied by the defendant, and it asserts that he was in the employ of one Heidlinger, who, it claims, had contracted to erect the mill for the defendant. The facts adduced establish that Heidlinger was employed by the defendant to attend to the construction of the mill, the defendant to pay him a compensation at the rate of \$5 per day for the time he was so engaged. It also appears that the defendant was to furnish all the materials for the structure and for the preparation of the grounds, and that it was to pay the daily wages of all the men needed in erecting the structure. The men were hired by Heidlinger, and he took account of their time and presented it to the defendant's officers, received the amounts due him for wages, and due the men whom he had engaged, and paid them, retaining out of the sum so paid him by the defendant the amount due him as compensation for his time, at the rate agreed upon by him and the defendant. It is also shown that the defendant's officers exercised a control over the undertaking, to the extent of directing its progress, course of procedure, and general management. The evidence does not establish that defendant and Heidlinger agreed that Heidlinger was to have the right to control the erection of the structure, and was to be responsible for the cost of the work and the wages of the men employed. It is manifest that the defendant was responsible to all persons engaged on the job, and that Heidlinger merely acted as its agent in securing their services. Under these circumstances, it cannot be said that Heidlinger had contracted with defendant to erect the mill according to his own method and without being subject to the control of the defendant, except as to the result of the work. Upon the evidence it must be held that the plaintiff was in defendant's employ at the time of the accident. From the foregoing conclusion, it follows that Spanbauer was in 20 L.R.A. (N.S.)

defendant's employ when he was conducting the operation of blasting the earth at the mill site.

We are persuaded that the defendant exercised reasonable care in selecting Spanbauer as one competent to do the blasting. Whether or not Spanbauer proved to be competent to perform this highly dangerous service does not determine this question. The inquiry is: Did the defendant act upon such information respecting Spanbauer's skill and competency in this regard as that upon which ordinarily prudent men will act under the same or similar circumstances? If so it fulfilled its measure of duty to its other servants in the selection of employees. It is shown that Heidlinger apprised the defendant's officer in charge of the construction, that he had not the knowledge and skill to set the loads of dynamite, and explode them. Thereupon he was directed by defendant to obtain for this purpose a competent blaster from among the men engaged in this service in a neighboring quarry. Pursuant to this direction, Heidlinger applied to the person operating the quarry, and was informed that Spanbauer was engaged at the quarry and understood the business. It is manifest that the officers of the defendant and Heidlinger knew that persons were engaged in blasting in the quarry, and understood, from the representations of the person operating, that Spanbauer had performed this service and was skilled in it. Their conduct in this respect was that of reasonable and careful men, and acquits them of the charge of negligence in this respect.

It is insisted by respondent that, if the plaintiff was in defendant's employ in performing the service at which he was injured, then defendant is not liable therefor, because it was caused by the negligence of Spanbauer, who was a fellow servant of the plaintiff in the work of blasting. The trial court held this contention of the defendant to be sustained by the facts of the case, under the ruling in Wiskie v. Montello Granite Co. 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461. In the Wiskie Case the plaintiff, while assisting the foreman of the quarry in conducting the blasting, was injured through the unexpected explosion of part of a powder blast which the foreman had negligently permitted to remain, and near which he had set the plaintiff at work. The facts of the case show that Wiskie and the foreman had jointly placed the blast, that they worked together under the foreman's direction at raising and blasting rocks, and that they had been so engaged for a long time before the accident. It was held, upon these facts, that Wiskie and the foreman were engaged in a common service of blasting rocks when Wiskie was injured. From an examination

of the facts of that case, it is manifest that Wiskie and the foreman were jointly performing the same task, and were engaged in a common service; but we do not find a like state of facts in the instant case. Here the defendant had employed the plaintiff to help remove the earth for the foundation of the mill. The defendant, in the course of the prosecution of such work, decided to employ a blaster to break the frozen ground so as to expedite the work. Spanbauer was engaged for this purpose, and was employed at this special work for two days. The work was conducted as follows: Plaintiff and the other workmen at the excavation drove holes with iron bars into the earth for setting dynamite charges in. Spanbauer then took charge of the work. He placed the dynamite charges in the holes, packed them with earth, connected them by wire with an electric battery, and discharged them by turning on the electric current. Neither the plaintiff nor the other workmen took part in setting and packing in the charges, or in connecting them by fire with the battery, or in discharging them. All of this was under the control of, and was performed by, Spanbauer in the capacity of blaster. From this it appears that the setting and exploding of the blast was exclusively intrusted to the expert, and that plaintiff took no part in performing this service. It is obvious, from the dangerous character of this service, that it was treated as separate and distinct from the service plaintiff and the other workmen were performing, in excavating the earth for the foundation of the mill. In the Wiskie Case the plaintiff assisted the expert in performing the work of blasting. In the instant case the plaintiff did not assist or engage in the work of blasting, and herein the two cases are widely distinguished. In the former the plaintiff and expert were engaged in the common service of blasting. In the latter the plaintiff and the expert were engaged in separate and distinct services, which were different in nature, and in the hazards and dangers incident thereto. True they both served a common master and occupied the same place while performing their respective duties, but the operation of blasting was wholly different, distinct, and independent of the employment of the excavator engaged in the construction of the mill. The risks and dangers of blasting are not ordinarily incident to the service plaintiff was performing. These features and conditions of the instant case clearly differentiate it from the Wiskie Case. Upon these considerations the ruling of the trial court, that plaintiff and Spanbauer were fellow servants, cannot be approved. The case must be treated from the standpoint that plaintiff was not the servant of the defendant, and was not engaged in the operation of blasting with Spanbauer, who acted alone for the defendant in using and handling highly explosive and dangerous agencies for blasting the earth.

Nor can the plaintiff be treated as one informed of the dangers which are incident to the want of a proper conduct of the blasting operation. The nature of plaintiff's work, and his relation to the blasting, did not inform him of the unsafe condition of the place where he was directed to proceed with the work of excavating after Spanbauer had exploded the blast, and had pronounced the place safe for continuing the work of excavating. While the plaintiff knew that an explosive was being used by Spanbauer to expedite the work, he was not informed of the particular danger to him from a failure to discharge part of the dynamite charges. He had no reason to apprehend that an undischarged load was hidden in the earth where he was put to work. He was in fact led to believe by the expert that the place was safe.

It does not appear that plaintiff was instructed or warned of the extraordinary hazards and dangers incident to the use of dynamite, and he cannot be held to have assumed the risks thereof as dangers ordinarily incident to his employment. It devolves on the master, who finds it necessary and expedient to use hazardous agencies in the conduct of his business, to inform his servants, not informed on the subject, of the extraordinary risks and dangers attending their use, in order that they may avoid them by refusing to continue in the service, or may otherwise protect themselves against them. The evidence in the case, bearing on the question of defendant's negligence, was such as to present questions for solution by a jury; and it was error to direct a verdict for the defendant.

Judgment reversed, and the cause remanded to the trial court for a new trial.

Winslow, Ch. J., took no part.

Marshall, J., dissenting (filed March 13, 1909):

In my opinion this case is clearly ruled in favor of respondent by Wiskie v. Montello Granite Co. 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461, and the principle there referred to, exempting the master from the consequences to one servant from the negligence of his fellow servant. The trial judge doubtless supposed, as well in my opinion he might, that there was no fair way of distinguishing the two cases, or escaping the effect of the principle.

The logic indulged in, by my brethren, has support in some jurisdictions, but was

repudiated by this court at quite an early day, and such repudiation has been uniformly adhered to.

I will say, in passing, that I have not the slightest idea the court now intends to adopt the doctrine which its opinion, as it seems, will be regarded as promulgating. At some future time the apparent departure from the long traveled road will be corrected. This case goes upon the theory that employment in a general enterprise may be, or, to put it stronger, is necessarily, divided up into different tasks, services, or departments, according to character, grade, and degree of danger; and that, in the law of negligence, fellowship in one branch of a general employment does not extend to those employed in the other.

How wide the doctrine stated is from the rule prevailing in this state, which is so familiar that it hardly need be stated, must be apparent at once.

Neither grade of work, particularity of group, within a broad general class of employees in a particular proprietor's business, nor degree of danger, nor rank of employment, is the test of fellowship between servants, in the law of negligence. The sole test is whether the persons concerned are employed in the same general enterprise, to accomplish the same general purpose, by the same master under the same general control, regardless of whether they are, at the particular time, engaged in the same branch of the work or not. *Toner v. Chicago, M. & St. P. R. Co.* 69 Wis. 188-198, 31 N. W. 104, 33 N. W. 433.

A station agent employed in a widely different branch of the business of operating a railroad from a train crew, the latter from a track crew, and that one from the roundhouse crew, all being in the common employment of operating the railroad, the engineer on the locomotive and the most humble trainman, the trackman wielding his shovel, the station agent, the most common workman moving freight about the depot,—are fellow servants. *Toner v. Chicago, M. & St. P. R. Co.* supra; *Cooper v. Milwaukee & P. du Ch. R. Co.* 23 Wis. 668; *Howland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 230, 11 N. W. 529; *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163, 20 N. W. 908; *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 349, 21 N. W. 269; *Albrecht v. Chicago & N. W. R. Co.* 108 Wis. 530, 53 L.R.A. 653, 84 N. W. 882; *MacCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707. These cases amply illustrate all I have said. All these are held fellow servants: A shoveler in a gravel pit and a train conductor. *Naylor v. Chicago & N. W. R. Co.* 53 Wis. 661, 11 N. W. 24. A snow shoveler and a member of a train crew. *Howland v. Milwaukee, L. S. & W. R.* 20 L.R.A. (N.S.)

Co. supra. The foreman and men engaged under him, whom he has full power to direct. *Peschel v. Chicago, M. & St. P. R. Co.* supra. The track repair crew and the members of a crew on a passing train. *Toner v. Chicago, M. & St. P. R. Co.* supra. The train crew on one train with the train crew on another. *MacCarthy v. Whitcomb*, supra. The men who load coal on locomotive tenders and the track walker injured by coal dropping from the tender. *Schultz v. Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321.

Perhaps as striking an illustration as any case that can be cited is *Cooper v. Milwaukee & P. du Ch. R. Co.* supra. It has been many, many times approved. The person injured, as said in *Heine v. Chicago & N. W. R. Co.* 58 Wis. 525, 17 N. W. 420, was engaged in a branch of the service not in any way connected with that in which the negligent employee causing the injury was engaged. The particular work of the one had no connection whatever with the particular work of the other, except the two services were in departments of the general business of operating the railroad.

It seems useless to pursue the matter further. Here, at the best for appellant, he was engaged in one branch and the blaster in another of the general business of a common employment of preparing the ground for the foundation of a mill. They came much nearer being engaged in the same particular work, if that was a legitimate test, than the injured and the injurer in any of the cases referred to.

The idea that an industrial operation under an employer is subject to be divided into specific tasks or departments according to kind of work, whether of common or expert character, so as to make corresponding divisions as to fellowship, has no support in our jurisprudence.

Let it be conceded, for the purposes of the case, that the specific work of doing the blasting was delegated wholly to Spanbauer, while the work of making the holes for him to place the dynamite in, and of excavating after the blasts were discharged, was delegated to others, including appellant. Concede, if we may, as my brethren say, that the two kinds of work were widely different, one being of a common and the other of an expert character. Also concede, for now, that the particular service of one was distinct from that of the other and that they were different in nature and hazards and dangers. If those features, under the rule prevailing here, suggest want of fellowship, I do not understand the rule.

True, say my brethren, "they (Spanbauer and appellant) both served a common master, and occupied the same place while per-

forming their respective duties, but they were engaged in independent employments in the construction of the mill." That is, as I understand it, they were engaged in different tasks of the general work of construction. That concession, within all our cases, instead of indicating want of fellowship, indicates right the contrary, as I understand our decisions.

As the opinion goes: "Plaintiff was . . . not the servant of defendant, en-
20 L.R.A. (N.S.)

gaged in the operation of blasting with Spanbauer, who, alone, was the blaster." Thus suggesting, as before indicated, that a general employment is divisible into numerous special tasks as to fellowships. Where there is warrant for that suggestion I do not know.

I think the ruling of the learned trial court was right and the judgment should be affirmed.

INDEX TO NOTES.

(The General Index follows this.)

Abatement.

Of nuisance, see NUISANCE.

Action.

Right in action at law to attack release for fraud (Case Note) 915

Air.

Right of property owner to compensation for interference with light or air by railroad structure on company's own property (Case Note) 1061

Alimony.

See DIVORCE.

Architect.

Right to mechanic's lien for labor or material furnished on order of architect before abandonment of contract by contractor (Case Note) 89

Arms.

Constitutionality of right to bear arms (Case Note) 1007

Arrest.

See also FALSE IMPRISONMENT.

Arrest under civil process for breach of warranty (Case Note) 844

Assault.

Effect of fact that combat was by agreement or mutual consent of parties upon civil liability for assault (Case Note) 907

Assignment for creditors.

Right of assignee for creditors to maintain partition (Case Note) 105

Attachment.

Validity of pledge or other transfer of stock of corporation when not made in the books of the company as against attachment (Case Note) 996

Attorneys.

Right of client to maintain trover or case for money collected by attorney (Case Note) 35

Auction.

As a nuisance (Case Note) 972

Right to withdraw property from an auction sale after it has been offered (Case Note) 1133

Automobiles.

Duty of pedestrian in street to watch for automobiles (Case Note) 232

Awnings.

Municipal liability for injury by overhanging awnings (Subject Note) 645

Power of municipal corporation to compel removal of awnings encroaching on street (Case Note) 146

Bail.

Validity of agreement to indemnify bail in a criminal case (Case Note) 58

Effect of granting new trial after a conviction, to extend the liability of accused's bond (Case Note) 861

What constitutes breach of re exeat bond (Case Note) 76

Bankruptcy.

Engaging in other business as affecting exemption of farmer from involuntary proceedings (Case Note) 148

Right of trustee to maintain partition (Case Note) 105

Set-off by bank against bankrupt's deposit as a preference within the bankruptcy law (Case Note) 863

Character of false statement which will prevent a discharge (Case Note) 1023

Omission of bankrupt to keep books as ground for refusing discharge (Case Note) 246

Right of bankrupt to discharge as affected by act of partner or agent (Case Note) 785

Banks.

See also CHECKS.

Set-off by bank against bankrupt's deposit as a preference within the bankruptcy law (Case Note) 863

Loss or prejudice to bank resulting from negligent failure on part of depositor or correspondent bank to give prompt notice of forgery, as a condition of its right to charge forged checks to latter's account (Case Note) 79

When is a bank insolvent within statute making it an offense to receive further deposits (Case Note) 444

Barriers.

In highway, see HIGHWAYS.

Bill board.			
Municipal liability for injury by (Subject Note)	646		Duty of carrier to furnish cars of a type not owned by it (Case Note) 310
Blasting.			Cars.
Common laborers and persons engaged in blasting as fellow servants (Case Note)	1180		See CARRIERS.
Body execution.			Case.
Arrest under civil process for breach of warranty (Case Note)	844		Right of principal to maintain case for money collected by agent or attorney (Case Note) 35
Bonds.			Certified check.
As to bail bonds, see BAIL.			See CHECKS.
What constitutes breach of re exeat bond (Case Note)	76		Chattel mortgage.
Books.			Attempt to enforce lien under clause in a lease giving landlord a lien on crops and chattels as election preventing its enforcement as a chattel mortgage (Case Note) 259
Omission of bankrupt to keep books as ground for refusing to discharge (Case Note)	246		Validity of chattel mortgage of future earnings of threshing outfit (Case Note) 505
Brokers.			Checks.
Right of broker to purchase real estate listed with him for sale (Case Note)	1158		As to payment of, by bank, see BANKS.
Broker's right to commission where purchaser procured by him is financially unable to perform his contract (Case Note)	1168		Right of drawer to stop payment of certified check (Case Note) 290
Bucket shop.			Club.
As "place for gaming" (Case Note)	347		Applicability of liquor law to social club dispensing liquor to members (Case Note) 1095
Building and loan associations.			Collateral security.
Power of building and loan association to borrow money to pay withdrawing members (Case Note)	393		See PLEDGE.
Buildings.			Community.
Taking possession of building with knowledge of defects as waiver thereof as against contractor (Case Note)	872		Liability of community property to succession tax (Case Note) 208
Bulk sale law.			Compounding felony.
Constitutionality of (Case Note)	160		Contract procured by threats of prosecution of a relative (Case Note) 484
Business.			Conditional sale.
Contracts not to engage in rival business, see CONTRACTS.			See SALES.
Carriers.			Conflict of laws.
Termination of passenger's relation as such upon reaching destination (Case Note)	1019		Place of payment of debt as affecting jurisdiction to garnish same (Case Note) 264
Liability of carrier for injury to child passenger who exposes himself to danger in consequence of conduct of employee (Case Note)	1124		Consent.
Duty to guide or conduct passenger to or from train (Case Note)	1041		As affecting civil liability for assault (Case Note) 907
Duty of carrier to person at station for business consultation with individual passenger (Case Note)	837		Constitutional law.
Duty of carrier to persons who accompany passengers to, or wait for them at, station (Case Note)	833		As to use of school funds, see SCHOOLS.
Constitutionality of legislation affecting amount of liability or penalty for delay in delivery or for destruction of freight (Case Note)	126		Constitutional right to bear arms (Case Note) 1007
			Constitutionality of legislation affecting the amount of liability or penalty for delay in delivery, or for destruction of freight (Case Note) 126
			Constitutionality of statute making license, occupation, or privilege tax a lien on real property owned by one other than person assessed (Case Note) 42
			Constitutionality of "bulk sale" legislation (Case Note) 160

Contempt.

Summoning biased or otherwise improper jurors or talesman as a contempt (Case Note) 1018

Continuing offense.

Violation of Sunday law as (Case Note) 783

Contractor.

Taking possession of building with knowledge of defects as waiver thereof as against contractor (Case Note) 872

Contracts.

As to effect of duress, see DURESS.
With municipality, see MUNICIPAL CORPORATIONS.
For sale of real property, see VENDOR AND PURCHASER.
Mutuality of contract of employment which by its terms is binding upon only one of the parties for the time designated (Case Note) 899
Parol agreement to take title to real property, sell the same, and account for the proceeds, as affected by the statute of frauds (Case Note) 298
Contract which fixes compensation at a certain amount per unit of work done, as entire or severable (Case Note) 1069
Applicability of provision for stipulated damages or penalty for delay in the completion of a contract, where the entire contract is abandoned or repudiated (Case Note) 350
Validity of agreement to indemnify bail in a criminal case (Case Note) 58
Entering another's employment as breach of covenant not to engage in rival business (Case Note) 769
Gift as a fraud on contract to will property (Case Note) 1154
Taking possession of building with knowledge of defects as waiver thereof, as against contractor (Case Note) 872
Effect of provision in deed for benefit of stranger thereto (Case Note) 221

Conversion.

As to equitable conversion, see WILLS.

Corporations.

As to building and loan associations, see BUILDING AND LOAN ASSOCIATIONS.
Validity of pledge or other transfer of stock of corporation when not made in the books of the company as against attachments, executions, or subsequent transfers (Case Note) 998
Effect upon one's rights as a stockholder of the fact that paid-up stock was wrongfully issued to him for a sum less than its par value (Case Note) 1077
Right of stockholder to inspect books of corporation (Case Note) 185

Courts.

Place of payment of debt as affecting jurisdiction to garnish same (Case Note) 264
Superintending control of civil courts over courts-martial (Case Note) 413
Superintending control over inferior tribunals (Case Note) 942

Courts martial.

Superintending control of civil courts over courts martial (Case Note) 413

Covenant.

Against engaging in rival business, see CONTRACTS.

Criminal law.

Various particular crimes, see ASSAULT; BANKS; GAMBLING; LARCENY; SUNDAY.
As to bail, see BAIL.
As to evidence in criminal prosecution, see EVIDENCE.
Plea of guilty as affecting action for illegal arrest, false imprisonment, or malicious prosecution (Case Note) 295

Curtsey.

Right of curtesy in determinable fee (Case Note) 858
Curtsey in equity of redemption (Case Note) 454
Effect upon curtesy of death of issue before seisin by wife (Case Note) 825

Custom.

Effect of custom to give insured notice of maturity of premium where insured is not otherwise entitled to notice (Case Note) 1057

Damages.

Necessity of jury to compute damages on default judgment (Case Note) 1
Right of purchaser of goods to recover costs and other expenses incurred by him in defending a collateral action, as damages for breach of the seller's warranty (Case Note) 492
Applicability of provision for stipulated damages or penalty for delay in completion of a contract where the entire contract is abandoned or repudiated (Case Note) 350
Constitutionality of legislation affecting amount of liability or penalty for delay in delivery or for destruction of freight (Case Note) 126
Against municipality for injury from defect or obstruction in street (Subject Note) 763
Right of married woman to recover for loss of time, services, wages, or impaired capacity (Case Note) 125
Apprehension of injury to health as basis of recovery for mental anguish (Case Note) 458

Death.

Effect upon curtesy of death of issue before seisin by wife (Case Note) 825

Of parent to whom custody of child was awarded as affecting right of surviving parent (Case Note)	171	Electricity.	
Effect of death of principal contractor on right of subcontractor or materialman to a lien or to payment by owner (Case Note)	45	Municipal liability for injuries by electric wires and appliances (Subject Note)	648
Deeds.		Eminent domain.	
Replevin to recover deed of real property (Case Note)	507	Right of property owner to compensation for interference with light or air by railroad structure on company's own property (Case Note)	1061
Effect of provision in deed for benefit of stranger thereto (Case Note)	221	Equitable conversion.	
Default.		See WILLS.	
As to judgment by, see JUDGMENT.		Equity.	
Effect of tender by vendee of purchase price before due to put other party in default (Case Note)	388	Power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single tort (Case Note)	848
Depot.		Equity of redemption.	
See CARRIERS.		Curtsey in equity of redemption (Case Note)	454
Determinable fee.		Escape.	
Right of curtesy in (Case Note)	858	Admissibility of evidence of defendant's voluntary surrender or refusal to embrace an opportunity to escape (Case Note)	409
Discharge.		Estoppel.	
In bankruptcy, see BANKRUPTCY.		Taking possession of building with knowledge of defects as waiver thereof as against contractor (Case Note)	872
Discovery and inspection.		Evidence.	
Right of stockholder to inspect books of corporation (Case Note)	185	Receipt as, see RECEIPT.	
Divorce and separation.		May incompetence of a minor to perform the duties of a particular employment be inferred from his minority alone (Case Note)	831
Settlement of property rights between husband and wife on account of divorce as implied revocation of will (Case Note)	1073	May breach of duty to employ or retain none but competent servants be inferred from the fact of their incompetence (Case Note)	322
Right of wife against whom an absolute divorce is granted to permanent alimony (Case Note)	421	Presumption of negligence of innkeeper from injury to guest or his property (Case Note)	1027
Effect of death of parent to whom custody of child was awarded upon rights of surviving parent (Case Note)	171	Right of plaintiff in action for malpractice to avail himself of privilege as against testimony of defendant or other physicians (Case Note)	1003
Drains and sewers.		Admissibility of evidence of defendant's voluntary surrender or refusal to embrace an opportunity to escape (Case Note)	409
Right of municipality to create nuisance by pollution at a point where its sewers discharge (Case Note)	1050	Does the fact that one was not a participant or actor in an accident or affray render his statements or exclamations inadmissible as <i>res gestæ</i> (Case Note)	133
Duress.		General condition and other accidents as evidence on negligence on part of municipality in respect of highway (Subject Note)	665
Contracts procured by threats of prosecution of a relative (Case Note)	484	Execution.	
Ejectment.		Validity of pledge or other transfer of stock of corporation when not made in the books of the company as against execution (Case Note)	996
See IMPROVEMENTS.		Arrest under civil process for breach of warranty (Case Note)	844
Election.			
Effect of insurer's election to rebuild, repair, or replace insured property after a loss (Case Note)	960		
Election of remedies.			
Attempt to enforce lien under clause in a lease giving landlord lien on crops and chattels, as election preventing its enforcement as a chattel mortgage (Case Note)	259		

Exemplary damages.

See **DAMAGES**.

False imprisonment.

May false imprisonment be predicated of a partial or conditional restraint (Case Note)

968

Plea of guilty as affecting action for illegal arrest, false imprisonment, or malicious prosecution (Case Note)

295

Farmer.

See **BANKRUPTCY**.

Fees.

Of officers, see **OFFICERS**.

Fellow servant.

See **MASTER AND SERVANT**.

Fences.

Applicability of statutory provision for joint construction of line or division fence, where lands of one of adjoining owners are otherwise uninclosed (Case Note)

1092

Fight.

Effect of fact that combat was by agreement or mutual consent of parties upon civil liability for assault (Case Note)

907

Firemen.

Nature and circumstances of injury as affecting right to share in pension or insurance fund for policemen and firemen (Case Note)

1176

Fires.

Duty of railroad company to avoid interference with extinguishment of fires (Case Note)

1110

Foreman.

As fellow servant, see **MASTER AND SERVANT**.

Forgery.

Payment of forged checks, see **BANKS**.

Fraud and deceit.

See also **FRAUDULENT CONVEYANCES**.

Gift as a fraud on contract to will property (Case Note)

1154

Right, in an action at law, to attack release for fraud (Case Note)

915

Fraudulent conveyances.

Validity of pledge or other transfer of stock of corporation when not made in books of company as against attachments, executions, or subsequent transfers (Case Note)

996

Game.

Larceny by fraudulent race or game (Case Note)

1164

Gaming.

Operation of slot machine as gambling (Case Note)

239

Bucket shop as "place for gaming" (Case Note)

347

Garnishment.

Garnishment of unearned salary (Case Note)

912

Place of payment of debt as affecting jurisdiction to garnish the same (Case Note)

264

Gas.

Gas plant as a nuisance (Case Note)

466

Gift.

Gift as a fraud on contract to will property (Case Note)

1154

Health.

Apprehension of injury to health as basis of recovery for mental anguish (Case Note)

458

Highways.

As to negligent acts in street not relating to the condition of streets, see **NEGLIGENCE**.

As to injury by automobile, see **AUTOMOBILES**.

Right of municipal corporation to cut or trim trees within limits of highway (Case Note)

809

Authority of municipal officers to cut or trim tree on private property to facilitate use of street (Case Note)

814

Power of municipal corporation to compel removal of awnings or signs encroaching on streets (Case Note)

146

Duty of abutting owner to preserve lateral support to highway (Case Note)

287

Obstruction of surface water in street (Case Note)

155

Liability of municipality for injuries caused by freezing of water accumulated on walk by reason of artificial conditions (Case Note)

201

Liability of municipal corporation for defects or obstructions in streets (Subject Note)

513

I. Scope

516

II. Different general rules as to liability.

a. The common-law rule

516

b. Rule of liability based on control and duty to keep in safe condition

518

c. Liability under statutes

523

d. Exemption from liability by statute

526

III. Power to perform duty as affecting liability.

a. Generally

529

b. Insufficiency of funds

529

c. Insufficient time or opportunity

531

IV. Application of rule as to nonliability for governmental and discretionary acts.

a. Generally

532

b. In particular classes of cases

535

V. Delegation of duty.		IX.—continued.	
a. Right and effect of generally	538	b. As affected by locality and uses	585
b. Imposition on railway in street	539	c. With reference to whole width of street	
c. Imposition on abutting owner	540	1. The roadway	588
VI. Cause of obstruction or defect as affecting liability.		2. The sidewalk	591
a. Generally	541	3. Use of sides of street	
b. By act of city itself	542	(a) Generally	592
c. By act of agent or servant	544	(b) Objects outside of traveled track	
d. By permission or license of city	547	(1) General rules	592
e. By independent contractor.		(2) Park strips	593
1. General rules where contract calls for obstruction	547	(3) Obstructions, excavations, etc., outside the right of way	595
2. Application in particular cases	548	(4) Obstructions in proximity to sidewalks	597
3. Injury collateral to contract work	549	d. What obstructions or defects impose liability	
4. Effect of retention of control	550	1. Generally	598
5. Particular contract required by law	552	2. Obstructions authorized by law	600
f. By wrongdoer	552	3. Obstructions for general public convenience	600
g. By abutting owner	553	4. Obstructions for private or individual convenience	602
h. By act of railroad occupying street	553	5. Obstructions for improvement or repair	
VII. Ways as to which the duty exists		(a) Generally	602
a. Generally	553	(b) Barriers, lights, etc.	604
b. The question of title, locality, etc.	554	(c) By abutting owner	606
c. Opening and improvement of ways	556	6. Particular obstructions and classes of obstructions	
d. Dedication and acceptance	558	(a) Poles, posts, stumps, trees, etc.	607
e. Improvement, repair, and other acts of recognition as affecting		(b) Rubbish, refuse, etc.	610
1. Generally	560	(c) Storage of vehicles, lumber, etc.	612
2. Sufficiency of recognition	562	(d) Machines, tools, etc.	613
f. Particular ways and classes of ways		(e) Markets and other business or individual enterprises	614
1. Sidewalks		(f) Stones and other similar articles	615
(a) Generally	565	(g) Unevenness, inequalities	618
(b) Sidewalks made by citizens	568	(h) Slopes or grades	619
(c) Walks outside of highway	569	(i) Hydrants and other appliances pertaining to municipal waterworks	620
2. Bridges	571		
3. Crossings	572		
4. Alleys, tunnels, and passageways in public buildings	573		
5. Park paths, bicycle paths, etc.	574		
g. Streets in annexed territory	575		
h. Abandonment and closing	575		
VIII. The degree of diligence or care as affecting liability			
a. General rules	577		
b. Necessity of negligence to liability	579		
c. What constitutes reasonable diligence	581		
d. Reasonable diligence, how determined	583		
IX. The degree of perfection required.			
a. General rules	583		

IX., d, 6—continued.

(j) Cellar ways, stairways, and other projections	622
(k) Railways in streets,	624
(l) Embankments	626
(m) Gutters and drains	627
(n) Holes and openings	
(1) Generally	629
(2) For sewer purposes	631
(o) Defects and obstructions in side walks and crossings	
(1) Breaks, excavations, and depressions	632
(2) Holes	634
(3) Hatchways, areas, and other openings	635
(4) Steps	637
(5) Unevenness, inequalities	640
(6) Holes in cross walks	641
(p) Decay and wear	642
7. Overhanging and falling objects	
(a) Generally	644
(b) Awnings, sheds, etc.	645
(c) Signs, billboards, etc.	646
(d) Electric wires, appliances, etc.	648
(e) Trees, poles, etc.	649
(f) Other objects or structures in and over streets generally	650
(g) Objects and structures adjacent to streets	651
8. Objects calculated to frighten horses	
(a) Generally	652
(b) Steam rollers, etc.	654
(c) Building material and other objects	655
9. Snow and ice	
(a) Limitation to recent cases	656
(b) General rules	656
(c) Mere slipperiness	657
(d) Ordinary falls of snow	657
(e) Rough accumulations of snow and ice	658
(f) Time and opportunity for removal	661
(g) Snow and ice combined with defect in street	662

IX.—continued.

e. General condition and other accidents as evidence of negligence	
1. General condition of street	665
2. Subsequent repair or removal of defect or obstruction	667
3. Other accidents	668
f. Sufficiency of way, how determined	670
X. Failure to prevent improper conduct in streets as affecting liability	671
XI. Precautions against injury	
a. Warning of obstruction	
1. General rules	671
2. Necessity of	673
3. Nature and sufficiency of barrier	676
4. Application to particular classes of obstructions	
(a) Excavations, embankments, etc.	678
(b) Defective bridges	681
(c) Elevated streets and sidewalks	682
(d) Objects outside of way	684
b. Lighting streets	686
XII. Knowledge or notice of obstruction	
a. Necessity of, to liability	
1. General rules	689
2. Effect of special statutory provisions	692
b. Actual knowledge or notice	
1. General rules	694
2. How established	695
3. Officers or agents whose knowledge or notice is binding	697
4. Creation of obstruction as affecting	
(a) By act of city itself	701
(b) By officers, agents, or servants	703
(c) By contractor	704
(d) Under permit or license	705
c. Constructive or implied notice	
1. General rules	705
2. Duration of existence of obstruction as affecting	
(a) Generally	708
(b) Visible and notorious defects as distinguished from latent ones	711
3. Cause naturally calculated to produce obstruction	714
4. General defectiveness or obstruction as affecting particular defect	717

XII. c—continued.		
5. Other accidents	721	
6. Place, circumstances, etc.	721	
7. Removal of safeguard by unlooked-for event	723	
8. The duty to inspect	725	
9. Time to remove	728	
d. Question for the jury	730	
XIII. Injury as result of obstruction or defect		
a. Generally	732	
b. Proximate cause		
1. General rules	732	
2. Immediate contact with obstruction	735	
3. The primary or original cause as the proximate one	737	
4. Active as distinguished from passive agency of obstruction	739	
5. Fright of horses as affecting	742	
XIV. Right to redress of the person injured		
a. With reference to the person		
1. Nature of the injury	746	
2. Character, capacity, and condition	748	
b. With reference to the use of the street		
1. General rules	750	
2. Loitering deviation	751	
3. Play	753	
4. Relative use of footways and carriage ways	754	
5. Use of bicycles and automobiles	756	
XV. Notice of claim and cause of injury	757	
XVI. Effect of concurrent liability of third person	760	
XVII. Contributory negligence	763	
XVIII. Damages.		
a. Generally	763	
b. Exemplary damages	764	
XIX. Conclusion	765	
Duty of town or municipality to provide barriers to protect traveler from obstructions outside the highway (Case Note)		980
May injured person's place of residence be required to be stated in notice of accident or injury as condition of liability of municipality (Case Note)		938
Sufficiency of description of injury in notice given thereof as a condition of municipal liability (Case Note)		804
Horse.		
Negligence in leaving horse unhitched in highway (Case Note)		958
Hotel.		
What constitutes, within liquor license law (Case Note)		107
20 L.R.A. (N.S.)		
Husband and wife.		
As to estate by curtesy, see CURTESY.		
As to divorce, see DIVORCE.		
Liability of community property to succession tax (Case Note)		208
Right of married woman to recover for loss of time, services, wages, or impaired capacity to labor (Case Note)		215
Settlement of property rights between husband and wife on account of divorce as implied revocation of will (Case Note)		1073
Ice.		
On sidewalk, see HIGHWAYS.		
Improvements.		
Plowing and cultivating land as an "improvement" (Case Note)		378
Incompetent persons.		
Effect upon liability of surety of principal's incapacity to contract (Case Note)		1000
Independent contractor.		
Liability of municipality for obstruction or defect in street caused by independent contract (Subject Note)		547
Infants.		
As to custody of child in case of divorce, see DIVORCE.		
Liability of carrier for injury to, see CARRIER.		
Liability of master for injury to, see MASTER AND SERVANT.		
Injunction.		
Power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single tort (Case Note)		848
Innkeepers.		
What constitutes hotel or tavern within liquor license law (Case Note)		107
Presumption of negligence of innkeeper from injury to guest or his property (Case Note)		1027
Insane persons.		
See INCOMPETENT PERSONS.		
Insolvency.		
When is a bank insolvent within statute making it an offense to receive further deposits (Case Note)		444
Insurance.		
Misrepresentation as to dimensions of insured building (Case Note)		340
Vendee under executory contract as owner, where vendor holds legal title (Case Note)		775
Effect of custom to give insured notice of maturity of premium where insured is not otherwise entitled to notice (Case Note)		1037
Liability of insurer for property destroyed by mob or during riot (Case Note)		277

Liability of insurer for value of party wall (Case Note)	226	Constitutionality of statute making license occupation, or privilege tax a lien on real property owned by one other than the person assessed (Case Note)	42
Effect of insurer's election to rebuild, repair, or replace the insured property after a loss (Case Note)	960		
Right of insurance company, in making payment of proceeds of life policy, to rely on clause giving company option as to payee, and making receipt conclusive evidence of payment to proper person (Case Note)	928	Liens.	
Intoxicating liquor.		As to mechanics' liens, see MECHANICS' LIENS.	
Do statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor (Case Note)	1146	Of landlord's lien, see LANDLORD AND TENANT.	
What constitutes hotel or tavern within liquor-license law (Case Note)	107	Of vendor or purchaser, see VENDOR AND PURCHASER.	
Applicability of liquor laws to social club dispensing liquors to members (Case Note)	1095	As to lien of taxes, see TAXES.	
Right to levy legal process upon intoxicating liquors (Case Note)	1118	Light.	
Judgment.		Right of property owner to compensation for interference with light or air by railroad structure on company's own property (Case Note)	1061
Necessity of jury to compute damages on default judgment (Subject Note)	1	Limitation of actions.	
I. American cases	1	When does statute commence to run against action for damages for the flooding of land caused by the digging of a ditch or drain (Case Note)	894
II. English cases	33	When does statute begin to run against action for damages to land on account of obstructing stream or surface water (Case Note)	886
III. Summary	35	Malicious prosecution.	
Jury.		Plea of guilty as affecting action for malicious prosecution (Case Note)	295
Summoning biased or otherwise improper jurors or talesmen as a contempt (Case Note)	1018	Malpractice.	
Necessity of, to compute damages on default judgment (Subject Note)	1	See PHYSICIANS AND SURGEONS.	
Landlord and tenant.		Mandamus.	
Attempt to enforce lien under clause in a lease giving landlord a lien on crops and chattels as election preventing its enforcement as a chattel mortgage (Case Note)	259	Mandamus to compel municipal or other public officer or board to perform duty resting in contract alone (Case Note)	801
Larceny.		Markets.	
Larceny by fraudulent race or game (Case Note)	1164	Liability of municipality for obstruction or defect in street by market (Subject Note)	614
Lateral support.		Master and servant.	
Duty of abutting owner to preserve lateral support to highway (Case Note)	287	Mutuality of contract of employment which, by its terms, is binding upon only one of the parties for the time designated (Case Note)	899
Levy and seizure.		Garnishment of unearned salary (Case Note)	912
Validity of pledge or other transfer of stock of corporation when not made in the books of the company as against attachments or executions (Case Note)	996	Liability of master for injury to employee under statutory age of employment as affected by misrepresentations as to his age by himself or his parents (Case Note)	500
Right to levy legal process upon intoxicating liquors (Case Note)	1118	Effect on master's liability to servant of delegation of personal duty to independent contractor (Case Note)	798
Libel and slander.		Duty and liability under Federal and state railway safety-appliance acts (Case Note)	473
Privilege as affected by extent of publication (Case Note)	361	May breach of duty to employ or retain none but competent servants be inferred in fact from their incompetence (Case Note)	822
License.			
Municipal liability for defect or obstruction in street by person under a license from the city (Subject Note)	547		

- May incompetence of minor to perform duties of a particular employment be inferred from his minority alone (Case Note) 381
- May one employing child under statutory age rely on contributory negligence or assumption of risk to defeat liability for personal injuries sustained by the latter (Case Note) 876
- Liability of master as affected by inability of fellow servant to understand English (Case Note) 39
- Common laborers and persons engaged in blasting as fellow servants (Case Note) 1180
- Operatives employed in industrial plant as fellow servants of employees engaged in operation of private railroad conducted in connection therewith (Case Note) 354
- Section foreman as a fellow servant of the members of the crew with respect to operation of hand car (Case Note) 434
- Liability of municipal corporation for defect or obstruction in street caused by servants (Subject Note) 544
- Materialman.**
As to lien of, see MECHANICS' LIENS.
- Mechanics' liens.**
As to liens generally, see LIENS.
Mechanics' lien on public buildings (Case Note) 261
Right to mechanics' lien for labor or material furnished on order of architect before abandonment of contract by contractor (Case Note) 89
Effect of death of principal contractor on rights of subcontractor or materialman to a lien, or to payment by owner (Case Note) 45
- Mental anguish.**
See DAMAGES.
- Mob.**
Liability of insurer for property destroyed by mob or during riot (Case Note) 277
- Mortgage.**
As to chattel mortgage, see CHATTEL MORTGAGE.
Curtesy in equity of redemption (Case Note) 454
Right of junior mortgagee as to surplus upon a foreclosure sale under a senior mortgage, in a proceeding to which he was not a party (Case Note) 47
- Multiplicity of actions.**
See EQUITY.
- Municipal corporations.**
As to powers or liability in respect of highway, see HIGHWAYS.
As to municipal officers generally, see OFFICERS.
- Power of municipal corporation to compel removal of awnings or signs encroaching on street (Case Note) 146
- Right of seller of property to municipal corporation under invalid contract to retake or remove the property upon refusal of payment (Case Note) 110
- Right of municipality to create nuisance by pollution at a point where its sewers discharge (Case Note) 1050
- Mutuality.**
See CONTRACTS.
- Necessity.**
Justifying entry on another's land (Case Note) 152
- Ne exeat.**
What constitutes breach of ne exeat bond (Case Note) 76
- Negligence.**
As to proximate cause, see PROXIMATE CAUSE.
As to automobiles, see AUTOMOBILES.
Of master or servant, see MASTER AND SERVANT.
Of or toward person at railroad crossing, see RAILROADS.
Of street railway company, see STREET RAILWAYS.
Negligence in leaving horse unhitched in highway (Case Note) 958
- New trial.**
Effect of granting new trial after conviction to extend liability on accused's bond (Case Note) 861
- Normal school.**
Use of common school or teachers' training school (Case Note) 1033
- Notice.**
See also INSURANCE.
As condition of municipal liability for injury on highway, see HIGHWAYS.
- Nuisance.**
Auction as a nuisance (Case Note) 972
Gas plant as a nuisance (Case Note) 466
Right of municipality to create nuisance by pollution at the point where its sewers discharge (Case Note) 1050
- Occupation.**
See LICENSE.
- Occupying claimants' acts.**
See IMPROVEMENTS.
- Officer.**
Effect of detachment from a political division, of territory in which an officer resides, upon his tenure of the office (Case Note) 358
Is power conferred upon municipality to remove its officers exclusive (Case Note) 1128

Mandamus to compel municipal or other public officer or board to perform duty resting in contract alone (Case Note)	801	Plowing.	
Right of public to fees unlawfully collected by officer for his own benefit (Case Note)	1015	Plowing and cultivating land as an "improvement" (Case Note)	378
Parent and child.		Poles.	
As to custody of child, see DIVORCE.		Municipal liability for injury by poles in highway (Subject Note)	649
Parties.		Police.	
Effect of provision in deed for benefit of stranger thereto (Case Note)	221	Nature and circumstances of injury as affecting right to share in pension or insurance fund for policemen and firemen (Case Note)	1176
Partition.		Political division.	
Right of trustee in bankruptcy, or assignee for creditors, to maintain partition (Case Note)	105	Effect of detachment from a political division of territory in which an officer resides upon his tenure of office (Case Note)	358
Partnership.		Preference.	
See BANKRUPTCY.		As affected by bankruptcy, see BANKRUPTCY.	
Party wall.		Principal and agent.	
Liability of insurer for value of party wall (Case Note)	223	As to brokers, see BROKERS.	
Right of one party to raise height of party wall (Case Note)	386	Right of principal to maintain trover or case for money collected by agent or attorney (Case Note)	35
Passengers.		Principal and surety.	
See CARRIERS.		Effect upon liability of surety of principal's incapacity to contract (Case Note)	1000
Payment.		Privilege.	
Place where debt payable as affecting jurisdiction to garnish same (Case Note)	264	As to libel or slander, see LIBEL AND SLANDER.	
Penalty.		As to evidence, see EVIDENCE.	
Constitutionality of legislation affecting amount of liability or penalty for delay in delivery or for destruction of freight (Case Note)	123	See also LICENSE.	
Applicability of provision for stipulated damages or penalty for delay in completion of a contract where the entire contract is abandoned or repudiated (Case Note)	350	Privileged communications.	
Pension.		See EVIDENCE; LIBEL AND SLANDER.	
Nature and circumstances of injury as affecting right to share in pension or insurance fund for policemen and firemen (Case Note)	1176	Protection.	
Physician and surgeon.		Of trade secrets, see TRADE SECRETS.	
Right of plaintiff in action for malpractice to avail himself of privilege as against testimony of defendant or other physicians (Case Note)	1003	Proximate cause.	
Degree of skill and care required of specialist (Case Note)	1030	Weather conditions as an independent intervening, efficient cause (Case Note)	92
Pledge.		Defect or obstruction in street as proximate cause of injury (Subject Note)	732
Validity of pledge or other transfer of stock of corporation when not made in the books of the company, as against attachments, executions, or subsequent transfers (Case Note)	996	Publication.	
Effect of taking collateral security upon conditional sale (Case Note)	1065	As affecting libel or slander, see LIBEL AND SLANDER.	
20 L.R.A. (N.S.)		Public buildings.	
		As to mechanics' liens on, see, MECHANICS' LIENS.	
		Public lands.	
		See IMPROVEMENTS.	
		Public money.	
		As to use of school funds, see SCHOOLS.	
		Race.	
		Larceny by fraudulent race or game (Case Note)	1164

Railroads.

As to liability for injury to servant,
see MASTER AND SERVANT.

As to street railways, see STREET RAIL-
WAYS.

Right of property owner to compensa-
tion for interference with light or air
by railroad structure on the com-
pany's own property (Case Note) 1061

Liability of municipality for defect or
obstruction in street by railroad
(Subject Note) 553

Duty of railroad company to avoid inter-
ference with extinguishment of fires
(Case Note) 1110

Right of one crossing railway tracks
to assume that approaching train will
stop at intervening station (Case
Note) 380

Real property.

Deeds of, see DEEDS.

As to curtesy in, see CURTESY.

Receipt.

Right of insurance company in mak-
ing payment of proceeds of life policy
to rely on clause giving company op-
tion as to pay and making receipt
conclusive evidence of payment to
proper persons (Case Note) 928

Relatives.

Contract procured by threats of prose-
cution of a relative (Case Note) 484

Release.

Right in action at law to attack release
for fraud (Case Note) 915

Replevin.

Replevin to recover deed of real prop-
erty (Case Note) 507

Res geste.

See EVIDENCE.

Residence.

Requiring one's residence to be stated
in notice of accident or injury as
condition of municipal liability (Case
Note) 938

Res ipsa loquitur.

See EVIDENCE.

Riot.

Liability of insurer for property de-
stroyed by mob or during riot (Case
Note) 277

Runaway.

Negligence in leaving horse unhitched
in highway (Case Note) 958

Safety appliance acts.

See MASTER AND SERVANT.

Salary.

Garnishment of unearned salary (Case
Note) 912

20 L.R.A. (N.S.)

Sale.

As to damage for breach of warranty,
see DAMAGES.

At auction, see AUCTION.

Constitutionality of bulk sale legisla-
tion (Case Note) 160

Delivery on week day pursuant to con-
tract made on Sunday (Case Note) 88

Effect of taking collateral security up-
on conditional sale (Case Note) 1065

Right of seller of property to municip-
al corporation under invalid con-
tract to take or remove property upon
refusal of payment (Case Note) 110

Arrest under civil process for breach
of warranty (Case Note) 844.

Schools.

Use of common school funds for nor-
mal school or teachers' training
school (Case Note) 1033

Secrets.

See TRADE SECRETS.

Set-off.

By bank against bankrupt's deposit
as a preference within bankruptcy
law (Case Note) 863

Settlement.

Between husband and wife, see HUS-
BAND AND WIFE.

Sidewalk.

See HIGHWAYS.

Signs.

Power of municipal corporation to com-
pel removal of signs encroaching on
street (Case Note) 146

Municipal liability for injury by falling
signs (Subject Note) 646

Slot machine.

Operation of, as gambling (Case Note) 239

Snow.

Municipal liability for injury by snow
in street, see HIGHWAYS.

Specialists.

Degree of care and skill required of
specialists (Case Note) 1030

Station.

See CARRIERS.

Statute of frauds.

See CONTRACTS.

Steam roller.

Municipal liability for injury caused
by (Subject Note) 654

Street railways.

Duty of steam railroad or street rail-
road company to avoid interference
with extinguishment of fires (Case
Note) 1110

Duty of person in charge of street car upon perceiving an object the character of which is unknown, but which is in fact a person helpless on or near the track (Case Note)	987	Trespass. May entry upon land which would otherwise constitute a trespass be justified by private necessity (Case Note)	152
Subcontractor. Lien of, see MECHANICS' LIENS.		Trial. See also JURY.	
Sunday. Violation of Sunday law as a continuing offense (Case Note)	783	Trover. Right of principal to maintain trover or case for money collected by agent or attorney (Case Note)	85
Delivery on week day pursuant to contract made on Sunday (Case Note)	86	Vendor and purchaser. As to statute of frauds, see CONTRACTS. Vendee under executory contract as owner for purposes of insurance where vendor holds legal title (Case Note)	775
Superintending control. Over inferior tribunals (Case Note)	942	Effect of tender by vendee of purchase price before due to put other party in default (Case Note)	338
Of civil courts over courts martial (Case Note)	413	Right of vendee under executory contract to a lien on the land for the amount paid thereon where the contract fails or is rescinded (Case Note)	175
Surplus. On mortgage foreclosure, see MORTGAGE.		Wages. Garnishment of unearned salary (Case Note)	912
Talesmen. Summoning biased talesmen as a contempt (Case Note)	1013	Right of married woman to recover for loss of (Case Note)	215
Tavern. Generally, see INNKEEPER. What constitutes, within liquor license law (Case Note)	107	Waiver. Taking possession of building with knowledge of defects as waiver thereof as against contractor (Case Note)	872
Taxes. Constitutionality of statute making a license, occupation or privilege tax a lien on real property owned by one other than the person assessed (Case Note)	42	Warranty. On sale of goods generally, see SALE. Damages for breach of warranty on sale of goods, see DAMAGES.	
Liability of community property to succession (Case Note)	208	Waters. When does statute of limitations commence to run against action for damages for flooding of land caused by the digging of a ditch or drain (Case Note)	894
Tender. Effect of tender by vendee of purchase price before due, to put other party in default (Case Note)	388	Right of municipality to create nuisance by pollution at a point where its sewers discharge (Case Note)	1050
Thrashing machine. Validity of chattel mortgage of future earnings of (Case Note)	505	Obstruction of surface water in city (Case Note)	155
Tort. Power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single tort (Case Note)	848	Weather. Weather conditions as an independent intervening efficient cause (Case Note)	92
Town. Duty of, with respect to highways, see HIGHWAYS.		Wills. Gift as a fraud on contract to will property (Case Note)	1154
Trade secrets. Protection of trade secrets (Case Note)	933	Settlement of property rights between husband and wife on account of divorce as implied revocation of will (Case Note)	1078
Trees. Authority of municipal officers to cut or trim trees on private property to facilitate use of highway (Case Note)	814	When is there such a failure of testator's purpose or object as to preclude the application of the doctrine of equitable conversion (Case Note)	117
Right of municipal corporation to cut or trim trees within limits of highway (Case Note)	809	As of what time does conversion take place under a direction to sell real property, which postpones the sale to a definitely ascertainable time subsequent to the testator's death (Case Note)	
Municipal liability for injury by trees in highway (Subject Note)	649		

GENERAL INDEX

NOTES ARE INDEXED BY THE WORD "ANNOTATED" AFTER THE PARAGRAPHS TO WHICH THEY APPLY.

(Separate Index to Notes Precedes this.)

ABANDONMENT.

Of logs placed in river, see Logs, 4.

ABUTTING OWNERS.

Right of owners of land abutting on park to cut grass in park, see Parks.

On highways, see Highways.

ACCEPTANCE.

Of goods purchased, see Sale 6.

ACCIDENT INSURANCE.

See Insurance.

ACTION OR SUIT.

By stockholder, see Corporations, 7, 8.

Premature; conditions precedent.

One who, because of the unlawful suspension of his child from a public school, becomes liable for board and tuition in another district, cannot maintain an action for damages against those responsible for the suspension, as soon as he has arranged for accommodation in such district and before he has paid his money. *Douglas v. Campbell*, 20: 205, 116 S. W. 211, — Ark. —.

ACT OF GOD.

Where a cover is put over growing plants and fruit to protect them from ordinary and usual cold and frost, and the cover is burned by the negligence of another, injury to the growing plants and fruit by ordinary and usual cold and frost that should have been expected at the time and place of the negligence is not such an act of God as will relieve from liability the party who negligently burned the cover. *Benedict Pineapple Co. v. Atlantic C. L. R.* Co. 20: 92, 46 So. 732, 55 Fla. 514.

ADMINISTRATORS.

See Executors and Administrators.

ADMISSIONS.

See Evidence.

ADVERTISING.

Power of state to forbid publication of advertisements of liquors kept for sale in other states, see Commerce, 1; Statutes, 3.

20 L.R.A. (N.S.)

AGENCY.

See Principal and Agent.

AIR.

Compensation for interference with, see Eminent Domain, 1.

ALIMONY.

See Divorce and Separation, 1, 2.

AMENDMENT.

Of order overruling motion for new trial, see Motions and Orders, 2.

Of pleading, see Pleading, 1.

AMUSEMENTS.

False imprisonment by restraint upon person refusing to pay entrance fee, see False Imprisonment, 1.

ANIMALS.

Constitutionality of statute levying *per capita* tax on dogs, see Constitutional Law, 9.

Liability for injuries due to frightening of horse by obstruction in highway, see Highways, 3.

Pleading in complaint for injuries by frightening of horse on highway, see Pleading, 6, 7.

Liability of master for injury by horse in hands of servant, see Master and Servant, 23.

Liability for injury done by horse left unattended in street, see Negligence, 10.

Contributory negligence of one injured by runaway horse, see Negligence, 11.

ANTENUPTIAL AGREEMENT.

See Husband and Wife, 3.

APPEAL AND ERROR.

Record on appeal.

1. The filing of the necessary papers to make or complete a record on appeal during the months of July and August is not prevented by a statutory provision that all proceedings to make or complete the record on appeal shall be suspended during those months. *Young v. Lemieux*, 20: 160, 65 Atl. 426, 79 Conn. 434.

2. Compliance with a statute directing the præcipe for a transcript of record to be copied in the transcript is sufficient to present the record to the reviewing court, although a former statute requires the præcipe to be appended to the transcript. *Pere Marquette R. Co. v. Strange*, 20: 1041, 84 N. E. 819, — Ind. —.

3. The alleged erroneous refusal of a trial court to sustain a motion to re-fer a case to a master for further findings will not be considered upon appeal, where the record does not affirmatively show that the motion was ever acted upon by the court and exceptions taken thereto by the complaining party. *Ecker v. Ecker*, 20: 421, 98 Pac. 918, — Okla. —.

4. A motion for new trial is a part of the record without a bill of exceptions, and is covered by a præcipe for a complete transcript of record. *Pere Marquette R. Co. v. Strange*, 20: 1041, 84 N. E. 819, — Ind. —.

Hearing and determination; presumptions.

5. Where a record is silent upon the question of a referee having taken an oath as required by law, the presumption will be indulged that such oath was taken; and, even though omitted it will be held an irregularity only, and waived by a party who proceeds to trial without objection on this point. *Logan v. Brown*, 20: 298, 95 Pac. 441, — Okla. —.

Objections as to which party is estopped.

6. An accused who erroneously procures the introduction of nonprejudicial testimony as to the intoxicating properties of malt liquor alleged to have been unlawfully sold cannot complain thereof upon appeal. *Luther v. State*, 20: 1146, 120 N. W. 125, — Neb. —.

Discretionary matters.

7. The ruling of a trial court that proof of insolvency at a particular date is not too remote to be of evidentiary significance as circumstantially bearing on the question of like insolvency at an earlier date is a decision as to the competency of such evidence, and should not be disturbed on appeal unless clearly wrong. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

Questions not raised below.

8. The objection that defendant, an unincorporated voluntary association, was sued in its common name, cannot be raised for the first time on appeal. *Iron Moulders' Union No. 125 v. Allis-Chalmers Co.* 20: 315, 166 Fed. 45, — C. C. A. —.

9. Objections to the time of making statements as to what counsel intended to prove cannot be raised for the first time on appeal. *Houren v. Chicago, M. & St. P. R. Co.* 20: 1110, 86 N. E. 611, 236 Ill. 620.

10. The question of the effect of vacancy of a building without knowledge of the insurer, prior to the issuance of a vacancy permit, upon the validity of the policy, cannot be raised for the first time on appeal. 20 L.R.A. (N.S.)

Duncan v. National Mut. F. Ins. Co. 20: 340, 98 Pac. 634, — Colo. —.

11. A question of variance between pleading and proof cannot be raised for the first time on appeal. *Houren v. Chicago, M. & St. P. R. Co.* 20: 1110, 86 N. E. 611, 236 Ill. 620.

Errors waived or cured below.

12. The admission of incompetent evidence is not reversible error if the objecting party elicited on cross-examination evidence to the same effect. *Stewart & Co. v. Harman*, 20: 228, 70 Atl. 333, 108 Md. 446.

Review of facts.

13. Where, in a suit, defendant denies any liability to plaintiff and any foundation for the suit, but agrees for a reference of the same for trial before a referee, it is not error for the court, in its order, to state, "it appearing to the court that this is a case involving an accounting," etc., in the absence of any evidence that the referee was influenced in his findings thereby. *Logan v. Brown*, 20: 298, 95 Pac. 441, — Okla. —.

14. Technical errors which do not affect the substantial right of the defendant will not be considered upon appeal, where the record shows that a conviction was fairly obtained. *United States v. Hargo*, 20: 1013, 98 Pac. 1021, — Okla. —.

Grounds for reversal.

15. Admitting expert testimony upon the question of the dangerous character of a machine at which a minor is set at work, in an action by him to hold his employer liable for an injury, is not reversible error where the machinery is so dangerous that the court will take judicial notice of the danger. *Braasch v. Michigan Stove Co.* 20: 500, 118 N. W. 366, 153 Mich. 652.

16. The erroneous admission, in an action against a street car company to recover damages for the death of a person killed on the track, of evidence of a statement by the conductor at the time of the accident admonishing the motorman to make no statement, is not sufficiently prejudicial to require a reversal of a judgment against the company. *Louisville R. Co. v. Johnson*, 20: 133, 115 S. W. 207, — Ky. —.

17. In an action for the price of hay which was to be of a certain quality an error in the admission of evidence that an intending purchaser from the buyer would not take it is rendered nonprejudicial by his testifying fully as a witness as to its quality. *Eaton v. Blackburn*, 20: 53, 96 Pa. 870, — Or. —.

18. It is not prejudicial error to permit a witness by whom the defendant in a criminal case is attempting to prove good character to be asked if witness and defendant had not smoked opium together in a disreputable resort, if the answer is no. *State v. Donaldson*, 20: 1164, 99 Pac. 447, — Utah, —.

19. Upon the question of perjury on the part of one who swore that certain persons were properly registered as voters from a certain place, the admission of evidence

of a prior conversation tending to show that he knew that they could not properly register from that place is not prejudicial error, although it contains statements tending to show the commission of another crime, if the jury is cautioned to disregard that portion of it. *People v. Cahill*, 20: 1084, 86 N. E. 39, 193 N. Y. 232.

20. The exclusion of evidence of an assistant surgeon at an operation, tending to corroborate the evidence of the one who performed the operation, as to conditions found which bear upon the liability of another physician for malpractice, cannot, where the verdict was against defendant, be held non-prejudicial, if it was properly admissible, on the theory that it was merely cumulative. *Capron v. Douglass*, 20: 1003, 85 N. E. 827, 193 N. Y. 11.

21. The question whether instructions given on the trial of a suit for libel regarding particular questions in the case, not related to that of damages, misstate the law, becomes immaterial as not affecting the plaintiff's substantial rights, where the jury finds specially from the evidence that the plaintiff suffered no damage, since it will not be presumed that such finding was induced by instructions regarding points not related to damages. *Coleman v. MacLennan*, 20: 361, 98 Pac. 281, — Kan. —.

22. A reviewing court will not reverse a judgment for error in an instruction in an action by a minor to recover damages for personal injuries, which does not expressly deny a recovery for reduced earning capacity during minority, to which no exception was taken at the time, although the statute permits the assignment of errors upon the charge after judgment, where, from the whole instruction, the jury must have understood that such damages could not be allowed, they having been instructed that he could not recover for lost time. *Braasch v. Michigan Stove Co.* 20: 500, 118 N. W. 366, 153 Mich. 652.

23. Mere failure to instruct the jury on a particular issue is not reversible error, unless a specific instruction, good in point of law, covering the omission, is requested. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

24. It is reversible error for the judge to communicate with the jury otherwise than as provided by law, as by holding conferences with the foreman not in open court. *Texas Midland R. Co. v. Byrd*, 20: 429, 115 S. W. 1163, — Tex. —.

25. A judgment of conviction of murder will be reversed where the record shows that, after the regular panel of jurors had been exhausted, the deputy marshal, in summoning additional talesmen, improperly discriminated against men acquainted with defendant's counsel, for the purpose of obtaining the conviction. *United States v. Hargo*, 20: 1013, 98 Pac. 1021, — Okla. —.

26. The taking of a hat which had been introduced in evidence in an action for damages for an assault and battery, to the

jury room, constitutes an unprejudicial irregularity not affording ground for a reversal, where the evidence adduced upon a motion for a new trial showed beyond question that the act was an innocent mistake of one of the jurors, and that no use was made of the hat by the jury which could in any way affect or influence the minds of the jurors or work any injury to the defendant. *Morris v. Miller*, 20: 907, 119 N. W. 458, — Neb. —.

27. A trial court which deems the verdict in an action for damages to be excessive may impose upon the successful party the alternative of accepting a reduced amount or of submitting to a new trial; but it has no power to render judgment for a smaller sum against the plaintiff's objection, after refusal to remit, and such action is error as to both parties. *Cogswell v. Atchison*, T. & S. F. R. Co. 20: 837, 99 Pac. 923, — Okla. —.

Judgment.
28. A judgment will not be reversed because of an instruction which, although not affecting the real controversy between the parties, allows damages to one party to which he is not entitled, where the amount found under it can be segregated from the rest of the verdict if the successful party will remit such amount. *Eaton v. Blackburn*, 20: 53, 96 Pac. 870, — Or. —.

29. A creditor upon whose objection a bankrupt is denied his discharge for failure to disclose assets will not be required to pay the costs of appeal, although the decision is reversed, where the bankrupt refused to furnish information necessary to a proper disposition of the case. *Re McCrea*, 20: 246, 161 Fed. 246, 88 C. C. A. 282.

APPORTIONMENT.

Of costs where both parties obtain judgment, see Costs.

ARBITRATION.

Of loss of insured property, see Insurance, 19.

ARREST.

By police officer without warrant, see False Imprisonment, 2, 3.

Ne exeat bond to secure release from arrest, see Ne Exeat.

A warrant describing defendant as of a certain municipality in a certain county located within the state is sufficient to determine his residence within the United States, so as to entitle him to the benefit of a statutory exemption from arrest for debt. *Caldbeck v. Simanton*, 20: 844, 71 Atl. 881, — Vt. —.

ASSAULT AND BATTERY.

Taking object in evidence in action for, into jury room as prejudicial error, see Appeal and Error, 26.

Evidence in action for, see Evidence, 34.
Instruction as to right of self defense in action for assault, see Trial, 15.

1. A policeman on an Indian reservation

who assaults and imprisons a person of Indian blood who, upon going to a train to meet his wife and children, disregards his directions to keep back from the entrance to the train, is liable therefor in damages. *Deragon v. Sero*, 20: 842, 118 N. W. 839.

2. Where two persons engage voluntarily in a fight, either can maintain an action against the other to recover the actual damages for the injuries he may receive; and the fact that the combat was by agreement or mutual consent of the parties to it is no defense. *Morris v. Miller*, 20: 907, 119 N. W. 458, — Neb. —. (Annotated)

ASSIGNMENT.

Of stock, see Corporations, 2, 3.
Burden of proving fraud in assignment of legacy, see Evidence, 5.

ASSOCIATIONS.

Objecting for first time on appeal that association was sued in its common name, see Appeal and Error, 8.
See also Building and Loan Associations.

ASSUMPSIT.

Right of state manager to maintain action to recover from agent premiums collected and not paid in, see Parties.

ASSUMPTION OF RISK.

By passenger, see Carriers, 12.
By servant, see Master and Servant, 12.

ATTORNEY GENERAL.

Power of, to remove municipal officers, see Officers, 1, 2.

1. A statute requiring county attorneys to prosecute violations of statutes regulating the sale of intoxicating liquors does not limit or exclude the power of the state, through the attorney general, to prosecute such violations. *State ex rel. Young v. Robinson*, 20: 1127, 112 N. W. 269, 101 Minn. 277.

2. The attorney general of a state possesses, in addition to the authority expressly conferred upon him by statute, all common-law powers incident to and inherent in the office. *State ex rel. Young v. Robinson*, 20: 1127, 112 N. W. 269, 101 Minn. 277.

ATTRACTIVE NUISANCE.

Injury to children by, see Negligence, 8, 9.

AUCTION.

Forfeiture of auctioneer's license as penalty in civil suit by other merchant, see License.

As nuisance, see Nuisances, 5.

1. A bidder at a public auction may withdraw his offer to purchase, or the owner his offer to sell, at any time before the bid is accepted by the fall of the hammer. *Anderson v. Wisconsin C. R. Co.* 20: 1133, 120 N. W. 39, — Minn. —.
20 L.R.A. (N.S.)

2. A bid for property at public auction is merely an offer to purchase at the price named, and no contractual relation arises until acceptance of the bid. *Anderson v. Wisconsin C. R. Co.* 20: 1133, 120 N. W. 39 — Minn. —.

3. An announcement or advertisement that certain property will be sold at public auction to the highest bidder is not an offer to sell which becomes binding, even conditionally, on the owner when a bid is made, but is a mere declaration of an intention to hold an auction at which bids will be received. *Anderson v. Wisconsin C. R. Co.* 20: 1133, 120 N. W. 39, — Minn. —. (Annotated)

AUTOMOBILES.

Contributory negligence of person injured by, as question for jury, see Trial, 4.

Cross-examination of plaintiff in action for injuries by, see Witnesses, 1.

A pedestrian is not bound, as matter of law, when lawfully using the public highways, to be continuously looking or listening to ascertain if auto cars are approaching, under penalty that, upon his failure to do so, if he is injured his own negligence must be conclusively presumed. *Gerhard v. Ford Motor Co.* 20: 232, 119 N. W. 904, — Mich. —. (Annotated)

AWNINGS.

Requiring removal of stationary awnings, see Municipal Corporations, 1, 2; Trial, 2.

BAIL AND RECOGNIZANCE.

Validity of bond to indemnify bail, see Contracts, 11.

Right of bailor to whom bond for indemnity has been given to have deed by obligor in bond set aside, see Fraudulent Conveyances, 4.

Ne exeat bond to secure release from arrest, see *Ne Exeat*.

After conviction of an accused, for whose enlargement bail had been given, when he was present in court and his passing into custody of the sheriff, the court cannot, without the knowledge of the sureties, upon granting him a new trial, permit him to go at large under the former bond. *Miller v. State*, 20: 861, 48 So. 360, — Ala. —. (Annotated)

BANKING.

See Banks.

BANKRUPTCY.

Ne exeat bond to secure release of bankrupt, see *Ne Exeat*.

Right of trustee in bankruptcy to maintain partition, see Partition.

Effect of failure to record conditional sale to make it ineffectual against trustees in bankruptcy of vendee, see Sale 5.

1. The release of the honest, unfortunate, and insolvent debtor from the burden

of his debts, and his restoration to business activity in the interest of his family and the general public, is one of the main objects of the bankruptcy law of 1898. *Hardie v. Swofford Bros Dry Goods Co.* 20: 785, 165 Fed. 588, — C. C. A. —.

Who may be adjudged bankrupt.

2. A farmer is not taken out of the class engaged principally in farming, which cannot, under the provisions of the bankruptcy act, be subjected to involuntary bankruptcy proceedings, by the fact that he maintains cows from the produce of his farm and that bought elsewhere, and sells the milk at retail, although he also purchases and distributes milk of other producers. *Gregg v. Mitchell*, 20: 148, 166 Fed. 725, — C. C. A. —. (Annotated)

Preferences.

3. The set-off by a bank against a depositor's account of a note which it bona fide holds against him is not a transfer or preference within the provisions of the bankruptcy act; and it will therefore be upheld in favor of both the bank and the indorser from whom the note was received, although made within four months of the time the depositor becomes bankrupt. *Booth v. Prete*, 20: 863, 71 Atl. 938, 81 Conn. 638. (Annotated)

Discharge.

Costs of appeal from denial of discharge in bankruptcy, see Appeal and Error, 29.

4. Failure of one employed as a mine superintendent to keep books of his personal financial affairs shows no fraudulent intent which will deprive him of the privilege of discharge in bankruptcy. *Re McCrea*, 20: 246, 161 Fed. 246, 88 C. C. A. 232. (Annotated)

5. The materially false statement the use of which in obtaining credit will prevent one's receiving his discharge in bankruptcy must be intentionally or knowingly untrue; and therefore a statement by the bookkeeper of the applicant for discharge prepared from books not fully posted, which is believed to be approximately true, but which the actual state of the business proved to be untrue, will not prevent a discharge. *Gilpin v. Merchants' Nat. Bank*, 20: 1023, 165 Fed. 607, — C. C. A. —. (Annotated)

6. A bankrupt cannot be deprived of his discharge for failure to include in his schedule stock in a corporation which he had pledged as collateral for a debt, the property of the corporation itself having been disposed of by foreclosure of a mortgage. *Re McCrea*, 20: 246, 161 Fed. 246, 88 C. C. A. 282.

7. A bankrupt cannot be said to have fraudulently or knowingly made a false oath, which will deprive him of the right to discharge, in not including in his schedule an interest in his deceased father's estate, where it is not obvious what interest belonged to him, or that it was transferable, while he claims to have transferred it, 20 L.R.A. (N.S.)

even though the transfer was so informal as not to have been effective. *Re McCrea*, 20: 246, 161 Fed. 246, 88 C. C. A. 282.

8. A bankrupt cannot be denied his discharge for wilfully refusing to obey an order to produce his books, if they were lost or destroyed by fire. *Re McCrea*, 20: 246, 161 Fed. 246, 88 C. C. A. 282.

9. That goods were procured by a partnership on credit through false representations in writing of one partner as to the condition of the concern will not prevent the discharge in bankruptcy of his copartner, who had no knowledge of the wrongdoing. *Hardie v. Swofford Bros. Dry Goods Co.* 20: 785, 165 Fed. 588, — C. C. A. —. (Annotated)

BANKS.

Set-off by, against depositor's account of note against him as preference, see Bankruptcy, 3.

Rights and liabilities as to certified checks, see Checks.

Payment of checks; forgeries.

1. That a bank which has paid checks upon forged indorsements cannot show that it could have protected itself had it received prompt notice of the forgery will not prevent the failure to give such notice from depriving the depositor of his right to require the bank to make good to his account the amount of payment so made. *McNeely Co. v. Bank of North America*, 20: 79, 70 Atl. 891, 221 Pa. 588. (Annotated)

Receiving deposit when insolvent.

Sufficiency of indictment for receiving deposit while insolvent, see Indictment, etc.

2. The status of an officer of a bank who receives money on deposit for the credit of the depositor, and which is subject to withdrawal by him at his pleasure, as regards a statute making it an offense punishable by imprisonment to receive money on deposit in a bank, where the one receiving it knows, or has good cause to know, that the bank is unsafe or insolvent, is fixed, as regards guilt under such statute, as of the time of the deposit; and is not affected by the fact that the depositor is indebted to the bank on an indebtedness not then due, but which, in fact, does mature shortly, so as to absorb the deposit, in part, before the bank is forced to suspend, as such deposit, being at the disposal of the depositor, cannot be regarded as having been made to apply upon an undue indebtedness. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

3. The call of a statute making it an offense punishable by imprisonment to receive money on deposit in a bank, where the one receiving it knows, or has good cause to know, that the bank is unsafe or insolvent, as regards the act constituting a criminal fraud, is a deposit such as will create the relation of debtor and creditor, and not one which, in practical effect, is

only payment of an indebtedness to the bank. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

4. A bank is "unsafe or insolvent" within the meaning of a statute making it an offense punishable by imprisonment to receive money on deposit in a bank, where the one receiving it knows, or has good cause to know, that the bank is unsafe or insolvent, when the cash value of its assets, realizable in a reasonable time, in case of liquidation by its proprietors as ordinarily prudent persons would ordinarily close up their business, is not equal to its liabilities, exclusive of stock liabilities; and such term does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —. (Annotated)

5. Where bank officers are largely indebted thereto and possess property to a very considerable amount as compared to such indebtedness, the fact that some of the officers, equally interested in the bank and such property, are not debtors of the bank, but, nevertheless, agreed to join in conveying the property to strengthen the bank as to paper on which they were not liable, thereby creating a moral obligation only so to join, which obligation the other officers believed would be, and in fact was, redeemed, does not militate against the outside interests of such nondebtor officers being considered by the others before the transfer, on the question of whether the bank is insolvent within the meaning of a statute prohibiting the receipt of deposits after the one receiving them knows, or has good cause to know, that the bank is unsafe or insolvent. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

6. The deposit of a check in a bank, where it is treated as money subject to withdrawal by the depositor at his pleasure, constitutes a deposit of money within the meaning of a statute making it an offense punishable by imprisonment to receive money on deposit in a bank, where the one receiving it knows, or has good cause to know, that the bank is unsafe or insolvent. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

7. In case officers of a bank are largely indebted thereto, and possess property interests in a corporation to a very significant amount, as compared to such indebtedness, and they convey such property to the bank on account of such indebtedness, pursuant to an understanding of long standing, the situation before the conveyance should be regarded substantially the same as that thereafter, as regards the mental state of the officers respecting the condition of the bank as to solvency, in a prosecution against them for accepting deposits while insolvent. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

BATTERY.

See Assault and Battery.
20 L.R.A. (N.S.)

BID.

At auction, see Auctions.

BILLS AND NOTES.

Effect of taking collateral security on conditional sale, see Sale, 2.

Sufficiency of draft as tender for rent, see Tender.

BLASTING.

Injury to servant by, see Master and Servant, 11, 12, 19.

BONDS.

Validity of bond to indemnify bail, see Contracts, 11.

Right of bailor to whom bond for indemnity has been given to have deed by obligor in bond set aside, see Fraudulent Conveyances, 4.

Ne exeat bonds, see *Ne Exeat*.

Right of surety on indemnity bond to compel principal to pay in exoneration before payment by surety, see Principal and Surety, 3.

Exemption from taxation of money and interest bearing securities in sinking fund accumulated by municipality to retire bonds, see Taxes, 2.

BOYCOTT.

Injunction against, see Injunction, 2.

BROKERS.

1. A real estate broker cannot, after accepting, in response to his request for price, the owner's offer to sell at a certain price less a commission to himself, enforce a conveyance to himself, if, to his knowledge, the property was worth more than the price named, of which fact he failed to inform the owner. *Rodman v. Manning*, 20: 1158, 99 Pac. 657, — Or. —. (Annotated)

2. The financial inability of the purchaser to perform his contract to purchase real estate does not deprive the broker of his commission where a binding contract for sale is effected through his agency, in the absence of fraud or warranty, on his part, of the customer's financial ability. *Moore v. Irvin*, 20: 1168, 116 S. W. 682, — Ark. —. (Annotated)

BUCKET SHOP.

As place for gaming, see Gaming, 3.

BUILDING AND LOAN ASSOCIATIONS.

1. One lending money to a building association with knowledge that it was borrowed for the purpose of paying withdrawing members cannot compel a repayment on the ground of estoppel to deny the power to borrow. *Standard Sav. & L. Asso. v. Aldrich*, 20: 393, 163 Fed. 216, 89 C. C. A. 646.

2. One loaning money to a building association with knowledge that it was borrowing money and assigning securities for an illegal purpose cannot claim the standing of an innocent party. *Standard Sav. &*

L. Asso. v. Aldrich, 20: 393, 163 Fed. 216, 89 C. C. A. 646.

3. One lending money to a building association with knowledge of its intention to use it for an illegal purpose can recover the money only to the extent that he shows that the association has been benefited by it. Standard Sav. & L. Asso. v. Aldrich, 20: 393, 163 Fed. 216, 89 C. C. A. 646.

4. A building and loan association has no implied power to borrow money to pay a withdrawing stockholder. Standard Sav. & L. Asso. v. Aldrich, 20: 393, 163 Fed. 216, 89 C. C. A. 646. (Annotated)

5. One loaning money to a building association to satisfy the claims of withdrawing members, taking an assignment of mortgages of borrowing members as security, cannot hold the mortgages against the claims of a receiver of the association, since he is charged with knowledge of the want of power of the association to make the assignment. Standard Sav. & L. Asso. v. Aldrich, 20: 393, 163 Fed. 216, 89 C. C. A. 646, **Insolvency.**

6. One loaning money for an illegal purpose, to an insolvent building association, may recover what remains in its hands, and what it has expended for legitimate purposes, on the theory that *ex aequo et bono* it ought not to retain it. Standard Sav. & L. Asso. v. Aldrich, 20: 393, 163 Fed. 216, 89 C. C. A. 646.

7. The insolvency of a building and loan association suspends the power of the directors to apply funds to the payment of withdrawing shareholders. Standard Sav. & L. Asso. v. Aldrich, 20: 393, 163 Fed. 216, 89 C. C. A. 646.

BUILDING CONTRACT.

Damages for breach of, see Damages, 6. Discrimination by owner completing building after contractor's abandonment in payment of materialmen, see Mechanics' Liens, 4.

In general, see Contracts.

BUILDINGS.

Moving along highway see Highways, 1.

BULK.

Statute regulating sales of stock of goods in bulk, see Constitutional Law, 6, 7, 10; Fraudulent Conveyances, 1, 2.

BURDEN OF PROOF.

See Evidence, 1-17.

BY-LAWS.

Estoppel of insurer to claim that by-laws have been violated, see Insurance, 17.

CANCELTATION.

Of stock fraudulently issued, see Corporations, 6.

20 L.R.A. (N.S.)

CARDS.

Larceny by obtaining money by fraud in card game, see Larceny.

CARRIERS.

Who are passengers.

Question for jury as to existence of relation of passenger, see Trial, 3.

1. One who is upon the premises of a railroad company for the purpose of boarding a train in due course, and has purchased a ticket entitling him to transportation, is, while approaching the train upon which he is to be carried, a passenger. Pere Marquette R. Co. v. Strange, 20: 1041, 84 N. E. 819, — Ind. —.

2. A passenger on a crowded street car does not cease to be such by momentarily stepping to the ground to enable other passengers to leave the car. Tompkins v. Boston Elevated R. Co. 20: 1063, 87 N. E. 488, 201 Mass. 114.

3. A passenger alighting from a railroad train has a right to remain in the railroad waiting room a reasonable time, awaiting the arrival of friends who are to meet him, without losing his rights as a passenger. Powell v. Philadelphia & R. R. Co. 20: 1019, 70 Atl. 268, 220 Pa. 638. (Annotated)

4. A passenger who, upon alighting from a train, goes to the station, which is some distance from the place where he left the train, simply to await the arrival of a street car upon which he intends to become a passenger, and which could have been boarded from points less distant, cannot claim the rights of a passenger if injured by the negligence of the railroad company. Powell v. Philadelphia & R. R. Co. 20: 1019, 70 Atl. 268, 220 Pa. 638.

5. The mere use, by a passenger who has alighted from a train, of a public crossing, in getting to a station on the opposite side of the track, which is nearest his destination, does not *per se* terminate his relation to the carrier. Powell v. Philadelphia & R. R. Co. 20: 1019, 70 Atl. 268, 220 Pa. 638.

Duty to passenger; negligence.

Damages for negligent injury to passenger causing miscarriage, see Damages, 10.

Mental anguish as element of damages for injury to passenger, see Damages, 13.

Presumption of negligence from injury to passenger, see Evidence, 9.

6. A railroad company owes to a passenger, approaching a train which he intends to board, the duty of exercising only reasonable care for his protection. Pere Marquette R. Co. v. Strange, 20: 1041, 84 N. E. 819, — Ind. —.

7. An attempted guidance of passengers to a train by a station master, who, with a light in his hand, takes a proper place on the platform, and calls to the passengers to come to him, is not rendered negligent by the fact that one of the passengers thinks

that the call comes from the other side of the track, and is injured in attempting to cross it. *Pere Marquette R. Co. v. Strange*, 20: 1041, 84 N. E. 819, — Ind. —.

8. A railroad company is not bound to guide a passenger from the waiting room to his train, even at night, where he is a mature, normal man of experience, and the platform is in good condition, lying between the waiting room and the train, and he discloses no circumstances requiring guidance. *Pere Marquette R. Co. v. Strange*, 20: 1041, 84 N. E. 819, — Ind. —.

(Annotated)

Negligence of passenger.

See also *supra*, 8.

9. It is not necessarily negligence *per se* for a passenger to rest his hand on the door jamb while attempting to leave a car, so as to prevent his holding the carrier liable in case the door slams shut, catching and crushing his fingers. *Christensen v. Oregon S. L. R. Co.* 20: 255, 99 Pac. 676, — Utah, —.

10. A passenger cannot hold the railroad company liable for his injury, because of its failure properly to light its platform, if, being a stranger and going from the waiting room onto a safe platform, he approaches the track, half facing the approaching train, and, with the headlight in full view, needlessly attempts to cross the track directly in front of the engine under the erroneous impression that it had stopped. *Pere Marquette R. Co. v. Strange*, 20: 1041, 84 N. E. 819, — Ind. —.

11. A street car company is not liable for injury to a boy who, upon being harshly told by the conductor to show him his father, who the boy asserts has paid his fare, attempts to go to the other end of the car, along the running board, and falls off to his injury, where there is nothing to lead the conductor to anticipate such action by the boy, who might have pointed out his father without changing his position. *Goodfellow v. Detroit United R. Co.* 20: 1123, 119 N. W. 900, — Mich. —. (Annotated)

12. One voluntarily becoming a passenger on a street car so crowded that he is compelled to ride in the vestibule, with knowledge of a rule that persons riding on platforms do so at their own risk, assumes the risk of injury from being compelled temporarily to alight to enable other passengers to leave the car, including that of having the car negligently started before he resumes a safe position. *Tompkins v. Boston Elevated R. Co.* 20: 1063, 87 N. E. 488, 201 Mass. 114.

Safety of approaches and platforms.

13. A railroad company is liable to a passenger who, because of obstructions on the path providing egress from its station, is compelled to walk so close to tracks used by trains that, without negligence on his part, he is struck by a train passing along the track. *Powell v. Philadelphia & R. R. Co.* 20: 1019, 70 Atl. 268, 220 Pa. 638.

14. A railway company is liable to a person who goes to its depot to meet an 20 L.R.A. (N.S.)

incoming passenger for the purpose of continuing, after meeting him, a business negotiation between them, for injuries received by him because of the negligence of the company in permitting its station platform to remain in a dangerous condition, on account of which such person falls and is injured. *Cogswell v. Atchison, T. & S. F. R. Co.* 20: 837, 99 Pac. 923, — Okla. —.

(Annotated)

15. A railway company is bound to exercise ordinary care for the safety of a person who is upon its premises for the purpose of meeting an incoming passenger, and is liable to such person for injuries sustained on account of the railway company's failure to exercise such care. *Cogswell v. Atchison, T. & S. F. R. Co.* 20: 837, 99 Pac. 923, — Okla. —.

16. A railroad company is not bound to keep its station safe as for invited guests, for a mere friend or acquaintance of an intending passenger who resorts to it to see him begin his journey. *Galveston, H. & S. A. R. Co. v. Matzdorff*, 20: 833, 112 S. W. 1036, — Tex. —.

(Annotated)

17. A railroad company is liable for injury to a passenger through failure to light the path providing egress from its station sufficiently to enable the passenger to avoid collision with a train on an adjoining track. *Powell v. Philadelphia & R. R. Co.* 20: 1019, 70 Atl. 268, 220 Pa. 638.

Of freight; generally.

Imposing on carrier additional charge for goods lost in transit in case of failure to pay within certain time, see Constitutional Law, 4.

Ad interim injunction to restrain carrier from discrimination against shipper, see Injunction, 11.

Damages for failure to supply refrigerator cars, see Damages, 7.

18. The carrier's common-law obligation indifferently to serve the public in the receipt and transportation of goods does not inhibit a carrier by sea from making specific arrangements in advance for the transportation of certain goods by a particular vessel, provided that privilege is indifferently extended to all patrons, or if the grant of such privilege to shippers of that commodity does not interfere with the carrier's discharge of duty to the shippers of other commodities with respect to the receipt and transportation of their goods. *Ocean Steamship Co. v. Savannah Locomotive Works & S. Co.* 20: 867, 63 S. E. 577, — Ga. —.

19. A common carrier by sea cannot lawfully reject lumber, a commodity which it professes to carry, and afterwards receive and transport cotton and other goods, where, at the time of the tender, there was room in the vessel for the rejected lumber, and the safety of the vessel would in no wise be imperiled. *Ocean Steamship Co. v. Savannah Locomotive Works & S. Co.* 20: 867, 63 S. E. 577, — Ga. —.

20. The common-law obligation of a carrier by sea is to receive goods which it is

able and accustomed to carry in the order of their tender, without discrimination as between shippers of the same or of different commodities. *Ocean Steamship Co. v. Savannah Locomotive Works & S. Co.* 20: 867, 63 S. E. 577, — Ga. —.

21. A navigation company whose charter confers no power of eminent domain, nor imposes any public duties, may decline to receive goods in excess of its carriage capacity, and may select the character of goods it proposes to carry, or discontinue to carry any particular commodity, since it is a public carrier only as to the goods it proposes to carry. *Ocean Steamship Co. v. Savannah Locomotive Works & S. Co.* 20: 867, 63 S. E. 577, — Ga. —.

Contract or duty to furnish cars.

22. A railroad company which has obligated itself to furnish refrigerator cars to transport garden truck to market cannot escape liability for breach of that duty upon the ground that the crop was unusually large, if it was no larger than might reasonably have been expected from the acreage planted, knowledge of which the railroad company either had, or had the means of obtaining. *Atlantic C. L. R. Co. v. Geraty*, 20: 310, 166 Fed. 10, — C. C. A. —.

23. A railroad company which owns no refrigerator cars may be held liable for not furnishing them to shippers of garden truck, if it led them to expect that, if they raised the truck, the refrigerator cars necessary for its proper transportation would be furnished. *Atlantic C. L. R. Co. v. Geraty*, 20: 310, 166 Fed. 10, — C. C. A. —. (Annotated)

CARRYING WEAPONS.

The provisions of Wilson's Okla. Rev. & Ann. Stat. of 1903, §§ 2502, 2503, prohibiting the carrying of certain weapons not recognized in civil warfare, are not repugnant to each other or violative of article 2, § 26 of the Bill of Rights of the Oklahoma Constitution, granting citizens the right to keep and carry arms, subject to legislative control of the carrying of weapons, but are valid provisions under the enabling act and § 2 of the schedule of the Constitution, extending territorial laws to the state of Oklahoma, *Ex parte Thomas*, 20: 1007, 97 Pac. 260, — Okla. —. (Annotated)

CARS.

Carrier's duty to furnish, see *Carriers*, 22, 23; *Damages*, 7.

CERTIFICATION.

Of check, see *Checks*.

CERTIORARI.

The determination of trustees of a police pension fund that an injury was contracted by a policeman in the line of his duty is one of fact, which cannot be reviewed by the courts on certiorari. *State ex rel. McManus v. Board of Trustees*, 20: 1175, 119 N. W. 806, — Wis. —. 20 L.R.A. (N.S.)

CHARITIES.

1. The superintendent of a state lunatic asylum is not, under the doctrine of *respondeat superior*, responsible for injuries inflicted upon inmates of the asylum by employees whom he appointed. *Ketterer v. Kentucky State Bd. of Control*, 20: 274, 115 S. W. 200, — Ky. —.

2. A state board having control of a lunatic asylum which is supported by state funds is not liable for injuries inflicted by its employee on an inmate of the asylum, although it knew, or might have known, that he was in the habit of mistreating such inmates. *Ketterer v. Kentucky State Bd. of Control*, 20: 274, 115 S. W. 200, — Ky. —.

CHATTEL MORTGAGE.

A chattel mortgage which purports to assign, to secure a specified debt, all the future earnings of a specified threshing machine, also of any other threshing machines operated by the mortgagor and of the men and teams operating them, which may accrue for threshing during the then-ensuing two years within three designated townships, is void against creditors who had no actual notice thereof. *Dyer v. Schneider*, 20: 505, 118 N. W. 1011, — Minn. —. (Annotated)

CHECKS.

See also *Banks*.

1. The transfer of a certified check is an assignment of money to meet it; and the bank making the certification is liable therefore to the holder. *Blake v. Hamilton Dime Sav. Bank*, 20: 290, 87 N. E. 73, 79 Ohio, 189.

2. The certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. *Blake v. Hamilton Dime Sav. Bank*, 20: 290, 87 N. E. 73, 79 Ohio, 189.

3. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay; and a bank that has received a certified check for deposit, and has credited the depositor with the amount of it, is a bona fide holder, and may enforce payment of it, notwithstanding it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor. *Blake v. Hamilton Dime Sav. Bank*, 20: 290, 87 N. E. 73, 79 Ohio, 189. (Annotated)

CLUBS.

Dispensing of intoxicating liquors by, see *Intoxicating Liquors*, 6-8.

C. O. D.

C. O. D. sale of intoxicating liquors, see *Intoxicating Liquors*, 10.

COLLATERAL ATTACK.

On order changing boundaries of school district, see Schools, 2.

COMMERCE.

Transportation of liquor as interstate commerce, see Intoxicating Liquors.

3.

1. Since the passage by Congress of the Wilson act, a state may forbid the publication, within its limits, of advertisements of the keeping for sale of intoxicating liquors at places in other states. *State v. J. P. Bass Publishing Co.* 20: 495, 71 Atl. 894, — Me. —

Regulating railroad companies.

2. Requiring an interstate railroad company to light its crossings in a city does not interfere with its rights as an interstate road, although the effect will be to compel those in charge of the engine to run slowly and cautiously in approaching the light to prevent its interfering with their duty to keep a lookout along the track by obscuring vision past it. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONS.

Of brokers, see Brokers.

COMMON CARRIERS.

See Carriers.

COMMUNITY PROPERTY.

See Husband and Wife.

COMPENSATION.

Of brokers, see Brokers, 2.

Of officer, see Officers, 5, 6.

CONDITIONAL SALE.

See Sale, 2-5.

CONFESSIONS.

Evidence of, see Evidence, 20.

CONFIDENTIAL COMMUNICATIONS.

See Evidence, 21.

CONFLICT OF LAWS.

1. Whether residence within a state for the statutory period of limitation will prevail as a plea in bar upon a written contract, made in another state, depends upon the nature of the contract, its maturity, and the date from which the statute begins to run. *Sterrett v. Sweeney*, 20: 963, 98 Pac. 418, 15 Idaho, 416.

2. Where a resident of Idaho goes into the state of Washington, and makes a partial payment upon a Washington contract, after its maturity, and before such contract is barred by the statute of limitations of that state, upon his return to Idaho, the contract follows him as made, and is enforceable under the laws of that state, and the statute of limitations of Idaho continues to run upon his re-entry into that state after such payment. *Sterrett v. Sweeney*, 20: 963, 98 Pac. 418, 15 Idaho, 416.

3. In order to determine the application of the statute of limitations of one state to a contract entered into in another state, it is necessary to examine the contract and the laws of such other state for the purpose of determining the date from which the statute runs. *Sterrett v. Sweeney*, 20: 963, 98 Pac. 418, 15 Idaho, 416.

CONSIDERATION.

For contracts, see Contracts, 1.

CONSOLIDATION.

Of corporations, see Corporations, 1.

CONSTITUTIONAL LAW.**Delegation of power.**

1. The legislature may delegate to a municipality the selection of the character of light which it will require a railroad company to maintain at its street crossings. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

Property rights; due process of law; freedom of contract.

2. A state constitutional provision that no person shall be deprived of property without due process of law, and the provisions of the 14th Amendment of the United States Constitution as to property rights, extend to the property held and used by a railroad corporation, since the beneficial use of such property is in natural persons, and the law forbids the doing by indirection that which is forbidden to be done directly. *Seaboard A. L. R. Co. v. Simon*, 20: 126, 47 So. 1001, — Fla. —

3. The provisions of the Ohio Constitution forbid the laying of an imposition upon the private property of one for the sole benefit of another. *Alma Coal Co. v. Cozad*, 20: 1092, 87 N. E. 172, 79 Ohio St. 348.

4. A statute imposing on railroads alone an additional charge for goods lost in transit in case of failure to pay any claim within a certain time is inoperative, as it provides for an unreasonable classification that in effect denies to those operating railroads the constitutional guaranty of due process of law and the equal protection of the law; since, as the duty of a common carrier to pay for goods lost in transit is one that applies to all common carriers alike, there is no just basis for the classification. *Seaboard A. L. R. Co. v. Simon*, 20: 126, 47 So. 1001, — Fla. — (Annotated)

5. A statute providing for the punishment of any person who shall keep open any playhouse or theater on Sunday does not apply to the opening of such place for religious and other quiet, legitimate, and orderly exercise, and, therefore, unconstitutionally interfere with property rights of the owner as forbidding legitimate use of his property on that day. *State v. Herald*, 20: 433, 92 Pac. 376, 47 Wash. 538.

6. No unconstitutional interference with property rights is affected by requiring retail merchants to file notice of intention to sell the whole or a large part of their stocks, seven days before the sale, under penalty of the sale being voidable at the instance of creditors. *Young v. Lemieux*, 20: 160, 65 Atl. 436, 79 Conn. 434. (Annotated)

7. A statute requiring, under penalty of having the sale presumed fraudulent as to the creditors, one about to sell a stock of merchandise in gross or in a manner out of the due course of business to make an inventory and list of his creditors and notify them of the proposed sale, which is not required of persons selling other kinds of property under similar circumstances, unconstitutionally deprives him of liberty and property. *Off v. Morehead*, 20: 167, 85 N. E. 264, 235 Ill. 40.

8. A railroad company is not entitled to a hearing upon the question of the passage of an ordinance requiring it to light its street crossings. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

Police power.

9. A statute requiring the levy and collection, as of other taxes, of a *per capita* tax on dogs upon the real estate upon which the dogs may have been kept and harbored, notwithstanding the owner of such real estate had no knowledge that the dogs had been harbored thereon, and was not consenting thereto, is unconstitutional and void, it being an arbitrary and unreasonable exercise of police power, not required by the general welfare. *Mirick v. Gims*, 20: 42, 86 N. E. 880, 79 Ohio, 174. (Annotated)

10. Requiring a retail merchant to file notice of intention to sell the whole or a large part of his stock seven days prior to the sale, under penalty of the sale being voidable at the instance of creditors, is within the police power of the state. *Young v. Lemieux*, 20: 160, 65 Atl. 436, 79 Conn. 434. (Annotated)

CONSTRUCTION.

Of contracts, see Contracts, 8, 9.

Of statutes, see Statutes, 3.

CONTEMPT.

Unlawful, impartial, or improper conduct on the part of any officer whose duty it is to summon a jury or to select and summon talesmen when the regular panel has been exhausted, in selecting or summoning such juries or talesmen, constitutes gross contempt of court, meriting severe punishment. *United States v. Hargo*, 20: 1013, 98 Pac. 1921, — Okla. —. (Annotated)

CONTRACTS.

As to damages, see Damages.

As to antenuptial contract, see Husband and Wife, 3.

Mandamus to compel city engineer to furnish monthly estimates of completion of work under public contract, see Mandamus, 3, 4.

Architect contracting for labor or material before abandonment of contract by contractor as agent of owner, see Mechanics' Liens, 5.

Discrimination by owner completing building after contractor's abandonment in payment of materialmen, see Mechanics' Liens, 4.

Liquidated damages for failure to complete building, see Damages, 6.

Injunction against interference with contracts, see Injunction, 5.

Sufficiency of allegation of damages in action for breach, see Pleading, 2.

As to termination of contract of agency, see Principal and Agent.

Damages for improper termination of agency contract, see Damages, 5, 14.

Specific performance of, see Specific Performance.

Delivery on week day pursuant to contract made on Sunday, see Sunday.

Consideration.

1. A contract entered into between copartners upon dissolution of the copartnership, whereby one of the partners, in consideration of being paid in cash the full value of his interest therein, agreed with the purchasing partner "not to engage for the next two years" in the same business theretofore conducted by the firm, in the same city, "in the manner aforesaid, or with any partner, partners, firm, company, or corporation," for such period, is based upon a sufficient consideration, as there was no legal duty resting upon either partner to purchase the interest of the other. *Siegel v. Marcus*, 20: 769, 119 N. W. 358, — N. D. —.

Mutuality.

Specific performance of unilateral contract, see Specific Performance.

2. The mere physical acceptance and attempted enforcement by one party of a contract unilateral in form, executed by another, does not make the former a party to the contract so as to bind him to its performance. *Levin v. Dietz*, 20: 251, 87 N. E. 454, 194 N. Y. 376.

3. A contract for employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period. *Newhall v. Journal Printing Co.* 20: 899, 117 N. W. 228, 105 Minn. 44. (Annotated)

Offers and their acceptance.

4. Failure of one who has made a void parol offer to purchase chattels in his possession to reply to a letter accepting the offer, does not effect a contract binding upon him. *Godkin v. Weber*, 20: 498, 117 N. W. 628, 154 Mich. 207.

Statute of frauds.

Creation of trust by one taking title to real property to sell it for benefit of real owner, see Pleading, 20; Trusts.

5. The provisions of the statute of frauds, or of uses and trusts, have no application where an agreement to take title

to real property and sell it as an agent of the real owner, to whom the proceeds are to be turned over, has been completely performed as to the part thereof which comes within the statute, and the part remaining to be performed is merely a payment of the money, the promise to do which is not required to be in writing. *Logan v. Brown*, 20: 298, 95 Pac. 441, — Okla. —.

6. That personal property is in possession of an intending purchaser at the time he makes a verbal offer for it which is duly accepted is not sufficient to comply with a statute providing that no contract for the sale of goods of the value of \$50 or more shall be valid unless the purchaser shall accept and receive part of the goods sold. *Godkin v. Weber*, 20: 498, 117 N. W. 628, 154 Mich. 207.

7. A binding contract to purchase mill culls is not effected by the fact that one making a verbal offer for them accepted and paid for merchantable lumber which was cut from them, claiming that this timber was not part of the culls. *Godkin v. Weber*, 20: 498, 117 N. W. 628, 154 Mich. 207.

Construction.
8. The mere affixing of a price to each bushel of a crop contracted to be threshed is not sufficient to make the contract severable. *Johnson v. Fehsefeldt*, 20: 1069, 118 N. W. 797, 106 Minn. 202. (Annotated)

9. An agreement by a retiring partner "not to engage for the next two years" in the same city in competition with a business sold, in "the manner aforesaid, or with any partner, partners, firm, company, or corporation for the period aforesaid," is violated by the entering of such partner into the employ, as a managing clerk, of a third person, whom such retiring partner was instrumental in procuring to open a rival business adjacent to that of the original firm, and such violation should be enjoined at the suit of the purchasing partner. *Siegel v. Marcus*, 20: 769, 119 N. W. 358, — N. D. —. (Annotated)

Validity; public policy.

10. A contract entered into between copartners upon dissolution of the copartnership, whereby one of the partners, for a valuable consideration, agrees not to engage for the next two years in the same business theretofore conducted by the firm in the same city, is not violative of N. D. Const. art. 1, p. 23, which provides that any citizen of the state shall be free to obtain employment wherever possible, and that any person who shall maliciously interfere therewith or hinder any citizen from obtaining employment shall be deemed guilty of a misdemeanor. *Siegel v. Marcus*, 20: 769, 119 N. W. 358, — N. D. —.

11. A bond of indemnity, given by a person under charge of felony, to indemnify his bail in a recognizance for his appearance to answer the charge, is not void as against public policy. *Carr v. Davis*, 20: 58, 63 S. E. 326, — W. Va. —.

(Annotated)

20 L.R.A. (N.S.)

Incomplete performance.

12. Where a contract is entire, and one party, not in default, is willing to complete its performance, the other party, who abandons the contract or refuses to perform it, cannot recover, on the contract or on a *quantum meruit*, the value of the labor he has expended in its partial performance. *Johnson v. Fehsefeldt*, 20: 1069, 118 N. W. 797, 106 Minn. 202.

Termination.

Rescission of contract for purchase of land, see Vendor and Purchaser, 1-4.

13. A contract for space, for a term of years, on a particular floor of a building occupied by a department store, in which to conduct a particular line of business in connection with the general enterprise, which is to be paid for by a monthly rental and a percentage of sales in excess of a certain amount, is terminated by the destruction of the building, and the beneficiary cannot insist on the allotment of space in the new building to which the department store business is moved. *Martin Emerich Outfitting Co. v. Siegel, Cooper, & Co.* 20: 1114, 86 N. E. 1104, 237 Ill. 610.

CONTRIBUTORY NEGLIGENCE.

See Negligence, 11.

CONVERSION.

As to equitable conversion, see Equitable Conversion.

CORPORATIONS.

Ultra vires acts of building association, see Building and Loan Associations.

Presumption that corporation will renew franchise. see Evidence, 7.

Garnishment of foreign insurance company, see Garnishment, 2.

Injunction by purchaser of stock to restrain sheriff from selling on execution against vendor, see Injunction, 9.

Notice to agent as notice to company, see Notice.

Consolidation.

Amendment of pleading in action against consolidated company, see Pleading, 1.

1. A corporation formed by consolidation of others may assert the rights, equities and defenses of one of the constituent companies when sued on a liability existing against it prior to the consolidation. *Southern Steel Co. v. Hopkins*, 20: 848, 47 So. 274, — Ala. —.

Transfer of stock.

2. A purchaser of the capital stock of a corporation for a valuable consideration, in the absence of fraud or a controlling statute, is protected against subsequent attachment or execution issued against his grantor, although he failed to have his assignment recorded upon the books of the corporation. *Everett v. Farmers & M. Bank*, 20: 996, 117 N. W. 401, — Neb. —.

(Annotated)

3. A bona fide purchaser of the capital stock of a corporation may sue in equity to compel the corporation to enter the assignment upon its books, and to issue a new certificate therefor. *Everett v. Farmers & M. Bank*, 20: 996, 117 N. W. 401, — Neb. —.

Fraudulent issue of stock.

4. A corporation which has been induced fraudulently to issue corporate stock cannot, by subsequent ratification, bind stockholders who had no notice of the fraud. *Shaw v. Staight*, 20: 1077, 119 N. W. 951, — Minn. —.

5. An issue of 28,000 shares of stock of a packing company, selling in the market at \$1 per share, in consideration of certain fishing paraphernalia and locations represented as worth \$21,800, but which in fact were worthless, to a director who acted as secretary of the corporation, and who had full knowledge that it would receive no value therefrom for the stock, is fraudulent and void, and will be set aside at the suit in equity of a stockholder, notwithstanding, as a part of the consideration, such director agreed to act as secretary of the corporation for two years, without compensation, the reasonable value of which services would be \$600. *Shaw v. Staight*, 20: 1077, 119 N. W. 951, — Minn. —.

6. A holder of corporate stock who has full knowledge of the fraudulent dealings by which his transferrer obtained the issue of the stock, and who pays no consideration therefor, is not such a good-faith holder as can complain of the cancelation of the stock at the suit of a bona fide shareholder. *Shaw v. Staight*, 20: 1077, 119 N. W. 951, — Minn. —.

Action by stockholders.

7. The holder of shares of stock in a corporation, issued and sold as full-paid stock, though for a sum less than its par value, may maintain an action to protect such rights as accrue to him as a stockholder by reason of the fraudulent issue and transfer of corporate stock, since the agreement between the holder and the corporation that his stock shall be considered and treated as paid in full is not void, but voidable only as to creditors of the corporation. *Shaw v. Staight*, 20: 1077, 119 N. W. 951, — Minn. —. (Annotated)

8. A request of the managing officers of a corporation to institute an action to set aside and cancel a fraudulent issue of corporate stock, and their refusal, is sufficient, without a request to other stockholders to commence such a suit, to enable an individual stockholder to maintain a suit therefor, since such injury and the consequent cause of action is one that accrues to the stockholders, and not to the corporation as such. *Shaw v. Staight*, 20: 1077, 119 N. W. 951, — Minn. —.

Right to inspect books.

Mandamus to enforce stockholder's right to inspect books, see Mandamus, 5, 9.

9. That a stockholder seeking to compel the corporation to permit him to exam-

ine its books to protect his interests is also a stockholder in a rival corporation is not sufficient to deprive him of the right to the relief sought. *Kuhback v. Irving Cut Glass Co.* 20: 185, 69 Atl. 981, 220 Pa. 427.

(Annotated)

10. A corporation cannot deprive its stockholder of the right to inspect its books by offering to furnish him abstracts of them or to permit an inspection by an expert to be selected by it and him. *Kuhback v. Irving Cut Glass Co.* 20: 185, 69 Atl. 981, 220 Pa. 427.

11. A corporation cannot deprive its stockholder of the right to inspect its books for the protection of his interests by offering to purchase his stock at a price fixed by it. *Kuhback v. Irving Cut Glass Co.* 20: 185, 69 Atl. 981, 220 Pa. 427.

COSTS.

On appeal, see Appeal and Error, 29.

When plaintiff obtains judgment on his demand, and defendant obtains judgment on his demand in re-convention, each of the parties should pay the costs incurred in obtaining the judgment against him. *Gilly v. Hirsh*, 20: 972, 48 So. 442, 122 La. 966.

COURTS.

As to contempt, see Contempt.

Jurisdiction of garnishment proceedings against nonresident, see Garnishment, 1.

Power to issue writ of prohibition, see Prohibition.

Relation to other departments of government.

1. A railroad company directed by municipal ordinance to light its street crossings has no right to question in the courts the necessity of the ordinance, or the fairness, honesty, or propriety of the exercise of the power. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

Superintending control.

2. The superintending control extends to reviewing the decision of the trial court that a grand juror was incompetent to act, which results in its refusal to proceed with the trial, and to requiring it to do so by mandamus if the decision was erroneous. *State ex rel. McGovern v. Williams*, 20: 947, 116 N. W. 225, 136 Wis. 1. (Annotated)

3. A court-martial is not an inferior court within the meaning of a constitutional provision giving a supreme court appellate jurisdiction over inferior courts, since such court, although exercising judicial functions, belongs to the executive department of the government, and not to the judicial. *State ex rel. Poole v. Nuchols*, 20: 473, 119 N. W. 632, — N. D. —. (Annotated)

COURTS-MARTIAL.

Review of action of, under power of superintending control, see Courts, 3.

COVENANTS AND CONDITIONS.

As to conditions in insurance policy, see Insurance.

CRIMINAL LAW.

As to bail, see Bail and Recognizance.
Receipt of deposit by bank while insolvent, see Banks, 2-7.

Presumption against one accused of crime arising from statements made against himself, see Evidence, 17.

Evidence that one on trial for crime refused to escape, see Evidence, 29.

As to indictment, see Indictment, etc.
Liability of master for wrongful sale of liquor by servant, see Intoxicating Liquors, 9.

As to jury, see Jury.

New trial for newly discovered evidence, see New Trial.

See also Embezzlement; Perjury; Suicide.

1. Only one conviction can be secured for giving several performances in the theater on Sunday, under a statute providing that any proprietor of any place of amusement who shall permit it to be open on that day shall be fined. *Muckenfuss v. State*, 20: 783, 116 S. W. 51, — Tex. Crim. App. —. (Annotated)

Crimination of self.

Privilege of witness against self-crimination, see Witnesses, 2, 3.

2. One on trial for a capital offense cannot waive his right to be present when the verdict is rendered, even by voluntarily absenting himself from the court room in case he is on bond; and it is immaterial that the verdict actually returned is for an offense not capital. *Sherrod v. State*, 20: 509, 47 So. 554, — Miss. —.

Procedure.

3. When a motion is made, supported by affidavit, to withdraw a criminal case from the consideration of, and to discharge, a jury, on account of improper action of the officer who selected and summoned the jury or talesmen, and such motion is made as soon as the facts stated therein come to the knowledge of the defendant or his counsel, and the matters of fact therein stated are not denied under oath, they will be taken as confessed, and will be construed most strongly against the prosecution, and in favor of the defendant. *United States v. Hargo*, 20: 1013, 98 Pac. 1021, — Okla. —.

Sentence and imprisonment.

4. Where a person who has been convicted and sentenced to the penitentiary for one felony appeals from the judgment, and, while enjoying his liberty under a bond given to stay the execution thereof, commits a second felony, for which he is convicted and sentenced to a term to begin upon the expiration of the former term, such second sentence is valid. *State v. Finch*, 20: 273, 89 Pac. 922, 75 Kan. 582. 20 L.R.A. (N.S.)

Pardon.

5. The expiration of the term for which a convict was sentenced does not make inoperative a provision in a conditional pardon that, if he is subsequently convicted of crime, he shall serve the unexpired time in addition to that imposed by the new sentence; but he may be compelled to serve out such unexpired term, although his subsequent conviction does not occur until after the expiration of the term of the original sentence. *Re Kelly*, 20: 337, 99 Pac. 368, — Cal. —.

CRIMINATION OF SELF.

See Criminal Law, 2; Perjury; Witnesses, 2, 3.

CROSS-EXAMINATION.

Of witnesses, see Witnesses, 1.

CUMULATIVE SENTENCE.

See Criminal Law, 4.

CURTESY.

1. That an estate purchased by funds from the wife's separate estate is conveyed to husband and wife jointly does not deprive him of his curtesy in the property. *Donovan v. Griffith*, 20: 825, 114 S. W. 621, 215 Mo. 149.

2. The conveyance to a man of land purchased with funds from the separate estate of his wife, and his holding the legal title at the time of her death, will not prevent his having curtesy in the property. *Donovan v. Griffith*, 20: 825, 114 S. W. 621, 215 Mo. 149.

3. That the wife's title to real estate is not acquired until after the death of the only child of the marriage will not deprive the husband of curtesy in the property. *Donovan v. Griffith*, 20: 825, 114 S. W. 621, 215 Mo. 149. (Annotated)

4. A surviving husband is entitled to curtesy out of a determinable fee owned by his wife with issue born alive; notwithstanding the contingency upon which the fee is to terminate exists at the time of her death. *Carter v. Couch*, 20: 858, 47 So. 1006, — Ala. —. (Annotated)

5. Curtesy exists in the equity of redemption of the wife's lands. *Jackson v. Becktold Printing & B. Mfg. Co.* 20: 454, 112 S. W. 161, 86 Ark. 591. (Annotated)

CUSTODY.

Of infants, see Infants, 1-3.

CUSTOM.

To send notice of maturity of insurance premium, see Insurance, 10.

DAMAGES.

Error in rendering judgment for small sum in case of excessive verdict, see Appeal and Error, 27.

Right to recover expense of preparing for suit in case of dismissal by plaintiff, see Dismissal and Discontinuance.

Evidence on question of, see Evidence.
 Right to jury to assess damages on default judgment, see Jury, 1.
 Sufficiency of allegations as to, see Pleading, 2, 3, 10.

Duty to keep down.

1. Damages resulting from the breach of a contract to lease lands and tenements cannot be recovered in so far as plaintiff could have prevented them by the exercise of reasonable exertion or care. *Moses v. Autuono*, 20: 350, 47 So. 925, — Fla. —.

Exemplary damages.

2. Punitive damages may be awarded against a railroad company for killing a person at a railroad crossing which was manifestly dangerous, if it had failed to comply with warnings by the public officials to make it safe. *Thompson v. Seaboard A. L. R. Co.* 20: 426, 62 S. E. 396, 81 S. C. 333.

Contracts as to real property.

3. For breach of a contract to lease lands and tenements the measure of damages is generally the difference between the stipulated rent and the value of the use of the premises; though, under special circumstances, damages may also be recovered for losses that are the natural, direct, and necessary consequence of the breach, when they are capable of being estimated by reliable data. *Moses v. Autuono*, 20: 350, 47 So. 925, — Fla. —.

Sales of personality; warranty.

4. Damages for loss of time, expenses, and attorneys' fees incurred in preparing a defense to an action on a promissory note for the purchase price of a threshing machine, which action was afterwards dismissed by plaintiff, with prejudice, upon payment of all legal costs, cannot be recovered in an action for breach of warranty upon which the machine was purchased, no malice, want of probable cause, or bad faith having been alleged, since the dismissed suit, and not the breach of warranty, was the proximate cause of such damages. *John Deere Plow Co. v. Spatz*, 20: 492, 99 Pac. 221, — Kan. —.

5. A corporation is not liable in damages for the improper termination by it, as principal, of an agency contract, beyond the period for which it was organized, where no definite period was fixed by the contract itself, and no offer was made to show that the corporation intended to extend its artificial existence beyond such period. *Newhall v. Journal Printing Co.* 20: 899, 117 N. W. 228, 105 Minn. 44.

Liquidated damages.

6. Where a contract expressly provides stipulated or liquidated damages for failure to complete a building within a specified time, and the breach alleged is a refusal to perform any part of the contract, and it appears that the parties, in stipulating for liquidated damages, did not contemplate such refusal, but only a failure to complete within the specified time, the damages sustained by the plaintiff are not recoverable. *20 L.R.A. (N.S.)*

tained by the alleged breach of the contract should be determined not by the stipulation contained in the contract, but by proper rules of law. *Moses v. Autuono*, 20: 350, 47 So. 925, — Fla. —.

(Annotated)

In respect to freight.

7. A railroad company which refuses to supply refrigerator cars for shipping garden truck to market according to its obligation to do so may be liable for the value of truck not gathered and tendered for shipment, where the failure to gather it was for the purpose of avoiding useless expense, and it was to be sold free on board at point of shipment. *Atlantic C. L. R. Co. v. Geraty*, 20: 320, 166 Fed. 10, — C. C. A. —.

Torts generally.

8. One whose son is unlawfully suspended from a public school for a period of only twenty days cannot hold those responsible for the suspension liable for the cost of his tuition in another district for a whole term. *Douglas v. Campbell*, 20: 205, 116 S. W. 211, — Ark. —.

Personal injuries.

Error in instruction as to, in action for injury to servant, see Appeal and Error, 22.

9. A married woman may recover from one who negligently injures her, damages for impairment of her ability to labor, independently of her husband's right to recover for her loss of time. *Colorado Springs & I. R. Co. v. Nichols*, 20: 215, 92 Pac. 691, 41 Colo. 272. (Annotated)

10. A carrier by whose negligence a pregnant woman who is its passenger is thrown violently to the floor and injured, so that she suffers a miscarriage, cannot escape liability to her in damages for her injuries because they would not have occurred had she not been pregnant. *Colorado Springs & I. R. Co. v. Nichols*, 20: 215, 92 Pac. 691, 41 Colo. 272.

Injury to real property.

11. Where the owner of the legal title to wild lands dispossesses a holder under a void tax deed who has reduced such lands to cultivation, the rent allowable for the use of the premises during such wrongful possession is to be determined from the cash price usually paid for the use of wild lands during the same time and in the same locality. *Gibson v. Fields*, 20: 378, 98 Pac. 1112, — Kan. —.

Nuisance.

12. The owner of property which is to be let as a dwelling cannot recover damages for the temporary operation near it of a manufactory in such a manner as to constitute a nuisance, unless he shows a diminution in the rental value of the property because of the manner in which the manufactory is conducted. *McGill v. Pintach Compressing Co.* 20: 466, 118 N. W. 786, — Iowa, —.

Mental anguish.

13. Mental anguish for fear of going into consumption is not an element of damage to be allowed against a railroad company because of whose neglect to heat its passenger station a passenger is made ill with cold and fever. *St. Louis, I. M. & S. R. Co. v. Buckner*, 20: 458, 115 S. W. 923, — Ark. —. (Annotated)

Loss of profits.

14. Prospective profits during the remainder of the period for which a newspaper was incorporated may be recovered as damages for the improper breach, by the corporation, of its contract granting the exclusive right to sell its publication within certain specified territory, where no contract period was fixed by the contract itself. *Newhall v. Journal Printing Co.* 20 899, 117 N. W. 228, 105 Minn. 44.

DEATH.

Power of administrator to settle claim for negligent killing of intestate, see Executors and Administrators.

Effect of death of beneficiary within lifetime of insured, see Insurance, 12.

Effect of death of principal contractor before completion of contract on subcontractors' lien, see Mechanics' Liens, 3.

DEBT.

Arrest for, see Arrest.

DEBTOR AND CREDITOR.

Arrest for debt, see Arrest.

Validity as against creditors of chattel mortgage on future earnings of threshing machine, see Chattel Mortgage.

DECLARATION OR COMPLAINT.

See Pleading, 2-15.

DEDICATION.

A dedication of land for a park is effected by the exhibition of a plat on which the space is designated as a park when selling lots bordering thereon, followed by permitting the public to use the tract generally as it pleases. *Northport Wesleyan Grove Campmeeting Asso. v. Andrews*, 20: 976, 71 Atl. 1027, — Me. —.

DEEDS.

Right of bailor to whom bond for indemnity has been given to have deed by obligor in bond set aside, see Fraudulent Conveyances, 4.

Replevin to recover possession of title deed, see Replevin, 1.

An exception in a deed conveying real estate, of "a certain lot of timber" growing on a portion of the land granted, for the benefit of a stranger to the instrument, is an exception of the timber rather than of the land itself, for the benefit of the person named personally, and terminates with his death, the fee then being in the grantee in 20 L.R.A. (N.S.)

the deed. *Stone v. Stone*, 20: 221, 119 N. W. 712, — Iowa, —. (Annotated)

DEFAULT JUDGMENT.

See Judgment, 1.

DEFENSE.

To action on insurance policy, see Insurance, 22, 23.

DEFINITIONS.

Riot, see Riot.

DELEGATION OF POWER.

See Constitutional Law, 1.

DEMURRER.

See Pleading, 18-20.

DEPOSITIONS.

Use in evidence, see Evidence, 18, 19.

DIKES.

Deflecting current of river by, see Limitation of Actions, 4.

DISCHARGE.

In bankruptcy, see Bankruptcy, 4-9.

DISCRETION.

Review of, on appeal, see Appeal and Error, 7.

DISMISSAL.

The defendant in an action on a note dismissed by the plaintiff before trial, with prejudice, after payment of all legal costs incurred therein, cannot, in the absence of malice, want of probable cause, or bad faith, recover damages in a subsequent action for loss of time, expenses, or attorney fees incurred by him in preparing for the trial of the dismissed case. *John Deere Plow Co. v. Spatz*, 20: 492, 99 Pac. 221, — Kan. —. (Annotated)

DISORDERLY HOUSES.

The keeping of a disorderly house by a man of good character who has been a tavern keeper for thirty years is not shown by the fact that a few negroes congregated about his place, that drunken people have been seen on a neighboring highway, and that in two cases liquor had been sold to minors. *Schneider v. Com.* 20: 107, 111 S. W. 303, 33 Ky. L. Rep. 770.

DIVORCE AND SEPARATION.

Revocation of will by settlement of property rights in anticipation of divorce, see Wills, 2.

Alimony.

1. Alimony may be decreed to a wife against whom a divorce is granted under a statute providing that, where a divorce is granted, the court shall make such order touching the alimony of the wife as, under the circumstances and nature of the case, shall be reasonable. *Ecker v. Ecker*, 20: 421, 98 Pac. 918, — Okla. —. (Annotated)

2. A court is without authority, under a statute providing that, when a decree of divorce is granted, the court shall make such order touching the alimony of the wife as shall be reasonable, to decree absolutely a certain and specific sum of money, or a certain specific portion of the property, as alimony, but may decree alimony in a continuous allotment of sums, payable at regular intervals. *Ecker v. Ecker*, 20: 421, 98 Pac. 918, — Okla. —.

Custody of children.

3. A father is not deprived of the natural right to the custody of his minor children against any person except the mother by a decree in a divorce proceeding, awarding her temporary custody of them, in the absence of a finding that the father is unfit; and, upon her death, such right ceases to be affected by the award. *Ex parte Clarke*, 20: 171, 118 N. W. 472, — Neb. —. (Annotated)

4. The courts of a state of which a mother who has been granted a divorce and awarded the custody of minor children by the courts of a sister state becomes a resident, dying there, and leaving such children in the hands of relatives, who are appointed guardians, are not deprived of jurisdiction to determine the merits of a controversy between the divorced father and such guardians for the custody of the children by the fact that the court rendering the divorce retained jurisdiction for the purpose of making further orders, that court having refused to determine the merits of the material question in issue. *Ex parte Clarke*, 20: 171, 118 N. W. 472, — Neb. —.

DOCUMENTARY EVIDENCE.

See Evidence, 18, 19,

DOGS.

See Animals.

DRAINS AND SEWERS.

Nuisance resulting from, see Municipal Corporations, 10-12.

DRUNKENNESS.

Suspension of pupil from school because of, see Schools, 1.

DUE PROCESS OF LAW.

See Constitutional Law, 2-8.

DURESS.

Instructions in action to set aside mortgage for, see Trial, 11.

1. A mortgage which a father is coerced into executing to secure the payment of a defalcation of his son by threats of his arrest and prosecution for embezzlement if such security is not given may be avoided on the ground of duress. *Williamson-Halsell Frazier Co. v. Ackerman*, 20: 484, 94 Pac. 807, 77 Kan. 502. (Annotated)

2. If the threats of the arrest and prosecution, for embezzlement, of a son, operated to deprive a father of his free will, and to constrain the execution of a mortgage to se-

cure the payment of a defalcation by the son, the actual guilt or innocence of the son is not a material question in determining whether there was duress. *Williamson-Halsell Frazier Co. v. Ackerman*, 20: 484, 94 Pac. 807, 77 Kan. 502.

3. The test, in determining whether there was duress in securing the execution by a father of a mortgage to secure the payment of a defalcation of his son, in order to prevent his prosecution for embezzlement, is not so much the means by which the father was compelled to execute the mortgage as the state of mind induced by the means employed,—the fear which made it impossible for him to exercise his own free will. *Williamson-Halsell Frazier Co. v. Ackerman*, 20: 484, 94 Pac. 807, 77 Kan. 502.

EASEMENTS.

Right to compensation for interference with light, air, and view, see Eminent Domain, 1.

In party wall, see Party Walls.

EJECTMENT.

Damages for wrongful holding of lands in action of ejectment, see Damages, 11.

1. The breaking and reducing of wild lands to cultivation constitutes a "permanent improvement" for which compensation may be claimed by one in possession of lands under a tax deed, who has been defeated of the possession by the holder of the legal title. *Gibson v. Fields*, 20: 378, 98 Pac. 1112, — Kan. —. (Annotated)

2. Upon the adjudication of the counterclaims where one in possession of land under a tax deed has been defeated of the possession by the holder of the legal title, and claims compensation for permanent improvements and taxes paid, only the reasonable rent of the premises without the improvements should be offset, and not rent for the premises as increased by the improvements, since the one dispossessed should not be made to pay rent for improvements made by himself. *Gibson v. Fields*, 20: 378, 98 Pac. 1112, — Kan. —.

ELECTION OF REMEDIES.

1. Obtaining a judgment and execution to enforce the alleged lien under a clause in a lease giving the landlord the first lien on all crops and chattels of the lessee for rent and damages precludes the maintenance of a replevin suit to obtain possession of the property on the theory that the contract was a chattel mortgage, in the absence of anything to show that the property could not be secured by the sheriff under an execution. *Wilmore v. Mintz*, 20: 259, 95 Pac. 536, 42 Colo. 328. (Annotated)

2. One who has sold and transferred personal property to another, and received a portion of the price, has no right to sue him and others to whom he has transferred the property, for conspiracy to defraud her of her property, alleging the sale and transfer in the complaint; and such attempted

action will not, therefore, on the theory of election of remedies, bar her right to sue her vendee for the unpaid purchase money. *Henry v. Herrington*, 20: 249, 86 N. E. 29, 193 N. Y. 218.

ELECTIONS.

Evidence in prosecution for perjury for false swearing as to qualifications of voters, see *Evidence*, 28, 30, 31.

Perjury in swearing to qualifications of voters, see *Perjury*.

ELECTRICITY.

Presumption of negligence from happening of accident, see *Evidence*, 8.

1. A company furnishing electricity for the lighting of a shop, the inside wiring of which was done under an independent contract with the owner thereof, and accepted by him and approved by the city inspector, is not liable for injury to a person who is in such building as a mere licensee, caused by reason of such inside wiring having become imperfectly insulated by the act of the owner, without notice thereof to the electric company. *Minnesota General Elec. Co. v. Cronon*, 20: 816, 186 Fed. 651, — C. C. A. —.

2. A disinterested person who voluntarily and uninvited enters a building to ascertain the cause of, and to extinguish, a fire therein, is a mere licensee, to whom a company furnishing the electric current for the lighting thereof owes no obligation other than not wantonly or knowingly to injure him. *Minnesota General Elec. Co. v. Cronon*, 20: 816, 186 Fed. 651, — C. C. A. —.

ELEVATORS.

As dangerous machine on which children may not be employed, see *Master and Servant*, 4.

EMBEZZLEMENT.

Mortgage to prevent prosecution for, see *Duress*.

Instructions in action to set aside mortgage given to prevent prosecution for, see *Trial*, 11.

EMINENT DOMAIN.

What constitutes a taking.

1. Recovery cannot be had by an abutting owner because of interference with the light, air, or prospect of his property through an elevation of railroad tracks, in the absence of any taking of his land or destruction of his easements, under a statute requiring compensation to be made for all damage caused by the taking of land or by the change or discontinuance of a private way or by the taking of an easement. *Davis v. New England R. Co.* 20: 1061, 85 N. E. 475, 199 Mass. 292. (Annotated)

2. The remedy of one over whose property a temporary structure is erected for the running of trains pending an elevation of railroad tracks is an action for trespass, and not under the statutes allowing compensation for property taken by right of eminent domain. (N.S.)

inent domain. *Davis v. New England R. Co.* 20: 1061, 85 N. E. 475, 199 Mass. 292.

EMPLOYERS' LIABILITY INSURANCE.

See *Insurance*, 25.

ENTIRETIES.

Estate by, see *Husband and Wife*, 1.

ENTIRETY.

Of contract, see *Contracts*, 8.

EQUITABLE CONVERSION.

By will, see *Wills*, 4, 5.

Equity never enforces the doctrine of equitable conversion for the benefit of creditors. *Painter v. Painter*, 20: 117, 69 Atl. 323, 220 Pa. 82.

EQUITY.

Injunction to prevent multiplicity of suits, see *Injunction*, 8.

Injunction to avoid multiplicity of suits as infringement of right to trial by jury, see *Jury*, 2.

See also *Equitable Conversion*.

EQUITY OF REDEMPTION.

Curtsey in equity of redemption of wife's lands, see *Curtsey*, 5.

ERROR.

See *Appeal and Error*.

ESCAPE.

Evidence that one on trial for crime refused to escape, see *Evidence*, 23.

ESTOPPEL.

Of building association to deny power to borrow money, see *Building and Loan Associations*, 1.

Of insurance company, see *Insurance*.

Of infant falsely representing age to recover damages for personal injuries against master, see *Master and Servant*, 2.

EVIDENCE.

Estoppel to complain of evidence introduction of which one has procured, see *Appeal and Error*, 6.

Review on appeal of discretion as to admitting, see *Appeal and Error*, 7.

Waiver of error in admission of, see *Appeal and Error*, 12.

Reversible error in admission or exclusion of, see *Appeal and Error*, 15-20.

Error in admission of expert testimony as to dangerous character of machine, see *Appeal and Error*, 15.

New trial for newly discovered evidence, see *New Trial*.

Reception of, on trial, see *Trial*, 1.

Judicial notice that January is in the winter season, see *Pleading*, 11.

Presumptions and burden of proof.

Sufficiency of evidence to rebut presumption, see *infra*, 38.

As to presumptions on appeal, see Appeal and Error, 5.

Presumption of negligence from injury to servant, see Trial. 7.

Seal as prima facie evidence of consideration, see Seal.

1. In a criminal prosecution for the violation of a statute prohibiting the sale or keeping for sale of "malt, spirituous, or vinous liquors or any intoxicating drinks" without a license, where the charge is for selling or keeping for the purpose of sale "certain malt and intoxicating liquor," and the proof shows that malt liquor was sold and kept for sale, the state is not required to allege or prove that the liquors sold or kept for the purpose of sale are in fact intoxicating, as it is sufficient to allege and prove the sale, or the keeping for the purpose of sale, of any prohibited liquors, in violation of the terms of such statute. *Luther v. State*, 20: 1146, 120 N. W. 125, — Neb. —.

2. One accused of counseling suicide has not the burden of showing that decedent acted of his own volition, and not under the advice and counsel of the accused. *State v. Webb*, 20: 1142, 115 S. W. 998, 216 Mo. 378.

3. Proof of insolvency at a particular time does not create a presumption that the same condition existed at any considerable time anterior thereto, nor is it evidentiary of such condition at a time very remote to that to which the evidence is directed. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

4. As a general rule, after a boy has reached the age of fourteen years, courts do not permit juries to presume him incompetent for the duties of a particular employment, because of minority alone; and, when over that age, the burden of proof is upon the one alleging incompetence. *Wilkinson v. Kanawha & H. Coal & C. Co.* 20: 331, 61 S. E. 875, — W. Va. —.

(Annotated)

5. A judgment creditor of a legatee, who attempts to set aside an assignment of the legacy as in fraud of his rights, has the burden of showing the fraud. *Beaver v. Ross*, 20: 65, 118 N. W. 287, — Iowa, —.

6. That the consideration for a transfer of corporate stock between persons not related was paid to the grantor's near relative, upon assignment thereof, does not change the rule imposing on the party assailing the transaction the burden of proving it fraudulent. *Everitt v. Farmers' & M. Bank*, 20: 996, 117 N. W. 401, — Neb. —.

7. There is no presumption of law that a corporation organized for a definite period will prolong its artificial existence by availing itself of statutory provisions for renewal of its franchise. *Newhall v. Journal Printing Co.* 20: 899, 117 N. W. 228, 105 Minn. 44.

8. The doctrine of *res ipsa loquitur* cannot be invoked to hold liable an electric company furnishing a current of electricity 20 L.R.A. (N.S.)

to a private building, connected with inside wiring owned by, and under the exclusive control of, the owner of the building, for an injury resulting directly from the imperfect insulation and condition of such inside wiring, merely because the electric company is producing and furnishing the dangerous and subtle element of electricity under a contract with such owner. *Minnesota General Elec. Co. v. Cronon*, 20: 816, 166 Fed. 651, — C. C. A. —.

9. Negligence on the part of a railroad company will not be inferred from the mere fact that a car door slammed shut, catching and crushing the hand of a passenger, who, while attempting to pass through it, rested his hand on the door jamb. *Christensen v. Oregon S. L. R. Co.* 20: 255, 99 Pac. 676, — Utah, —.

10. Where a car is received from another company to be switched to its destination within a city without any inspection as to its condition, it cannot be inferred, when it is discovered that the coupling apparatus is so defective as not to meet the requirements of the safety-appliance act of Congress, which fact is discovered *en route*, that the break in the apparatus occurred at the time it was discovered to be out of order. *Chicago, M. & St. P. R. Co. v. United States*, 20: 473, 165 Fed. 423, — C. C. A. —.

11. Actionable negligence on the part of the owner of a building in maintaining a window the glass of which broke and injured an employee whose duty was to open and close the window, is not shown by the mere happening of the accident, where there is nothing to show the efficient cause of the accident. *Stewart & Co. v. Harman*, 20: 228, 70 Atl. 333, 108 Md. 446.

12. Under certain circumstances, the maxim, *Res ipsa loquitur* may apply in an action brought by a servant against his master for injury caused by an agency of the master, since the application of the maxim does not ordinarily depend upon the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. *Jenkins v. St. Paul City R. Co.* 20: 401, 117 N. W. 928, 105 Minn. 504.

13. The doctrine of *res ipsa loquitur* applies in case of injury to a servant through the alleged negligence of the master, where the facts eliminate blame on the part of the servant or his fellow servants, but show prima facie negligence on the part of someone. *La Bee v. Sultan Logging Co.* 20: 405, 91 Pac. 560, 47 Wash. 57.

14. Evidence that an appliance furnished by a master for a particular purpose breaks while being used in a proper manner for that purpose is sufficient to establish a prima facie case of negligence against the master. *La Bee v. Sultan Logging Co.* 20: 405, 91 Pac. 560, 47 Wash. 57.

15. An innkeeper has the burden of absolving himself from negligence when a guest shows a personal injury by the fall upon him of the upper portion of a folding

bed which he is occupying. *Lyttle v. Denny*, 20: 1027, 71 Atl. 841, 222 Pa. 395.

(Annotated)

16. In a trial following the replevying of intoxicating liquors, to determine the right of possession thereof, evidence that, at the commencement of the litigation, the defendant held the property as city marshal, under a warrant issued by a police court, justifies a presumption, in the absence of anything to indicate the contrary, that he was acting under an ordinance passed in aid of a prohibitory law, authorizing the seizure and destruction of liquors kept for sale in violation of the statute. *Hines v. Stahl*, 20: 1118, 99 Pac. 273, — Kan. —.

17. To make applicable to one suffering from a shot wound, and weakened by disease so that he was too weak to sign his name, and who is alleged to have made statements in answer to questions propounded to him, the rule as to presumptions arising against one accused of crime from statements made against himself, he must be found to have been in such condition of mind and body as to have been able to know the statement he was making, and to understand the questions propounded to him. *State v. Webb*, 20: 1142, 115 S. W. 998, 216 Mo. 378.

Documentary evidence.

18. That a decree was rendered in vacation may be shown by deposition. *Jackson v. Becktold Printing & B. Mfg. Co.* 20: 454, 112 S. W. 161, 86 Ark. 591.

19. Depositions, the taking of which is not authorized by any rule of court, are not admissible in evidence. *Lyttle v. Denny*, 20: 1027, 71 Atl. 841, 222 Pa. 395.

Confessions.

20. Where a sheriff having the custody of a person accused of murder obtains a confession from him by promises of assistance, and statements that he would do all he could to save accused from being hung, other confessions subsequently made to different persons, but in the presence of such sheriff, must be regarded as tainted with the same improper influence, and are inadmissible against accused, though he was warned before making them that, if made, they would be used against him. *State v. Wood*, 20: 392, 48 So. 438, 122 La. 1014.

Hearsay; declarations; *res gestæ*.

21. The plaintiff in a suit for malpractice, who fully describes his injury and the operation to which he was compelled to submit because of the defendant's alleged failure properly to care for it, waives the statutory privilege of excluding from evidence the testimony of the surgeon performing the operation. *Capron v. Douglass*, 20: 1003, 85 N. E. 827, 193 N. Y. 11. (Annotated)

22. Statements of bystanders at the time of the killing of a person by a street car are not admissible in evidence as part of the *res gestæ* in an action to hold the street car company liable for the death. *Louisville R. Co. v. Johnson*, 20: 133, 115 S. W. 207. — Ky. —. (Annotated)
20 L.R.A. (N.S.)

23. The statement by the conductor of a car which kills a man on the track, made when he and the motorman had reached deceased, admonishing the motorman to make no statements, is not admissible as *res gestæ* in an action against the street car company to recover damages for the death, since it does not tend to throw light upon any phase of the controversy. *Louisville R. Co. v. Johnson*, 20: 133, 115 S. W. 207. — Ky. —.

24. The statement of a motorman in charge of a car which killed a person on the track, immediately after the accident when he had reached the body of deceased, that he saw the man and tried to stop, but could not, is admissible in an action against the street car company to recover damages for the death as part of the *res gestæ*, when one controversy in the case is whether deceased was struck by the front of the car, or fell, or was pushed against the side of it. *Louisville R. Co. v. Johnson*, 20: 133, 115 S. W. 207. — Ky. —.

Relevancy and materiality.

25. Evidence of the general reputation of a person for financial responsibility is relevant on the question of his solvency. *Ellis v. State*, 20: 444, 119 N. W. 1110. — Wis. —.

26. Upon trial of one for perjury in falsely swearing that certain persons were properly registered as voters from a certain place, evidence is admissible that accused directed them to register, and promised to protect them from harm if they did so, as tending to establish a motive for the testimony as to their being properly registered. *People v. Cahill*, 20: 1084, 96 N. E. 39, 193 N. Y. 232.

27. Upon the question of damages to be awarded a married woman for negligent injury to her person, witnesses may state that before her injury she performed certain household duties, and what she was able or not able to do after the injury, for the purpose of showing the extent of the injury. *Colorado Spring & I. R. Co. v. Nichols*, 20: 215, 92 Pac. 691, 41 Colo. 272.

28. Evidence that, after the breaking of a pane of glass causing an injury, new beading or strips to hold the pane in place were placed in the sash, is not admissible to prove negligence on the part of the owner in the maintenance of the window. *Stewart & Co. v. Harman*, 20: 228, 70 Atl. 333. 108 Md. 446.

29. Evidence that one on trial for crime refused to embrace an opportunity to escape from prison is not admissible in his favor, although the state has proved his flight immediately after the crime was committed, where the two occurrences are entirely distinct and independent. *Bailey v. State*, 20: 409, 48 So. 227. — Miss. —.

(Annotated)

30. Where one who a person on trial for perjury falsely swore was properly registered as a voter from a certain place was disqualified both because of nonage and non-residence, evidence of an admission by ac-

cused, prior to the other's registry, that he was not qualified, may be considered by the jury as relating to either disqualification. *People v. Cahill*, 20: 1084, 86 N. E. 39, 193 N. Y. 232.

31. Upon the question of perjury in swearing that certain voters lived at the place from which they registered, evidence is admissible that, at the time accused instructed them to register, he told them that if any harm came he would see that they got out. *People v. Cahill*, 20: 1084, 86 N. E. 39, 193 N. Y. 232.

32. Evidence of the value of specific pieces of commercial paper, based wholly on ignorance of the witness as to whether the maker possesses any property liable to execution, is not relevant on the subject of the solvency of the maker thereof. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

33. Proof that a person was insolvent at a particular time, by means of judgments against him, shown at such time to be uncollectable, is not relevant as circumstantial evidence that he was insolvent six months or more prior thereto, especially where, shortly after the earlier date, he transferred his property for the payment of his obligations. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

34. In an action for damages for an assault and battery, a hat showing a break or rent at a place which, when worn, would be over or near the point of injury upon plaintiff's head, is admissible in evidence, where the evidence preliminary to its introduction showed that it was worn by plaintiff at the time of the alleged assault, that it was picked up immediately after the encounter near where he fell, and that it was presented in the same condition as when found, the contention of plaintiff being that the break could not have been made by defendant's fist, and that therefore some heavy and dangerous instrument was used by defendant in striking the blow complained of. *Morris v. Miller*, 20: 907, 119 N. W. 458, — Neb. —.

Weight and sufficiency.

Sufficiency of evidence to establish necessity of existence of hotel, see *Innkeepers*, 1.

Sufficiency of evidence to show that one is not a bona fide tavern keeper, see *Innkeepers*, 2.

Sufficiency to show keeping of disorderly house, see *Disorderly Houses*.

35. That firemen would have been able to prevent the destruction of a building by fire had they not been interfered with may be found by the fact that the buildings on fire were small and burned slowly, and that, but for the interference, they would have reached the scene seventeen minutes before the building in question began to burn, and would have been fully equipped to fight the fire. *Houren v. Chicago, M. & St. P. R. Co.* 20: 1110, 86 N. E. 611, 236 Ill. 620.

36. The inability of a helper on a complicated machine to understand the lan-

guage of his superior may be found to be the cause of the latter's loss of fingers, cut off by the machinery, where they were caught in such a way as to be fastened, but not injured, and the superior directed the helper, whose duty it was to do so, to put the power off from the machine, but the latter, not knowing the situation, and not understanding the directions, started the machine, cutting off the fingers. *Beers v. Prouty*, 20: 39, 85 N. E. 864, 200 Mass. 19.

37. That a release of liability for negligently killing a person was induced by fraud may be found from the fact that the responsible person represented that his attorney, having full knowledge of the circumstances and cause of action, said that there was no liability for the death, and that the person signing the release need not go to the expense of looking up the facts and seeking advice, but might settle the case upon the opinion of such attorney. *Olston v. Oregon Water Power & R. Co.* 20: 915, 96 Pac. 1095, — Or. —.

38. In an action by a motorman of an electric street car for damages for personal injuries caused by his car running upon a curve with such speed as to derail and capsize it, thereby causing the injuries complained of, where the issue is whether a shock of electricity passing through him from his hand on the controller, and through his foot, resting upon the metallic dog of the hand brake produced temporary paralysis, by reason of which he was deprived of control of the car, any presumption of negligence arising from the application of the maxim, *Res ipsa loquitur*, is rebutted by affirmative testimony, *inter alia*, that the car had been used without similar trouble for twenty days before, and months after, the occurrence of the accident, during which time the car was shown to have been in the same condition as at the time of the accident, that it was of standard type, and made by a reputable manufacturer, and that it had been subjected to all reasonable, practical, and usual inspection. *Jenkins v. St. Paul City R. Co.* 20: 401, 117 N. W. 928, 105 Minn. 504.

39. One sent to help operate a complicated machine may be found incompetent, so as to render the master liable for injury to his superior through his act, where he could not understand the language of his superior, and the operation of the machine required two men and the frequent stopping, cleaning, and starting of it, in the accomplishment of which directions to him from the superior were necessary. *Beers v. Prouty*, 20: 39, 85 N. E. 864, 200 Mass. 19.

(Annotated.)

40. A jury cannot decide a person unfit for his employment on account of what they see, or suppose they see, or can read, in his face and manner while testifying before them. *Wilkinson v. Kanawha & H. Coal & C. Co.* 20: 331, 61 S. E. 875. — W. Va. —.

41. The incompetence of a railroad con-

ductor may be found from evidence that, although he had worked in several capacities on the railroad for some time, he had only recently been placed in charge of a scheduled train, with nothing to show that he was instructed, or knew, that, when directed to pass an inferior train at a particular point by special order, he was bound to await its arrival; and that, upon arriving at the meeting place under such order, and not finding the other train there, he directed the engineer to go forward, under the general rule that trains moving in the direction that his train was going had the right of way, and inferior trains from the opposite direction must keep out of the way. *Still v. San Francisco & N. W. R. Co.* 20: 322, 98 Pac. 672, — Cal. —.

Admissibility under pleadings.

42. An allegation in a complaint by a servant against his master for personal injuries, of failure to provide a safe place in which to work, which is a mere deduction from specific acts of negligence alleged, does not widen the scope of the inquiry so as to admit evidence of negligence not covered in the specific allegations. *La Bee v. Sultan Logging Co.* 20: 405, 91 Pac. 560, 47 Wash. 57.

Variance.

Raising question of variance for first time on Appeal, see Appeal and Error, 11.

43. There is no material variance between the pleading and proof in an action for the death of an employee in a mine, caused by the negligence of one employed to assist in lowering cars from the mine to a tippie at a railroad below, where the declaration charged that it was defendant's duty to have a careful and competent person to operate the knuckle where the cars were let down from the mine entry to the tippie, but that, not regarding that duty, it employed an irresponsible boy of the age of fifteen years to operate the knuckle and levers necessary to operate the knuckle in letting down the cars, while the evidence showed that the word "knuckle" was sometimes used as an inclusive term, to embrace the drum house and all the appurtenances at the head of the incline, but that the boy was employed simply to operate the chock blocks immediately at the knuckle, and also that he was fifteen years and four months old. *Wilkinson v. Kanawha & H. Coal & C. Co.* 20: 331, 61 S. E. 875, — W. Va. —.

EXCEPTIONS.

Necessity of, see Appeal and Error, 3, 4.

Bill of exceptions, see Appeal and Error, 4.

In deed of growing timber, see Deeds.

EXECUTION.

Obtaining judgment in execution to enforce lien as bar to maintenance of replevin suit, see Election of Remedies, 1.

20 L.R.A. (N.S.)

Exemption from, see Exemptions.

Levy on intoxicating liquors, see Evidence, 16.

Injunction by purchaser of stock to restrain sheriff from selling on execution against vendor, see Injunction, 9.

As to what property is subject to seizure on execution, see Levy and Seizure.

Mandamus to compel issuance of, see Mandamus, 1.

Right of officer from whom property levied on has been replevied to continue litigation after expiration of term of office, see Officers, 4.

Intoxicating liquors seized by officer under warrant, see Replevin, 2.

The clerk cannot issue an execution on a judgment which has been set aside by the court. *State ex rel. Spratlin v. Thompson*, 20: 1, 102 S. W. 349, 118 Tenn. 571.

EXECUTORS AND ADMINISTRATORS.

An administrator may settle a claim for the negligent killing of his intestate without authority from the court. *Olston v. Oregon Water Power & R. Co.* 20: 915, 96 Pac. 1095, — Or. —.

EXEMPLARY DAMAGES.

See Damages, 2.

EXEMPTIONS.

Statutory exemption from arrest for debt, see Arrest.

From taxation, see Taxes, 2.

A homestead purchased with pension money belonging to a man, and, by his direction, conveyed to his wife, is not subject to execution upon a judgment against her, although it is based on a claim antedating the acquisition of the homestead, if the purchase was made without the intention of making her the real owner of the property. *Ratliff v. Elwell*, 20: 223, 119 N. W. 740, — Iowa, —.

EXPLOSION.

Injury by explosion of stove polish, see Negligence, 5-7.

FALSE IMPRISONMENT.

1. A person who enters upon grounds lawfully in possession of boys giving a free picnic, notice having been given in advance that later in the day a baseball game would be played, to which admission would be charged, and who, when the game was about to commence, refused to pay the fee or go out, and was thereupon taken by the arm by a citizen,—one of the assembled patrons,—acting in behalf of the boys, though without special authority, and led in the direction of the gate, always with the privilege of paying and staying, and the alternative of not paying and going, and who, before reaching the gate, did pay, and thereafter stay, is thereby afforded, as against such

citizen, no ground for an action in damages for false imprisonment, since the restraint imposed was not total, and was imposed merely as a means of his ejection until he elected to pay the lawfully charged fee, and was therefore the result of his voluntary persistence in an unlawful act. *Crossett v. Campbell*, 20: 967, 48 So. 141, 122 La. 659. (Annotated)

2. The arrest without warrant, by one clothed with the authority of a police officer, of a person found by him in a public place in a state of intoxication and acting in a disorderly manner, is not a false arrest; nor is his detention for the action of the proper police authorities a false imprisonment. *Erie R. Co. v. Reicherd*, 20: 295, 166 Fed. 247, — C. C. A. —.

3. One who, upon being arrested for intoxication and disorderly conduct, to secure his release, enters a plea of guilty and waives the reading of the affidavit and the right to be present in court upon trial, waives any claim he may have against the officer who arrested him, for false arrest or imprisonment. *Erie R. Co. v. Reicherd*, 20: 295, 166 Fed. 247, — C. C. A. —.

(Annotated)

FALSE REPRESENTATIONS.

In insurance policy, see Insurance.

FARMERS.

Exemption of, from involuntary proceedings in bankruptcy, see Bankruptcy, 2.

FELLOW SERVANTS.

See Master and Servant, 16-22.

FENCES.

A statute providing that the owners of adjacent lands shall build and maintain the partition fences between them in equal shares unless otherwise agreed upon, and that, if any party neglects to build or repair a partition fence, or the portion thereof which he ought to build, the aggrieved party may complain to the township trustees, who, if, upon notice, he fails to construct, may order it built, and the costs collected as other taxes, cannot be so construed and administered as to charge the owner of lands which are, and are to remain, uninclosed, with any part of the expense of constructing and maintaining such a line fence for the sole benefit of the adjoining proprietor. *Alma Coal Co. v. Cozad*, 20: 1092, 87 N. E. 172, 79 Ohio St. 348.

(Annotated)

FIRE INSURANCE.

See Insurance.

FIRES.

Injury to growing plants from frost by negligent burning of protecting cover as act of God, see Act of God.

Interference with firemen in reaching burning building, see Evidence, 35.

20 L.R.A. (N.S.)

Proximate cause of loss by, see Proximate Cause, 3, 4.

Set by sparks from railroad locomotives, see Railroads, 6.

1. The violation by a railroad company of a statute forbidding the obstruction of street crossings in cities is negligence, as matter of law, as against the owner of a house destroyed by fire, because of failure of the fire department, whose progress was interfered with by the obstruction, to reach it in time to extinguish the fire. *Houren v. Chicago, M. & St. P. R. Co.* 20: 1110, 86 N. E. 611, 236 Ill. 620. (Annotated)

2. A railroad company cannot avoid liability for loss of a building by fire on account of its delaying the fire department by maintaining a train across the street because the policeman might have cleared the crossing. *Houren v. Chicago, M. & St. P. R. Co.* 20: 1110, 86 N. E. 611, 236 Ill. 620.

FORFEITURE.

Of insurance policy, see Insurance, 10, 11.

Waiver of forfeiture of insurance policies, see Insurance, 16.

Forfeiture of auctioneer's license as penalty in civil suit by other merchant, see License.

FORGERY.

Payment of forged check, see Banks, 1.

FRAUD AND DECEIT.

Effect of, on right to discharge in bankruptcy, see Bankruptcy, 4, 5, 7, 9.

In issue of stock, see Corporations, 4, 5.

Burden of proving fraud in assignment of legacy, see Evidence, 5.

Sufficiency of evidence to show that release was secured by fraud, see Evidence, 37.

As to fraudulent conveyances, see Fraudulent Conveyances.

As defeating liability on insurance policy, see Insurance, 23.

When action for relief on ground of, is barred, see Limitation of Actions, 5.

Larceny of money obtained by, see Larceny.

Right to attack for fraud release under sale, see Sale.

Rescission for, of executory contract for purchase of land; vendee's right to lien for advance payment, see Vendor and Purchaser, 1.

FRAUDULENT CONVEYANCES.

Burden of proof, see Evidence, 6.

1. The sale by a merchant of a drug store which he conducts in a separate building and under a separate name from that in and under which his general business is conducted must comply with the statutes providing for the sale by a merchant of the whole or a large part of his stock in trade.

since it is to be regarded as the sale of an independent business. *Young v. Lemieux*, 20: 160, 65 Atl. 436, 79 Conn. 434.

2. One who purchases a retail stock of goods from a merchant who has not complied with the statutory requirement as to notice of sale is not entitled to retain against creditors of the merchant articles placed in the stock by him after the purchase, if they merely replace the goods sold, and are purchased with the avails of such sales. *Young v. Lemieux*, 20: 160, 65 Atl. 436, 79 Conn. 434.

Liability of purchaser.

3. The rule that a vendee is not a bona fide purchaser for value until he has actually paid the purchase price, or become irrevocably bound for its payment, cannot be invoked against one who has promised to give a consideration for the transfer assailed, unless it appears that the transfer will hinder or delay the vendor's creditors. *Everitt v. Farmers' & M. Bank*, 20: 996, 117 N. W. 401. — Neb. —.

Remedies.

4. A bail in a criminal recognizance, against whom an award of execution upon the recognizance has been made, and to whom a bond has been given to indemnify him against all loss or damage which he might sustain on account of having signed the recognizance, may file a bill in equity, before payment of the recognizance debt, to set aside a deed made by the obligor in such indemnity bond, as made with intent to defraud him as a creditor. *Carr v. Davis*, 20: 58, 63 S. E. 326. — W. Va. —.

5. Anyone who, but for a deed made to defraud creditors, would have a right to subject the property to his demand is a "creditor," entitled to sue in equity to set it aside, under W. Va. Code 1906, §§ 3099-3108. *Carr v. Davis*, 20: 58, 63 S. E. 326. — W. Va. —.

FREIGHT CARRIERS.

See Carriers, 18-23.

FUTURES.

Dealing in, as gaming, see Gaming, 3.

GAMING.

1. A slot machine known as a percentage game of chance, in which a fund is constantly kept, against which the player plays, and to which the losings are added, and from which his winnings are taken, the chances being unequal in favor of the owner of the machine, is a banking game within the inhibition of N. M. Laws 1907, chap. 64, p. 25, § 1, making it unlawful to run and operate any banking games of chance such as faro, etc., or any other banking games or games of chance played with dice or cards, by whatsoever name known. *Territory v. Jones*, 20: 239, 99 Pac. 338. — N. M. —.

2. Slot machines, where the chances are unequal in favor of the machine, are *ejusdem generis* with faro, monte, roulette, fan

tan, poker, craps, etc., specifically enumerated in, and prohibited by N. M. Laws 1907, chap. 64, p. 25, § 1, and are unlawful. *Territory v. Jones*, 20: 239, 99 Pac. 338. — N. M. —. (Annotated)

3. The keeping of a bucket shop is within the provisions of a statute providing for the punishment of one who shall keep any place for the purpose of gaming. *Wade v. United States*, 20: 347. — App. D. C. —. (Annotated)

GARNISHMENT.

Against whom.

1. The courts of a state have jurisdiction to entertain garnishment proceedings against nonresident parties in all cases where the defendant and garnishee are both personally served with process while within that state. *McShane v. Knox*, 20: 271, 114 N. W. 955, 103 Minn. 268.

2. A foreign insurance company authorized to do business within the state is chargeable there as trustee for money due its agent for commissions on business done there, under a statute providing that a person doing business in the state and residing outside may be charged as trustee, as if he were an inhabitant of the state, for any credits of the defendant by reason of contracts performed within the state. *Steer v. Dow*, 20: 263, 71 Atl. 217, 75 N. H. 95.

What subject to.

3. Renewal commissions due by an insurance company to its general agent under contract are subject to garnishment in the hands of the company in favor of his creditor, although they accrued partly from the efforts of subagents and, under the contract, were payable at his residence in another state. *Steer v. Dow*, 20: 263, 71 Atl. 217, 75 N. H. 95. (Annotated)

4. A writ of garnishment does not reach salary unearned at the date of service thereof, as it applies only to property *in esse* at such date. *Humphrey v. Midkiff*, 20: 912, 48 So. 331, 122 La. 939. (Annotated)

5. A garnishee cannot be penalized for false answers made to interrogatories regarding the amount of salary paid, and the amount of his indebtedness to a judgment debtor, by the rendering of a judgment for a larger amount than that due at the date of service thereof, since unearned salary cannot be reached by anticipation through process of garnishment. *Humphrey v. Midkiff*, 20: 912, 48 So. 331, 122 La. 939.

Situs of debts.

6. A debt due by a resident of this state to a nonresident may be reached by garnishment proceeding sued out upon a tax execution issued by a tax collector for a special tax due the state by such nonresident, notwithstanding the debt due the nonresident may have been payable in the state where the creditor of the garnishee resided. *A. B. Baxter & Co. v. Andrews*, 20: 268, 62 S. E. 42. — Ga. —.

7. The situs of property, as determined by the residence of the parties, which is

sought to be reached by garnishment, is immaterial, where personal service is had upon both defendant and garnishee. *McShane v. Knox*, 20: 271, 114 N. W. 955, 103 Minn. 268.

8. In garnishment, the place of payment of a debt is immaterial where the garnishee interposes no claim that he cannot be compelled to make payment at a place other than that agreed upon with the creditor. *McShane v. Knox*, 20: 271, 114 N. W. 955, 103 Minn. 268.

GRAND JURY.

Exercise of superintending control in reviewing decision as to competency of grand juror, see Courts, 2.

Mandamus to compel court to hear cause; where this would require overruling of order, quashing indictment, or disqualification of grand juror, see **Mandamus**, 2.

The presence upon the grand jury of the man intended by the jury commissioners is shown by the fact that although, in placing his name in the box, an initial was misplaced, and the statute did not require his residence to be designated on the paper slip, yet they substituted for the residence of the man bearing the name so written on the slip that of the one who served on the jury. *State ex rel. McGovern v. Williams*, 20: 941, 116 N. W. 225, 136 Wis. 1.

GUARANTY INSURANCE.

See **Insurance**, 25.

GUARDIAN AND WARD.

Effect of appointment of guardian on parent's right to custody of children, see **Infants**, 3.

HARMLESS ERROR.

See **Appeal and Error**, 15-27.

HIGHWAYS.

Use of automobiles on, see **Automobiles**.

Injunction to restrain injury to lateral support of highway, see **Injunction**, 10.

Right to lateral support for, see **Lateral Support**.

Requiring removal of stationary awnings from, see **Municipal Corporations**, 2.

Negligent injuries on, generally, see **Negligence**, 10.

Uses.

Pleading in complaint for injuries by frightening of horse on highway, see **Pleading**, 6, 7.

Sufficiency of declaration in action for injuries because of defective highway, see **Pleading**, 8.

1. A permit to move a building along a street will not justify the moving of a building larger than the one described therein. *Com. v. Byard*, 20: 814, 86 N. E. 285, 200 Mass. 175.
20 L.R.A. (N.S.)

Trees in.

2. A municipal corporation acting in good faith may, under its charter authority to repair the streets and remove nuisances, remove without compensation or notice the trees of an abutting owner which are within the limits of the highway, the roots of which interfere with the operation of a municipal sewer. *Rosenthal v. Goldsboro*, 20: 809, 62 S. E. 905, 149 N. C. 128.

(Annotated)

Liability of municipality as to.

3. A city cannot be held liable for injuries due to the frightening of a horse by stones which, for the purpose of repairing a highway, it had piled along the curb out of that traveled path, if it has used due care in their location, although they may be of such a nature that horses of ordinary gentleness are occasionally frightened by them, though they are permitted to remain longer than is absolutely necessary before the injury occurs. *Elam v. Mt. Sterling*, 20: 512, 117 S. W. 250, — Ky. —.

(Annotated)

4. A town is not bound as matter of law to place a barrier in every case between a highway and a stone lying immediately adjacent thereto, which, if within the limits of the highway, would constitute an obstruction, falling over which might injure a traveler; and it is immaterial that there is nothing to mark the line of the highway. *Shea v. Whitman*, 20: 980, 83 N. E. 1096, 197 Mass. 374.

(Annotated)

5. A municipal corporation which maintains, without drainage, a sidewalk along a street crossing a railroad below grade in such a manner that, by reason of its grade and formation, ice accumulates and remains on it in freezing weather so as to be unsafe for pedestrians using it, without any attempt to remove the ice, will be held liable for injuries to a pedestrian who falls thereon, if the jury finds that the conditions existing at the time of the accident are due to the city's negligence. *Holbert v. Philadelphia*, 20: 201, 70 Atl. 746, 221 Pa. 266.

(Annotated)

Contributory negligence of pedestrian.

Contributory negligence of one injured by runaway horse on, see **Negligence**, 11.

Contributory negligence of pedestrian on, as question for jury, see **Trial**, 5.

6. The mere presence of ice on a sidewalk is not sufficient to admonish a pedestrian that, by the exercise of proper care, he cannot pass over it in safety. *Holbert v. Philadelphia*, 20: 201, 70 Atl. 746, 221 Pa. 266.

7. Mere knowledge of the icy condition of a sidewalk leading under a railroad track which is kept open and maintained for travel by the municipality will not preclude one from using the walk without assuming the risk of its dangerous condition. *Holbert v. Philadelphia*, 20: 201, 70 Atl. 746, 221 Pa. 266.

Notice of injury.

8. A statement in a notice of claim for an injury alleged to have been due to the negligence of a municipal corporation, that it was caused by falling through a defective sidewalk, the location of which is stated, is a sufficient compliance with a requirement that the notice must describe the defect that caused the injury. *Hase v. Seattle*, 20: 938, 98 Pac. 370, — Wash. —.

HOMESTEAD.

Exemption of homestead purchased with pension money, see Exemptions.

HOMICIDE.

Reversal of conviction for improper conduct of officer in selecting jurors, see Appeal and Error, 25.

HORSES.

See Animals.

HOTEL.

See Innkeepers.

HUSBAND AND WIFE.

As to curtesy, see Curtesy.

As to divorce, see Divorce and Separation.

Measure of damages to married woman for negligent injury, see Damages, 9, 10.

Evidence on question of damages to married woman for negligent injuries, see Evidence, 27.

Exemption of homestead purchased with pension money and conveyed to wife from liability for claim against her, see Exemptions.

Release of surety for married woman incapable of contracting by discharge of principal, see Principal and Surety, 1.

Instruction as to damages in action by married woman for injury, see Trial, 13.

Revocation of will by settlement of property rights in anticipation of divorce, see Wills, 2.

Liability of community property to succession tax, see Taxes, 3, 4.

Estate by entirety.

1. A conveyance to a man and wife jointly of real estate purchased by him with funds partly his own and partly belonging to his wife's separate estate, without her written authority to do so, does not create an estate by entirety, but equity will protect her interest in favor of her heirs. *Donovan v. Griffith*, 20: 825, 114 S. W. 621, 215 Mo. 149.

Wife's separate estate.

2. In a proceeding by heirs of a wife for partition of real estate purchased wholly or partly with funds from her separate estate and standing in the name of her husband or in their joint names at the time of her death, he is not chargeable for rents accruing on the property before her death, 20 L.R.A. (N.S.)

whether it was occupied by him or rented to others, where the parties were living together and there is nothing to show that both did not enjoy the benefits and products of the land. *Donovan v. Griffith*, 20: 825, 114 S. W. 621, 215 Mo. 149.

Antenuptial agreement.

3. A provision in an antenuptial contract, that the husband would adopt a child of the wife, and make her his heir, and bequeath and devise all his property to her, does not prevent his giving, in good faith, to his relatives, before death, a policy of insurance upon his life, which amounts only to a reasonable gift, in view of the property possessed by him. *Dickinson v. Seaman*, 20: 1154, 85 N. E. 818, 193 N. Y. 18. (Annotated)

ICE.

Injury by ice on sidewalk, see Highways, 5-7.

IMPROVEMENTS.

Allowance for, to one ejected from premises, see Ejectment.

IMPUTED NOTICE.

See Notice.

INCOMPETENT PERSONS.

Liability of state lunatic asylum for acts of employees, see Charities.

INDEFINITENESS.

Of ordinance as to lighting of street crossings by railroad companies, see Municipal Corporations, 4.

INDEMNITY INSURANCE.

See Insurance, 25.

INDEPENDENT CONTRACTORS.

Who is, see Master and Servant, 1.

Delegation of master's duty to, see Master and Servant, 16-18.

INDIANS.

Assault on Indian by policeman on Indian reservation, see Assault and Battery, 1.

1. State laws for the peace and good order of the people within its borders extend over Indian reservations, and apply to the infraction of such laws by persons of Indian blood. *Deragon v. Sero*, 20: 842, 118 N. W. 839, — Wis. —.

2. An Indian agent cannot authorize policemen on a reservation to require persons of Indian blood, going to meet relatives on an incoming train, to keep away from the entrances to the cars. *Deragon v. Sero*, 20: 842, 118 N. W. 839, — Wis. —.

3. A direction of an Indian agent to policemen on the reservation to keep people back from car entrances when persons are getting on and off cars does not apply to a person of Indian blood who goes in an orderly manner to meet his wife and children who are arriving on a train. *Deragon v. Sero*, 20: 842, 118 N. W. 839, — Wis. —.

INDICTMENT, INFORMATION, AND COMPLAINT.

A charge in an indictment under a statute making it an offense punishable by imprisonment for any officer to receive money on deposit in a bank, where the one receiving it knows, or has good cause to know, that the bank is unsafe or insolvent, that a particular person deposited in a specified bank, for his credit, a check on another bank, and that it was received for the bank by its president, naming him, and accepted on deposit, satisfies all the essentials of such statute as to an officer of a bank accepting or receiving money on deposit. *Ellis v. State*, 20: 444, 119 N. W. 1110, — Wis. —.

INFANTS.

Presumption of incompetence because of minority of servant, see Evidence, 4.

Unlawful employment of, see Master and Servant, 2-4.

Negligence toward trespassing children, see Negligence, 8, 9.

Custody.

Effect of divorce on custody of, see Divorce and Separation, 3, 4.

1. The degree of unfitness which will deprive a parent of the natural right to the custody of his children, while it must be positive, and not comparative, must be considered in relation to the attending circumstances, such as the concern he has shown for them in the past, the suitability of his domestic surroundings to receive them, and the question of their general welfare. *Ex parte Clarke*, 20: 171, 118 N. W. 472, — Neb. —.

2. The unfitness which deprives a parent of the right to the custody of his children must be positive, and not comparative; and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive the parent of his right to their custody. *Ex parte Clarke*, 20: 171, 118 N. W. 472, — Neb. —.

3. The appointment of a guardian by a county court is not conclusive as against a parent's right to the custody of his children, unless it appears that he had notice of the proceeding, and that the question of his competency and suitability was adjudicated. *Ex parte Clarke*, 20: 171, 118 N. W. 472, — Neb. —.

INHERITANCE TAX.

See Taxes, 3, 4.

INJUNCTION.

Infringement of right to trial by jury by, see Jury, 2.

Against nuisance, see Nuisance, 5.

Appropriation of secret information.

1. One employed by an optician to examine the eyes of patients and prescribe lenses will, after leaving his employment, be enjoined from making use of names, addresses, and prescriptions which he copied
20 L.R.A. (N.S.)

from his employer's records, although his contract did not expressly forbid his making use of such knowledge, and the information he is attempting to use relates exclusively to persons examined by him and the records of whose cases he himself made. *Stevens & Co. v. Stiles*, 20: 933, 71 Atl. 802, — R. I. —.

(Annotated)

Against boycott; acts of strikers.

2. Striking employees cannot be enjoined from inducing employees in factories by which their former employer is attempting to get the work done to fill his contracts, to refuse to work on it, although it results in the owners of such factories breaking their contracts. *Iron Molders' Union No. 125 v. Allis-Chalmers Co.* 20: 315, 166 Fed. 45, — C. C. A. —.

3. Striking employees cannot be enjoined from using persuasion to prevent other workmen from taking their places, or to induce those who have done so without making a definite contract from quitting work. *Iron Molders' Union No. 125 v. Allis-Chalmers Co.* 20: 315, 166 Fed. 45, — C. C. A. —.

4. Striking employees cannot be enjoined from picketing if the efforts of the pickets are limited to getting into communication with candidates for employment for the purpose of presenting arguments and appeals to their free judgments to persuade them not to supply the places of the strikers. *Iron Molders' Union No. 125 v. Allis-Chalmers Co.* 20: 315, 166 Fed. 45, — C. C. A. —.

5. Striking employees may be enjoined from using persuasion to force apprentices to break their contracts to serve for definite times. *Iron Molders' Union No. 125 v. Allis-Chalmers Co.* 20: 315, 166 Fed. 45, — C. C. A. —.

6. An employer is entitled to an injunction to restrain its striking workmen from keeping other workmen away from his plant by the use of vile and abusive language, threats of violence and assaults. *Iron Molders' Union No. 125 v. Allis-Chalmers Co.* 20: 315, 166 Fed. 45, — C. C. A. —.

As to offices, elections.

7. Quo warranto, and not injunction, is the proper remedy for an illegal holding of a public office. *School Dist. No. 116 v. Wolf*, 20: 358, 98 Pac. 237, — Kan. —.

Legal proceedings.

8. A corporation having a perfect defense applicable alike to more than one hundred cases brought against it by employees injured by an accident in its works may, to avoid a multiplicity of suits, maintain a bill to enjoin prosecutions of the actions at law until the defense can be established. *Southern Steel Co. v. Hopkins*, 20: 848, 47 So. 274, — Ala. —.

(Annotated)

9. A bona fide purchaser of corporate stock is entitled to an injunction to restrain the sheriff from selling the stock upon an execution against the vendor. *by Everitt v.*

Farmers & M. Bank, 20: 996, 117 N. W. 401, — Neb. —.

As to parks, highways, and railroads.

10. An incorporated village having exclusive control of its highways may maintain a suit in equity to restrain excavation of adjacent lands so as to affect the lateral support and cause or threaten the subsidence of a highway. *Haverstraw v. Eckerson*, 20: 287, 84 N. E. 578, 192 N. Y. 54.

Preliminary and interlocutory injunctions.

11. An *ad interim* injunction is properly granted to restrain a common carrier from further discriminations against a shipper of lumber, where the evidence shows that discriminations have been made in favor of shippers of cotton by giving them advance bookings for particular vessels, and refusing like privileges to the shipper of lumber. *Ocean Steamship Co. v. Savannah Locomotive Works & S. Co.* 20: 867, 63 S. E. 577, — Ga. —.

INNKEEPERS.

Presumption of negligence from injury to guest, see Evidence, 15.

1. The existence of hotels in a city a mile away does not establish the non-necessity of a tavern at a river landing where one has existed for thirty years, and the receipts from it, exclusive of the bar, amount to from \$16 to \$20 per week, and a number of reputable citizens testify to its necessity, although there is testimony to the contrary. *Schneider v. Com.* 20: 107, 111 S. W. 303, 33 Ky. L. Rep. 770.

2. One is not shown not to be a bona fide tavern keeper by the fact that the receipts from his bar are in excess of those from the tavern proper. *Schneider v. Com.* 20: 107, 111 S. W. 303, 33 Ky. L. Rep. 770. (Annotated)

INSOLVENCY.

Receipt of deposit by bank while insolvent, see Banks, 2-7.

Presumption of, see Evidence, 3.

Evidence to show, see Evidence, 25, 32, 33.

Of building association, see Building and Loan Associations, 6, 7.

INSPECTION.

Of books by stockholders, see Corporations, 9-11; *Mandamus*, 5, 9.

Master's duty of inspection, see Master and Servant, 8, 16.

Right to reasonable time for, upon purchase of articles, see Sale, 1.

INSTRUCTIONS.

See Trial, 10-16.

INSURANCE.

Garnishment of foreign insurance company, see Garnishment, 2.

Garnishment of renewal commissions due general insurance agent, see Garnishment, 3.

20 L.R.A. (N.S.)

Right of state manager to maintain action to recover from agent premiums collected and not paid in, see Parties.

Trover by state manager to recover premium collected by agent and not paid over, see Trover, 1.

Conditions; warranties; representations.

Raising question of effect of vacancy for first time on appeal, see Appeal and Error, 10.

1. A statement regarding the dimensions of a building, in an application for insurance, is not warranted correct by a warranty that the description and statement of the condition, situation, value, occupancy, and title of the property are true. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

2. The valuation at \$1,500, in an application for insurance of a building which is worth only \$200, cannot be regarded as so approximately correct as to comply with a warranty of the statement of value. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

3. Statements in an application for insurance that the value of the property is estimated by applicant does not prevent a gross overvaluation from avoiding the policy, where the statement of value is warranted. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

4. A statement of the dimensions of the building in an application for insurance is not within a provision of the policy that it shall be void for misrepresentation of any material fact, if it does not appear that the insured was influenced in issuing the policy because of the statement regarding the dimensions of the building. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —. (Annotated)

5. A substantially true statement of the value of a building, in an application of insurance, is a compliance with the warranty of the statement of value. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

6. A vendee of land, occupying the same under an executory contract of purchase, on which he has paid a portion of the purchase price, is an "unconditional and sole owner" in fee simple of the equitable title, within the condition of the insurance policy providing that it shall be void if the interest of the insured is other than unconditional and sole ownership of the fee-simple title. *Arkansas Ins. Co. v. Cox*, 20: 775, 98 Pac. 552, — Okla. —. (Annotated)

7. A provision in an insurance policy which is to become void if the building becomes and remains vacant for five days, unless continued by consent of the insurer, that it shall be the duty of the owner to report a vacancy within five days of such occurrence and as often as every ten days thereafter, applies only when no permit for

vacancy has been issued. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

8. An application for additional insurance will not avoid a policy under a provision therein that it shall be void if assured shall procure any other contract of insurance, whether valid or not, on the property, if both the owner and the company to which the application for additional insurance is made understand that no risk is assumed under it. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

9. An insurance policy covering different classes of property, each class being separated from the others, and insured for a specific amount, is separable, and recovery may be had for one or more classes without regard to the other items, where there is a breach of a condition of the contract as to one class of property insured, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase in the risk of the property insured. *Arkansas Ins. Co. v. Cox*, 20: 775, 98 Pac. 552, — Okla. —.

Forfeiture.

10. Although a contract for accident insurance, the premiums on which are to be paid monthly, expressly provides that they must be paid on the first day of each month, without notice, yet, if for ten months the insured is sent notice of the maturity of the premium, with a request that it be sent in a self-addressed envelop, the insurer cannot suddenly, without warning, cease to send the notice, and forfeit the policy for nonpayment, which occurs because the assured has, in good faith, waited for the usual notice; especially where the payments were to be entered in a book which must always be presented with the payment, so that assured might well assume that the only safe way of preserving the book was in sending it as directed by the insurer, to a post-office address designated by it. *Knoebel v. North American Acci. Ins. Co.* 20: 1037, 115 N. W. 1094, 135 Wis. 424. (Annotated)

11. A fire insurance policy is not invalidated by nonpayment of premium notes at maturity, where no reference is made to them in the policy, and its validity is in no way made contingent upon their payment. *Arkansas Ins. Co. v. Cox*, 20: 775, 98 Pac. 552, — Okla. —.

Transfer of policy or interest therein.

12. Death within the lifetime of the insured terminates the interest of the beneficiary of life insurance policies, and leaves the insured free to make other disposition of the policy. *Smith v. Metropolitan L. Ins. Co.* 20: 928, 71 Atl. 11, 222 Pa. 226.

Waiver and estoppel.

See also *infra*, 18.

13. Breach of warranty of a statement of title in an application for insurance is waived if the facts are presented to the agent, and he concludes that the facts establish the title stated, upon which conclusion the statement is inserted in the application. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

14. An insured who truthfully and correctly stated the nature and condition of his title in making an application for insurance is not precluded from recovery after loss by a different title being stated in the policy. *Arkansas Ins. Co. v. Cox*, 20: 775, 98 Pac. 552, — Okla. —.

15. A policy issued upon an application stating the title to the land on which the building is situated to be a lease is not avoided by a provision in the policy that it shall be void if the land is not owned by the insured in fee simple. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

16. Issuance by an insurer of a vacancy permit with knowledge that the building has been vacant waives a forfeiture because of such vacancy. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —.

17. An insurance company which furnishes blanks for change of beneficiary, and accepts and recognizes a designated change for a period of years, is estopped to claim that the change was not made in strict accordance with its by-laws. *Smith v. Metropolitan L. Ins. Co.* 20: 928, 71 Atl. 11, 222 Pa. 226.

18. Failure to notify an insured within a reasonable time after the filing of proofs of loss, which are defective, in that the notary public before whom the same was sworn to did not designate his official title nor attach his seal, of the defect therein, estops the insurer from afterward objecting thereto. *Arkansas Ins. Co. v. Cox*, 20: 775, 98 Pac. 552, — Okla. —.

The loss, arbitration.

19. No question as to the title of the insured can be considered by referees appointed in accordance with a clause in a standard insurance policy which provides that, upon failure of the parties to agree as to the amount of loss, it should be referred to arbitrators, the award of a majority of whom should be conclusive as to the amount of loss and damage. *Dunton v. Westchester F. Ins. Co.* 20: 1058, 71 Atl. 1037, — Me. —.

Cause of loss.

20. One who has insured property against all direct loss or damage by fire, except as hereafter provided, among which exceptions is loss caused directly or indirectly by riot, is not liable for property burned by an armed and masked body of men who overawe and terrorize the civil authorities and inhabitants of a town, and proceed to burn the property, because they think it is intended to be put to a use detrimental to their interests. *Spring Garden Ins. Co. v. Imperial Tobacco Co.* 20: 277, 116 S. W. 234, — Ky. —. (Annotated)

Extent of loss or recovery.

21. The owner of a building supported by a party wall which is injured by the burning of the adjoining building may recover,

under the insurance policy on his building, diminution in its value because of the injuries to the party wall, which may include the full value of the wall. *Citizens' F. Ins. Co. v. Lochridge*, 20: 226, 116 S. W. 303, — Ky. — (Annotated)

Defenses.

22. A life insurance company cannot absolve itself from liability to the beneficiary duly designated by the insured for the proceeds of the policy by paying them to the administrator of the insured, although the policy provides that the production by the corporation of the policy and of a receipt signed by any person furnishing satisfactory proof that he is executor of insured shall be conclusive proof that the sum had been paid to the person lawfully entitled to receive the same. *Smith v. Metropolitan L. Ins. Co.* 20: 928, 71 Atl. 11, 222 Pa. 226. (Annotated)

23. To entitle an insurance company to defeat liability on a policy because of fraud, it is not required to tender back the premium received. *Duncan v. National Mut. F. Ins. Co.* 20: 340, 98 Pac. 634, — Colo. —

Actions; enforcing payment.

24. A stipulation in an insurance policy that no suit shall be brought on a contract unless within twelve months next after the damage occurs does not apply to a suit for damages because of the defective character of repairs which the insurer elects to make after the loss in accordance with its rights under the contract. *Winston v. Arlington F. Ins. Co.* 20: 960, 32 App. D. C. 61. (Annotated)

Indemnity insurance.

See also Motions and Orders, 1.

25. The giving to the employee of his note by a receiver appointed in supplementary proceedings to collect a judgment against an insolvent employer for injury to his employee is not a satisfaction of the claim within the meaning of an indemnity insurance policy, that no action shall lie against the insurer unless brought by the assured himself, to reimburse him for actual loss sustained and paid by him in satisfaction of a judgment, and gives the receiver no standing to enforce the policy. *Stenbom v. Brown-Corliss Engine Co.* 20: 956, 119 N. W. 308, — Wis. —

INTERLOCUTORY DECREE.

Time for setting aside, see Judgment, 3.

INTERLOCUTORY INJUNCTION.

See Injunction, 11.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUOR.

Power of state to forbid publication of advertisements of liquors kept for sale in other states, see Commerce, 1; Statutes, 3.

Levy on, see Levy and Seizure; Replevin, 2.

20 L.R.A. (N.S.)

Power of attorney general to remove municipal officers for failure to make complaint of violation of statute regulating sale of, see Officers, 1, 2.

1. General statutes of a state, regulating the sale of intoxicating liquors, operate and have force uniformly throughout that state, notwithstanding anything in municipal charters or ordinances to the contrary. *State ex rel. Young v. Robinson*, 20: 1127, 112 N. W. 269, 101 Minn. 277.

Licenses.

2. The owner of the fee of a street at the point where it abuts on property, to sell liquor upon which an application has been made for license, is within the provisions of a statute authorizing owners of real estate within 25 feet of such property to object to the granting of the license. *Moran v. Gallagher*, 20: 116, 85 N. E. 579, 199 Mass. 486.

Unlawful sales.

Prosecution by attorney general for unlawful sales, see Attorney General, 1.

Burden of proof in criminal prosecution for wrongful sale, see Evidence, 1.

3. Whether or not the transportation of liquor from one county, where the sale is lawful, into another in the same state, by a route leading through another state, is interstate commerce, is immaterial to any issue presented by a prosecution for an alleged unlawful sale in the latter county. *State v. Rosenberger*, 20: 284, 111 S. W. 509, 212 Mo. 648.

4. A statute prohibiting the sale, or keeping for the purpose of sale, of malt liquors, without a license, applies to all malt liquors sold or kept for sale, to be used as a beverage, whether intoxicating or not. *Luther v. State*, 20: 1146, 120 N. W. 125, — Neb. — (Annotated)

5. The distribution of intoxicating liquors in less quantities than 5 gallons by a bona fide incorporated social club to its members for a consideration, though without profit, constitutes a "sale" within the meaning of Minn. Rev. Laws 1905, § 1519, prohibiting the sale of intoxicating liquors to be drunk upon the premises, and is prohibited unless protected by license, as provided by law. *State ex rel. Young v. Minnesota Club*, 20: 1101, 119 N. W. 494, 106 Minn. 515.

6. An ordinance merely imposing a license tax upon the business of selling intoxicating liquors does not include a bona fide social club which merely distributes such liquor to its members at a slight advance over the cost, the profit being devoted to the expenses of the institution. *Cuzner v. California Club*, 20: 1095, 100 Pac. 868, — Cal. — (Annotated)

7. An incorporated social club is a "person" within the meaning of Minn. Rev. Laws 1905, § 1519, prohibiting "any person"

from retailing intoxicating liquors without a license. *State ex rel. Young v. Minnesota Club*, 20: 1107, 119 N. W. 494, 106 Minn. 515.

8. A clause in an ordinance providing for a license tax upon those conducting, managing, or carrying on the business of retail liquor dealers, which defines a "retail liquor establishment" to be any place where intoxicating liquors are sold, served, or given away in quantities less than 5 gallons, does not include a social club which serves liquors to its members at a slight advance on the cost, the profit being devoted to the maintenance of the club, where the purpose of the definition is to distinguish between retail and wholesale business and restaurants. *Cuzner v. California Club*, 20: 1095, 100 Pac. 868, — Cal. —.

9. The proprietor of a stand where soft drinks are sold is not guilty of selling or being interested in the sale of intoxicating liquors without a license, contrary to the provisions of the statute, because an adult employee, in his absence, sells a bottle of beer which he had provided for his own use and which he gave no authority to anyone to sell. *Partridge v. State*, 20: 321, 114 S. W. 215, — Ark. —.

10. Upon the filling of an order for liquor sent from a prohibition county to one where the sale is lawful, by delivering it to a carrier to be transported C. O. D., the sale is complete at the place where the order is filled, and lawful. *State v. Rosenberger*, 20: 284, 111 S. W. 509, 212 Mo. 648.

JUDGMENT.

On appeal, see Appeal and Error, 28.
Personal judgment against nonresident constructively served, see Writ and Process.

Effect of judgment of foreclosure on junior mortgagee not made party, see Mortgage, 1.

Collateral attack on order changing boundaries of school district, see Schools, 2.

By default.

Right to jury to assess damages on default judgment, see Jury, 1.

1. Failure to call out defendant prior to the entry of a default judgment will not render the judgment void. *State ex rel. Spratlin v. Thompson*, 20: 1, 102 S. W. 349, 118 Tenn. 571.

Form; substance.

2. A judgment enforcing specific performance of a contract to devise all one's property to a particular person, so far as it relates to money or other property owned and left by the promisor at the time of his death, does not include the proceeds of a policy of insurance on his life, which he had given away in his lifetime. *Dickinson v. Seaman*, 20: 1154, 85 N. E. 818, 193 N. Y. 18.

20 L.R.A. (N.S.)

Relief against.

Issuing execution on judgment set aside by court, see Execution.

Laches in applying for setting aside of, see Limitation of Actions, 2.

Mandamus to compel issuance of execution where not proper remedy for questioning propriety of setting aside judgment, see Mandamus, 1.

3. A decree fixing the amount of indebtedness of a loan association in the hands of a receiver to a claimant is merely interlocutory, and, upon good cause shown, may be set aside at any time before the close of the trial at which the final decree in the cause is enrolled, although it is subsequent to the term at which the interlocutory decree is passed. *Standard Sav. & L. Assn. v. Aldrich*, 20: 393, 163 Fed. 216, 89 C. C. A. 646.

JUDICIAL NOTICE.

That January is in the winter season, see Pleading, 11.

JURY.

Motion to withdraw criminal case from consideration of, and discharge jury, see Criminal Law, 3.

As to grand jury, see Grand Jury.

Right to trial by.

1. Failure to file in court the insurance policy on which suit is brought will preclude the entry of a substantial judgment by the court on default without the intervention of a jury. *State ex rel. Spratlin v. Thompson*, 20: 1, 102 S. W. 349, 118 Tenn. 571.

(Annotated)

2. The right of trial by jury is not infringed by entertaining a bill in equity in favor of one sued by numerous persons against whose actions he has a common defense, to enjoin prosecution of the actions to enable him to establish his defense so as to avoid a multiplicity of suits. *Southern Steel Co. v. Hopkins*, 20: 848, 47 So. 274, — Ala. —.

Impanelling; selection; competency.

Improper conduct of officer in selecting, see Appeal and Error, 25; Contempt.

As to competency of grand juror, see Grand Jury.

3. In a criminal prosecution it is the duty of an officer who summons jurors, or who selects and summons talesmen, to use his best efforts to secure men of intelligence, courage, and good moral character; but, in so doing, he should act with entire impartiality between the prosecution and the defendant. *United States v. Hargo*, 20: 1013, 98 Pac. 1021, — Okla. —.

4. A challenge to the array or panel in a criminal prosecution will lie for bias, partiality, or irregular action of the summoning officer. *United States v. Hargo*, 20: 1013, 98 Pac. 1021, — Okla. —.

LABOR ORGANIZATIONS.

The employment of assault and duress by members of labor unions in furthering a strike undertaken against the representatives of a certain line of business in a certain city to enforce demands with respect to wages, time, work, apprentices, etc., will not be regarded as within the terms of a statute making it illegal to combine for the purpose of "doing harm maliciously for the sake of the harm as an end in itself," so as to make illegal the whole strike. *Iron Molders' Union No. 125 v. Allis-Chalmers Co.* 20: 315, 166 Fed. 45, — C. C. A. —.

LACHES.

See Limitation of Actions, 2.

LANDLORD AND TENANT.

Termination of lease by destruction of building, see Contracts, 11.

Damages for breach of contract to lease lands and tenements, see Damages, 1.

Attempt to enforce lien under lease giving landlord lien on crops and chattels as election preventing its enforcement as a chattel mortgage, see Election of Remedies, 1.

Taxation of oil lease, see Taxes, 1.

Sufficiency of draft as tender for rent, see Tender.

LARCENY.

1. If one takes from a card table, without consent of his opponent, money belonging to the latter, under the pretense that he has won it in the game, which was in fact fraudulently conducted by him, so that the owner of the money had no chance to win, and was the only one who risked anything, with intent to appropriate it to his own use, he is guilty of larceny. *State v. Donaldson*, 20: 1164, 99 Pac. 447, — Utah, —. (Annotated)

2. One who obtains from another a sum of money by a fraudulent use of cards is guilty of larceny of the whole amount, although he intends to divide it with others who are confederated with him in the transaction. *State v. Donaldson*, 20: 1164, 99 Pac. 447, — Utah, —.

LATERAL SUPPORT.

Injunction to restrain injury to lateral support of highway, see Injunction, 10.

The owner of land abutting on a highway is burdened with the duty of preserving lateral support to the highway as constructed and operated for public use. *Haverstraw v. Eckerson*, 20: 287, 84 N. E. 578, 192 N. Y. 54. (Annotated)

LEGAL PROCEEDINGS.

Injunction against, see Injunction, 8, 9.

LEVY AND SEIZURE.

Obtaining judgment in execution to enforce lien as bar to maintenance of replevin suit, see Election of Remedies, 1.

20 L.R.A. (N.S.)

Levy on intoxicating liquors, see Evidence, 16.

Intoxicating liquors are not subject to seizure upon execution, where a statute forbids its sale except by certain persons, for restricted purposes, and upon affidavit of the buyer, showing the occasion for the purchase. *Hines v. Stahl*, 20: 1118, 99 Pac. 273, — Kan. —. (Annotated)

LIBEL AND SLANDER.

Immaterial error in instructions on suit for, see Appeal and Error, 21.

Privileged communications.

1. A state newspaper published primarily for a state constituency is not deprived of its privilege in the discussion of subjects of state-wide concern by a small circulation elsewhere. *Coleman v. MacLennan*, 20: 361, 98 Pac. 281, — Kan. —.

2. A newspaper publication, to be privileged, should be no wider than the moral or social duty to publish; and, if it be designedly or unnecessarily or negligently excessive, the privilege is lost. *Coleman v. MacLennan*, 20: 361, 98 Pac. 281, — Kan. —. (Annotated)

3. A publication reciting facts and making comment relating to the official conduct and character of a state officer who is a candidate for re-election, made in good faith, and for the sole purpose of giving to the people what the publisher honestly believes to be true information, in order that the voters may be enabled to cast their ballots more intelligently, is privileged, although the matters contained in the article may be untrue in fact, and derogatory to the character of the candidate. *Coleman v. MacLennan*, 20: 361, 98 Pac. 281, — Kan. —.

LICENSE.

For sale of intoxicating liquor, see Intoxicating Liquors.

Forfeiture of an auctioneer's license cannot be imposed as a penalty in the civil suit of an adjoining merchant for unfair dealings in the conduct of his business, nor can the latter put the auctioneer out of business by signs or publications reflecting upon the character of his business. *Gilly v. Hirsh*, 20: 972, 48 So. 442, 122 La. 966.

LICENSEES.

Injury to, by electricity, see Electricity, 2.

LIENS.

Obtaining judgment in execution to enforce lien as bar to maintenance of replevin suit, see Election of Remedies, 1.

As to mechanics' liens, see Mechanics' Liens.

Of vendee for advance payment on rescission for fraud of executory contract for purchase of land, see Vendor and Purchaser, 1.

LIFE INSURANCE.

See Insurance.

LIGHT.

Compensation for interference with, see Eminent Domain, 1.

Duty of carrier to light stations and platforms, see Carriers, 17.

LIMITATION OF ACTIONS.

Conflict of laws as to, see Conflict of Laws.

Limitation of time for action on insurance policy, see Insurance, 24.

1. The statute of limitations does not mean that the debt has been paid, but is a personal privilege which the law gives to the debtor, whereby he may say that the debt is stale, and for that reason should not be enforced. *Sterrett v. Sweeney*, 20: 963, 98 Pac. 418, 15 Idaho, 416.

Laches.

2. Unexplained delay for five years to apply for the setting aside of a decree foreclosing a mortgage, void because rendered in vacation, during which time purchasers at the sale and their grantees had sold timber, changed fences, and in all respects used the property as their own, is such laches as will defeat relief. *Jackson v. Beckettold Printing & B. Mfg. Co.* 20: 454, 112 S. W. 161, 86 Ark. 591.

When statute runs.

3. The statute of limitations begins to run upon a right of action against a railroad company which, without authority, straightens the bed of a stream so as to accelerate the flow in such manner that its future injurious effect on the riparian land is certain from the time of the completion of the work, although the actual injury is done only by gradual erosion and the overflow of the property in times of freshet. *Turner v. Overton*, 20: 894, 111 S. W. 270, 86 Ark. 406. (Annotated)

4. The limitation period for injury to land on the opposite shore by deflection of the current of a river by the construction of a permanent dike to protect one shore begins to run from the completion of the structure, although the injury occurs by the washing away of the shore during periods of high water in successive years thereafter, a process as certain to continue as the annual rains and the flow of the water of a large river. *Gulf, C. & S. F. R. Co. v. Moseley*, 20: 885, 161 Fed. 72, 88 C. C. A. 236. (Annotated)

When action is barred.

5. The statutory limitation of the time within which "an action for relief on the ground of fraud" must be commenced only applies when the party against whom the bar of the statute is interposed is required to allege fraud in pleading his cause of action, or to prove fraud to entitle him to relief. *Logan v. Brown*, 20: 298, 95 Pac. 441, — Okla. —.

Interruption of statute.

6. Under the statute of Washington, a 20 L.R.A. (N.S.)

partial payment made upon a promissory note after maturity, and before the statute of limitations has run, is an acknowledgment that the debt is recognized as in existence, that the privilege to claim the maturity of the note as the date from which the statute begins to run is waived, and that the date of payment is fixed as a new date from which the statute begins to run. *Sterrett v. Sweeney*, 20: 963, 98 Pac. 418, 15 Idaho, 416.

LIQUIDATED DAMAGES.

See Damages, 6.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOGGING RAILROAD.

Servants engaged in operating as fellow servants of other employees, see Master and Servant, 20.

Sufficiency of petition in action by servant for personal injuries, see Pleading, 12.

LOGS AND LOGGING.

Failure to record marks placed on logs, see Records and Recording Laws.

1. The rights of the riparian owner are not unlawfully interfered with by the reclamation, from the bed of the stream, of logs placed in it to be floated to market, which sink and become partly embedded in the soil, so long as there is no injury to the banks or unlawful trespass thereon. *Whitman v. Muskegon Log Lifting & O. Co.* 20: 984, 116 N. W. 614, 152 Mich. 645.

2. The mere fact that the marks upon the logs placed in a river, to be floated to market, and which sink and become embedded in the soil, have become obliterated, does not destroy the title of their original owners or prevent an assignment of the property to a salvage company. *Whitman v. Muskegon Log Lifting & O. Co.* 20: 984, 116 N. W. 614, 152 Mich. 645.

3. The title of logs taken from the bed of a stream is not changed by the unlawful trespass of the owner in piling them on the property of the riparian owner. *Whitman v. Muskegon Log Lifting & O. Co.* 20: 984, 116 N. W. 614, 152 Mich. 645.

4. The mere fact that the logs placed in a river, to be floated to market, sink to the bottom and cease to float, is not sufficient to show abandonment of them. *Whitman v. Muskegon Log Lifting & O. Co.* 20: 984, 116 N. W. 614, 152 Mich. 645.

LOOKOUT.

Duty of motorman on street car to keep, see Street Railways, 3.

MALPRACTICE.

See Physicians and Surgeons.

MALT LIQUOR.

Statute prohibiting sale of, see Intoxicating Liquors, 4.

MANDAMUS.

1. Mandamus to compel the issuance of an execution is not the proper remedy to question the propriety of the court's action in setting aside a judgment. *State ex rel. Spratlin v. Thompson*, 20: 1, 102 S. W. 349, 118 Tenn. 571.

To court or judge.

2. The issuance of a writ of mandamus to compel a court to proceed to hear a cause is not prevented by the fact that the effect of so doing will result in requiring the overruling of an order quashing an indictment for disqualification of a member of the grand jury. *State ex rel. McGovern v. Williams*, 20: 941, 116 N. W. 225, 136 Wis. 1.

To county, town, or municipal officers.

3. Mandamus will not lie to compel a city engineer to furnish monthly estimates of the completion of work under a public contract in accordance with a provision in that contract that they shall be furnished. *State ex rel. Fire & R. P. C. Constr. Co. v. Icke*, 20: 800, 118 N. W. 196, 136 Wis. 583. (Annotated)

4. Mandamus will not lie to compel performance of a duty under a statute giving public officers discretion to grant contractors for public work estimates of work completed from time to time, which shall entitle them to payment therefor. *State ex rel. Fire & R. P. Constr. Co. v. Icke*, 20: 800, 118 N. W. 196, 136 Wis. 583.

To corporations.

5. That a corporation, prior to a certain time, was paying dividends, and that it then ceased, and, three years afterwards, owed its directors large sums of money, and was otherwise in debt, are sufficient to entitle a stockholder to a writ of mandamus to compel the corporation to permit him to inspect its books and papers for the purpose of securing information upon which to base a proceeding against the directors for mismanagement. *Kuhback v. Irving Cut Glass Co.* 20: 185, 69 Atl. 981, 220 Pa. 427.

To school officers.

6. In the absence of direct pecuniary injury, the remedy of a parent whose child is wrongfully suspended from a school is mandamus to secure his restoration, and not an action for damages. *Douglas v. Campbell*, 20: 205, 116 S. W. 211, — Ark. —.

Procedure; parties.

7. Filing a return in pursuance of an agreement that papers served by the one making a return shall be regarded as an alternative writ of mandamus waives all irregularity in the proceedings prior thereto. *Kuhback v. Irving Cut Glass Co.* 20: 185, 69 Atl. 981, 220 Pa. 427.

8. That, in the absence of an agreement by a corporation that papers served in a mandamus proceeding shall be regarded as an alternative writ, its president would be subject to attachment, will not relieve it from the agreement. *Kuhback v. Irving Cut Glass Co.* 20: 185, 69 Atl. 981, 220 Pa. 427. 20 L.R.A. (N.S.)

9. The answer of the president of a corporation on behalf of himself and all other officers in a mandamus proceeding to compel the inspection of the corporate books subjects the other officers to the orders of the court, although they were not served with the papers in the proceeding. *Kuhback v. Irving Cut Glass Co.* 20: 185, 69 Atl. 981, 220 Pa. 427.

10. An insurance company against which a judgment has been rendered by default is a necessary party to a mandamus proceeding to compel the issuance of a fieri facias thereon. *State ex rel. Spratlin v. Thompson*, 20: 1, 102 S. W. 349, 118 Tenn. 571.

MARKS.

On logs, see *Logs and Logging*, 2.

MASTER AND SERVANT.

Error in instruction in action against master for injuries to minor servant, see *Appeal and Error*, 22.

Error in admitting expert testimony as to dangerous character of machine at which minor is set to work, see *Appeal and Error*, 15,

Mutuality of contract for employment, see *Contracts*, 3.

Variance in action for death of employee, see *Evidence*, 43.

Presumption of negligence from injury to servant, see *Evidence*, 11-14.

Presumption of negligence from breaking of appliance, see *Evidence*, 14.

Presumption as to time of break in defective apparatus, see *Evidence*, 10.

Sufficiency of pleadings to justify admission of evidence in action for injury to servant, see *Evidence*, 42.

Sufficiency of evidence to rebut presumption of negligence in case of injury to servant, see *Evidence*, 38.

Sufficiency of evidence to show cause of injury to servant, see *Evidence*, 36.

Picketing by employees, see *Injunction*, 4.

Injunction against prosecution at law of actions by servants, see *Injunction*, 8.

Validity of strike of employees, see *Labor Organizations*.

Sufficiency of petition in action by servant for personal injuries, see *Pleading*, 12.

Question for jury as to negligence of master, see *Trial*, 7.

When relation exists.

1. An independent contract for the erection of a building, so as to relieve the owner from liability for negligent injuries to workmen, is not shown by the employment of one at a certain salary to attend to its construction and hire the men, where the owner pays them and furnishes the materials, directing the progress, course of procedure, and general management of the work. *Rankel v. Buckstaff-Edwards Co.* 20: 1180, 120 N. W. 209, 200 Wis. —.

Unlawful employment of children.

2. A minor whose age is falsely represented with his knowledge and acquiescence, for the purpose of securing employment for him, is not estopped, in an action against his employer to recover damages for personal injuries, from showing that he was under the age at which the statute permitted him to be employed. *Braasch v. Michigan Stove Co.* 20: 500, 118 N. W. 366, 153 Mich. 652. (Annotated)

3. A master is not relieved from liability for injury to a child employed in violation of the terms of a statute because the statute does not in express terms provide for such liability. *Strafford v. Republic Iron & S. Co.* 20: 876, 87 N. E. 358, 238 Ill. 371.

4. A freight elevator which passes floors is a dangerous machine, within the meaning of a statute forbidding employment of children under sixteen years of age upon such machines. *Braasch v. Michigan Stove Co.* 20: 500, 118 N. W. 366, 153 Mich. 652.

Duty as to place and appliances.

5. In the absence of any rule or custom for independent inspection by the owner of a building of the windows in it, he is not liable for injury to an employee whose duty is to open and close the windows, by the breaking of a glass caused by some defect in the setting, which arose after the original construction of the building. *Stewart & Co. v. Harman.* 20: 228, 70 Atl. 333, 103 Md. 446.

6. The switching from an exchange track, where it had been left by another carrier, of a loaded car from another state to its destination a few blocks away within the city, which is so defective as not to comply with the requirements of the safety-appliance act of Congress, is a violation of the provisions of that act. *Chicago, M. & St. P. R. Co. v. United States.* 20: 473, 165 Fed. 423. — C. C. A. —

7. Hauling to the repair shops in another state, as part of a regular train engaged in interstate commerce, a foreign empty car which has been damaged in a wreck so as to be defective under the safety-appliance act of Congress, is a violation of the provisions of that act, although the damaged end of the car is chained to another car, from which it is not intended to be separated until it reaches its destination. *Chicago, M. & St. P. R. Co. v. United States.* 20: 473, 165 Fed. 423. — C. C. A. —

(Annotated)

Inspection.

8. An electric passenger carrier fulfils its duty to its servants, so far as the controller of an electric car is concerned, if the controller is shown to have been of standard type, made by a reputable manufacturer, in good condition, and to have been subjected to such inspection as is reasonable, practicable, and usual; and in such case the carrier's duty does not require him to dismantle the controller in order visually to examine the grounding wire. *Jenkins* 20 L.R.A. (N.S.)

v. St. Paul City R. Co. 20: 401, 117 N. W. 928, 105 Minn. 504.

Selection and retention of employees.

Presumption of incompetence because of minority of servant, see Evidence, 4.

Sufficiency of evidence to show incompetency of servant, see Evidence, 39-41.

Question for jury as to negligence of master in employing servants, see Trial, 8.

9. The fact that other servants are competent will not excuse a master in employing an incompetent person to perform a particular service, although in conjunction with such competent fellow servants. *Wilkinson v. Kanawha & H. Coal & C. Co.* 20: 331, 61 S. E. 875. — W. Va. —

10. A railroad company which, without proper investigation as to his qualification, places in charge of a scheduled train a conductor who has not the requisite knowledge of the meaning of orders for meeting and passing trains, is liable for the death of a fireman on another train with which the train in charge of such conductor collides because of his failure to obey, through ignorance of its meaning, an order requiring him to pass the other train at a certain point. *Still v. San Francisco & N. W. R. Co.* 20: 322, 98 Pac. 672. — Cal. —

11. A master is not negligent towards his servants in employing one to do blasting, if he secured him upon recommendation as to his competence of the owner of a quarry where he had been employed in such duties. *Rankel v. Buckstaff-Edwards Co.* 20: 1180, 120 N. W. 269. — Wis. —

Assumption of risk.

12. A servant engaged in removing earth for the foundation of a building does not assume the risk of injury from unexploded dynamite used in breaking up a frozen crust, where he had no reason to apprehend that explosives would be left in the earth which he was required to remove, and which he had been led to believe was safe. *Rankel v. Buckstaff-Edwards Co.* 20: 1180, 120 N. W. 269. — Wis. —

Contributory negligence of servant.

13. The provisions of a statute regulating the employment of servants are not to be so construed as to abrogate the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless such defense is expressly excluded thereby, although a violation of the statute by a master is negligence *per se*, and actionable, if injuries are sustained by a servant in consequence thereof. *Darsam v. Kohlmann.* 20: 881, 48 So. 781. — La. —

14. The owner of a factory is not liable in damages to a boy twelve years of age, who was employed by the factory foreman in the belief, superinduced by the boy's representations and his appearance, and by the acquiescence of his family, that he was over the age prescribed by a statute regu-

lating the employment of minors, and assigned to a safe place to work, with instructions to stay there, and not go near or meddle with any of the machinery, notwithstanding that the employment of boys of that age in a factory is a penal offense, for injuries received by the boy whilst unnecessarily, and in violation of his instructions, subjecting himself to an obvious risk, the danger of which he was capable of understanding. *Darsam v. Kohlmann*, 20: 881, 48 So. 781, — La. —.

15. The contributory negligence of a child employed in violation of the terms of a statute is no defense to an action against the master for personal injuries received by him in consequence of such employment, although he had temporarily abandoned the work he was employed to do and was attempting to perform work which he had been forbidden to do. *Strafford v. Republic Iron & S. Co.* 20: 876, 87 N. E. 358, 238 Ill. 371. (Annotated)

Fellow servants.

16. A railroad company is not relieved from liability for injuries resulting to a servant by reason of the negligent performance, by an independent contractor, of the nondelegable duty of the master to furnish and maintain a reasonably safe place for its servants to work, by lack of actual notice of such negligence in time to have avoided the resulting injury to the servant, since, in such case, the law imposes the duty upon the master of inspections and tests adequate to avoid the dangers. *Vickers v. Kanawha & W. V. R. Co.* 20: 793, 63 S. E. 367, — W. Va. —.

17. The nonassignable duty of a railroad company to provide its servants a reasonably safe place to work extends to the entire track over which the servants are required to pass in the discharge of their duties, and the master will not be absolved from liability for the nonperformance thereof by intrusting such positive duty to an independent contractor. *Vickers v. Kanawha & W. V. R. Co.* 20: 793, 63 S. E. 367, — W. Va. —. (Annotated)

18. A person employed by a railroad company as an independent contractor to build certain abutments, with permission to construct guy ropes across the track, does not stand in the relation of an independent contractor with respect to the operation of the railroad and the furnishing of the company's employees with a safe place to work, since the effect of such contract with respect to such ropes is simply to delegate to such independent contractor performance of the nonassignable duty of the company to maintain a reasonably safe place for its servants to work, rendering it liable for his negligent performance thereof. *Vickers v. Kanawha & W. V. R. Co.* 20: 793, 63 S. E. 367, — W. Va. —.

Who are fellow servants.

19. An employee engaged in removing earth for the foundation of a building is not a fellow servant of an expert employed for 20 L.R.A. (N.S.)

a short time to break up frozen ground by blasting, where the former has nothing to do with the placing, packing, or discharging of the explosives, although he drills the holes to contain them. *Rinkel v. Buckstaff-Edwards Co.* 20: 1180, 120 N. W. 269. — Wis. —. (Annotated)

20. Servants engaged in operating a private railroad used for hauling logs to a sawmill and for transporting other employees to their work in the woods are fellow servants with such other employees, and the owner of the mill is not liable to one of the servants, injured in the operation of the train by the negligence of his co servants. *Roland v. Tift*, 20: 354, 63 S. E. 133, — Ga. —. (Annotated)

Vice principal.

21. An independent contractor to whom a railroad company intrusts the performance of its positive duty to provide its servants a reasonably safe place to work thereby becomes a vice principal, and his negligent performance of those duties becomes notice to the company, rendering it liable for injuries to its servants resulting therefrom. *Vickers v. Kanawha & W. V. R. Co.* 20: 793, 63 S. E. 367, — W. Va. —.

22. A section foreman on a railroad, having direction of the movement of a hand car used by the men, is a vice principal in having the car propelled at a reckless speed on down grade in the face of an approaching train of which he has knowledge, and suddenly applying the brake without warning when the train comes into view, so as to throw a section man from the car to his injury. *Tillis v. Great Northern R. Co.* 20: 434, 97 Pac. 737, 50 Wash. 536. (Annotated)

Liability to third person.

Liability of superintendent of state lunatic asylum for acts of employees, see Charities, 1.

Liability of owner of horse left by servant unhitched in street for injury done by, see Negligence, 10.

Liability of master for wrongful sale of liquor by servant, see Intoxicating Liquors, 9.

Sufficiency of allegation as to authority of servant in suit against master for damages, see Pleading, 14.

23. A coal dealer whose team is under the control of his servant all the time, whether he is hauling coal or not, to feed and care for, cannot escape liability for injury caused by its running away when left unattended by the servant, because, at the time, he has gone to move a trunk which was not within the scope of his duty to do, since it was his duty to see that the team was not left unattended in the street. *Corona Coal & I. Co. v. White*, 20: 958, 48 So. 362, — Ala. —.

MAXIMS.

1. Equity regards that done which ought to be done. *Beaver v. Ross*, 20: 65, 118 N. W. 287. — Iowa, —.

2. *Res ipsa loquitur*. *Stewart & Co. v. Harman*, 20: 228, 70 Atl. 333, 108 Md. 446; *Christensen v. Oregon Short Line*, 20: 255, 99 Pac. 676, — Utah, —; *Jenkins v. St. Paul City R. Co.* 20: 401, 117 N. W. 928, 105 Minn. 504; *La Bee v. Sultan Logging Co.* 20: 405, 91 Pac. 560, 47 Wash. 57; *Minnesota General Elec. Co. v. Cronon*, 20: 816, 166 Fed. 651, — C. C. A. —.

3. *Respondeat superior*. *Ketterer v. Kentucky State Bd. of Control*, 20: 274, 115 S. W. 200, — Ky. —.

4. *Volenti non fit injuria*. *Minnesota General Elec. Co. v. Cronon*, 20: 816, 166 Fed. 651, — C. C. A. —.

5. What ought to be done will be considered or treated as already done. *Painter v. Painter*, 20: 120, 69 Atl. 323, 220 Pa. 82.

6. Where two rights meet in the same person, they are to be viewed as if they existed in different persons. *Beaver v. Ross*, 20: 65, 118 N. W. 287, — Iowa, —.

MECHANIC'S LIENS.

Necessity of affirmatively pleading set-off, see Pleading, 16.

For what work or materials.

1. Every person performing labor or furnishing material for a building, who files notice as required by Idaho Lien Laws, § 6, is entitled to a lien therefore under § 1 of such laws, and the amount to be recovered under such lien is the amount due under his contract. *Steltz v. Armory Co.* 20: 872, 99 Pac. 98, 15 Idaho, 551.

To what property attaches.

2. A statute providing for a mechanics' lien, or any building does not include a building belonging to the public, such as a school-house. *National Fire Proofing Co. v. Huntington*, 20: 261, 71 Atl. 911, 81 Conn. 632. (Annotated)

Of subcontractors and materialmen.

3. The death of the principal contractor during the completion of a contract for the improvement of a village street, which contract was thereafter completed by the administrator, does not deprive a subcontractor, who has furnished material which has gone into the work, of his statutory right to a lien upon the fund arising from the contract. *Vernon v. Harper*, 20: 44, 86 N. E. 882, 79 Ohio, 181. (Annotated)

4. Where the owner of a building, after the contractor's abandonment of the contract for its construction, completes it at a cost in excess of the original contract price, and pays the amount due under the contract to some materialmen to the exclusion of others, he may be compelled to pay the latter their *pro rata* share of the original contract price, less the extra cost of completing the building. *Sternberg v. Fort Smith Refrigerator Works*, 20: 89, 112 S. W. 174, 87 Ark. 56.

5. A provision in a building contract that, upon neglect of the contractor, the architect will have power to provide materials, the expense of which shall be deducted from 20 L.R.A. (N.S.)

the contract price, does not make the architect the agent of the owner, so that his act in procuring materials will create a lien on the property in excess of the original contract price, to which extent a lien is allowed by statute. *Sternberg v. Fort Smith Refrigerator Works*, 20: 89, 112 S. W. 174, 87 Ark. 56. (Annotated)

Enforcement; set-off.

6. The owner of a building, who has entered into possession thereof on the theory that it is a completed structure, may recover damages caused by the front falling out, by reason of the building being latently defective, in that it was not properly tied to the adjoining wall, as an offset against the contractor, who is seeking to foreclose his mechanics' lien for the construction of the building. *Steltz v. Armory Co.* 20: 872, 99 Pac. 98, 15 Idaho, 551.

7. The fact that the owner of a building went into possession thereof with knowledge that the building contained latent defects in its construction and inferior material will not prevent his claiming damages for such defects as an offset against the contractor's action to recover the contract price therefor, unless an express waiver is shown, or such other facts and circumstances as would amount to a waiver of damages. *Steltz v. Armory Co.* 20: 872, 99 Pac. 98, 15 Idaho, 551. (Annotated)

MENTAL ANGUISH.

Damages for, see Damages, 13.

MINES.

Taxation of oil lease, see Taxes, 1.

MINORS.

See Infants.

MISCARRIAGE.

Damages for negligence causing, see Damages, 10.

MOB.

Liability of insurer for destruction of property by, see Insurance, 20.

MONEY.

Trover to recover, see Trover, 2.

MORTGAGE.

Obtained by duress, see Duress.

Laches in application to set aside decree of foreclosure, see Limitation of Actions, 2.

Instruction in action on mortgage given to prevent prosecution for crime, see Trial, 11.

See also Chattel Mortgage.

Parties.

1. A junior mortgage is not affected by a judgment and decree foreclosing a first mortgage, where he is not made a party to the suit, but the foreclosure is effectual against those persons who were made parties, and a sale vests the estate in the purchaser subject to the rights therein of the

junior mortgagee. *Horr v. Herrington*, 20: 47, 98 Pac. 443, — Okla. —.

Relief; decree.

2. A decree of foreclosure of mortgaged premises merges the interests of the parties to the suit in the decree, and transfers and vests such interests in the purchaser at the sale. *Horr v. Herrington*, 20: 47, 98 Pac. 443, — Okla. —.

Sale; purchaser's rights.

3. A purchaser of mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage, which had been duly recorded, and with knowledge of the rights of the holder of that mortgage to redeem. *Horr v. Herrington*, 20: 47, 98 Pac. 443, — Okla. —.

Surplus.

4. A junior mortgagee has no claim, by virtue of his mortgage, upon the surplus money arising from a sale under a suit to foreclose a senior mortgage, to which he was not made a party. *Horr v. Herrington*, 20: 47, 98 Pac. 443, — Okla. —.

(Annotated)

Redemption.

Curtsey in equity of redemption of wife's lands, see *Curtsey*, 5.

5. The holder of a junior encumbrance waives his right to redeem by purchasing the lands upon the foreclosure of the senior mortgage, he not having been made a party to the foreclosure suit. *Horr v. Herrington*, 20: 47, 98 Pac. 443, — Okla. —.

6. An inferior lienholder has a right to redeem the property in the same manner as its owner might, from the superior lien, and the right to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby. *Horr v. Herrington*, 20: 47, 98 Pac. 443, — Okla. —.

MOTIONS AND ORDERS.

Motion to withdraw criminal case from jury, see *Criminal Law*, 3.

1. A court which has entered an *ex parte* order in a supplementary proceeding to enforce a judgment against an insolvent employer in favor of an injured employee, empowering the receiver appointed in such proceeding to execute his note in satisfaction of the judgment, and bring an action for reimbursement upon a policy of indemnity insurance held by the employer, which is indefensible in character, may set the order aside as soon as its attention is called thereto, although the motion is made by the judgment debtor, who had no right to complain thereof. *Stenbom v. Brown-Corliss Engine Co.* 20: 956, 119 N. W. 308, — Wis. —.

2. Memoranda of the trial judge showing that appellant was given ninety days for bill of exceptions, made at the time of overruling a motion for new trial, are sufficient upon which to amend *nunc pro tunc* an order

overruling the motion, so as to show the allowance of ninety days in which to present a general bill of exceptions. *Pere Marquette R. Co. v. Strange*, 20: 1041, 84 N. E. 819, — Ind. —.

MOTIVE.

Evidence to show, see *Evidence*, 26.

MUNICIPAL CORPORATIONS.

Delegation of legislative power to, see *Constitutional Law*, 1.

Mandamus to compel city engineer to furnish monthly estimates of completion of work under public contract, see *Mandamus*, 3, 4.

Power of attorney general to remove municipal officers, see *Officers*, 1, 2.

Exemption from taxation of money and interest bearing securities in sinking fund accumulated by municipality to retire bonds, see *Taxes*, 2.

Ordinances.

Right of courts to review ordinance, see *Courts*, 1.

Violation of statute forbidding obstructing of street crossings as negligence, see *Fires*, 1.

Reasonableness of ordinance as question for jury, see *Trial*, 2.

Requiring interstate railroad to light crossings in city, see *Commerce*, 2.

Right of railroad company to hearing on question of ordinance as to lighting of street crossing, see *Constitutional Law*, 8.

1. A municipal ordinance requiring the removal of stationary awnings from over its sidewalks is reasonable. *Small v. Edenton*, 20: 145, 60 S. E. 413, 146 N. C. 527.

2. The power of a municipal corporation to remove stationary awnings from over its sidewalks is not dependent upon their being found to be nuisances, but upon the power of the municipality to make such a requirement under its authority over its streets, and upon the reasonableness of the requirement. *Small v. Edenton*, 20: 145, 60 S. E. 413, 146 N. C. 527. (Annotated)

3. An ordinance requiring railroad companies to light street crossings is so far a reasonable exercise of the police power that the court will not declare it an unconstitutional interference with property rights of the railroad company. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

4. An ordinance requiring railroad companies to light street crossings with lights of sufficient power to light the entire crossing is not invalid because of a provision that the power shall not exceed that of the lights used by the city, on the ground that the requirement is indefinite. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

5. An ordinance requiring a railroad company to maintain at street crossings lights of sufficient power to light the entire

crossing, not exceeding in power the light used by the city, requires a light sufficient to enable a traveler with good sight in the nighttime to perceive, before getting into the crossing, the tracks at the point of intersection and the character of the way across the same. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

6. Statutory authority to a municipality to prescribe the kind of lights a railroad company shall maintain at street crossings empowers it to direct a light to be located there. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

7. A municipal corporation may require a light maintained by a railroad company at a street crossing to be burning for five minutes before the passage of a train. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

Indebtedness: Limitation of amount.

8. One selling machinery to a municipal corporation for use in its public affairs at a time when the contract for purchase is unenforceable because exceeding the constitutional debt limit, but who retains a lien on the machinery for the purchase price, may enforce his lien by sale of the machinery for satisfaction of the purchase money debt. *Bardwell v. Southern Engine & B. Works*, 20: 110, 113 S. W. 97, — Ky. — (Annotated)

Liability for damages.

Liability for injuries on highways, see Highways, 3-5.

Notice of claim for injury from defective sidewalk, see Highways, 8.

Right to remove trees in highway, see Highways, 2.

9. A notice to a municipal corporation of an injury through its alleged negligence, stating that the injured person sustained an injury to his person, badly bruising himself, and sustaining other bodily injury of a serious nature, does not comply with a statute requiring the notice to specify the nature of the injuries. *Spear v. Westbrook*, 20: 804, 72 Atl. 311, — Me. — (Annotated)

9a. A provision in a municipal ordinance making notice a prerequisite to suit against the municipality for damages caused by its negligence, that the notice must state the injured person's place of residence for a year past, is unreasonable, and omission of such statement from the notice will not defeat an action. *Hase v. Seattle*, 20: 938, 98 Pac. 370, — Wash. — (Annotated)

10. Municipalities, in planning and maintaining systems of sewerage, must make provision against public nuisances resulting from occurrences naturally and reasonably to be anticipated. *State v. Concordia*, 20: 1050, 96 Pac. 487, — Kan. —

11. A statute authorizing municipalities to exercise the right of eminent domain in order to connect sewers with creeks, 20 L.R.A. (N.S.)

rivers, and ravines does not warrant the commission of a public nuisance as a result of such connection. *State v. Concordia*, 20: 1050, 96 Pac. 487, — Kan. —

12. Legislative power vested in municipalities to build and maintain sewers does not warrant the commission by such cities of a public nuisance. *State v. Concordia*, 20: 1050, 96 Pac. 487, — Kan. — (Annotated)

MUTUALITY.

Of contract, see Contracts, 2, 3.

NE EXEAT.

1. A bankrupt court may relieve a surety from liability on a bond executed to secure the release of a bankrupt who has been arrested under a writ of ne exeat after it has been broken by the departure of the bankrupt from the jurisdiction, if he has returned and is ready to abide the decrees of the court so that the result sought by the obligation has not failed. *Re Appel*, 20: 76, 163 Fed. 1002, — C. C. A. —

2. A bond filed by a bankrupt to secure his release from arrest under a writ of ne exeat, and conditioned to be void if he will not go or attempt to go into parts beyond the jurisdiction of the court, and not depart from the district without leave, is not a mere bail bond, but is broken by an attempt to go beyond the jurisdiction without leave. *Re Appel*, 20: 76, 163 Fed. 1002, — C. C. A. — (Annotated)

NEGLIGENCE.

As to act of God, see Act of God.

As to damages for negligent injury, see Damages.

Sufficiency of pleading in action for negligent injuries, see Pleading.

Sufficiency of allegation in action for negligent injuries to property, see Pleading, 5.

As to proximate cause, see Proximate Cause.

Instruction as to, see Trial.

As question for jury, see Trial.

See also Automobiles; Carriers; Electricity; Fires; Physicians and Surgeons; Railroads; Street Railways.

1. An injury that, under the circumstances, is the natural, probable, and ordinary result of a negligent act of omission, is in law held to have been contemplated by the negligent party as a probable and proximate result of the negligence when he is informed, or, by ordinary observation, would have been informed, of the facts and circumstances attending the negligence. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.*, 20: 92, 46 So. 732, 55 Fla. 514.

2. Where one has provided a cover to protect his property from injury that will probably occur, and such cover is, without the fault of the owner, injured or destroyed by the negligence of another who knew, or should have known, of the use to which the cover was applied, and of the injury that

would probably result from its destruction, and the destruction of the cover defeats the sole purpose for which it was used, damages may be recovered for injuries to the property that was so protected, which proximately follow or result from the destruction of the cover provided for the protection of the property injured. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

3. The negligent act or omission for which a party is liable in damages is one that, in ordinary, natural sequence, causes, or contributes to causing, an injury to another when no independent, efficient cause intervenes, and the injured party is not at fault. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

4. Those who are negligent are held in law to know the usual effect of ordinary, natural conditions and forces upon a negligent act of omission, and to have contemplated the probable effect of such conditions and forces upon their negligence or upon its proximate results, and to be liable in damages for the natural and probable proximate results of the negligence. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

Dangerous agencies.

5. To entitle a purchaser of stove polish to hold the seller liable for its explosion because of his negligently selling it as safe for use, the purchaser must show that the seller's negligence was the sole cause of the injury. *Cunningham v. C. R. Pease House Furnishing Co.* 20: 236, 69 Atl. 120, 74 N. H. 435.

6. One selling stove polish which explodes to the injury of the purchaser, when the latter attempts to use it, is liable for such injury if he knew that his statement, made to induce its purchase, that it was safe for the intended use, was false, or if he negligently made the statement believing it to be true, when the ordinary man having no more knowledge of the danger than he had would not have done so. *Cunningham v. C. R. Pease House Furnishing Co.* 20: 236, 69 Atl. 120, 74 N. H. 435.

7. A merchant selling stove blacking which explodes in use under such circumstances as to render him liable to the purchaser for injuries thereby caused is liable also to a member of the purchaser's family so injured, although he did not have him in mind when the blacking was sold, if he knew that the blacking was to be used on a stove, and that other members of the family were likely to use it. *Cunningham v. C. R. Pease House Furnishing Co.* 20: 236, 69 Atl. 120, 74 N. H. 435.

Children; dangerous attractions.

8. No invitation to children to play in one's lumber yard can be implied from the fact that he does not always drive them away when they enter it. *Kelly v. Benas.* 20: 903, 116 S. W. 557, — Mo. —. 20 L.R.A. (N.S.)

9. A landowner is not liable for injury to a trespassing child by the fall of a pile of lumber on which he was playing, on the theory that it was an attractive nuisance. *Kelly v. Benas.* 20: 903, 116 S. W. 557, — Mo. —.

On highway.

10. The owner of a horse left by his servant unhitched and unattended in a public street is liable for injury done to others by its running away. *Corona Coal & I. Co. v. White.* 20: 958, 48 So. 362, — Ala. —.

(Annotated)

Contributory.

Duty of pedestrian to look out for automobiles. see Automobiles.

Contributory negligence of person injured on railroad track, see Railroads, 7-9.

Contributory negligence of passenger, see Carriers, 9-12.

Contributory negligence of pedestrian on sidewalk, see Highways, 6, 7.

Contributory negligence of servant, see Master and Servant, 13-15.

As question for jury, see Trial, 4, 5.

11. One walking on the sidewalks or cross walks of a municipality is not negligent in failing to look to see whether or not a team which he hears approaching is running away, so as to preclude his holding the owner of the team liable for injuries caused by being struck by it, since he has a right to assume that the team is under control, and will not be driven over him. *Corona Coal & I. Co. v. White.* 20: 958, 48 So. 362, — Ala. —.

NEWSPAPER.

Power of state to forbid publication of advertisements of liquors kept for sale in other states, see Commerce, 1; Statutes, 3.

Effect of extent of publication on privilege, see Libel and Slander.

NEW TRIAL.

Effect of granting new trial after conviction to extend liability on accused's bond, see Bail and Recognizance.

Amendment of order overruling motion for, see Motions and Orders, 2.

A new trial will not be granted on the ground of newly discovered evidence in a criminal case, the only effect of which is to impeach the credibility of a witness for the state. *Bailey v. State.* 20: 409, 48 So. 227, — Miss. —.

NOISE.

As nuisance, see Nuisances, 1, 2.

NONINTOXICATING LIQUORS.

Statute prohibiting sale of, see Intoxicating Liquors, 4.

NOTICE.

Requiring notice of intention to sell stock of goods in bulk, see Constitutional Law, 6, 10; Conveyances, 2.

Of claim for injury from defective highway, see Highways, 8.

Of injury as condition of recovery for, against municipality, see Municipal Corporations, 9, 9a.

A corporation which places one of its directors upon the board of directors of another corporation for the purpose of ascertaining its financial condition is chargeable with knowledge which he could not escape without wilfully shutting his eyes. *Standard Sav. & L. Asso. v. Aldrich*, 20: 393, 163 Fed. 216, 89 C. C. A. 646.

NOVATION.

A settlement between the parties to a contract of conditional sale in accordance with its terms, and the taking of notes from the vendee to cover such portions of the property as remained in his possession, or as he had sold and had not been paid for, is not a novation which will destroy the conditional sale features of the original contract; and it is immaterial that the settlement was not on the exact date provided for by the contract, and that a conditional sale agreement covering unsold articles was not given, if the original contract clearly reserved title in the vendor. *Monitor Drill Co. v. Mercer*, 20: 1065, 163 Fed. 943, — C. C. A. —.

NUISANCES.

Liability of municipality for maintaining, see Municipal Corporations, 10-12.

Legislative authority for maintenance of nuisance by municipality, see Municipal Corporations, 11, 12.

To health or comfort.

Diminution in rental value as measure of damages for, see Damages, 12.

1. To render noise a nuisance, it must be of such a character as to be of actual physical discomfort to persons of ordinary sensibilities. *McGill v. Pintsch Compressing Co.* 20: 466, 118 N. W. 786, — Iowa, —.

2. The operation of a gas manufacturing plant in such a manner that the noise from the engine exhaust shakes neighboring houses and the smoke from the chimneys requires the keeping of windows and doors closed in warm weather and blackens everything exposed constitutes a nuisance. *McGill v. Pintsch Compressing Co.* 20: 466, 118 N. W. 786, — Iowa, —. (Annotated)

3. The owner of property cannot recover damages because of a diminution of its rental value because of the erection of a manufacturing plant near it. *McGill v. Pintsch Compressing Co.* 20: 466, 118 N. W. 786, — Iowa, —.

4. To constitute the imparting of smoke to the atmosphere a nuisance to neighboring property, it must have been emitted in unreasonable amounts or in an unreasonable manner in view of the locality and surroundings, and must be such as to render the occupancy of such property physically uncomfortable to a person of ordinary sensibilities for the purpose to which it is devoted. 20 L.R.A. (N.S.)

voted. *McGill v. Pintsch Compressing Co.* 20: 466, 118 N. W. 786, — Iowa, —.

Abatement.

5. The auction business is not a nuisance *per se*, but may be so conducted as to become one, and an auctioneer engaged in selling goods similar to those dealt in by a merchant next door, who keeps a number of employees standing about to molest and interfere with actual and prospective customers who are looking in the neighbor's show window, and who represent that the two places conduct one and the same business, may be restrained at the suit of such adjoining owner from so doing, but he cannot complain because the auctioneer undersells or oversells him, or sells inferior goods unfairly to his customers. *Gilly v. Hirsh*, 20: 972, 48 So. 442, 122 La. 966. (Annotated)

OATH.

Presumption that referee took oath required by law, see Appeal and Error, 5.

OBSTRUCTION.

Of surface water, see Waters.

OFFICERS.

Presumption that officer levying on liquors acted according to law, see Evidence, 16.

Libel by criticism of candidate for election, see Libel and Slander, 1, 3.

Mandamus to compel city engineer to furnish monthly estimates of completion of work under public contract, see Mandamus, 3, 4.

Injunction as remedy for illegal holding of office, see Injunction, 7.

Effect of detachment of political division of territory in which an officer resides upon his tenure of office, see Schools, 3.

Removal.

1. The power to remove municipal officers for misconduct in office, conferred by a city charter upon the city council thereof, does not exclude the powers of the state, through the attorney general, to effect a removal for violation of a statute subjecting the mayor to forfeiture of office and pecuniary penalty upon failure to make complaint of known violations of a statute regulating the sale of intoxicating liquors, since the powers of the state and the city council are concurrent. *State ex rel. Young v. Robinson*, 20: 1127, 112 N. W. 269, 101 Minn. 277. (Annotated)

2. The forfeiture of office and pecuniary penalty prescribed by Minn. Rev. Laws 1905, §§ 1561 and 1562, for the failure of a mayor to make complaint of known violations of statutes regulating the sale of intoxicating liquors, may be enforced by the attorney general under Rev. Laws 1905, § 4545, which expressly empowers the attorney general to enforce forfeitures of office without restriction or limitations as to particular officers.

State ex rel. Young v. Robinson, 20: 1127, 112 N. W. 269, 101 Minn. 277.

Rights: powers; liabilities.

Liability of superintendent of state lunatic asylum for acts of employees, see Charities, 1.

Liability for false imprisonment, see False Imprisonment, 2, 3.

3. Officers of municipal corporations organized under legislative authority are, in respect to all general laws having force and operating within their municipality, agents of the state, and may be charged with the performance of such duties in the enforcement of the same as the legislature may, from time to time, impose. State ex rel. Young v. Robinson, 20: 1127, 112 N. W. 269, 101 Minn. 277.

4. A public officer involved in litigation in his official capacity as to the right to the possession of intoxicating liquor which he had seized in pursuance of a warrant, and which had been subsequently replevied, is not defeated of the right to recover the possession thereof by the fact that his term of office has expired during the litigation. Hines v. Stahl, 20: 1118, 99 Pac. 273, — Kan. —.

5. A public official who has collected fees under statutory authority, in violation of the Constitution, cannot be compelled to turn them over to the state, where the legislature has made no provision therefor. State ex rel. McNary v. Dunbar, 20: 1015, 98 Pac. 878, — Or. —. (Annotated)

6. A constitutional provision that the secretary of state shall be paid a salary, and receive no fees or perquisites whatever for the performance of any duties, does not prevent the allowance to him of the necessary cost of procuring copies of laws and resolutions, which he is required to deliver to the state printer. State ex rel. McNary v. Dunbar, 20: 1015, 98 Pac. 878, — Or. —.

OIL.

Taxation of oil lease, see Taxes 1.

ORDER.

See Motions and Orders.

ORDINANCES.

See Municipal Corporations.

PARDON.

See Criminal Law, 5.

PARENT AND CHILD.

Mortgage by father to prevent prosecution of son, see Duress.

Right of parents to custody of child, see Infants.

PARKS.

Dedication of land for, see Dedication.

Persons who have bought lots bordering on a tract of land dedicated for park purposes may, as against the owner of the fee, cut the grass thereon if the authorities have not assumed jurisdiction over the park, and the removal of the grass will render the 20 L.R.A. (N.S.)

park more suitable for the use for which it was intended. Northport Wesleyan Grove Campmeeting Asso. v. Andrews, 20: 976, 71 Atl. 1027, — Me. —.

PARTIES.

Action by stockholders, see Corporations, 7, 8.

Parties defendant to mandamus proceeding, see Mandamus, 10.

To foreclosure of mortgage, see Mortgage, 1.

A state manager of an insurance company may maintain an action to recover from an agent, whom he has appointed to canvass for applications and collect premiums and pay them over to himself or the company, money so collected in payment of premiums. Hazelton v. Locke, 20: 35, 71 Atl. 661, — Me. —.

PARTITION.

Partition of wife's separate estate after her death, see Husband and Wife, 2.

1. A trustee in bankruptcy, having legal title to and no beneficial interest in, undivided property, is not such a tenant in common as authorizes him to sue for partition, where title and possession are not denied him, and it is not shown that a reduction of the property to money is necessary for the purpose of paying debts, or that the bankruptcy court has authorized the proceeding, or that it will be advantageous to the interests of creditors. Hobbs v. Frazier, 20: 105, 47 So. 929, — Fla. —. (Annotated)

2. The Federal bankruptcy act contains no express authority to a trustee in bankruptcy to sue for partition for the bankrupt's property, the title to which is by law vested in such trustee for the purpose of paying the debts of the bankrupt, and the nature of the trustee's powers and duties does not necessarily make the right to sue for partition exist by implication, since a sale of the bankrupt's interests may be had without partition, and that may be sufficient for debt-paying purposes. Hobbs v. Frazier, 20: 105, 47 So. 929, — Fla. —.

3. An allegation by a trustee in bankruptcy who is suing for the partition of property, that he is desirous of obtaining a partition and division of the premises, is not sufficient to establish the right of such trustee so to sue, where it does not in any way appear that partition is essential to the statutory duties of such trustee, or that the bankruptcy court has authorized the proceeding, or that it is necessary to fully protect the rights of those interested in the bankrupt's estate. Hobbs v. Frazier, 20: 105, 47 So. 929, — Fla. —.

PARTNERSHIP.

Right of bankrupt to discharge as affected by act of partner, see Bankruptcy, 9.

Retiring partner's agreement not to re-engage in same business, see Contracts, 1, 9, 10.

PARTY WALL.

Right of owner of building supported by, to recover under insurance policy on building where party wall is injured by burning of adjoining building, see Insurance, 21.

1. The right to maintain a wall resting on each side of a boundary line as a party wall can never rest upon prescription, but must always be founded in contract, express or implied. *Bright v. Bacon*, 20: 386, 116 S. W. 268, — Ky. —.

2. A wall is not made a party wall by a trespasser obtaining in it an easement by long-continued use, except to the extent that the use of the encroacher has become a right. *Bright v. Bacon*, 20: 386, 116 S. W. 268, — Ky. —.

3. Every joint owner of a party wall standing across a boundary line, and which has stood so long that the original agreement under which it was erected cannot be established, has a right to add to its height to its whole width for the benefit of additions to the building on his property, so long as it does not unnecessarily interfere with the other's use as it was begun or has developed. *Bright v. Bacon*, 20: 386, 116 S. W. 268, — Ky. —. (Annotated)

PASSENGER CARRIERS.

See Carriers.

PAYMENT.

Payment of insurance policy to wrong person, see Insurance, 22.

PENALTY.

Forfeiture of auctioneer's license as penalty in civil suit by other merchant, see License.

PENSIONS.

Review on certiorari of determination of trustees of police pension fund. see Certiorari.

Exemption of homestead purchased with pension money, see Exemptions.

Pneumonia contracted by a policeman in the line of his duty is an injury within the meaning of a statute providing for a police pension fund, notwithstanding the legislature, in amending a former statute, omitted the words, "or any disease contracted by reason of his occupation." *State ex rel. McManus v. Board of Trustees*, 20: 1175, 119 N. W. 806, — Wis. —. (Annotated)

PERJURY.

Error in admission of evidence in prosecution for, see Appeal and Error, 19.

Evidence in prosecution for, see Evidence, 26, 30, 31.

One who, having been subpoenaed in a proceeding against himself for illegal registration as a voter, makes oath that other persons against whom proceedings have also been instituted, who are registered from 20 L.R.A. (N.S.)

the same place, were properly registered, cannot escape punishment for perjury with respect to the latter statement on the theory that he had been compelled to become a witness against himself, in violation of the provisions of the Constitution, although the information with respect to all cases was embodied in one affidavit. *People v. Cahill*, 20: 1084, 86 N. E. 39, 193 N. Y. 232.

PHYSICIANS AND SURGEONS.

Confidential communications to, see Evidence, 21.

Liability for injuries.

Error in exclusion of evidence in action against, for malpractice see Appeal and Error, 20.

Negligence of, as question for jury, see Trial, 9.

1. A physician who, for twelve years, specializes his practice to treatment of diseases of the eye, and is placed in charge of the eye, ear, and throat department of a hospital of high standing, and is advertised by its literature as its ophthalmatist, will be held responsible as a specialist for treatment of the eye. *Rann v. Twitchell*, 20: 1030, 71 Atl. 1045, — Vt. —.

2. One who holds himself out as a specialist in the treatment of a certain organ, injury, or disease is bound to bring to the aid of one employing him as such that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury, or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time. *Rann v. Twitchell*, 20: 1030, 71 Atl. 1045, — Vt. —. (Annotated)

3. The question of the negligence of a specialist in the treatment of disease in making a diagnosis is to be determined by reference to the pertinent facts existing at the time of his examination, of which he knew, or, in the exercise of due care, should have known, his negligence depending upon the fact that, with an opportunity for examination, he failed to discover conditions which should have been discovered in the exercise of a reasonable degree of care and skill. *Rann v. Twitchell*, 20: 1030, 71 Atl. 1045, — Vt. —.

PLEADING.

Variance between pleading and proof, see Evidence, 43.

Admissibility of evidence under, see Evidence, 42.

Amendment.

A motion to dismiss an action against a consolidated corporation for a liability which arose against one of the constituent companies before the consolidation cannot prevail because the name of the original defendant was necessary and not used in the cause, since the defect might have been cured by amendment. *Southern Steel Co. v. Hopkins*, 20: 848, 47 So. 274, — Ala. —.

Declaration as complaint.

2. Under a general allegation of damages in an action on a contract, such damages as the law holds to be the direct, natural, and necessary result of the breach may be recovered; special damages may be recovered only on sufficient allegations and proofs. *Moses v. Autuono*, 20: 350, 47 So. 925, — Fla. —.

3. Under a complaint setting out breach of a contract whereby the plaintiff was granted the exclusive right to sell defendants' publication within a certain territory, and which provided for daily delivery, "Sundays excepted," recovery cannot be had for breach of a contract to sell and deliver a Sunday edition subsequently issued. *Newhall v. Journal Printing Co.* 20: 899, 117 N. W. 228, 105 Minn. 44.

4. An allegation in a declaration for breach of warranty, that defendant "falsely and fraudulently warranted the property," is not sufficient to charge knowledge of the falsity on his part. *Caldbeck v. Simanton*, 20: 844, 71 Atl. 881, — Vt. —.

5. An allegation that injury to growing plants and fruit by frost and cold occurred after, and as a result of, the negligent burning of the cover used to protect the plants and fruit from frost and cold, sufficiently connects, by ordinary, natural sequence, the negligence and the injury. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

6. A complaint seeking to hold a city liable for injuries caused by its piling stones in a street in such a manner as to be likely to frighten horses of ordinary gentleness must allege that they would naturally do so, where the mere placing of the stones in the street was not in and of itself negligence. *Elam v. Mt. Sterling*, 20: 512, 117 S. W. 250, — Ky. —.

7. A complaint in an action to hold a city liable for injuries caused by its placing in the street an object calculated to frighten horses of ordinary gentleness should allege that the horse which was in fact frightened was of ordinary gentleness. *Elam v. Mt. Sterling*, 20: 512, 117 S. W. 250, — Ky. —.

8. A declaration in an action against a town for injuries caused by a defective highway, which alleges that the highway was negligently permitted to become out of repair to the injury of plaintiff, is sufficient to cover a defect consisting of want of suitable rail or barrier to protect travelers from perils which would be encountered immediately adjacent to the limits of the highway. *Shea v. Whitman*, 20: 980, 83 N. E. 1096, 197 Mass. 374.

9. A declaration based upon negligence should contain allegations of the negligent act or omission of the defendant, and also allegations of facts to show injury to the plaintiff, and that such injury was a proximate result of the negligence alleged. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514. 20 L.R.A. (N.S.)

10. A declaration which states that the defendant railroad company so carelessly and negligently managed and operated one of its locomotives that fire escaped therefrom and set fire to and burned the canvass with which a pinery belonging to the plaintiff, and situated near the track of the defendant, was covered, and alleges damages in a stated amount, is sufficient to authorize recovery of general damages, or such as necessarily result from the burning of the canvass cover, to the extent of its value within the amount stated. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

11. In an action for damages, where it is in effect alleged that, in the month of January, the defendant negligently burned the cover used to protect growing plants and fruit from injury by ordinary cold and frost usual "in the winter season" at the place of the negligence, of which use, to prevent probable injury, the defendant knew, or should have known, that shortly after the burning of the cover the plants and fruit were injured by frost and cold, which injury defendant should have anticipated, and that the injury "was caused by the negligence of the defendant in burning part of the cover, as aforesaid," and damages are claimed, it is not necessary to allege "that, at the time of the occurrence of the fire, the weather was such that cold and frost could be anticipated by the defendant," or "that, in the month of January, cold and frost of such character as to damage growing plants ordinarily occurred," since the court takes judicial notice that January is in the winter season, and, if frost or cold of any degree injured the plants and fruit as a proximate result of the defendant's negligence, under such circumstances, the extent of the cold or the condition of the weather at the time of the negligence are not material. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

12. A petition by a servant against his master for personal injuries sustained in his service, which alleges that the master operated a sawmill, and, in connection therewith, a private railroad for the purpose of transporting his employees from the mill to their work in the woods, and hauling logs to the mill, and that, while being transported on a log train to his work, he was injured in the wreck of the train, caused by its collision with a tree which had fallen on the track; that the negligence of the master consisted in knowingly permitting the tree, which was dead and in such a bad and defective condition that it was liable at any time to fall upon the track, to remain in such close proximity that it might and did fall on the track,—is defective because of the failure to allege that the servant did not know of the location of the tree and its defective condition, or could not have known thereof by the exercise of ordinary care. *Roland v. Tift*, 20: 354, 63 S. E. 133, — Ga. —.

13. An action in tort for breach of warranty that an article sold was perfect, which may be begun by arresting defendant, will not lie unless *scienter* is alleged. *Caldbeck v. Simanton*, 20: 844, 71 Atl. 881, — Vt. —. (Annotated)

14. That the servant of the owner of a wharf was acting within the scope of his employment in casting off a vessel moored there is sufficiently alleged in a declaration for damages for injuries thereby caused, by allegation that the wharf was in charge of the servant, and that defendant, by his servant, wilfully and designedly, negligently, carelessly, and wrongfully unmoored the vessel. *Ploof v. Putnam*, 20: 152, 71 Atl. 188, — Vt. —.

15. The absence of other available mooring place is sufficiently pleaded by a declaration in an action to recover damages for casting off a vessel necessarily moored to defendant's wharf, by an averment that a tempest compelled mooring to the defendant's wharf. *Ploof v. Putnam*, 20: 152, 71 Atl. 188, — Vt. —.

Pleas and answers.

16. The owner of a building, who is kept out of possession thereof after the day fixed by contract for its completion, cannot recover the *per diem* forfeiture as provided for in the contract, in an action by the contractor to foreclose his mechanics' lien for the construction of the building, unless the same is affirmatively pleaded by way of defense or cross complaint. *Steltz v. Armory Co.* 20: 872, 99 Pac. 98, 15 Idaho, 551.

17. A statement in a paragraph of defense to an action on an insurance policy that applicant represented the value of the property to be a certain amount, is not insufficient to raise the question of breach of warranty if, from the defense as a whole, it appears that the statement of value was warranted to be true. *Duncan v. National Mut. F. Ins. Co.* 20: 40, 98 Pac. 634, — Colo. —.

Demurrer.

18. A demurrer, or a ground thereof, that in effect merely states that a declaration, or a count therein, is bad in substance, or fails to allege a cause of action, does not comply with the statute requiring the substantial matters of law intended to be argued to be stated, and will not avail as a demurrer, unless it plainly appears, from a reading of the declaration or count, that it does not, by direct statements, or by fair inference drawn therefrom, contain all the essentials of a cause of action. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

19. A demurrer to a declaration which states a cause of action for any recovery should be overruled. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

20. A petition for an accounting for the proceeds of the sale of certain real estate, title to which was placed in defendant under L.R.A. (N.S.)

der a verbal promise for this purpose, is not vulnerable on demurrer on the ground that a parol trust in real estate is declared on. *Logan v. Brown*, 20: 298, 95 Pac. 441, — Okla. —.

POLICE.

Review on certiorari of determination of trustees of police pension fund, see *Certiorari*.

Right of policemen to payment from pension fund, see *Pensions*.

POLICE POWER.

See *Constitutional Law*, 9, 10.

POLICE REGULATIONS.

On Indian reservations, see *Indians*.

PRÆCIPLE.

Necessity of appending to transcript of record, see *Appeal and Error*, 2.

PREFERENCES.

By bankrupt, see *Bankruptcy*, 3.

PREJUDICIAL ERROR.

See *Appeal and Error*, 15-27.

PREMATURITY.

Of action, see *Action or Suit*.

PREMIUM.

Forfeiture for nonpayment of insurance premium, see *Insurance*, 10, 11.

PRESCRIPTION.

As foundation for rights in party wall, see *Party Wall*, 1, 2.

PRESUMPTIONS.

On appeal, see *Appeal and Error*, 5.

In general, see *Evidence*, 1-17.

PRINCIPAL AND AGENT.

Agreement to take title to real property and sell as agent of real owner, see *Contracts*, 5.

Garnishment of renewal commissions due general insurance agent, see *Garnishment*, 3.

Architect contracting for labor or material before abandonment of contract by contractor as agent of owner, see *Mechanics' Liens*, 5.

Notice to agent as notice to principal, see *Notice*.

Creation of trust by one taking title to real property to sell it for benefit of real owner, see *Pleading*, 20.

Creation of trust by taking title to property under parol agreement to sell and deliver proceeds to owner, see *Trusts*.

Damage for improper termination of agency contract, see *Damages*, 5, 14.

A contract of agency which leaves the agent free to terminate the agency on specified notice confers the same right upon

the principal unless provisions to the contrary are stipulated. *Newhall v. Journal Printing Co.* 20: 899, 117 N. W. 228, 105 Minn. 44.

PRINCIPAL AND SURETY.

Surety on *ne exeat* bond as release from arrest, see *Ne Exeat*.

1. A surety for a married woman incapable of contracting is not released by the discharge of the principal. *Gates v. Tebbetts*, 20: 1000, 119 N. W. 1120, — Neb. — (Annotated)

2. A surety upon a contract is not released because the plaintiff in an action thereon fails to inform the court that another party to the contract is the principal debtor. *Gates v. Tebbetts*, 20: 1000, 119 N. W. 1120, — Neb. —.

3. A surety on an indemnity bond may, before payment, in equity compel the principal to pay in exoneration. *Carr v. Davis*, 20: 58, 63 S. E. 326, — W. Va. —.

PRIVATE RAILROAD.

Servants engaged in operating, as fellow servants of other employees, see *Master and Servant*, 20.

PRIVILEGED COMMUNICATIONS.

See *Libel and Slander*, 1, 2.

PROFITS.

Loss of, as element of damages, see *Damages*, 14.

PROHIBITION.

As the North Dakota supreme court has only such jurisdiction as is expressly or by necessary implication granted by North Dakota Constitution, § 86, granting appellate jurisdiction only, together with a general superintending control over all inferior courts, except as provided by § 87, which grants power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original writs and remedial writs as may be necessary to the proper exercise of its jurisdiction, it cannot issue a writ of prohibition, that not being one of the enumerated writs, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending cause, or to effectuate its general superintending control over inferior courts. *State ex rel. Poole v. Nuchols*, 20: 413, 119 N. W. 632, — N. D. —.

PROXIMATE CAUSE.

Of damages, see *Damages*, 4.

1. The ordinary conditions or forces of nature, such as ordinary wind, cold, heat, and the like, that are usual at the time and place and under the circumstances, and that reasonably should have been expected

or foreseen as probably to occur, are not, in general, independent, efficient causes when they effect or operate upon a negligent act of omission in causing an injurious result. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514. (Annotated)

2. Where an action is brought for an injury that is the result of the negligence of the defendant and of some other contributing cause, not an independent efficient cause, and the result could not have been produced in the absence of either contributing cause, the defendant's negligence is a proximate cause of the injury if, under the circumstances attending the defendant's negligence, the injury was a probable, natural, and usual result of the two contributing causes, that the defendant is held to have contemplated, and the plaintiff, or those for whom he is responsible, did not contribute proximately to the injury. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

Of loss by fire.

3. The wrongful act of a railroad company in permitting a train to stand across a street in a city cannot be held not to be the proximate cause of the burning of a dwelling house because the fire apparatus could not reach it on account of the obstruction because a prudent man would not have foreseen that the burning of that house would follow the wrongful act. *Houren v. Chicago, M. & St. P. R. Co.* 20: 1110, 86 N. E. 611, 236 Ill. 620.

4. Interference with the fire departments reaching the fire may be found to be the proximate cause of the burning of a building to which the fire was communicated from that in which it originated. *Houren v. Chicago, M. & St. P. R. Co.* 20: 1110, 86 N. E. 611, 236 Ill. 620.

Of injury by carrier or railroad company.

5. The act of one desiring to meet an approaching train at a station, in attempting to cross the track in front of it, which resulted in his being hit by the train, and not the negligence of the railroad company in running a special at greater speed past the station on the time of the regular train, which was to stop, was the cause of the accident, where the train is visible and its speed obvious, although he may have been misled as to the character of the train, and relied on the supposed fact that it was going to stop according to schedule. *Louisville & N. R. Co. v. James*, 20: 380, 115 S. W. 719, — Ky. — (Annotated)

6. The negligence of a railroad company in maintaining the approach to its tracks in an unsafe condition so that a wagon is caught, holding the team on the tracks, may be found to be the proximate cause of the death of the driver, who was struck by a train in attempting to signal it to stop before striking the team. *Thompson v. Seaboard A. L. R. Co.* 20: 426, 62 S. E. 396, 81 S. C. 333. Digitized by Google

PUBLIC MONEY.

Exemption from taxation of money and interest bearing securities in sinking fund accumulated by municipality to retire bonds, see Taxes, 2.

I. A common school, within the meaning of a constitutional provision requiring the school funds to be applied exclusively to such schools, is one which is common to all children of proper age and capacity, free and subject to, and under the control of, the qualified voters of the district. *School Dist. No. 20 v. Bryan*, 20: 1033, 99 Pac. 28, — Wash. —.

2. Model training schools, to be conducted in connection with various normal schools, the pupils of which are to be selected from the school districts within which the normal schools are located by requisition of the authorities of the normal schools, are not common schools within the constitutional provision that the school moneys shall be applied exclusively to the support of common schools. *School Dist. No. 20 v. Bryan*, 20: 1033, 99 Pac. 28, — Wash. —.

(Annotated)

PUBLIC POLICY.

See Contracts, 11.

PUBLIC PROPERTY.

Mechanics' liens on, see Mechanics' Liens, 2.

PUNITIVE DAMAGES.

See Damages, 2.

QUANTUM MERUIT.

Right to recover on, on partial performance of contract, see Contracts, 12.

QUO WARRANTO.

As remedy for illegal holding of public office, see Injunction, 7.

RAILROADS.

Requiring interstate railroad to light crossings in city, see Commerce, 2; Constitutional Law, 1, 8; Courts, 1; Municipal Corporations, 3-7; Statutes, 2.

Interference with light, air, and prospect by elevation of track, see Eminent Domain, 1.

Statute requiring safety appliances on cars, see Evidence, 10; Master and Servant, 6, 7.

Running of limitations upon action against, for accelerating flow of stream, see Limitation of Actions, 3.

See also Master and Servant.

1. The right of a railroad company to run its engines and trains over its tracks is coupled with a duty arising by implication of law out of the relation of the parties to each other, so to operate its engines as not negligently to injure the property of others. 20 L.R.A. (N.S.)

near the track. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

2. Under statutes providing that railroad companies shall be liable for any damages to property by the running of trains unless the companies shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the companies, and that, if the complainant and the agents of the companies are both at fault, the former may recover, but the damages shall be diminished or increased in proportion to the amount of default attributable to the complainant, a complainant has a right of action for the negligence of a railroad company even if he has also been negligent; but the amount of the recovery is affected by the complainant's negligence. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

Injury to persons on or near track.

Proximate cause of injury to persons met by train in crossing tracks, see Proximate Cause, 5.

Punitive damages for killing of person at crossing, see Damages, 2.

Proximate cause of injuries on crossing, see Proximate Cause, 6.

Question for jury whether failure to give signals caused accident, see Trial, 6.

3. The mere fact that those in charge of an engine on a misty night failed to observe one attempting to signal it to stop because of an obstruction on the track, in time to stop the train before striking him, is not sufficient to establish negligence on the part of the railroad company. *Thompson v. Seaboard A. L. R. Co.* 20: 426, 62 S. E. 396, 81 S. C. 333.

4. The negligence of a railroad company in the management of a train approaching a station at night is disproved, where the headlight is burning, the bell ringing, the train running slowly and under control, while the person complaining of the negligence was discovered the moment he stepped on the track, and the emergency brakes, applied. *Pere Marquette R. Co. v. Strange*, 20: 1041, 84 N. E. 819, — Ind. —.

5. One entering upon a railroad track to attempt to stop a train approaching a crossing on which a team is stalled is not a trespasser, since the consent of the railroad company to his act will be presumed. *Thompson v. Seaboard A. L. R. Co.* 20: 426, 62 S. E. 396, 81 S. C. 333.

Liability for fires.

Obstructing fire department on way to burning building, see Fires; Proximate Cause, 3.

6. Owners of property having land near a railroad track have a right to place a canvass cover over plants growing on the land, and the mere fact that the cover is within the reach of sparks of fire emitted from locomotive engines passing on the track nearby does not relieve the railroad

company from liability for its negligence in permitting sparks to escape from the engine and burn the cover. *Benedict Pineapple Co. v. Atlantic C. L. R. Co.* 20: 92, 46 So. 732, 55 Fla. 514.

Contributory negligence.

7. A licensee who unnecessarily selects a railroad bridge as a route to his destination is negligent so that he cannot hold the railroad company liable for an injury received, when compelled to jump therefrom, by an approaching train. *Texas Midland R. Co. v. Byrd*, 20: 429, 115 S. W. 1163, — Tex. —.

8. It cannot be said to be negligence *per se* for the driver of a team caught on a railroad track by the negligence of the railroad company, to go onto the track for the purpose of attempting to stop an approaching train. *Thompson v. Seaboard A. L. R. Co.* 20: 426, 62 S. E. 396, 81 S. C. 333.

9. The fact that one who rightfully goes upon a railroad track to attempt to stop an approaching train which is carrying a powerful headlight cannot be said to have been negligent *per se* merely because he did not get off in time to avoid being struck by the train. *Thompson v. Seaboard A. L. R. Co.* 20: 426, 62 S. E. 396, 81 S. C. 333.

RATIFICATION.

By corporation of fraudulent issue of stock, see Corporations, 4.

REAL ESTATE BROKERS.

See Brokers.

REASONABLENESS.

Of ordinance, see Municipal Corporations, 1, 3, 9a; Trial, 2.

RECOGNIZANCE.

See Bail and Recognizance.

RECORDS AND RECORDING LAWS.

Records on appeal, see Appeal and Error, 1-4.

Duty to record transfer of stock on books of company, see Corporations, 2.

Failure of the owner of logs to record as required by statute, the mark which he places upon them does not deprive him of his property in the logs or the privilege of proving property by the mark. *Whitman v. Muskegon Log Lifting & O. Co.* 20: 984, 116 N. W. 614, 152 Mich. 645.

REDEMPTION.

Of mortgaged premises, see Mortgage, 3, 5, 6.

REFERENCE.

Necessity of exception to refusal to sustain motion to refer case to master, see Appeal and Error, 3.

Presumption that referee took oath required by law, see Appeal and Error, 5.

20 L.R.A. (N.S.)

Harmless error in order of court for reference, see Appeal and Error, 13.

To determine rights under insurance policy, see Insurance, 19.

REFRIGERATOR CARS.

Duty of carrier to furnish, see Carriers, 22, 23; Damages, 7.

RELEASE.

Of surety on contract, see Principal and Surety, 1, 2.

Sufficiency of evidence to show that release was secured by fraud, see Evidence, 37.

Right to attack for fraud release under sale, see Sale.

REMEDIES.

Election of, see Election of Remedies.

REMITTITUR.

Of damages on appeal, see Appeal and Error, 28.

REPLEVIN.

Replevy of intoxicating liquors seized under execution, see Evidence, 16.

Right of officer from whom property levied on has been replevined to continue litigation after expiration of term of office, see Officers, 4.

1. Replevin will not lie to recover possession of a title deed where the real controversy is as to whether or not there had been such a delivery of it as to pass title to the property. *Campbell v. Brooks*, 20: 507, 47 So. 545, — Miss. —.

(Annotated)

2. An officer who is found, upon the trial of a cause to determine the right to the possession of certain intoxicating liquors which he had seized under a warrant and which were subsequently replevined, to be entitled to the return thereof, is also entitled to a judgment for their full value in case the return cannot be had. *Hines v. Stahl*, 20: 1118, 99 Pac. 273, — Kan. —.

RESCISSION.

On contract for purchase of land, see Vendor and Purchaser, 1-4.

RES GESTÆ.

See Evidence, 22-24.

RES IPSA LOQUITUR.

See Evidence, 8, 12, 13, 38; Maxims, 2.

REVERSIBLE ERROR.

See Appeal and Error, 15-27.

REVOCATION.

Of wills, see Wills, 1, 2.

RIOT.

Liability for destruction of property during riot, see Insurance, 20.

A riot exists where a hundred or more armed and masked men overawe and

terrorize the civil authorities and the inhabitants of a town, and burn and otherwise destroy property of private citizens, which they assume is intended for a use detrimental to their interests. *Spring Garden Ins. Co. v. Imperial Tobacco Co.* 20: 277, 116 S. W. 234, — Ky. —.

SAFETY APPLIANCE.

Requiring placing of, on cars, see Evidence, 10; Master and Servant, 6, 7.

SALE.

Of stock of goods in bulk, see Constitutional Law, 6, 7, 10.

Election of remedies in case of purchaser's failure to pay, see Election of Remedies, 2.

Delivery on week day pursuant to contract made on Sunday, see Sunday.

C. O. D. sale of intoxicating liquors, see Intoxicating Liquors, 10.

When title passes.

1. Upon sale of articles of certain quality free on board at point of shipment, to be transported to another place, the buyer has a reasonable time for inspection after they arrive at destination, where the contract is silent as to time and place of inspection and acceptance, or of payment of purchase price. *Eaton v. Blackburn*, 20: 53, 96 Pac. 870, — Or. —.

Conditional.

Settlement between parties to, as novation, see Novation.

2. Taking notes and collateral security for the purchase price of chattels does not destroy features of the contract constituting the transaction a conditional sale. *Monitor Drill Co. v. Mercer*, 20: 1065, 163 Fed. 943, — C. C. A. —. (Annotated)

3. The effect of a provision in a contract for the sale of personal property, that the title shall remain in the vendor until the property is fully paid for, in creating a conditional sale, is not destroyed by a clause which authorizes the vendor, under certain conditions, to retake all property unsold by the vendee. *Monitor Drill Co. v. Mercer*, 20: 1065, 163 Fed. 943, — C. C. A. —.

4. A provision in a contract of conditional sale of chattels, authorizing the vendor to take possession of property, of whatever nature, derived from sale of the chattels by the vendee, reduce it to cash, and apply the proceeds upon the amount due under the contract, does not qualify the title to the property remaining unsold by the vendee, which was retained by the vendor. *Monitor Drill Co. v. Mercer*, 20: 1065, 163 Fed. 943, — C. C. A. —.

5. Failure to record a conditional sale contract will not make it ineffectual against trustees in bankruptcy of the vendee, if the recording acts make unrecorded sales voidable only against lien creditors, and the trustees represent no creditors having a prior lien on the bankruptcy proceedings. 20 L.R.A. (N.S.)

Monitor Drill Co. v. Mercer, 20: 1065, 163 Fed. 943, — C. C. A. —.

Acceptance; retention.

6. The mere receipt by the consignee of articles to be of a certain quality under the contract of sale, sent to him through a carrier, at point of destination, and his offer to sell and dispose of them, do not amount to an acceptance as matter of law if a reasonable time in which to inspect and reject has not elapsed; nor does the unauthorized sale by his agent of a small part of the property, which is promptly repudiated by him. *Eaton v. Blackburn*, 20: 53, 96 Pac. 870, — Or. —.

Warranty.

7. An express warranty of a car load of potatoes may be found from the fact that at the time of the sale a few bags were opened and examined, and the owner's agent represented that the rest of the potatoes in the car were as good as those examined, on which representation the buyer relied. *King v. Graef*, 20: 86, 117 N. W. 1058, 136 Wis. 548.

Rights and remedies of parties.

Damages for breach of warranty, see Damages, 4.

Sufficiency of declaration for breach of warranty, see Pleading, 4.

Necessity of alleging *scienter* in action in tort for breach of warranty, see Pleading, 13.

Right of seller of property to municipal authority under invalid contract to retake or remove property upon refusal of payment, see Municipal Corporations, 8.

8. The buyer of an engine cannot avoid payment of the contract price because of the existence of defective parts therein, so long as the seller is ready and willing to perform his contract to replace defective parts without charge. *Bardwell v. Southern Engine & B. Works*, 20: 110, 113 S. W. 97, — Ky. —.

SALES IN BULK.

See Fraudulent Conveyances, 1, 2.

SAMPLES.

Warranty on sale by, see Sale, 7.

SCHOOLS.

Prematurity of action for damages for unlawful suspension of child, see Action or Suit.

Damages for wrongful suspension of pupil, see Damages, 8.

Mandamus to secure restoration of pupil wrongfully suspended, see Mandamus, 6.

Mechanics' liens on school building, see Mechanics' Liens, 2.

Use of common-school moneys for support of model training schools, see Public Money.

1. A pupil may be suspended from a public school for being drunk and disorderly in violation of the ordinances of the mu-

nicipality, although his misconduct was not on the school grounds, where the statute authorizes suspension for gross immorality. *Douglas v. Campbell*, 20: 205, 116 S. W. 211. — Ark. —.

2. An order of a county superintendent, changing the boundaries of a school district, which is affirmed, upon appeal, by the board of county commissioners, even though irregular, is final, and not subject to collateral attack in an action for injunction. *School Dist. No. 116 v. Wolf*, 20: 358, 98 Pac. 237, — Kan. —.

3. Upon the detachment of the territory within which a school district officer resides from the school district of which he is an officer, his office immediately becomes vacant *ipso facto*, and may be filled by appointment. *School Dist. No. 116 v. Wolf*, 20: 358, 98 Pac. 237, — Kan. —.

(Annotated)

4. Although the statute contemplates the filing of a petition with a county superintendent for the change of boundaries of a school district as a basis for the issuance by him of a notice setting a time for a hearing upon the requested change, yet, where a verbal request is made for the change and proper notice is given, the interested parties appear, the order is made, appeal is taken to the board of county commissioners, and the order is affirmed, the proceeding is only irregular, but is not void. *School Dist. No. 116 v. Wolf*, 20: 358, 98 Pac. 237, — Kan. —.

SCIENTER.

Necessity of alleging *scienter* in action in tort for breach of warranty, see Pleading 13.

SEAL.

A release under seal may be attacked at law for fraud in the consideration, where the seal is, by statute, made only prima facie evidence of consideration. *Olston v. Oregon Water Power & R. Co.* 20: 915, 96 Pac. 1095. — Or. —.

(Annotated)

SECRETS.

Injunction to protect, see Injunction, 1.

SELF-CRIMINATION.

See Criminal Law, 2; Perjury; Witnesses, 2, 3.

SEPARATE ESTATE.

See Husband and Wife, 2.

SET-OFF AND COUNTERCLAIM.

By bank against depositor's account of note against him as preference, see Bankruptcy, 3.

In action to enforce mechanics' lien, see Mechanics' Liens, 6, 7.

Necessity of pleading, see Pleading 16.

SEVERABILITY.

(Of contract, see Contracts, 8, 20 L.R.A. (N.S.))

SHIPPING.

Damages for injuries by casting off vessel moored to wharfs, see Pleading 14, 15.

Right to moor to another's wharf to escape fury of tempest, see Wharves.

SITUS.

Of debt for purpose of garnishment, see Garnishment, 6-8.

SLANDER.

See Libel and Slander.

SLOT MACHINE.

As gaming device, see Gaming, 1, 2.

SMOKE.

As nuisance, see Nuisances, 2, 4.

SPECIAL LEGISLATION.

See Statutes, 2.

SPECIFIC PERFORMANCE.

Contract to devise one's property, see Judgment, 2.

Equity will not specifically enforce a contract to sell real estate which is sufficient to satisfy the statute of frauds so far as the vendor is concerned, but which the purchaser does not promise to perform until after the vendor has withdrawn his offer. *Levin v. Dietz*, 20: 251, 87 N. E. 454, 194 N. Y. 376.

SPEED.

Of street car, see Street Railways, 1.

STATE INSTITUTIONS.

Liability for acts of employees of state lunatic asylum, see Charities.

STATUTE OF FRAUDS.

See Contracts, 5-7.

STATUTES.

Title.

1. A constitutional provision that "each law enacted in the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," is not violated by an act the title of which extends to the comprehensive class of "any common carrier," while the body of the act covers only "any person, firm, or corporation operating any railroad," since the class affected by the subject embraced in the body of the act is not as broad as, but is included within, that expressed in the title, which is not misleading. *Seaboard A. L. R. Co. v. Simon*. 20: 126, 47 So. 1001, — Fla. —.

Special legislation.

2. Permitting only cities, not operating under special charters, to require railroad companies to light the street crossings with in their limits does not render the statute invalid. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, 20: 461, 82 N. E. 787, 170 Ind. 674.

Construction.

Construction of statute as to keeping open of theater on Sunday, see Constitutional Law, 5.

Construction of statute providing for building of partition fences, see Fences.

3. A statute imposing a penalty upon anyone publishing a newspaper in which appear advertisements of the keeping for sale of intoxicating liquors, applies to those kept without as well as within the state, *State v. J. P. Bass Publishing Co.* 20: 495, 71 Atl. 894, — Me. —.

STIPULATED DAMAGES.

See Damages, 6.

STOCK.

See Corporations.

STOCKHOLDERS.

See Corporations.

STOVE POLISH.

Injury to purchaser or user by explosion of, see Negligence, 5-7.

STREET RAILWAYS.

Error in admission of evidence in action for death of person killed on track, see Appeal and Error, 16.

Admissibility in evidence of statements by bystander or employee at time of accident, see Evidence, 22-24.

See also Master and Servant.

1. Running a street car from 12 to 20 miles an hour at night, in a sparsely settled community, upon a track elevated on an embankment 3 feet high, is not *per se* negligence. *Trigg v. Water, L. & T. Co.* 20: 987, 114 S. W. 972, 215 Mo. 521.

2. Those in charge of a street car are not bound to look out for persons lying on the embankment of the right of way, although it is within the limits of a public street, if there is nothing to show that anyone ever used that portion of the embankment for any purpose whatever. *Trigg v. Water, L. & T. Co.* 20: 987, 114 S. W. 972, 215 Mo. 521.

3. A motorman in charge of a street car must keep a lookout for persons on the track, and for those so near thereto as to be in danger of being injured by the car. *Louisville R. Co. v. Johnson*, 20: 133, 115 S. W. 207, — Ky. —.

4. The one in charge of an electric car is not bound to stop the car or slacken its speed upon discovering an object beside the track, which he takes to be a clump of dirt, although it proves in fact to be a man, whom he strikes before he can stop the car, after he discovers that it is a man. *Trigg v. Water, L. & T. Co.* 20: 987, 114 S. W. 972, 215 Mo. 521. (Annotated)

5. The mere fact that a street car was running at a negligent rate of speed when it struck a person beside the track will not entitle him to recover for the injury if he 20 L.R.A. (N.S.)

was negligent in being where he was when struck. *Trigg v. Water, L. & T. Co.* 20: 987, 114 S. W. 972, 215 Mo. 521.

STRIKE.

Injunction against acts of strikers, see Injunction, 2-6.

Validity of strike, see Labor Organizations.

SUBROGATION.

Of junior mortgagee to benefits of superior lien upon payment thereof, see Mortgage, 6.

SUCCESSION TAX.

See Taxes, 3, 4.

SUICIDE.

Burden of proof in prosecution for counseling, see Evidence, 2.

1. One who, after agreeing with another that they should commit suicide together, and procuring a pistol for that purpose, afterward changes his mind and endeavors to escape from the consequences of his agreement, but is unable to do so because of physical weakness, is not liable for assisting the suicide, in case deceased refuses to permit him to escape, and proceeds to shoot him and then kill himself. *State v. Webb*, 20: 1142, 115 S. W. 998, 216 Mo. 378.

2. To relieve one from liability to punishment for counseling suicide who repents and endeavors to persuade the person so counseled not to do so, before he has committed the act, it is not necessary that deceased should have abandoned his purpose, and led accused in good faith to believe that he had done so. *State v. Webb*, 20: 1142, 115 S. W. 998, 216 Mo. 378.

SUNDAY.

Punishing keeping open of theater on Sunday; construction of statute as to, see Constitutional Law, 5.

Several performances in theater on Sunday as one offense only, see Criminal Law, 1.

Delivery of a car load of potatoes on Monday, and the payment and receipt of the purchase money, constitute a complete sale and delivery, although the transaction was in pursuance of a parol contract made on Sunday. *King v. Graef*, 20: 86, 17 N. W. 1058, 136 Wis. 548. (Annotated)

SUPERINTENDING CONTROL.

See Courts, 2, 3.

SURFACE WATER.

See Waters.

SURGEONS.

See Physicians and Surgeons.

SURPLUS.

In foreclosure sale; rights of junior mortgagee in, see Mortgage, 4.

TAKING.

What constitutes a taking, see Eminent Domain, 1.

TAXES.

Levy of *per capita* tax on dogs, see Constitutional Law, 9.

Right of one holding land under tax deed to allowance for improvements when dispossessed by holder of legal title, see Ejectment, 1, 2.

What taxable.

1. The rights of the holder of an oil lease may be taxed separately from those of the owner of the fee, under a statute providing that the term "real estate" shall include all mines and minerals in and under land, and all rights and privileges appertaining thereto. *Graciosa Oil Co. v. Santa Barbara County*, 20: 211, 90 Pac. 483, — Cal. —.

Exemptions.

2. Money and interest-bearing securities in a sinking fund accumulated by a municipal corporation under legislative authority to retire bonds issued to secure a water-works system, the income from which has never exceeded the expense of maintenance, are held for a public purpose, and are not subject to taxation. *Commonwealth ex rel. Albritton v. Rubel*, 20: 224, 112 S. W. 1128, — Ky. —.

Succession tax.

3. The wife, upon the death of the husband, takes his half of the community property as heir, within the meaning of a statute taxing all property which shall pass by the intestate laws from one who shall die seized or possessed of the same. *Re Moffitt*, 20: 207, 95 Pac. 653, 153 Cal. 359. (Annotated)

4. A constitutional provision directing the legislature to define the rights of the wife in relation to property held in common with her husband does not give her a vested right in the property which cannot be subjected to an inheritance tax when the husband's share passes to her upon his death, where the property referred to is community property in which she has only an expectancy during the husband's life. *Re Moffitt*, 20: 207, 95 Pac. 653, 153 Cal. 359.

TENDER.

That a draft for rent which may be paid by check or draft is made payable through a particular clearing house does not render it ineffectual as a tender, and justify a forfeiture of the lease for non-payment of rent. *Philadelphia Co. v. Renner*, 20: 932, 71 Atl. 1056, 222 Pa. 512.

TERMINATION.

Of contract of lease, see Contracts, 13.

TIMBER.

Exception in deed of growing timber, see Deeds.

20 L.R.A. (N.S.)

TIME.

For completing record on appeal, see Appeal and Error, 1.

For setting aside interlocutory decree, see Judgment, 3.

TITLE.

Sufficiency of title statutes, see Statutes.

TITLE DEED.

Replevin to recover possession of title deed, see Replevin, 1.

TRADE SECRETS.

Injunction to protect, see Injunction, 1.

TRANSFER.

Of stock, see Corporations, 2, 3.

TREES.

In highway, see Highways, 2.

1. A tree warden is subject to punishment under a statute prohibiting wanton injury to trees, where he proceeds irreparably to injure trees standing upon private property, which he has no authority to do, without trying to ascertain what his rights and duties are in regard to them. *Com. v. Byard*, 20: 814, 86 N. E. 285, 200 Mass. 175.

2. One is within the operation of a statute providing punishment for wantonly injuring a tree if he does a manifestly injurious act thereto wilfully in reckless disregard to the right of the owner. *Com. v. Byard*, 20: 814, 86 N. E. 285, 200 Mass. 175.

3. A tree warden has no authority to cut from a tree standing on private property branches extending over the street to aid the moving of a house along the street, under a statute permitting the surveyors and road commissioners to cause parts of trees standing on private property to be removed if they obstruct the way, or endanger, hinder, or incommode persons traveling therein, and providing for the cutting of trees standing in ways. *Com. v. Byard*, 20: 814, 86 N. E. 285, 200 Mass. 175. (Annotated)

TRESPASS.

Negligence toward trespassing children, see Negligence, 8, 9.

Injuries to trespasser on railroad tracks, see Railroads, 5.

Right to moor to another's wharf to escape fury of tempest, see Wharves.

TRIAL.

Time for objecting to statements of counsel, see Appeal and Error, 9.

Communication by judge with jury not in open court, see Appeal and Error, 24.

Taking of object in evidence into jury room as prejudicial error, see Appeal and Error, 26.

Error in rendering judgment for smaller sum in case of excessive verdict, see Appeal and Error, 27.

Reception of evidence.

Reversible error in decision as to competency of evidence, see Appeal and Error, 7.

1. It is not error to refuse to exclude from evidence a release of liability for negligently killing a person, signed by his administrator, as such, in an action by him to recover damages for the killing on behalf of the estate, on the theory that it was signed by him in his individual capacity, because it binds only him, his heirs, executors, and administrators, since the question of the intent is for the jury. *Olston v. Oregon Water Power & R. Co.* 20: 915, 96 Pac. 1095, — Or. —.

Questions of law and fact.

Question for jury as to negligence of railroad interfering with fire department, see Fires, 1.

2. The court, and not the jury, must determine the question of the reasonableness of a municipal ordinance requiring the removal of stationary awnings from over the sidewalk where the question of the good faith of the municipal authorities is not involved. *Small v. Edenton*, 20: 145, 60 S. E. 413, 146 N. C. 527.

3. The jury must determine, as a question of fact, whether or not a passenger injured after arriving at his station, while awaiting the arrival of the friends who were to meet him, had, prior to the injury, been offered a reasonable opportunity to make arrangements to depart, so as to terminate his relation of passenger to the carrier. *Powell v. Philadelphia & R. R. Co.* 20: 1019, 70 Atl. 268, 220 Pa. 638.

4. The question of the negligence of a delivery boy who is struck and injured by an automobile is for the jury, where the evidence tends to show that, before leaving his wagon, he looked but did not see the automobile, and that, after he reached the ground and secured the packages he was to deliver, he walked a few steps beside the wagon, waiting for it to pass so that he could go behind it to reach the house where the packages belonged, when he was struck by the automobile coming rapidly up behind him. *Gerhard v. Ford Motor Co.* 20: 232, 119 N. W. 904, — Mich. —.

5. Whether or not a pedestrian injured by a fall on a sidewalk was exercising proper care in passing along the walk, and whether he fell from any want of care on his part, are questions for the jury. *Holbert v. Philadelphia*, 20: 201, 70 Atl. 746, 221 Pa. 266.

6. The question is for the jury to determine, whether or not the failure of a railroad company to give signals for a street crossing contributed to the death of the driver of a team struck while attempting to stop the train after his team had been caught on the tracks at the crossing, where the circumstances would warrant an inference that the team was caught only a very few moments before the train approached, although at the time of his injury he had gone along the track 100 feet 20 L.R.A. (N.S.)

or so from the crossing. *Thompson v. Seaboard A. L. R. Co.* 20: 426, 62 S. E. 396, 81 S. C. 333.

7. The maxim, *Res ipsa loquitur*, raises only a rebuttable case of negligence, and no presumption of negligence necessarily follows its invocation, so as to compel a submission of fact to the jury. *Jenkins v. St. Paul City R. Co.* 20: 401, 117 N. W. 928, 105 Minn. 504.

8. The question whether or not a railroad company made sufficient investigation as to the qualification of one placed in charge of a scheduled train as conductor, who is shown not to have had the requisite knowledge of the meaning of orders to make him competent, to relieve itself from the charge of negligence in that regard, is for the jury, where the only evidence of investigation is that the train master made some inquiry as to his competency, and had some discussion with him relative to the duties to be performed, about the time he was promoted to that service from inferior service which required no such knowledge, the information received not necessarily indicating that he possessed the requisite knowledge. *Still v. San Francisco & N. W. R. Co.* 20: 322, 98 Pac. 672, — Cal. —.

(Annotated)

9. Whether or not a specialist in the treatment of eye diseases exercises due care is for the jury, where, upon examination of a wound beneath an eye, he fails to discover therein a foreign substance of the presence of which he has been notified by other physicians, and which the evidence tends to show a probe would readily have disclosed. *Rann v. Twitchell*, 20: 1030, 71 Atl. 1045, — Vt. —.

Instructions.

Reversible error in failing to instruct, see Appeal and Error, 23.

Error in instruction, see Appeal and Error, 21, 22.

10. Refusal of an instruction which emphasizes a particular portion of the evidence is not error in the absence of anything to show why it should be so singled out and emphasized. *Still v. San Francisco & N. W. R. Co.* 20: 322, 98 Pac. 672, — Cal. —.

11. It is not essential that the court, in charging the jury in an action on a mortgage given by a father to secure the payment of a defalcation by his son, in order to prevent his prosecution for embezzlement, in which the defense of duress is set up, to give a complete definition of the offense of embezzlement, since the guilt or innocence of the son is not a material question in determining whether or not there was duress. *Williamson-Halsell Frazier Co. v. Ackerman*, 20: 484, 94 Pac. 807, 77 Kan. 502.

12. That physicians describe plaintiff's disease as neurasthenia, in an action to recover damages for personal injuries, does not require an instruction that, under the pleadings, no damage can be recovered for

it if found to exist, where the pleadings state that she suffers severe bodily and mental pain, is unable to eat solid food, and is confined to bed and unable to move about. *Colorado Springs & I. R. Co. v. Nichols*, 20: 215, 92 Pac. 691, 41 Colo. 272.

13. It is not error to refuse to instruct the jury, in an action by a married woman to recover for negligent injuries to her person, that she cannot recover for inability to perform her household duties, where no claim for such damages is made in the complaint. *Colorado Springs & I. R. Co. v. Nichols*, 20: 215, 92 Pac. 691, 41 Colo. 272.

14. All instructions bearing upon a common proposition should be construed together as a whole. *Morris v. Miller*, 20: 907, 119 N. W. 458, — Neb. —.

15. In an action for damages for an assault and battery, wherein it was claimed by each of the parties that the other was the aggressor, and by the defendant that what he did was in self-defense, it was not error for the court to instruct the jury, among other things, that the right of self-defense did not imply the right to attack, or voluntarily to enter into an affray, nor to use more force than was necessary for his defense, and that the question as to who provoked the difficulty or made the first assault was for the jury to decide, under the evidence. *Morris v. Miller*, 20: 907, 119 N. W. 458, — Neb. —.

16. In an action for damages, based upon the defendant's negligence, where the evidence leaves the matter uncertain as to which one of the several things immediately brought about the injury, for some of which the defendant is answerable and for others is not, it is error for the court to single out an act for which defendant was responsible and suggest to the jury that they may infer that it was the cause of the injury without directing their attention to other inferences more or equally reasonable, exculpatory of the defendant. *Minnesota General Elec. Co. v. Cronon*, 20: 816, 166 Fed. 651, — C. C. A. —.

Findings by court.

17. A general finding that all material allegations of an answer are supported by the evidence, and true, and that all the material allegations of the complaint in conflict with the findings are unsupported by the evidence, and untrue, is sufficient to support a judgment. *Sterrett v. Sweeney*, 20: 963, 98 Pac. 418, 15 Idaho, 416.

TROVER.

1. Trover will not lie by a state manager of an insurance company, who has appointed an agent to secure applications and collect premiums, to recover a premium which the agent has collected, and which he refuses to pay over, where the contract does not require him to keep the money collected intact, and he is entitled to commissions on 20 L.R.A. (N.S.)

premiums collected and paid over. *Hazleton v. Locke*, 20: 35, 71 Atl. 661, — Me. —. (Annotated)

2. Trover will lie to recover money so long as it is capable of being identified. *Hazleton v. Locke*, 20: 35, 71 Atl. 661, — Me. —.

TRUSTS.

Agreement to take title to real property and sell as agent of real owner, see also Contracts, 5; Pleading, 20.

One who takes title to real property under a parol agreement to sell the same as an agent, and sells it and receives the money therefor, is liable to the grantor for the proceeds. *Logan v. Brown*, 20: 298, 95 Pac. 441, — Okla. —. (Annotated)

ULTRA VIRES.

Ultra vires acts of building associations, see Building and Loan Associations.

VARIANCE.

Raising question of, for first time on appeal, see Appeal and Error, 11. In general, see Evidence, 43.

VENDOR AND PURCHASER.

Vendee of land under executory contract of purchase as sole and unconditional owner, see Insurance, 6.

Specific performance of unilateral contract to sell real estate, see Specific Performance.

1. After rescission for fraud of an executory contract for purchase of land the vendee has no lien upon the land for the amount of his advance payment. *Davis v. William Rosenzweig Realty O. Co.* 20: 175, 84 N. E. 943, 192 N. Y. 128. (Annotated)

2. One defrauded into a contract for the purchase of land may maintain a bill in equity for rescission of the contract, and secure full relief, including a decree for return of money paid on the contract. *Davis v. William Rosenzweig Realty O. Co.* 20: 175, 84 N. E. 943, 192 N. Y. 128.

3. That the title of one who has contracted to convey real estate at a future time is not perfect is no ground for the rescission of the contract until the time for performance arrives. *Hanson v. Fox*, 20: 338, 99 Pac. 489, — Cal. —.

4. One entitled to a deed of land upon payment of instalments covering several months cannot put the vendor in default so as to effect a rescission of the contract by making a present tender of the full amount due. *Hanson v. Fox*, 20: 338, 99 Pac. 489, — Cal. —. (Annotated)

VICE PRINCIPAL.

See Master and Servant, 21, 22.

VIEW.

Compensation for interference with, see Eminent Domain, 1.

WAGES.

Garnishment of unearned salary, see Garnishment, 4, 5.

WAIVER.

Of irregularity not objected to, see Appeal and Error, 5.

Of error in admission of incompetent evidence, see Appeal and Error, 12.

Of privilege against self-crimination, see Criminal Law, 2; Witnesses, 2.

Of privilege of excluding confidential communications to physician, see Evidence, 21.

Of claim against officer for false arrest, see False Imprisonment, 3.

By insurance company, see Insurance.

Of irregularities in proceedings for mandamus, see Mandamus, 7.

By owner of building of defects therein, see Mechanics' Liens, 7.

Of junior mortgagee's right to redeem, see Mortgage, 5.

WARRANTY.

Damages for breach of, see Damages, 4.

In insurance policy, see Insurance.

Of article sold, see Sale, 7.

WATERS.

As to floating of logs in stream, see Logs and Logging.

Limitation period for injury to land or deflection of current of river, see Limitation of Actions, 4.

Limitation of time for action for accelerating flow of stream, see Limitation of Actions, 3.

Surface water.

The owner of city property has the right to improve it in such manner as to protect it from surface water flowing from adjacent land, even to the closing of a drain which he had constructed across it and which he discovers to be injurious to his land, without liability to the owners of adjoining lands for injury caused by the backing of the water upon them. *Levy v. Nash*, 20: 155, 112 S. W. 173, 87 Ark. 41.

(Annotated)

WEAPONS.

As to right to carry, see Carrying Weapons.

WHARVES.

Damages for injuries caused by casting off vessel moored to, see pleading, 14, 15.

A shipowner may be justified by necessity in mooring to another's wharf to escape the fury of a tempest. *Ploof v. Putnam*, 20: 152, 71 Atl. 188, — Vt. —.

(Annotated)

20 L.R.A. (N.S.)

WILLS.

Burden of proving fraud in assignment of legacy, see Evidence, 5.

Judgment enforcing specific performance of contract to devise property, see Judgment, 2.

Revocation.

1. The common-law rule of implied revocation of wills by "changed conditions and circumstances" of the testator, arising subsequent to their execution, is affirmatively adopted as the law of Minnesota by Rev. Laws 1905, § 3665. *Re Hall*, 20: 1073, 119 N. W. 219, 106 Minn. 502.

2. A settlement of property rights between husband and wife in anticipation of a divorce, by which the husband made over to the wife one third of all his property, coupled with the fact of divorce, revokes, by implication of law, a will theretofore executed by the husband, in and by which he devised and bequeathed to her the amount of property she so received on the settlement, he having died within thirty days of the settlement, without having expressly revoked the will. *Re Hall*, 20: 1073, 119 N. W. 219, 106 Minn. 502. (Annotated)

Nature of estate or interest created.

3. A debased fee, and not a life estate, is created by a devise to one to have and to hold to her and to the heirs of her body (which fee tail is by statute raised to a fee), and, should she die without issue surviving, the property to go to her heirs at law; and, upon the happening of the contingency, the fee vests in the heirs at law. *Carter v. Couch*, 20: 858, 47 So. 1006, — Ala. —.

Equitable conversion.

4. The doctrine of equitable conversion does not apply in case of a devise of real estate to testator's wife for life, and directing that at her death the property be sold and the proceeds divided between testator's daughters, where they die without issue after testator but before their mother's death, so that testator's scheme has failed; but the property will descend as real estate to testator's heirs at law. *Painter v. Painter*, 20: 117, 69 Atl. 323, 220 Pa. 82.

(Annotated)

5. A devise of land to testator's wife for life with directions to sell it at her death, and out of the proceeds pay a certain amount to a certain person, and divide the remainder among testator's children, effects a conversion of the property as of the time of the testator's death; and judgments against the child before sale is actually effected will not create a lien on his interest in the property as testator's heir. *Beaver v. Ross*, 20: 65, 118 N. W. 287, — Iowa. —.

(Annotated)

WITNESSES.

Error in examination of, see Appeal and Error, 18.

1. A question on cross-examination of plaintiff, in an action to recover damages for injuries caused by being struck by an automobile, "And this accident happened

simply because you were in a real hurry, . . . and you jumped down off the wagon, didn't you?"—is incompetent as calling for a mere conclusion. *Gerhard v. Ford Motor Co.* 20: 232, 119 N. W. 904. — Mich. —

2. The privilege against self-crimination in testifying as to illegal registration of voters must be claimed; and, if it is not, a prosecution for perjury because of the testimony given cannot be defeated on the ground that the constitutional rights of the accused were violated. *People v. Cahill*, 20: 1084, 86 N. E. 39, 193 N. Y. 232.

3. One implicated in the illegal registration of another as a voter cannot avoid testifying as to the facts of such registration, on the theory that he would incriminate himself, where the statute provides that the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person testifying,

and that a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given. *People v. Cahill*, 20: 1084, 86 N. E. 39, 193 N. Y. 232.

WRIT AND PROCESS.

A court has no jurisdiction to enter a personal judgment against a nonresident constructively served, who has made no appearance in the action, nor can any finding made in the case touching his personal liability operate as an estoppel so as to prevent him from showing to the contrary in a personal action subsequently brought against him. *Gates v. Tebbetts*, 20: 1000, 119 N. W. 1120, — Neb. —

WRIT OF ERROR.

See Appeal and Error.

